

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of) Case Nos.: **10-O-08957-RAH**
) (10-O-09681; 11-O-15881)
THOMAS WILLIAM SMITH,)
) **DECISION AND ORDER**
Member No. 93102,)
)
A Member of the State Bar.)

Introduction¹

This matter involves a Stipulation Re Facts, Conclusions of Law and Disposition executed by the State Bar of California (State Bar) and respondent Thomas William Smith, and, thereafter, approved by the State Bar Court. That matter was later returned by the California Supreme Court for further consideration.

Significant Procedural History

On October 19, 2011, respondent signed a Stipulation Re Facts, Conclusions of Law and Disposition (Stipulation) in the above-captioned matter. On October 24, 2011, the State Bar also signed the Stipulation, which was approved by the court on November 9, 2011, and filed by the State Bar Court on November 14, 2011.

On June 21, 2012, the Supreme Court issued an order in case No. S199224 returning the Stipulation “for further consideration of the recommended discipline in light of the applicable

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

attorney discipline standards. (*In re Silvertown* (2005) 36 Cal.4th 81, 89-94; see *In re Brown* (1995) 12 Cal.4th 205, 220.)”

On September 21, 2012, the State Bar filed a motion for an order permitting limited modification of the returned Stipulation or, in the alternative, withdrawal from the returned Stipulation and the filing of a Notice of Disciplinary Charges. Specifically, the State Bar sought limited modifications of the aggravation and mitigation set forth in the Stipulation. Respondent did not file a response to the motion.

On November 1, 2012, the court filed an order granting the State Bar’s request for modification. The court ordered that, subject to any court ordered sanctions, the parties may present new evidence or argument relating only to standards 1.2(b)(ii), 1.2(b)(iv), 1.2(e)(i), 1.2(e)(iv), and 1.2(e)(v) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. The court also specifically denied the State Bar’s motion, in the alternative, to withdraw from the stipulation.

Trial in this matter was held on November 29, 2012. The State Bar was represented by Melanie J. Lawrence. Respondent appeared in propria persona.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on May 2, 1980, and has been a member of the State Bar of California at all times since that date.

Case No. 10-O-08957 – The Lasse Matter

Facts

On January 13, 2009, Jeff Lasse (Lasse) employed respondent to pursue a lawsuit for unpaid wages against his former employee. Lasse paid respondent \$1,875.

Respondent took no action to advance Lasse’s lawsuit until April 2010. At that time, Lasse discovered respondent had failed to file a lawsuit and confronted respondent.

On April 26, 2010, respondent filed a lawsuit in San Diego Superior Court, *Jeff Lassle v. Danzler, Inc., Tony Godinez*, 37-2010-00054181.

Shortly after April 26, 2010, Lassle terminated respondent and requested respondent return the fees he had paid him and his file. Respondent has never returned Lassle's file.

Conclusions

Rule 3-110(A) [Failure to Perform Legal Services with Competence]

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. By failing to file a lawsuit on behalf of Lassle for 15 months, respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

Rule 3-700(D)(1) [Failure to Return Client Papers/Property]

Rule 3-700(D)(1) requires an attorney, upon termination of employment, to promptly release to the client, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. This includes pleadings, correspondence, exhibits, deposition transcripts, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

By failing to return Lassle's file, respondent failed to release promptly, upon termination of employment, to the client, at the request of the client, all the client papers and property, in willful violation of rule 3-700(D)(1).

Case No. 10-O-09681 – The Gilliland Matter

Facts

In March 2008, Judith Gilliland (Gilliland) employed respondent to obtain a restraining order against Victoria Bradshaw (Bradshaw). Respondent was successful in obtaining a restraining order for Gilliland.

Bradshaw appealed the issuance of the restraining order to the Court of Appeal. Respondent represented Gilliland in the appeal. On May 15, 2009, the Court of Appeal, Fourth Appellate District, Division One, in D053397, affirmed and remanded the judgment with directions. Gilliland had requested that the court award her attorney fees incurred in the appeal. Instead of doing so, the court remanded the case to the trial court to award Gilliland attorney fees on appeal in an amount to be determined by that court.

