PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **ERIC BRYAN SEUTHE,** **Member No. 90269,** A Member of the State Bar.	Case No.: **11-O-19427-YDR** **DECISION**

Introduction[1]

This matter comes to this court following a remand from the Review Department. The State Bar alleges that Eric Bryan Seuthe (Respondent) is culpable of a single ethical violation in one client matter. The Office of Chief Trial Counsel of the State Bar of California (State Bar) has the burden of proving this charge by clear and convincing evidence.[2] This court finds that there is clear and convincing evidence demonstrating that Respondent is culpable of willfully violating a single count of rule 4-100(B)(3) (failure to render an appropriate accounting). The court recommends that Respondent 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 probation for a period of two years.

[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.

[2] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

Significant Procedural History

The State Bar initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on December 20, 2012. The NDC involved two client matters, case numbers 11-O-19427 and 12-O-13950. On January 28, 2013, Respondent filed a response to the NDC. The hearing judge granted the State Bar's motion to dismiss all charges in case number 12-O-13950 and one charge in case number 11-O-19427. The sole remaining count in case number 11-O-19427 was that Respondent failed to render an appropriate accounting, in willful violation of rule 4-100(B)(3).

A two-day trial was held on November 7 and 8, 2013. After the State Bar presented its case, Respondent filed a motion to dismiss. On February 5, 2014, the hearing judge granted Respondent's motion and dismissed the rule 4-100(B)(3) charge with prejudice.

The State Bar sought review of the hearing judge's decision on March 3, 2014. On September 22, 2015, the Review Department filed an opinion reversing the dismissal of the 4-100(B)(3) charge and remanded the case to the Hearing Department for a new trial.

A new trial was set for June 8, 2016. On the trial date, the parties filed a Stipulation as to Facts and Admission of Documents. The documents included the prior trial transcripts. The State Bar was represented by Deputy Trial Counsel Shane C. Morrison. Respondent was represented by James I. Ham, Esq. After the stipulation and documents were entered into evidence, each side rested. The court took the matter under submission on June 22, 2016. The State Bar and Respondent filed closing argument briefs on July 12, 2016.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on November 29, 1979, and has been a member of the State Bar of California at all times since that date. These findings of fact are based on the record, the evidence admitted at trial, and the facts set forth by the parties in their factual stipulation.

Case No. 11-O-19427 – Finstrom Matter

Facts

On October 18, 2008, Jane Finstrom was injured in an accident involving an uninsured, intoxicated driver. In October 2008, Finstrom retained Respondent to handle the personal injury claim against her insurance carrier, Liberty Mutual.

Liberty Mutual sent Respondent a $5,000 draft for Finstrom's medical payment coverage, which he deposited into his client trust account (CTA) on February 19, 2009. Respondent promptly advised Finstrom of receipt of the medical payment check. On March 7, 2009, Respondent provided Finstrom with a $3,000 check, representing Finstrom's share of the medical payment funds. Respondent wrote a check to himself for $2,000. Respondent met with Finstrom on March 8, 2009, where he provided Finstrom with a written accounting of her medical bills and the medical payment funds.

During 2009, Finstrom obtained an arbitration award against Liberty Mutual for $115,000 for Finstrom's uninsured motorist claim. After Liberty Mutual sent Respondent $115,000 in award funds, Respondent promptly informed Finstrom that he received the funds. On July 29, 2009, Respondent deposited the funds into his CTA.

On August 9, 2009, Respondent met with Finstrom and gave her a distribution letter addressing the $115,000 in settlement proceeds. The letter stated that Respondent's fees would be $46,000, the amount of arbitration and case costs that Finstrom was liable for would be reduced to $8,000; Respondent would hold back $11,000 to negotiate a reduction of billings of three medical providers in Finstrom's case; and the remaining $50,000 would be disbursed to Finstrom. Finstrom signed the letter authorizing the disbursements, and the distribution was timely made.

