PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed October 11, 2013

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case Nos. 11-O-11316; 11-O-15546 (Cons.)
DAVID C. JOHNSON,	)	
A Member of the State Bar, No. 59553.	)	OPINION AND ORDER

I. SUMMARY

The Office of the Chief Trial Counsel (State Bar) charged David C. Johnson, a 40-year practitioner, with misconduct in two consolidated cases. In the first case, the State Bar asserted that Johnson mishandled his mother's estate while serving as trustee. In the second case, it claimed that he improperly revealed in open court the address an alleged victim gave to police. The hearing judge found Johnson culpable in each case of one count of failing to support the law in violation of section 6068, subdivision (a), of the Business and Professions Code. The judge recommended discipline including an 18-month suspension in light of two prior records of discipline from 1988 and 1997.

Johnson and the State Bar seek review. The State Bar does not challenge the culpability findings, but requests Johnson's disbarment because this is his third discipline. Johnson contends the State Bar did not prove he violated any laws. Alternatively, he argues that if he did violate the law, it was due to good faith negligent acts; therefore, he should not be disciplined. Finally, he urges no more than a 60-day suspension if we find him culpable.

In the probate matter, Johnson acted as trustee for his mother's trust for several years. He admittedly made errors, but they were not dishonest nor did they harm the estate. Johnson's siblings became dissatisfied with his actions as trustee, and two of them filed complaints with the

State Bar. A few months before the discipline trial, all the siblings fully settled their dispute in superior court, and the probate judge "ratified, confirmed, and approved" Johnson's actions and transactions as trustee. The record below supports the superior court's findings.

In the criminal matter, Johnson cross-examined an alleged sexual assault victim about an address she provided to police that he understood to be false. The superior court judge thought that Johnson violated the Penal Code by revealing the address, and referred him to the State Bar. Johnson testified at his discipline trial that he honestly believed his question was proper impeachment, and presented expert testimony that established his belief was reasonable.

Upon independent review (Cal. Rules of Court, rule 9.12), we find the State Bar did not prove by clear and convincing evidence that Johnson committed misconduct. (See *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command unhesitating assent of every reasonable mind].) Rather, he believed in good faith his actions in each case were appropriate, although he made negligent mistakes of law. Since Johnson's errors do not constitute misconduct meriting discipline, we dismiss this case with prejudice.

II. CASE NUMBER 11-O-11316 – THE TRUST MATTER

A. Facts

1. Johnson's Mother Executed Her Will and Trust

Dorothy A. Johnson executed a Declaration of Trust in 1990. Ten years later, she amended it and executed her will. The primary beneficiaries of both her trust and her will were her children, Johnson and his siblings, Karen Coit, Robert Johnson, and Matthew Johnson.[1] Dorothy named Coit and Johnson as co-trustees of the trust, and Coit as executor of the will.

[1] To avoid confusing the reader and intending no disrespect, we refer to Dorothy, Matthew, and Robert Johnson by their first names.

Dorothy died in December 2003. The only assets of the trust were the family home, located in Rohnert Park, and its furniture and furnishings. The remainder of Dorothy's estate, including bank accounts totaling around $100,000, was to pass through her will. As executor, Coit failed to add the entire estate to the trust, as the will instructed.

Shortly after Dorothy's death, Coit told Johnson that she did not wish to be co-trustee because her husband was ill. She requested that Johnson act as sole trustee. He wrote to his siblings asking if they objected to him being sole trustee. In the letter, he admitted he "had no training or experience in this area of law." None of the siblings objected.

