

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of) Case Nos.: **10-O-10873-LMA (11-O-10110);**
) **11-N-14316 (Cons.)**
JAMES J. MURRAY,)
) **DECISION AND ORDER OF**
Member No. 66952,) **INVOLUNTARY INACTIVE**
) **ENROLLMENT**
A Member of the State Bar.)
_____)

Introduction¹

This is respondent James J. Murray's fourth disciplinary proceeding. He has been charged with five counts of misconduct in two client matters and with one count of willfully failing to comply with California Rules of Court, rule 9.20(c). His alleged misconduct included: (1) failing to promptly return client funds and file; (2) failing to maintain client funds in his trust account; (3) misappropriating client funds (\$898); and (4) failing to render an accounting.

This court finds, by clear and convincing evidence, that respondent is culpable of the charged counts of misconduct. Based upon the nature and extent of culpability and the applicable aggravating circumstances, particularly his three prior records of discipline, the court recommends that respondent be disbarred from the practice of law.

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.

Significant Procedural History

On September 27, 2011, respondent filed a resignation with disciplinary charges pending. While the State Bar of California, Office of the Chief Trial Counsel (State Bar), and the Review Department recommended that respondent's resignation be accepted, the Supreme Court declined to accept his voluntary resignation on September 12, 2012.

On December 13, 2011, the parties filed a stipulation as to facts.

The State Bar initiated this proceeding by filing a notice of disciplinary charges (NDC) on March 7, 2013. Respondent filed a response on April 9, 2013.

On June 24, 2013, this court ordered that the stipulation as to facts be enforced as agreed by the parties, but not the conclusions of law.

A four-day hearing was held on July 9 – 12, 2013. Senior Trial Counsel Donald R. Steedman represented the State Bar. Respondent represented himself.²

On July 12, 2013, the court took this matter under submission.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 18, 1975, and has been a member of the State Bar of California at all times since that date.

The following findings of fact are based on the stipulation filed December 13, 2011.

Case No. 11-N-14316 – The California Rules of Court, Rule 9.20 Matter³

Facts

On March 30, 2011, the California Supreme Court filed a disciplinary order in case No. S189929 (State Bar Court case No. 05-O-03820 et al.). Among other things, the Supreme Court

² Attorney Megan Zavieh represented respondent throughout these proceedings. However, she did not appear at trial.

³ References to rule 9.20 refer to California Rules of Court, rule 9.20, which provides the duties of disbarred, resigned or suspended attorneys.

ordered respondent to comply with California Rules of Court, rule 9.20, subdivisions (a) and (c), within 30 and 40 days, respectively, after the effective date of the Order. The Order became effective April 29, 2011, and was duly served on respondent. Respondent received the Order.

Rule 9.20, subdivision (c) mandates that respondent “file with the Clerk of the State Bar Court an affidavit showing that he . . . has fully complied with those provisions of the order entered under this rule.”

Respondent was to have filed the rule 9.20 affidavit by June 8, 2011.

Respondent did not file a declaration of compliance with the Clerk of the State Bar Court by the due date.

On August 3, 2011, respondent filed his rule 9.20 declaration.

Conclusion

Count One – (Cal. Rules of Court, Rule 9.20(c) [Filing Proof of Compliance]

Respondent filed his rule 9.20(c) compliance declaration on August 3, 2011, almost two months after the due date. While the Review Department in its May 25, 2012 order acknowledged that respondent had complied with rule 9.20, the court also stated that he had failed to *timely* file a rule 9.20(c) compliance declaration.

Whether respondent is aware of the requirements of rule 9.20 or of his obligation to comply with those requirements is immaterial. “Willfulness” in the context of rule 9.20 does not require actual knowledge of the provision which is violated. The Supreme Court has disbarred attorneys whose failure to keep their official addresses current prevented them from learning that they had been ordered to comply with rule 9.20. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

Therefore, the State Bar has established by clear and convincing evidence that respondent willfully failed to timely comply with rule 9.20, as ordered by the Supreme Court in case No. S189929.⁴

Case No. 10-O-10873 – The Calderon Matter

Facts

On March 29, 2010, Pedro Calderon employed respondent to represent him in a purchase of a mobile home. In addition to paying respondent \$3,000 as attorney fees, Calderon also entrusted respondent with \$1,000 to be held in his trust account and used for payment of taxes due as a result of the sale of the mobile home or other expenses relating to the sale such as filing fees and recording fees.

