FILED DECEMBER 19, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case Nos.: **12-O-11176-RAH** (12-O-14869)
GENE EDWIN O'BRIEN,	)	**DECISION**
Member No. 99524,	)	
A Member of the State Bar.	)	

Introduction[1]

Respondent is charged in four counts of abandoning a single client. While the court has found misconduct in each of the four counts, it has also found significant mitigation arising out of his approximately 30 years of unblemished practice, and his severe emotional difficulties involving a failing marriage that he faced during the precise period of time when the misconduct occurred.

Significant Procedural History

The Notice of Disciplinary Charges was filed on May 23, 2013, reflecting two client matters – cases 12-O-11176 (counts one through four) and 12-O-14869 (counts five through nine.) Counts seven, eight, and nine were ordered dismissed in the interests of justice on the motion of the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed on

[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.

September 20, 2013. Trial commenced on September 23, 2013. Senior Trial Counsel Michael J. Glass represented the State Bar, and David Cameron Carr represented respondent.

At trial, on September 24, 2013, the remaining counts of case no. 12-O-14869 (counts five and six) were dismissed in the interests of justice, on the motion of the State Bar. Since all the counts in case no. 12-O-14869 have been dismissed, the court will not discuss the facts or conclusions of law with respect to that matter.

This matter was submitted for decision on September 24, 2013.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 1, 1981, and has been a member of the State Bar of California at all times since that date.

Case No. 12-O-11176 – The Solorio Matter

Facts

On August 20, 2010, Margarita Solorio (Solorio) hired respondent to file an action against her lender for predatory lending. At the time, there were foreclosure proceedings contemplated or instituted by the lender.

On October 20, 2010, Solorio hired respondent to review and prepare a second action against Solorio's niece in a real estate fraud matter. Between August 20, 2010, and January 20, 2011, Solorio paid respondent a total of $10,000 in advanced fees for the two matters. Pursuant to the written fee agreements, respondent was paid $5,000 for each matter.

On March 28, 2011, Solorio sent respondent an e-mail requesting an update on the status of her matters and requesting a meeting with respondent. Respondent received the e-mail, but failed to respond. Between May 27, 2011, and on or about August 1, 2011, Solorio telephoned respondent approximately 33 times seeking an update on the lawsuits, and left multiple voicemail messages.

In August 2011, Solorio met with respondent in person. During this meeting, respondent informed Solorio he would file the actions in September 2011. Respondent, however, did not file any lawsuit on behalf of Solorio in 2011.

In September 2011, respondent told Solorio he was working on the lawsuits and scheduled a meeting with Solorio on or about November 18, 2011. On November 18, 2011, respondent left Solorio a voice mail message canceling the meeting, and informing Solorio that an attorney named Harold Hewell (Hewell) would be working with respondent on the actions.

On November 18, 2011, Solorio phoned Hewell, who told Solorio he needed $8,000 before beginning work on Solorio's cases. Solorio refused to pay Hewell any additional fees. Hewell received $4,000 from respondent.

Respondent retained Hewell[2] because of his expertise in predatory lending practices. Hewell testified that the courts were not supportive of challenges based on a theory of predatory lending in 2012. In fact, Hewell opined that the matter would be "knocked out" by demurrer if it were filed at that time. Whether or not this opinion is accurate, it is clear that respondent did not advise his client of this opinion, nor did he advise his client that it was his position that they should wait for the law to change. Significantly, respondent did not refund any funds to his client as a result of this opinion by Hewell while they were waiting for a more favorable litigation environment.

Between November 23, 2011, and on or about January 3, 2012, Solorio faxed respondent at least six times, seeking a status update on the lawsuits. Respondent received the faxes, but failed to respond.

[2] Hewell never signed a written agreement with Solorio.

On January 6, 2012, Solorio sent respondent a letter by certified mail requesting a refund of the $10,000 in advanced fees paid to respondent, as respondent had not performed any work on the lawsuits. Respondent received the certified mail letter, but did not respond.[3]

In mid-April 2012, respondent phoned Solorio's husband, Samuel, and informed him that the actions would be filed on April 20, 2012. Respondent did not file an action on behalf of Solorio on April 20, 2012.