Respondent represented Finstrom in several other matters, including a medical malpractice action against a physician who performed surgery on Finstrom, a medical malpractice action against the University of California Los Angeles Hospital (UCLA Hospital), and a bad faith case against her insurance company. The settlement funds from the bad faith case were fully and appropriately distributed pursuant to Finstrom's authorization. Respondent expended substantial sums of money in filing, serving and conducting initial discovery in the case of *Finstrom v. UCLA*. He also expended substantial time assisting Finstrom in the previously mentioned matters.

In June 2011, attorney Gary Brown substituted into Finstrom's medical malpractice action against UCLA Hospital. On June 22, 2011, Brown wrote a letter to Respondent which requested "an accounting and a check for the remainder of funds you are holding for [Finstrom] from previous representations." The letter also indicated that Finstrom believed Respondent held $5,000 on her behalf. On October 6, 2011, Brown resent the letter containing the request to Respondent.

On October 17, 2011, Respondent wrote to Brown stating, "I do not understand how Ms. Finstrom can claim that she is due $5,000. From our information, we are holding $2,000 in trust for payment of the Meridian Resource claimed health insurance reimbursement lien of $ 1,992.50. [¶] Furthermore, it is my recollection that Ms. Finstrom had agreed that we could utilize those monies for costs with regard to her pending action against UCLA Medical Center, et al. . . . If Ms. Finstrom claims that we were not authorized to utilize those monies in order to obtain medical records, pay filing fees, and court costs to prosecute her pending action against UCLA Medical Center, et al., please immediately advise."

On October 21, 2011, Pam Shannon, Administrative Assistant to Brown, sent a facsimile to Respondent stating, "Thank you for your letter to Mr. Brown of 17 October regarding the

funds held in trust for Ms. Finstrom. Mr. Brown requests that you provide a written accounting will full back up within five days." On October 23, 2011, Respondent wrote a letter to Brown stating, "Please specifically advise what you are requesting by way of a ' . . . written accounting with [sic] full back up . . . .' [¶] Please advise in writing if Finstrom believes that the amount of money previously held to reimburse her health insurance should be in excess of $2,000 and whether or not Ms. Finstrom is now denying her prior authorization to utilize this money, in trust, to pay her costs on her medical malpractice/products liability action." On October 24, 2011, Brown wrote a letter to Respondent which, stated in part, "I do not have to engage in a debate with you nor answer your obvious obstreperous question that evades your duty. Your next move determines your fate, for I will report this transgression if you don't comply with Rule [4-100] within five days . . . ."

Respondent did not provide Brown with a written statement of all receipts and disbursements of funds received by Respondent on behalf of Finstrom in response to Brown's October 24, 2011 letter. Respondent contends he provided a sufficient response. The communications with Brown broke down after Brown and his assistant threatened to report Respondent to the State Bar of California.

In June 2013, Respondent and Finstrom reached a written settlement agreement. The settlement funds were fully distributed. Respondent and Finstrom agreed that any funds remaining in Respondent's trust account would be distributed, pursuant to the settlement agreement, and the dispute regarding the payment of Respondent's costs and legal fees would be resolved.

Conclusions

Count One - (Rule 4-100(B)(3) [Render Appropriate Accounts])

Respondent is charged with failing to render appropriate accounts to a client regarding all funds coming into Respondent's possession, in willful violation of rule 4-100(B)(3). 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. Respondent maintains that he provided an appropriate accounting to Finstrom for the $5,000 medical payment and to Finstrom and Brown for the $115,000 arbitration award. The court disagrees and finds Respondent is culpable of willfully violating rule 4-100(B)(3).

Medical Payment Accounting

Respondent contends that the March 8, 2009, accounting he provided Finstrom satisfied rule 4-100(B)(3). The Review Department's September 22, 2015, opinion held that an appropriate account "would reference any trust account balance owed the client, reflect any interim deposits of trust funds, set forth as deductions any interim payments identified by nature, and reflect the remaining or interim closing balance." Although the parties stipulated that Respondent provided Finstrom with a "written accounting" of Finstrom's medical bills and the medical payment funds, the March 8, 2009, document is not an accounting pursuant to rule 4-100(B)(3). Rather, the March 8, 2009, document is an itemization of Finstrom's medical bills. Moreover, the notes on the document fail to indicate that Respondent received a $5,000 medical payment on Finstrom's behalf, fail to clearly reflect the payments that were actually made, and fail to reference any remaining balance. Thus, Respondent's bill itemization failed to satisfy rule 4-100(B)(3).

