

Filed July 11, 2013

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

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| In the Matter of |) | Case No. 09-O-18507 |
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| CARLOS O. TINSLEY, JR., |) | OPINION AND ORDER |
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| A Member of the State Bar, No. 34020. |) | |
| _____ |) | |

Respondent Carlos O. Tinsley, Jr. practiced law for 45 years without discipline. However, when a client quarreled with him about his fee, Tinsley lost his objectivity and professionalism. As the dispute escalated, the attorney-client relationship deteriorated. In short order, Tinsley sued to recover his fee without first withdrawing from representation of his client.

Tinsley appeals the hearing judge’s discipline recommendation of a private reproof, contending that he is not culpable of any misconduct. The Office of the Chief Trial Counsel (State Bar) also is appealing and claims that the discipline recommendation is insufficient. It asserts that a 30-day actual suspension is warranted by the decisional law. Based on our independent review of the record (Cal. Rules of Court, rule 9.12), we adopt the hearing judge’s finding that Tinsley violated rule 3-700(B)(2) of the State Bar Rules of Professional Conduct,¹ by suing to recover his fees before withdrawing from representing his client. We dismiss the charge that Tinsley breached his duty of loyalty to his client, in violation of Business and

¹ All further references to rules are to the State Bar Rules of Professional Conduct unless otherwise noted.

Professions Code section 6068, subdivision (a),² as it is duplicative of the misconduct that underlies the rule 3-700(B)(2) violation.

The hearing judge found no factors in aggravation. However, we find that Tinsley's lack of cooperation with his client aggravated an already difficult situation. Nonetheless, the circumstances surrounding the fee dispute and, most importantly, Tinsley's 45 years of discipline-free practice are persuasive evidence that his misconduct was aberrational. We therefore adopt the hearing judge's recommendation that Tinsley should be privately reprimanded.

I. FACTUAL AND PROCEDURAL HISTORY

The parties do not dispute the material facts, which we summarize below. Tinsley was admitted to practice law in California on January 15, 1963.

Pets & Pals Animal Shelter, Inc., a California non-profit corporation (Pets & Pals), was one of several charities named as beneficiaries under a trust created by Marvin Walton. Tinsley contacted Pets & Pals about representing it in the Walton estate matter. In May 1993, a representative of Pets & Pals signed an engagement letter with Tinsley and Michael Nudelman³ agreeing to pay a contingency fee of one-third of any distribution it received from the Walton trust. The engagement letter provided that Tinsley would assist in obtaining an accounting of all funds, ensure the assets were protected from dissipation, expedite the distribution of the assets, and generally represent Pets & Pals "in all matters arising out of the Marvin Walton Trust."

On behalf of Pets & Pals, Tinsley joined in a lawsuit filed in Santa Clara County Superior Court to remove the trustee of the Walton trust. In January 1995, Pets & Pals and the other beneficiaries settled the matter, agreeing to a distribution of all of the trust's assets, except for

² All further references to sections are to the Business and Professions Code.

³ Tinsley and Nudelman were sole practitioners who associated with each other to represent Pets & Pals in the Walton trust matter. Nudelman withdrew as counsel approximately nine months later due to a potential conflict of interest.

\$545,000, which was to be reserved for the care of Marvin Walton's cats. Tinsley received two lump sum payments on behalf of Pets & Pals. In May 1995, he received \$33,016.47, and forwarded \$22,010.98 to Pets & Pals, retaining \$11,005.49 as his contingency fee. In March 1998, he received \$5,769.90, paid \$3,846.60 to Pets & Pals, and kept \$1,923.30 as his fee. In each instance, Tinsley explained the basis of his contingency fee to Pets & Pals, which did not object to the fees. In addition, between April 1995 and January 2000, Pets & Pals received monthly distributions from a collection agent that had been retained by the trust. Tinsley received his one-third contingency fee payments from the same agent. As of January 2000, Tinsley had received approximately \$33,174 in total fees.

After the last of Marvin Walton's cats died in 2009, the attorney for the Walton trustee sent a letter to Richard LaBare, the secretary-treasurer of Pets & Pals, with a copy to Tinsley. The trustee notified LaBare that the Santa Clara County Superior Court had ordered distribution of the remaining trust assets, except for \$40,000 which was to be retained by the trustee for administrative costs. The trustee enclosed a check for \$70,300 payable to Pets & Pals. Tinsley immediately wrote to LaBare asking for his one-third contingency fee of \$23,433. LaBare forwarded Tinsley's request to Susan Molen, the president of Pets & Pals. Molen had been president for almost 13 years, but she had no knowledge of the Walton trust or the legal services performed by Tinsley. Even though LaBare was well aware of the trust distributions and Tinsley's representation of Pets & Pals, he provided little useful information to Molen, merely offering his opinion that Tinsley's right to collect his contingency fee was questionable.