On May 1, 2012, respondent sent Solorio a fax stating that Solorio would not be charged additional legal fees for Hewell's services, and stating that Solorio's cases "should be filed this Friday." Respondent failed to file any action on behalf of Solorio on that Friday or at any other time in 2012.

On May 23, 2013, the Notice of Disciplinary Charges (NDC) in the instant case was filed and served on respondent. Respondent received the NDC. On June 10, 2013, after the filing and service of the NDC, respondent and Hewell filed an action on behalf of Solorio, entitled *Solorio v. Deutsche Bank*, Case No. CIVDS1306443, in the San Bernardino County Superior Court.

On June 22, 2013, respondent refunded Solorio's $5,000 retainer for the second action against Solorio's niece. Prior to issuing this refund, respondent did not provide Solorio with an accounting.

Respondent continues to represent Solorio in the predatory lending action.

[3] Respondent contends that this letter (exhibit 14) did not clearly state that Solorio wanted to terminate respondent's services. The court disagrees. Solorio complained that respondent had "done nothing" and demanded a refund of the $10,000 fee she paid, referring to both cases. She also noted that if respondent did not respond within five days, she would "be forced to take other actions against" him. Three weeks later, Solorio filed a complaint with the State Bar. The court finds that Solorio's letter demonstrated complete dissatisfaction and a desire to terminate respondent's services.

Conclusions

Count One - (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 the lawsuits on behalf of Solorio for over two and one-half years, respondent willfully violated rule 3-110(A).

Count Two - (§ 6068, subd. (m) [Failure to Communicate])

Section 6068, subdivision (m), provides that an attorney has a duty to promptly respond to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services. Respondent, in his counsel's closing brief, stipulated that there was clear and convincing evidence of a violation of section 6068, subdivision (m). This court agrees, finding that respondent's failure to promptly respond to several of Solorio's reasonable status inquiries constituted a willful violation of section 6068, subdivision (m).

Count Three - (Rule 3-700(D)(2) [Failure to Return Unearned Fees])

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund any part of a fee paid in advance that has not been earned. Respondent was terminated Solorio's January 6, 2012 letter. He did not return any unearned fees until June 22, 2013. Accordingly, respondent willfully violated rule 3-700(D)(2).[4]

Count Four - (Rule 4-100(B)(3) [Failure to Account])

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

[4] Although the court found that Solorio's January 6, 2012 letter terminated respondent in both matters, the parties reached a subsequent resolution in the predatory lending matter. Therefore, respondent continues to represent Solorio in that matter. Accordingly, the court is not recommending that respondent pay Solorio restitution on fee paid in the predatory lending matter.

accounts to the client regarding such property. Upon his termination in January 2012, respondent had a duty to provide an accounting of the fees his client had paid. While it is true that he provided a refund in the second action, he did not do so until 18 months later. Consequently, respondent willfully violated rule 4-100(B)(3) by failing to timely render appropriate accounts.

Aggravation[5]

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

The State Bar argues that there were multiple acts of misconduct. However, all of the found misconduct resulted from respondent's single act of abandoning his client. As such, the court does not find any aggravation under standard 1.2(b)(ii).

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

By retaining Solorio's funds for over 18 months after he was terminated, respondent caused Solorio significant financial harm. This constitutes an aggravating factor.

Indifference Toward Rectification/Atonement (Std. 1.2(b)(v).)

By failing to refund Solorio's fee or perform the services for which he was retained until State Bar proceedings were commenced, respondent displayed indifference toward his client's interests.

Mitigation

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

Respondent is entitled to highly significant mitigation for his nearly 30 years of discipline-free practice prior to the misconduct in this matter. (*Friedman v. State Bar* (1990) 50

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

Cal.3d 235, 245 [more than 20 years of practice with an unblemished record is highly significant mitigation].)

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

Respondent and his wife married in 2003. During the period of his representation of Solorio, respondent and his wife were involved in an emotional and time consuming separation.