Arbitration Award Accounting

Respondent alleges that the August 9, 2009 letter was an accounting of Finstrom's $115,000 arbitration award. Respondent's August 9, 2009 correspondence was a distribution letter, not an appropriate accounting. Respondent's letter explained that his fees were $46,000, the costs were reduced to $8,000, $11,000 would be retained to pay medical providers, and Finstrom would receive $50,000. The letter indicated how Respondent *intended* to distribute the funds; Respondent never provided Finstrom with the amount and nature of payments that were actually made and her balance of funds after the funds were distributed. In addition, Respondent's letter indicated that he intended to retain $11,000 to pay outstanding medical provider bills, but the $11,000 was not the actual amount owed to the providers. Respondent's letter explained that he hoped to negotiate and reduce certain provider's bills.

Respondent never provided an accounting for the remaining $11,000 when Brown requested one on Finstrom's behalf. Respondent's oral explanation that the remaining funds were used for fees and costs,[3] and his subsequent letter indicating that he was retaining $2,000 in trust for a lien payment do not provide for the total funds received on Finstrom's behalf, all payments made from those funds, and the amount of Finstrom's funds remaining in Respondent's CTA. As such, Respondent failed to render an appropriate accounting to Finstom and Brown, in willful violation of rule 4-100(B)(3).

[3] Respondent credibly testified that he and Finstrom agreed that Respondent would apply the remaining funds to fees and costs incurred in other matters for which Respondent represented Finstrom.

Aggravation[4]

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5.) The court finds the following with regard to aggravating circumstances.

Prior Record of Discipline (Std. 1.5(a).)

Respondent has one prior discipline record. On June 10, 1994, the Supreme Court ordered Respondent suspended for two years, stayed, and placed him on probation for four years with an actual suspension of 75 days. Respondent stipulated to his misconduct in seven client matters. Respondent acknowledged that he was culpable of threatening to present administrative charges against another attorney, failing to perform, failing to communicate, failing to promptly pay entrusted funds, commingling, misappropriation, and failing to keep a client informed. Multiple acts of wrongdoing was the single aggravating factor. Respondent's misconduct was mitigated by 14 years of discipline-free practice, restitution and cooperation during the disciplinary proceedings, candor with the State Bar, good character, and the change in office staff and procedures to avoid future misconduct.

The court notes that Respondent's prior misconduct is an aggravating circumstance, but the last act of misconduct in Respondent's prior occurred 20 years before the misconduct in the instant proceeding.

Mitigation

It is Respondent's burden to prove mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with regard to mitigating circumstances.

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

Candor/Cooperation to Victims/State Bar (Std. 1.6(e).)

Respondent entered into a stipulation as to facts and admission of exhibits which saved the State Bar time and resources. The court assigns moderate mitigation credit for Respondent's cooperation. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 ["more extensive weight in mitigation is accorded those who . . . willingly admit their culpability as well as the facts"].)

Good Character (Std. 1.6(f).)

Respondent presented the testimony of three witnesses at trial and declarations from four individuals who attested to his good character. They included a truck driver, custom home security engineer and a police officer. All of the witnesses or their family members were Respondent's clients. Respondent was described as honest and a "good guy" who is dedicated to his clients and works hard on their behalf. Each witness was satisfied with Respondent's representation and referred other individuals to Respondent. While it is clear that Respondent's clients think highly of him, Respondent's good character evidence is only entitled to moderate weight. Respondent's witnesses do not represent a "wide range of references in the *legal* and general communities." (Std. 1.6(f), italics added.)