Molen's husband then sought advice from his own attorney, Sharon Renschler, who sent a scathing letter to Tinsley on July 28, 2009, that was not authorized by Molen or Pets & Pals. The letter wrongly accused Tinsley of unethical conduct in his effort to collect his fee and threatened to complain to the State Bar if he continued with that effort. Tinsley responded in a

civil manner on August 12, 2009, advising: “Before Pets & Pals lodges a complaint with the State Bar, I suggest that you review the enclosed documents as well as the other pleadings, documents and records on file in Santa Clara County Superior Court Case No. 1-93-PR131836, and then call me. I am still the attorney of record for Pets & Pals in that case.” Tinsley included his engagement letter and the settlement agreement in the Walton estate trust litigation.

Thereafter, Renschler withdrew and advised Tinsley to contact Molen directly.

On August 31, 2009, Molen sent a letter to Tinsley that contained veiled accusations that Tinsley had acted improperly in initially soliciting Pets & Pals as a client. Nevertheless, she advised: “I honestly desire to do what is right but also have the responsibility of making sure the interests of Pets & Pals are protected as well.” Molen explained that she had no knowledge of the Walton trust or of Tinsley’s representation of the charity and asked for an itemized statement of his services in the trust matter. She concluded: “I do not wish to spend time in court or in arbitration so I am hoping to settle this matter quickly and amicably.”

The hostility between Molen and Tinsley rapidly accelerated after Tinsley sent a fax stating: “If you ‘honestly desire to do what is right,’ and avoid the expense of litigation or arbitration, then I suggest that Pets and Pals forthwith pay me the full amount due. Do not bother to offer some lesser amount!” He included copies of the engagement letter and the settlement agreement but provided no further details about the work he had performed or an itemization of past trust distributions and fee payments. He followed up nine days later advising that he concluded from her lack of response that Pets & Pals waived its right to submit the fee dispute to arbitration. He further stated that “the next communication you receive from me will be the service on you of a Summons and Complaint.” Molen responded that Pets & Pals had not waived its right to arbitration and that she considered the fee agreement to be “invalid,”

“ineffective,” and “bogus” based on her perception that Tinsley had at the outset improperly solicited representation of Pets & Pals.

On September 30, 2009, Tinsley filed a complaint against Pets & Pals in San Mateo County Superior Court for breach of contract and recovery of \$23,433 in attorney fees. Molen retained Charles Keen, who wrote to Tinsley to request that he dismiss the suit so the parties could participate in mandatory arbitration.⁴ On January 20, 2010, Molen sent Tinsley a letter stating that she intended to discharge him and requesting that he sign a substitution of attorney. She also asked for a copy of the complete file. Tinsley refused to sign the substitution of attorney, but sent the client file to Keen in February 2010. On March 26, 2010, Keen again asked Tinsley to sign a substitution of attorney and withdraw from the matter. Again, Tinsley refused, although he said he would not oppose a motion to remove him.

Molen complained to the State Bar, which filed a five-count Notice of Disciplinary Charges (NDC) in December 2011, alleging that Tinsley failed to: (1) render an accounting, in violation of rule 4-100(B)(3); (2) inform his client of significant developments, in violation of section 6068, subdivision (m); (3) release the client’s file, in violation of rule 3-700(D)(1); (4) comply with the laws of California, in violation of section 6068, subdivision (a); and (5) withdraw from representation when it was mandatory to do so, in violation of rule 3-700(B)(2). After a three-day trial, the hearing judge found Tinsley culpable of two counts of misconduct, specifically a violation of the common law duty of loyalty and the failure to withdraw from representation of his client. Both parties appeal.

⁴ Tinsley did not dismiss the suit, although the matter ultimately settled in 2011.

II. CULPABILITY

A. The Hearing Judge Properly Dismissed Counts One, Two, and Three

The State Bar does not contest the hearing judge's findings that there was insufficient evidence of Tinsley's culpability as charged in Count One (Failure to Render Accounting under rule 4-100(B)(3)), Count Two (Failure to Inform Client of Significant Developments under section 6068, subdivision (m)), and Count Three (Failure to Release Client File under (rule 3-700(D)(1)). Upon our independent review, we affirm the dismissal order.