On March 29, 2010, respondent deposited Calderon's funds into his trust account at United States Bank, account number ending in 3201. Respondent immediately withdrew the \$3,000 in attorney fees.

Thereafter, respondent did not make any payments on behalf of Calderon and Calderon did not authorize respondent to use the \$1,000 for any other purpose. Therefore, respondent should have been holding the \$1,000 in trust for Calderon.

On September 17, 2010, Calderon sent respondent a letter terminating his employment and requesting a refund.

At all times thereafter, respondent was aware that his employment had terminated and that Calderon had requested a refund.

Respondent failed to refund the \$1,000 until May 27, 2011, more than eight months later. Respondent made this refund only after (1) the State Bar repeatedly contacted respondent's

⁴ Specifically, rule 9.20(d) provides that a suspended attorney's willful failure to comply with rule 9.20 constitutes a cause for disbarment or suspension and for revocation of any pending probation.

counsel concerning the issue; (2) Calderon sued respondent; and (3) the day of the small claims court trial had arrived.

Between March 30 and December 20, 2010, respondent made numerous withdrawals from his trust account for purposes unrelated to Calderon. Respondent thereby removed all but \$101.71 of Calderon's funds from the trust account.

Conclusions

Count Two - (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 the \$1,000 that was earmarked for payment of taxes until May 27, 2011, more than eight months after his termination, respondent failed to release promptly to the client, at the request of the client, all client property, in willful violation of rule 3-700(D)(1).

Count Three - (Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account])

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions.

Respondent's trust account balance was \$101.71 by December 20, 2010. Thus, by removing Calderon's funds of \$1,000 from the trust account, respondent failed to maintain the balance of funds received for the benefit of a client and deposited in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import, in willful violation of rule 4-100(A).

Count Four - (§ 6106 [Moral Turpitude])

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

When respondent received \$1,000 in March 2010, he was required to maintain the funds in his trust account for Calderon. However, by December 20, 2010, the balance dipped to \$101.71.

It is well settled that the mere fact that the balance in an attorney's trust account has fallen below the total of amounts deposited in and purportedly held in trust, supports a conclusion of misappropriation. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474-475.) The rule regarding safekeeping of entrusted funds leaves no room for inquiry into the attorney's intent. (See *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113.)

"[O]nce the trust account balance is shown to have dipped below the appropriate amount, an inference of misappropriation may be drawn." (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.) When the balance in the CTA fell below \$1,000 by December 2010 to a balance of \$101.71, respondent misappropriated \$898.29 (\$1,000 - \$101.71) of his client funds.

Thus, respondent committed an act of moral turpitude in willful violation of section 6106 by misappropriating \$898.29 of Calderon's funds on December 20, 2010.

Case No. 11-O-10110 – The Lewis/Himes Matter

Facts

On March 3, 2010, Diana Lewis employed respondent to represent her in a real property dispute with realtors and lenders. Respondent agreed to file a lawsuit to stop the foreclosure process.

On October 26, 2010, Lewis, acting through her attorney Scott L. Woodall, sent respondent a written request for her client files. The request was accompanied by a paper, signed by Lewis, authorizing respondent to release the materials to attorney Woodall. Respondent received this request shortly thereafter.

Attorney Woodall repeated this request in letters sent on November 3, November 8, and December 1, 2010, and in a voicemail left on November 3, 2010. Lewis similarly requested the files in emails sent on December 20, 2010, and January 18, 2011. Respondent received the letters, emails and voicemail shortly after they were sent.