The trust required Johnson to perform three primary acts: (1) sell the home upon Dorothy's death; (2) make specific gifts of furniture and furnishings to certain individuals, with the remainder to the siblings; and (3) make cash distributions of $5,000 to each grandchild and $1,000 to Matthew for the benefit of one of his children. Johnson testified that he consulted his friend and probate attorney, Anthony Santucci, for advice on "everything I did" as trustee. Both Santucci and Johnson believed that the trust granted broad powers to the trustee.[2]

2. Johnson Administered the Trust

Johnson immediately made the home furnishings available to the beneficiaries. He could not, however, fulfill the bequests to the grandchildren since the trust had no cash assets until the home sold, and Coit never transferred the money from Dorothy's bank accounts, as the will had directed. In late 2008, with no objections by the siblings, Johnson paid the grandchildren from Dorothy's bank accounts and distributed the remainder to his siblings according to the trust.

Dorothy's home appraised for $340,000, but showed 30 years of deferred maintenance. Johnson offered to advance his own money, subject to reimbursement, to renovate the property

[2] The trust provided: "The trustee shall have the full power to sell, . . . invest, reinvest, partition, divide, improve and repair the property constituting the trust estate. . . . and the trustee shall have all the rights, powers, and privileges that an absolute owner of the same property would have, subject to the obligations of a fiduciary. . . ."

before putting it on the market. The siblings agreed. By early 2006, the renovations totaling nearly $50,000 were completed.

In the summer of 2006, Johnson hired a real estate agent who listed the home for $505,000. It did not sell. Later that year, the agent re-listed it, but it still did not sell. Santucci advised Johnson to rent the property and wait for the weak housing market to rebound before attempting another sale. The siblings agreed. Johnson leased the home for $1,600 per month, beginning January 2007.[3]

In mid-2009, all the siblings agreed to sell their mother's home.[4] However, Johnson delayed listing it for sale because he was still struggling with grief over his mother's death, managing his private criminal law practice, and recovering from major surgery for a detached retina. The siblings became dissatisfied with, among other things, the length of time it was taking to sell the home. In 2010, Matthew and Coit filed complaints with the State Bar.[5] Johnson listed the property in June 2011, and it sold later that year for $236,000. He distributed the sales proceeds and the rental income to his siblings, in accordance with the trust.

3. The Superior Court Approved Johnson's Actions as Trustee

In 2011, Johnson consulted Nick Livak, an experienced probate attorney. Livak told Johnson that Santucci had not properly advised him, and he should seek court intervention to

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[3] In 2008, Johnson offered to purchase the home from the siblings for the original appraised value of $340,000, or at a higher appraisal if they obtained one. None of the siblings presented an appraisal or sold their interest.

[4] By this time, Johnson had traveled from his home in Santa Clara at least 50 times to supervise the renovation, meet with the realtor, and resolve other problems. We take judicial notice of the 90-mile distance between Johnson's home and his mother's property. (See Evid. Code, § 451, subd. (f) [generalized knowledge can be judicially noticed].)

[5] Matthew alleged Johnson breached his fiduciary duty by not probating their mother's will, and failing to keep accurate records, protect the assets, provide accountings, communicate with beneficiaries, re-title the home, properly distribute the assets, or timely respond to inquiries of the beneficiaries. He further claimed Johnson misappropriated assets and gave false and misleading information to the beneficiaries.

settle the estate. Johnson hired Livak. In January 2012, Livak filed Johnson's petition in superior court to approve the trust's account and the trustee's report. The siblings filed objections alleging that Johnson had mishandled the trust.

Before the hearing, the siblings participated in a judicially-supervised settlement conference. As a result, in May 2012, they withdrew their objections to Johnson's petition and executed a written Settlement Agreement and Mutual Release, which stipulated that: (1) claims related to delay in the sale of the home or completion of the trust were dismissed; (2) each received an equal distribution of rental income; and (3) Johnson established a trust bank account.

In June 2012, the superior court issued an order approving Johnson's actions as trustee: "All acts and transactions of [Johnson], as Trustee, set forth in the account and report . . . are ratified, confirmed, and approved." The court found that Johnson administered the trust in an acceptable manner as follows: (1) all investments were authorized, proper, and made in the best interests of the trust and all interested persons; (2) all cash was invested and properly maintained; and (3) the account and report for the period of December 9, 2003 to December 31, 2011 were approved as appropriate and timely.