B. Tinsley Is Culpable of Failing to Properly Withdraw

1. The Ongoing Attorney-Client Relationship

Tinsley argues that he is not culpable of any misconduct because the attorney-client relationship ended in September 1996 before he filed a lawsuit against Pets & Pals. We disagree. The engagement letter provided that Tinsley would represent Pets & Pals' interests in "securing [its] just portion of the distribution from the 1988 Walton Trust" and he would obtain "an accounting of all funds spent or appropriated by the Trustee." He thus owed a continuing duty to represent Pets & Pals' interests in the Walton trust matter until after the final accounting in December 2009 and the distribution of the remaining assets of the trust in January 2010.⁵ In fact, as of March 26, 2010, Tinsley remained the attorney of record in the Walton trust matter when he refused for the second time to sign a substitution of attorney proffered by Pets & Pals. "Once an attorney has actually undertaken the representation of a client . . . the execution and filing of a substitution of attorney is essential to an effective change in representation; until the substitution is a matter of record, the successor attorney cannot act affirmatively to protect the client's interests" (*Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950.)

⁵ Pets & Pals did not receive its final distribution until October 13, 2011, due to Tinsley's lawsuit seeking his fees.

Alternatively, Tinsley argues that he had a right to consider that his duties to Molen had ended because he repudiated the attorney-client relationship prior to filing the lawsuit. Again, we disagree. Molen was surprised to receive Tinsley's invoice because she was unaware of the trust and his representation of Pets & Pals. Her discussions with LaBare also made her wary of Tinsley. Even so, Molen advised Tinsley that she "honestly desire[d] to do what is right" and requested an itemized statement of his services. However, she did not terminate the relationship until January 20, 2010, when she formally discharged him and asked him to sign a substitution of attorney. The fact that he did not sign this substitution of attorney is evidence that he believed he was still Pets & Pals' attorney well after he filed the lawsuit against the charity. (*Hulland v. State Bar* (1972) 8 Cal.3d 440, 446 [attorney's refusal to file substitution of attorney evidence of his belief he is still attorney of record].)

We find that the attorney-client relationship was ongoing when Tinsley filed his lawsuit. Accordingly, we consider the hearing judge's culpability determinations in light of this finding.

2. Count Four: The Duty of Loyalty (§ 6068, subd. (a))

Section 6068, subdivision (a), requires an attorney to support the Constitution, the laws of the United States, and the laws of California. The State Bar alleged in Count Four that Tinsley violated his common law duty of client loyalty when he sued Pets & Pals while still representing it in the trust matter. The State Bar concedes there is no case that directly addresses the issue of whether the common law duty of loyalty prohibits an attorney from suing a current client. To establish culpability under Count Four, the State Bar cites to dicta in *Santa Clara County Counsel Attys. Ass'n. v. Woodside* (1994) 7 Cal.4th 525, 548-549. In *Woodside*, the Supreme Court considered whether, under a duty of loyalty, "an attorney in a fee dispute with a client must withdraw from representing a client prior to filing suit against a client." (*Id.* at p. 549.) But the Court did not decide the issue, stating "we do not decide here generally the extent to which

the duty of loyalty precludes an attorney's lawsuit against a current client." (*Ibid.* at p. 549.) Rather, the Court based its decision on the statutory right of public employees to engage in collective bargaining.

In this case, we also need not decide the issue because the same misconduct that is alleged in Count Four also is alleged in Count Five as a violation of rule 3-700(B)(2). "If, as in this case, misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of section 6068, subdivision (a)." (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.) The appropriate resolution of this case does not depend on how many rules of professional conduct or statutes proscribe the same conduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) We therefore dismiss this duplicative count with prejudice and consider Tinsley's misconduct in the context of the mandatory withdrawal provisions of rule 3-700(B)(2).

3. Count Five: Mandatory Withdrawal (Rule 3-700(B)(2))

Rule 3-700(B)(2) requires an attorney to withdraw from employment when the attorney "knows or should know that continued employment will result in violation of these rules [of professional conduct] or of the State Bar Act." The State Bar alleged in Count Five that Tinsley violated this rule because he failed to withdraw as Pets & Pals' attorney before he sued his client.

Once Tinsley decided to sue Pets & Pals for recovery of his fees, he was obligated to withdraw from representation before filing the complaint. Obviously, he knew, or should have known, that such a lawsuit was inimical to his client's interests and therefore a breach of his duty of loyalty. "When an attorney, in his zeal to insure the collection of his fee, assumes a position inimical to the interests of his client, he violates his duty of fidelity to his client." (*Hulland v. State Bar, supra*, 8 Cal.3d at p. 448.) We accordingly adopt the hearing judge's finding of culpability as to Count Five.

III. AGGRAVATION AND MITIGATION

The offering party bears the burden of proving aggravating and mitigating circumstances.