Between August 2009 and July 2010, Gilliland repeatedly queried respondent as to the status of the attorney fees award. Respondent often did not respond or failed to give any meaningful response. Respondent never took any steps to obtain an award of attorney fees from the trial court for the benefit of Gilliland.

Conclusions

Rule 3-110(A) [Failure to Perform Legal Services with Competence]

By failing to respond to Gilliland's inquiries and failing to take any steps to obtain an award of attorney fees from the trial court for the benefit of Gilliland, respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

Case No. 11-O-15881 – The McKenzie Matter

Facts

On July 1, 2011, respondent's law license was placed on administrative inactive status because he had not reported compliance with his MCLE. He remained on inactive status and not eligible to practice law until September 12, 2011, when he was returned to active status.

On August 4, 5, and 12, 2011, respondent appeared as co-counsel for the respondent in the *Matter of Gregory J. Bianoco v. Marcela Bianco*, San Diego Superior Court case No. D520702.

On August 12, 2011, the court declared a mistrial in the matter after learning that respondent was not entitled to practice law.

Conclusions

Section 6068, subd. (a) [Duty to Support Constitution and Applicable Laws]

Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and laws of the United States and California. By appearing as co-counsel, respondent held himself out as entitled to practice law, and actually practiced law, when he was not an active member of the State Bar in violation of sections 6125 and 6126, and thereby failed to comply with the laws of California, in willful violation of section 6068, subdivision (a).

Aggravation²

Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)

Respondent's misconduct significantly harmed a client, the public, or the administration of justice. Gilliland paid a total of \$9,000 to respondent for costs and fees. A portion of that went to fees and costs incurred in defending the appeal. Because of respondent's inaction, Gilliland has never received an award of attorney fees.³

Respondent's misconduct also harmed the administration of justice because the San Diego Superior Court was forced to declare a mistrial in the *Matter of Gregory J. Bianco v. Marcela Bianco*.

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)

Respondent committed multiple acts of misconduct.

² All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

³ The court does not recommend restitution in the Gilliland matter because the amount of attorney's fees that may have been awarded is too speculative and it is unclear what portion of the \$9,000 was paid for the appeal.

Mitigation

No Prior Record (Std. 1.2(e)(i).)

Respondent has no prior record of discipline over many years of practice. Respondent had been admitted to practice law in California for approximately 29 years before the first act of misconduct in this matter. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [attorney's practice for more than 20 years with an unblemished record is highly significant mitigation].) However, while still a significant mitigating factor, this mitigation is reduced somewhat because the underlying misconduct is serious. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 49.)

Candor/Cooperation to Victims/State Bar (Std. 1.2(e)(v).)

By entering into a stipulation, respondent displayed spontaneous candor and cooperation with the State Bar during the disciplinary investigation and proceedings prior to the filing of a Notice of Disciplinary Charges.

Extreme Emotional/Physical Difficulties (Std. 1.2(e)(iv).)

At the time of the stipulated acts of professional misconduct, respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish were directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and respondent no longer suffers from such difficulties or disabilities. Respondent suffers from a medical condition that requires medication to stabilize him. In 2009, he was unable to obtain the medication and, as a result, began to suffer from physical and mental exhaustion that prevented him from adequately attending to his law practice. Respondent has since obtained the required medication and his condition has stabilized.

Discussion

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 provides that the primary purposes of disciplinary proceedings “are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.”