4. Johnson's Discipline Trial

A few months after the superior court settled the estate, the State Bar proceeded with Johnson's discipline trial. Matthew and Coit testified that they were not satisfied with the way Johnson handled the trust. They raised essentially the same complaints the superior court addressed in their settlement and release. Johnson testified that he administered the trust to the best of his ability after seeking advice from Santucci. He produced an October 2008 letter to Coit offering to resign: "If you do not wish to have me continue I will step aside." None of the siblings asked him to resign or petitioned the court to have him removed as trustee. Johnson expressed devastation that the family had been so divided over the trust.

Johnson also admitted that he made two good faith mistakes as trustee. First, he did not initially keep the rental proceeds segregated in a separate trust account. Based on Santucci's advice, he believed he could maintain the funds in his own bank account as long as he separately identified them. When he further consulted with Santucci and realized he must have a separate trust account, he established one and transferred all the rental proceeds into it. Johnson's second error was he did not provide regular accountings to his siblings. Livak testified that although the Probate Code calls for an annual accounting, it is not done in 75% of small estates like Dorothy's because it is too expensive. Johnson testified he felt administering the trust was a "family matter," and based his actions on conversations, discussions, and understandings among the siblings. In 2012, he filed a full accounting in superior court.

B. Culpability[6]

Count 1 – Failure to Comply with Laws (Bus. & Prof. Code, § 6068, subd. (a)[7])

The State Bar alleged, and the hearing judge found, that Johnson failed to comply with the law by violating four sections of the Probate Code. To prove these violations, the State Bar presented Coit and Matthew, who testified that Johnson did not properly administer the trust. But these are the same allegations that the siblings made in superior court, and were fully resolved by settlement and court order just months before the discipline trial. We decline to make contrary findings now based on the very same evidence. Moreover, the record supports the superior court's findings that Johnson properly administered the trust, as detailed below. (See

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[6] In this consolidated case, the State Bar charged a total of five counts. The hearing judge dismissed three counts alleging moral turpitude and failure to cooperate. We adopt these dismissals, which the State Bar does not contest, and examine only the remaining single count in each NDC that alleges Johnson failed to support the law in the Probate and Penal Codes.

[7] This section makes it an attorney's duty to "support the Constitution and laws of the United States and of this state." Attorneys may be disciplined under Business and Professions Code, section 6068, subdivision (a), for violating a specified law "not otherwise made disciplinable under the State Bar Act." (*In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487.)

Maltaman v. State Bar (1987) 43 Cal.3d 924, 947 [superior court's findings entitled to strong presumption of validity where they are supported by substantial evidence].)

1. Probate Code Section 16000

Probate Code section 16000 provides that the "trustee has a duty to administer the trust according to the trust instrument . . . ." The State Bar alleged that Johnson violated this duty because he: (1) did not sell the house for over six years; and (2) did not distribute the grandchildren's cash bequests until October 2008. We do not agree.

The length of time Johnson took to sell the home was reasonable given the required repairs, the multiple attempts to sell it, and the declining real estate market. (See Prob. Code, § 16040, subd. (a) [trustee shall administer trust with reasonable care that prudent person acting in like capacity would use].) In fact, the siblings agreed to renovate and lease the home during the first five years, from 2004 to mid-2009. Although Johnson did not re-list it until June 2011, he testified the delay was caused by his continued grief over his mother's death, the demands of his law practice, and his recovery from eye surgery. Having spent five years managing the property, the delay was reasonable in light of his personal difficulties and professional demands.

We also find that Johnson acted properly by using money from Dorothy's bank accounts to fulfill the cash bequests to the grandchildren in 2008. He could not make them earlier since the trust had no cash assets. Had Coit transferred Dorothy's bank accounts into the trust, as the will directed her to do, Johnson could have immediately paid the beneficiaries. Significantly, none of the siblings objected to his 2008 payment from Dorothy's bank accounts. Under these circumstances, we find that Johnson acted reasonably and in good faith.