The State Bar must establish aggravating circumstances by clear and convincing evidence.

(Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).⁶)

Tinsley has the same burden to prove mitigation. (Std. 1.2(e).)

A. **One Aggravating Factor: Failure to Cooperate with Client (Std. 1.2(b)(vi))**

The hearing judge concluded that the State Bar did not prove any factors in aggravation.

The State Bar argues on appeal that Tinsley's client suffered significant harm. (Std. 1.2(b)(iv).)

Molen's testimony that Pets & Pals spent "thousands of dollars to deal with [Tinsley's demand for payment of his fees]" lacks sufficient specificity of financial harm to satisfy the clear and convincing standard, particularly since the dispute was ultimately settled.

However, we find clear and convincing evidence that Tinsley's lack of cooperation with his client was a significant factor in causing their irreconcilable differences. Molen may well have been a contentious client, but she was attempting to "do the right thing" for both Pets & Pals and Tinsley. And Tinsley's fiduciary relationship with Pets & Pals obligated him to provide the relevant information for Molen to make an informed decision. Instead, he merely thwarted her efforts to resolve the matter. This is an aggravating factor under standard 1.2(b)(vi).

Tinsley also failed to cooperate with his client by refusing to sign the substitution of attorney. Molen's hostility toward him did not justify that refusal. (*In the Matter of Doran* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871, 877 [obligation to withdraw not excused in spite of client's failure to cooperate with attorney].) "[A] client's power to substitute one attorney for another has little meaning unless its exercise is accompanied by the original attorney's prompt execution of a substitution of attorney. The original attorney's refusal to

⁶ All further references to standards are to this source.

comply works a serious hardship on the client and puts the client's interests at risk." (*Kallen v. Delug, supra*, 157 Cal.App.3d at pp. 950-951.)

Finally, Tinsley failed to cooperate when he refused to accede to Pets & Pals' demand for mandatory fee arbitration, which would have obviated the litigation.⁷ Tinsley's lack of cooperation surrounding his failure to withdraw is an aggravating factor.

B. Two Mitigating Factors

We adopt the hearing judge's findings in mitigation that Tinsley has no prior discipline record, and he performed community service.

1. No Prior Record of Discipline (Std. 1.2(e)(i))

We accord significant weight in mitigation to Tinsley's practice of law for 45 years without discipline under standard 1.2(e)(i). (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [over 10 years of practice before first act of misconduct given significant mitigative weight]; *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 49 [17 years with no prior record of discipline significant mitigating factor].)

2. Community Service (Std. 1.2(e)(vi))

The hearing judge afforded mitigating credit under standard 1.2(e)(vi) for Tinsley's charitable work. Community service may be considered as a mitigating factor, even when the attorney is the sole source of proof. (*In the Matter of Sullivan* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 189, 193 [modest mitigation afforded for community service when established by respondent's testimony].) Tinsley testified that he had been involved for the past 25 years in raising funds for a children's hospital, for the past 20 years supporting his wife's volunteer work with senior citizens, and for five years with the Lion's Club. While we find his service is

⁷ Under section 6200, fee arbitration is mandatory if commenced by a client. The attorney must provide a client with notice that complies with the form prescribed by the Board of Trustees of the State Bar and no waiver of the right to arbitration shall occur until 30 days after receipt of such notice. (§ 6201.)

commendable, his testimony was lacking in specificity as to the nature and extent of his community service, and therefore we afford him only modest mitigating credit.

IV. DISCIPLINE ANALYSIS

We begin our discipline analysis by examining the standards, which we afford “great weight.” (*In re Silverton* (2005) 36 Cal.4th 81, 92.) However, we are not bound to follow the standards in a talismanic fashion. (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221.) Ultimately, we are guided by the purposes of disciplinary proceedings, which are the protection of the public, the courts, and the legal profession, maintenance of high professional standards by attorneys, and the preservation of public confidence in the legal profession. (Std. 1.3.)

The State Bar argues that we should consider standard 2.6(a), which applies to violations of section 6068. But we have dismissed that violation as duplicative of Count Five, which is more specific to the misconduct here at issue.

Instead, we consider standard 2.10 as most relevant, as it calls for reproof or suspension for violations of rule 3-700(B)(2). Given the wide range of discipline suggested by this standard, we look to the decisional law for guidance. Yet, as both Tinsley and the State Bar acknowledge, this case is *sui generis* since there is no discipline case where the sole misconduct involves an attorney’s failure to withdraw before filing a lawsuit against a client.