Pro Bono Work

Five of Respondent's character witnesses stated that Respondent provides many pro bono services. He has conducted research and done work on cases after his clients were abandoned by their prior attorneys. He has not charged for these services. Respondent's clients' friends and families call him with legal questions, which he answers without charging a fee. This pro bono work is afforded moderate mitigating credit.

Discussion

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.) The State Bar contends that Respondent should be suspended for 30 days, while Respondent argues that if he is culpable of misconduct, the appropriate level of discipline is a reproval.

In determining the level of discipline, the court looks first to the standards for guidance. *(Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628). While they are guidelines for discipline and are not mandatory, they are given great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Moreover, the Supreme Court has instructed that the standards should be followed "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Standards 1.8(a) and 2.2(b) are the most applicable to Respondent's misconduct.

Standard 1.8(a) provides, "[i]f a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust." Respondent's prior misconduct occurred 20 years before the wrongdoing in this proceeding, and although the misconduct was serious, standard 1.8(a) does not apply. Respondent's current ethical violation is relatively minimal, and the current wrongdoing is not nearly as extensive or of the same character as the prior misconduct. Additionally, the State Bar acknowledged in its closing brief that "imposing progressive discipline in accordance with Standard 1.8(a) would not be appropriate in this matter." Under these circumstances, a departure from standard 1.8(a) is warranted. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [deviations from the standards must be clearly articulated].)

Pursuant to Standard 2.2(b), a suspension or reproval is the appropriate sanction for violating rule 4-100(B)(3). This case involves a single charge of failing to render an appropriate accounting, with a remote but serious prior record of discipline, and mitigating factors that slightly outweigh Respondent's prior discipline record. If Respondent had no prior record, the minimal nature of Respondent's misconduct would call for a sanction at the low end of the discipline range. But, although the weight of Respondent's prior is diminished, the court considers the prior in recommending the level of discipline.

In addition to the standards, case law is considered to determine the appropriate level of discipline. In *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, the attorney was culpable of failing to promptly notify his client of the receipt of medical payment funds and failing to render an appropriate accounting. The attorney received funds for his client's medical expenses from the client's insurer, deposited the funds into his CTA, but did not notify his client or render an accounting. When the client retained subsequent counsel, the attorney forwarded his client's file to subsequent counsel, but failed to reveal that he had received funds for medical expenses ten months earlier. The attorney violated rule 4-100(B)(3) even though he provided subsequent counsel an accounting one year after receiving the medical payment funds. The attorney's misconduct was aggravated by uncharged misconduct of unilaterally determining attorney's fees and withdrawing trust funds to satisfy the fee; and mitigated by good faith, candor, acknowledgment that a change in procedures was required, and lack of client harm. The attorney received a two-month stayed suspension and was placed on probation for one year.

Respondent's misconduct is less serious than the attorney in *Lazarus*, *supra*, 1 Cal. State Bar Ct. Rptr. 387, but Respondent has less mitigating credit and he has a prior record of discipline, which was not present in *Lazarus*. As such, Respondent's case warrants a greater

level of discipline than the discipline in *Lazarus*. Considering the circumstances of this case, the standards, and relevant case law, the court recommends that Respondent be suspended from the practice of law for one year, stayed, and placed on probation for two years.

Recommendations

It is recommended that respondent Eric Bryan Seuthe, State Bar Number 90269, 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 probation[5] for a period of two years subject to the following conditions:

1. 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.

2. 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.

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. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, Respondent must state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of Respondent's probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, Respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation

[5] 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.)

monitor that are directed to Respondent personally or in writing, relating to whether Respondent is complying or has complied with Respondent's probation conditions.

6. 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.)

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.

Dated: September 14, 2016

YVETTE D. ROLAND
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on September 14, 2016, I deposited a true copy of the following document(s):

DECISION

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

JAMES IRWIN HAM
PANSKY MARKLE HAM LLP
1010 SYCAMORE AVE UNIT 308
SOUTH PASADENA, CA 91030

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

SHANE MORRISON, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on September 14, 2016.

Johnnie Lee Smith
Case Administrator
State Bar Court