On November 8, 2010, respondent wrote a cogent, lengthy four-page letter to attorney Woodall refusing (among other things) to release the file until he received an executed substitution of attorney form. On November 9, 2010, respondent received the executed substitution of attorney form.⁵

On Wednesday, December 15, respondent emailed Lewis and told her that her file would be sent to her new attorney “asap....Friday or Monday at the latest.” Respondent did not send the file by this date.

On January 7, 2011, respondent emailed Lewis and told her that her file would be sent by FedEx by the end of the day. Again, respondent did not send the file by the end of the day.

On January 27, 2011, a State Bar investigator contacted respondent’s counsel to discuss the Lewis matter.

Respondent finally delivered the client file on January 28, 2011, after his counsel was contacted by the State Bar concerning this issue.

⁵ Respondent's testimony that he didn't receive this form was not credible.

Between March and August 2010, Lewis paid respondent a total of \$4,000 as attorney fees in the matter.

Respondent's employment terminated on or about October 26, 2010.

Attorney Woodall's October 26 and November 8, 2010 letters requested that respondent provide an itemization of his services. These requests triggered a duty for respondent to provide an accounting for the funds that he received. To date, respondent has not provided an accounting to Lewis or her counsel.

Conclusions

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

Respondent willfully violated rule 3-700(D)(1) by failing to return the client file to Lewis or her attorney Woodall even though they had repeatedly asked for it from October 26, 2010 through January 18, 2011. He finally returned the file on January 28, 2011, three months after his employment was terminated.⁶

Count Six - (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])

Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds, securities, and other properties coming into the attorney's possession and render appropriate accounts to the client regarding such property.

Although attorney Woodall requested in October and November 2010 that respondent provide an itemization of his services, respondent did not provide an accounting to Lewis or her

⁶ Respondent's testimony that he was trying to protect his client's interest in not returning the file was not credible. In his emails to Lewis in December 2010 and January 2011, he never mentioned about protecting Lewis's interest. He simply told her that he would return the file "asap." Also, respondent could not have been too sick to return the file or render an accounting when he was able to write that lengthy four-page letter in November 2010.

counsel. Therefore, respondent willfully violated rule 4-100(B)(3) by failing to render appropriate accounts to Lewis regarding the \$4,000 he received as attorney fees from Lewis.

Aggravation⁷

Prior Record of Discipline (Std. 1.2(b)(i).)

Respondent has three prior disciplines.

1. On October 18, 1984, the State Bar Court issued an order of private reproof against respondent, in which he stipulated to, for failing to communicate directly with four clients and being inattentive to their needs and for failing to provide one client with an accounting and did not promptly pay funds to that client. Mitigating factors included extreme emotional distress, depression, remorse, and cooperation with the State Bar. (State Bar Court case No. 82-O-210 AL.)
2. On March 30, 2011, the California Supreme Court filed an order that suspended respondent from the practice of law for one year, stayed, placed him on probation for two years, and actually suspended him for one year for his misconduct in two client matters. Respondent was terminated from the State Bar Court's Alternative Discipline Program (ADP)⁸ based upon his noncompliance with the ADP's requirements. He had stipulated to: failing to perform services competently; failing to communicate; failing to provide an accounting; failing to promptly refund an unearned fee; improperly withdrawing from employment; and failing to cooperate with the State Bar. Aggravating factors included: prior record of discipline; multiple

⁷ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

⁸ The Alternative Discipline Program is for attorneys with substance abuse and/or mental health issues.

acts of misconduct; significant harm to client; and indifference. (Supreme Court case No. S189929; State Bar Court case Nos. 05-O-03820 et al.)

3. On April 14, 2011, the California Supreme Court filed an order suspending respondent from the practice of law for two years, stayed, and placing him on probation for three years on condition that he be actually suspended for six months (the period of actual suspension would run consecutively to the previous actual suspension). Respondent stipulated to culpability in two matters, including failure to communicate, failure to release client file, and failure to refund unearned fees. In mitigation, he suffered extreme emotional and physical problems, displayed remorse, and was cooperative and candid with the State Bar. Significantly, respondent stipulated that he was aware "that should he commit any additional misconduct, or violate the conditions of probation in this matter, disbarment is likely." (Supreme Court case No. S190332; State Bar Court case Nos. 10-O-03545 et al.).