Nevertheless, after considering the offense and the offender in the present matter, we find three cases that have relevance to the misconduct here at issue: *Sorensen v. State Bar* (1991) 52 Cal.3d 1036; *Hulland v. State Bar, supra*, 8 Cal.3d 440; and *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439. In *Sorensen*, the Supreme Court imposed a 30-day actual suspension upon finding that an attorney violated section 6068, subdivisions (c) and (g), because of his obstreperous response to a court reporter’s efforts to resolve a \$94 dispute over the cost of a transcript. The attorney failed to respond to the court reporter’s phone calls

and letters, did not provide her with needed financial information, and failed to answer her small claims complaint to recover her costs. He then counter-sued her for fraud, seeking \$14,000 in punitive damages. The Supreme Court found that the attorney was motivated by spite and vindictiveness in using “the most oppressive and financially taxing means of redress, out of all proportion to the minor sum and rather innocuous incident in controversy.” (*Sorensen v. State Bar, supra*, 52 Cal.3d at p. 1042.) The Court did not find any mitigating factors, but found in aggravation that the attorney lacked insight and remorse.

Although his conduct was not as serious, Tinsley similarly exacerbated his fee dispute with Pets & Pals by failing to respond to Molen’s inquiries or to provide her with the basic information needed to resolve the fee dispute before he filed suit. But Tinsley did not seek damages “out of all proportion” to the sum in controversy (*Sorensen v. State Bar, supra*, 52 Cal.3d at p. 1042); he sued only for the amount provided by his engagement letter. And prior to the filing of the NDC, he settled the matter with his client. We note too that Sharon Renschler inflamed the situation, while purportedly acting on behalf of Pets & Pals, by leveling unfounded accusations of malfeasance and ethical impropriety at Tinsley. Still, it was Tinsley’s duty to act professionally and in Pets & Pals’ best interests, which he failed to do.

In *Hulland v. State Bar, supra*, 8 Cal.3d 440, the Supreme Court publicly reprovved an attorney who failed to appear at a divorce hearing on his client’s behalf because she refused to endorse a tax refund check over to him for payment of his fees. The attorney then obtained a judgment against his client for his fee while he was still her attorney of record, and a writ of execution garnishing his client’s wages. The attorney obtained the judgment using a confession of judgment he had the client sign to secure representation and stated would be used only if she did not pay. The Court found that the attorney breached his duty of fidelity to his client when he failed to render legal services and then assumed an interest adverse to his client’s in an attempt to

collect unearned fees. The misconduct in *Hulland* is more serious than in the instant case because it involved a breach of trust, and the attorney's use of the confession of judgment was deemed "an oppressive and overreaching attempt to collect unearned fees." (*Hulland v. State Bar, supra*, 8 Cal.3d at p. 448.) Also, the Court did not consider any factors in mitigation, whereas here Tinsley presented strong mitigation due to his 45 years of discipline-free practice.

Finally, we consider *In the Matter of Respondent C, supra*, 1 Cal. State Bar Ct. Rptr. 439, which the hearing judge relied upon in making her discipline recommendation of a private reproof. In *Respondent C*, this court admonished an attorney with almost 40 years of discipline-free practice for not fulfilling his "common law" duty to communicate with his client, in violation of section 6068, subdivision (a). Specifically, after filing the lawsuit on his client's behalf, the attorney failed to inform his client that he would not pursue her claim for damages, which he believed was meritless. The attorney thus deprived his client of the benefit of his professional advice as well as the opportunity to consult with another attorney if she so chose. (*Id.* at p. 451.) We viewed this single failure to communicate in the context of the attorney's lengthy practice without discipline. (*Id.* at p. 455.) We consider the misconduct in *In the Matter of Respondent C* to be less serious than that which occurred in this case.

In sum, this case entails an acrimonious and unfortunate fee dispute that deteriorated into unprofessional behavior by Tinsley. However, Tinsley's practice without discipline for nearly five decades strongly suggests that his conduct was aberrational. We thus find that "the public, courts and legal profession would be adequately protected by a more lenient degree of sanction than set forth in [the] standards" (Std. 1.2(e).) Accordingly, we concur with the hearing judge's proposal of a private reproof as it is within the bounds of the discipline imposed in similar cases and is consistent with the purposes of our disciplinary system.

V. ORDER

It is ordered that Carlos O. Tinsley, Jr., State Bar number 34020, is privately reprovod. The reprovod will be effective when this opinion becomes final. (Rules Proc. of State Bar, rule 5.127(A).) Based on the nature and extent of Tinsley's misconduct, we do not order any conditions attached to his reprovod.

COSTS

No costs are awarded to the State Bar in accordance with section 6086.10.

EPSTEIN, J.

WE CONCUR:

REMKE, P. J.

PURCELL, J.