Standard 1.6(a) provides, in pertinent part, that when two or more acts of misconduct are found in a single disciplinary proceeding, and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

The standards applicable to the misconduct in this matter are standards 2.4(b), 2.6, and 2.10. The most severe sanction is found in standard 2.6, which provides that violation of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim, with due regard for the purposes of discipline.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton, supra*, 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) As the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn.2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Respondent has been found culpable of failing to perform legal services with competence in two client matters, failing to return a client’s file, and failing to support the laws of California by engaging in the unauthorized practice of law. In mitigation, respondent had been admitted to practice law in California for approximately 29 years before the first act of misconduct, he

cooperated with the State Bar by resolving the matters prior to the filing of a Notice of Disciplinary Charges, and his misconduct occurred at a time in which he was suffering from physical and mental exhaustion due to his being unable to obtain medication for a medical condition which prevented him from adequately attending to his law practice. In aggravation, respondent's misconduct harmed the administration of justice and his client, Gilliland.

The State Bar urges that respondent be actually suspended for 90 days, with other conditions. Respondent believes that the prior recommendation of one year stayed suspension is the appropriate discipline in this matter.

In determining the appropriate discipline to be imposed in this matter, the court has found *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, and *Chasteen v. State Bar* (1985) 40 Cal.3d 586, to be instructive.

In *Trousil*, the attorney was found culpable of one count of practicing law while suspended, first for nonpayment of State Bar dues, then later as a result of a disciplinary action. Trousil suffered from a long-standing mental disorder that had not yet been diagnosed at the time of the misconduct. Trousil had three prior records of discipline. Relying on *Chefsky v. State Bar* (1984) 36 Cal.3d 116, the review department recommended that Trousil be actually suspended for 30 days.

In *Johnston*, the attorney who had no prior record of discipline in 12 years of practice was actually suspended for 60 days for misconduct in a single-client matter. The attorney failed to communicate with his client and failed to perform competently, which caused his client to lose her case. He also improperly held himself out as entitled to practice law by misleading his client into believing that he was still working on her case while he was on suspension for not paying his State Bar dues. He defaulted in the disciplinary proceeding as well.

In *Chasteen*, the attorney was found culpable of the unauthorized practice of law for over a year, deceit of clients, commingling, and failure to return fees. The bulk of his misconduct was attributable to his long history of alcoholism. In light of his prior record of discipline and mitigation, the Supreme Court imposed a two-month actual suspension and until he made restitution of \$275 to his client.

While the court finds the present matter reflects some elements of each of the aforementioned cases, the level of discipline recommended in *Trousil* appears to be the most appropriate. For although the misconduct is more egregious than *Trousil*, the present case involves less aggravation and considerably more mitigation, including respondent's medical condition and 29 years of discipline-free practice. The misconduct reflected in this proceeding appears to represent isolated incidents in a long career. These incidents were caused by a serious medical condition, which has since been stabilized. Consequently, the court finds that the present matter warrants a level of discipline similar to that found in *Trousil*.

Therefore, having considered the evidence, the standards, and the case law, the court concludes that 30 days' actual suspension, among other terms and conditions, is sufficient to protect the public, the courts, and the legal profession.

Recommendations

It is recommended that respondent Thomas William Smith, State Bar Number 93102, be suspended from the practice of law in California for one year, that execution of that period of suspension be stayed, and that respondent be placed on probation⁴ for a period of two years subject to the following conditions:

1. Respondent Thomas William Smith is suspended from the practice of law for the first 30 days of probation.

⁴ The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.
3. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.
4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.
5. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.
6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.
7. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)
8. Within 30 days after the effective date of the discipline herein, respondent must:
 - (1) send Jeff Lasse a letter, by certified mail, return receipt requested, notifying him of his right to request fee arbitration if he disputes that respondent earned the entire fee he paid;

- (2) if the client initiates fee arbitration, respondent must abide by any final arbitration award made in the client's favor;
- (3) respondent must provide proof of compliance with this condition, including compliance with any award in the client's favor, to the State Bar's Office of Probation no later than 45 days before the expiration of the probation period.

At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multistate Professional Responsibility Examination

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order

The order filed on November 14, 2011, approving the parties' Stipulation Re Facts, Conclusions of Law and Disposition in the above-entitled matter is hereby **VACATED**.

Dated: February _____, 2013

RICHARD A. HONN
Judge of the State Bar Court