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

Respondent's multiple acts of misconduct are an aggravating factor. He failed to promptly return client funds and file, failed to maintain client funds in his trust account, misappropriated client funds, failed to render an accounting, and failed to comply with rule 9.20.

Misconduct Surrounded/Followed by Bad Faith, Dishonesty, Concealment, Overreaching or Other Violations of State Bar Act/ Rules of Professional Conduct; If Trust Funds/Property Involved, Refusal/Inability to Account to Client/Other Person for Improper Conduct Toward Funds/Property (Std. 1.2(b)(iii).)

Respondent admitted that he has not filed any quarterly reports, as ordered in Supreme Court case No. S189929, because he believed that they would have been filed without substance. His failure to file the reports is a probation violation. Since it is related to the charged matter (rule 9.20 violation in count one), not considered as an independent ground of discipline, and

established as a circumstance in aggravation, the court finds his probation violation as an aggravating factor. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 36.)

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

Respondent significantly harmed his client. Calderon did not get his \$1,000 refund from respondent until May 2011, after contacting the State Bar and having to sue respondent in small claims court. The client was deprived of his funds for eight months (since September 2010).

Mitigation

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

In his three prior records of discipline, respondent had received mitigation credit for his mental health and emotional issues that gave rise to his prior misconduct that was similar to the misconduct here. In this proceeding, respondent testified that he still suffers from extreme emotional and physical difficulties and that these difficulties were directly responsible for his misconduct.

The Supreme Court has held that, absent a finding of rehabilitation, emotional problems are not considered a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073.) Therefore, because respondent's mental and physical health issues were previously considered in his three prior records of discipline, respondent still suffers from such difficulties (which causally contributed to his misconduct), and he has not established recovery, his emotional and physical difficulties are not considered as mitigation in this proceeding.

Good Character (Std. 1.2(e)(vi).)

Respondent had one character witness attesting to his honesty and trustworthiness. The witness did not know respondent professionally, only personally. Respondent is not entitled to mitigation for good character because he had only one witness. This did not constitute a broad

range of references from the legal and general communities. (*In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160.)

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The standards provide a broad range of sanctions ranging from reproof to disbarment, depending upon the gravity of the offenses and the harm to the victim. Standards 1.6, 1.7, 2.2, 2.3, 2.6, and 2.10 apply in this matter.

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* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although 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.)

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.

Standard 1.7(b) provides that, if an attorney has two prior records of discipline, the degree of discipline in the current proceeding must be disbarment unless the most compelling mitigating circumstances clearly predominate.

Standard 2.2(a) provides for disbarment for the willful misappropriation of entrusted funds or property unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the discipline recommended must not be less than one-year actual suspension, regardless of mitigating circumstances.

Standard 2.3 provides that culpability of an act of moral turpitude, fraud or intentional dishonesty, or of concealment of a material fact, must result in actual suspension or disbarment depending upon the degree of harm to the victim, the magnitude of the misconduct, and the extent to which it relates to the member's practice of law.

Standard 2.6 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.

Finally, standard 2.10 provides that violations of any provisions of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproof or suspension depending upon the gravity of the misconduct or harm to the victim, with due regard to the purposes of imposing discipline.

Respondent argues that if he was culpable, a one-year actual suspension would be adequate.

The State Bar urges disbarment. The court agrees.

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) The court recognizes that respondent has mental and physical difficulties and had tried to resign from the practice of law. But the Supreme Court rejected his resignation. Based on the offenses, the serious aggravating circumstances, above all, his three prior records of discipline, and the

lack of any compelling mitigating factors, the court must recommend disbarment under standard 1.7(b).

Recommendations

It is recommended that respondent James J. Murray, State Bar Number 66952, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

California Rules of Court, Rule 9.20

It is further recommended that respondent comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of this order.

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 of Involuntary Inactive Enrollment

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the Rules of Procedure of the State Bar, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: October _____, 2013

LUCY ARMENDARIZ
Judge of the State Bar Court