2. Probate Code Section 16009

Probate Code section 16009 provides that the trustee has a duty "(a) To keep the trust property separate from other property not subject to the trust. [¶] (b) To see that the trust property

is designated as property of the trust." The State Bar alleged that Johnson violated his duty by not establishing a bank account in the name of the trust to hold trust assets or changing the title to the home "to reflect its ownership by the Trust." We disagree.

As to establishing a separate trust account, Johnson admittedly made a negligent mistake but corrected it. Initially, he believed he could keep the rental income in his personal account. When he discovered his error, he established a trust bank account and transferred the rental proceeds to it. At all times, he maintained more than the total rental income he collected on his mother's home in his personal account.

As to re-titling the home, it was always designated as property of the trust. Dorothy had re-titled her home to reflect ownership in the trust, listing herself as trustee. To complete the sale, the title company substituted Johnson's name for Dorothy's as trustee on the title.

3. Probate Code Section 16061

Probate Code section 16061 states that "on reasonable request by a beneficiary, the trustee shall report to the beneficiary by providing requested information to the beneficiary relating to the administration of the trust relevant to the beneficiary's interest." The State Bar alleged that Johnson violated this section because he failed to provide a full and accurate report to Coit or Matthew upon their request. We disagree. Johnson filed a full accounting in his January 2012 petition in superior court to approve the trust's account and the trustee's report. This filing satisfies the siblings' requests.

4. Probate Code Section 16062

Probate Code section 16062, subdivision (a), requires the trustee to "account at least annually . . . to each beneficiary to whom income or principal is required or authorized . . . to be . . . distributed." The State Bar alleged that Johnson violated this section by not providing accountings to Coit or Matthew from 2004 to January 19, 2012, the date he filed the petition in

superior court. He admittedly failed to provide annual accountings because he did not believe they were required for a family trust. Nonetheless, the superior court ultimately found that his account and report for the period of December 2003 to December 2011 was appropriate and timely. By not providing annual reports, Johnson made a negligent mistake in good faith that did not result in harm and should not be a cause for discipline. (See *Call v. State Bar* (1955) 45 Cal.2d 104, 111 [good faith considered in determining whether discipline is imposed for ignorance or mistake].) Count One is dismissed with prejudice.

III. CASE NUMBER 11-O-15546 – THE CRIMINAL MATTER

Count 1 – Failure to Comply with Laws (Bus. & Prof. Code, § 6068, subd. (a))

A. Facts

In 2010, Johnson represented a client charged with sexually assaulting two admitted prostitutes and facing a life-term in prison. He requested discovery from the deputy district attorney (DDA), including the names and addresses of witnesses who may testify at the preliminary hearing. The disclosure of addresses is restricted under Penal Code section 1054.2, subdivision (a)(1), which prohibits an attorney from revealing "the address or telephone number of a victim or witness whose name is disclosed to the attorney . . . unless specifically permitted to do so by the court after a hearing and a showing of good cause."

The DDA used a confidential system to provide Johnson with the addresses the alleged victims gave to police. Johnson hired an investigator to confirm the addresses. The investigator reported back that "neither of these two women lived at the given addresses." Johnson informed the DDA, who responded in a letter that she did not have current addresses, but would make the witnesses available before the hearing. Johnson concluded the addresses were false and therefore not confidential under Penal Code section 1054.2.

At the hearing before Judge Joyce Allegro, Johnson questioned one of the alleged victims about the address she provided to police. The DDA objected, claiming Johnson improperly revealed the confidential address. The DDA asked the judge to strike the answer and sanction Johnson. In response, Johnson told the judge he thought his question was proper impeachment since the witness provided a false address. He explained his duty to represent his client, which included exploring the alleged victim's credibility. Judge Allegro believed Johnson had violated Penal Code section 1054.2. She referred him to the State Bar, but imposed no sanctions.

At his discipline trial, Johnson again asserted that Penal Code section 1054.2 does not apply to an invalid or false address. He presented the declarations of six criminal law experts, who, after reviewing the hearing transcript, opined that Johnson's question did not violate the Penal Code. Each expert believed that asking a witness about a false address does not reveal confidential information and is proper impeachment under current custom and practice in criminal proceedings. Many experts stated that attacking a witness's credibility was an important defense that Johnson was duty-bound to explore, particularly where the charges rely on the word of the witness. The State Bar did not rebut the experts' testimony.

B. Culpability

The State Bar alleged that Johnson violated Penal Code section 1054.2 when he cross-examined the witness and disclosed in open court an address "given by the witness to the police, without obtaining advance court permission to do so." The State Bar and Johnson agree that the courts have not addressed whether the confidentiality provision of Penal Code section 1054.2 includes an address given by a witness that is incorrect or not current. The State Bar contends that the statute covers any address the witness may give to police, while Johnson argues it applies only to a current and correct address.

The hearing judge agreed with the State Bar's interpretation, reasoning that limiting application of Penal Code section 1054.2 to a current or correct address would be "counter-productive" to the statute's intent to keep victims and witnesses "safe from defendants." The judge explained that if a witness moved, for example, an unwitting neighbor near the former address might reveal the witness's current location. Under this analysis, the hearing judge found Johnson violated Penal Code section 1054.2.

We need not interpret Penal Code section 1054.2 in this context as a matter of first impression because even if Johnson violated the statute, he is still not culpable under the facts of this case. Section 6068, subdivision (a), of the Business and Professions Code, and the analogous section 6067,[8] broadly set out an attorney's duties. Our Supreme Court has recognized that an attorney who makes a negligent mistake in good faith does not necessarily violate his legal duties under section 6067. (*Abeles v. State Bar* (1973) 9 Cal.3d 603, 610; see *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793 ["section 6067 recognizes that attorneys are not infallible and cannot at their peril be expected to know all of the law"]; *Lewis v. State Bar* (1981) 28 Cal.3d 683, 688 [inherent problems using disciplinary proceedings for attorney's negligence, mistake in judgment, or lack of experience or legal knowledge].) Likewise, we have held that an attorney's good faith mistake, even when it results in a violation of law, may be a defense to discipline under Business and Professions Code, section 6068, subdivision (a). (*In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 633 [violation of § 6068, subd. (a), not found where attorney's good faith but erroneous belief he could distribute settlement constituted negligent mistake].)

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[8] Section 6067 provides in relevant part: "Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability."

We conclude that if Johnson erred by revealing the address, his credible and un-rebutted testimony and the testimony of his expert witnesses established that he made a good faith mistake. He immediately told Judge Allegro at the hearing that his question was proper because he believed the address the witness provided to police was false—his claim of good faith was not an afterthought. He testified to the same belief at his discipline trial, and the hearing judge found him credible: "Clearly, respondent believed that the witness' address was either fake or not current. . . . There's also no indication that respondent's actions were designed to intimidate or harass the witness." We accord great weight to this credibility finding. (See *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.) Since all reasonable doubts must be resolved in the attorney's favor (*Alberton v. State Bar* (1984) 37 Cal.3d 1, 11), we find that, at most, Johnson made a negligent mistake in good faith when he revealed the address the witness gave to police. This count is dismissed with prejudice.

IV. ORDER

We have found Johnson not culpable of all charges. Therefore, we do not address the parties' issues involving aggravation and mitigation, and order this case dismissed with prejudice. Johnson may move for reimbursement of costs in accordance with Business and Professions Code section 6086.10, subdivision (d), and rule 5.131 of the Rules of Procedure of the State Bar.

PURCELL, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.