Respondent was working in Palm Desert, having opened his first solo office in January 2010. Difficulties began in approximately 2008, when his wife, a nurse, decided to move to Arizona to complete a third degree in Da Vinci robotics. Respondent helped move her there to go to school. In June 2010, when respondent thought she would return, she advised him that she had taken a job in Syracuse, New York. Respondent drove to Arizona, packed her up, and moved her to New York. This job was scheduled to last one year, but she subsequently advised him she wanted to move to Dodge City, Kansas. As a result, during Thanksgiving 2010, respondent flew back and drove a moving van with his wife's things from Syracuse to Dodge City.

In March 2011, respondent's wife decided to get out of Dodge and move to Riverside, California. He rented a house where they could live in Rancho Mirage, California. He tried to salvage the marriage.

On September 1, 2011, respondent returned home from work and found a U-Haul truck at the house. His wife had gotten a job back in Arizona. He has not seen her since September 2011. They filed for divorce in 2012.

This extremely traumatic and time-consuming series of events distracted respondent from his responsibilities as a lawyer. These distractions, coupled with the fact that respondent was opening a new practice, also created a severe financial strain on respondent. Consequently,

respondent's emotional and financial difficulties during the time of the present misconduct warrant some consideration in mitigation.

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 sets forth the purposes of disciplinary proceedings and sanctions as "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."

In addition, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In determining the appropriate 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.) The standards offer a range of sanctions from suspension to disbarment, depending upon the gravity of the offenses and the harm to the victim. (Standards 2.2(b), 2.6, and 2.10.) The most severe sanction is found at standard 2.2(b), which provides that a violation of rule 4-100 must result in at least a three-month actual suspension, irrespective of mitigating circumstances.

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51

Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar requested, among other things, that respondent be suspended for 90 days. Respondent, on the other hand, argued that he should receive a public reproval.

In support of its recommended discipline, the State Bar cited *Harris v. State Bar* (1990) 51 Cal.3d 1082. In *Harris*, the Supreme Court imposed a 90-day actual suspension for protracted inattention (four years) to a client's case, resulting in a large financial loss to the client's estate. In aggravation, the Court considered the attorney's lack of candor to her client and her lack of remorse and insight that her actions were wrong. In mitigation, the Court considered the absence of a prior record of discipline in approximately 10 years of practice and the attorney's illness with typhoid fever after the misconduct commenced.

The court also found guidance in *Layton v. State Bar* (1990) 50 Cal.3d 889. In *Layton*, the Supreme Court imposed a 30-day actual suspension on attorney with 30 years of practice without prior discipline. The attorney, acting as attorney for a trust and an estate for which he was also the executor, failed through neglect and inattention to fulfill important and material requirements of his office as executor for over five years, which ultimately resulted in his removal by the probate court. Aggravating factors included significant harm to the estate and a beneficiary and indifference toward rectification. In mitigation, the Court considered the attorney's 30 years of blemish-free practice, the lack of personal gain from the misconduct, and the emotional and physical strain of caring for his terminally-ill mother. Not much weight was afforded to the attorney's candor and cooperation because of the contrary explanations he offered for his acts and omissions.

Similar to *Layton* and *Harris*, respondent's misconduct continued over an extended period of time. However, considering both cases, the court finds the present case to be more on

par with *Layton*. For like *Layton*, respondent received significant mitigation for his extensive period of discipline-free practice and the extreme emotional difficulties he was experiencing at the time of the misconduct.

While *Layton* was adjudicated prior to the imposition of the standards, standard 2.2(b) has never been reflexively applied. Here, the court finds that respondent's substantial mitigation warrants a deviation from standard 2.2(b). Further, the court finds little likelihood that respondent will commit further misconduct. As noted above, he enjoyed a lengthy discipline-free career prior to the emotional difficulties that helped give rise to the present misconduct. Accordingly, the court concludes that a level of discipline similar to that ordered in *Layton* is appropriate.

Therefore, having considered the evidence and the law, the court finds that a 30-day period of actual suspension, among other things, is sufficient to protect the public, the courts, and the legal profession.

Recommendations

It is recommended that respondent Gene Edwin O'Brien, State Bar Number 99524, 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[6] for a period of two years subject to the following conditions:

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

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 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

[6] 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.)

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.

4. 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.

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 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 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with his 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.

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.)

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: January _____, 2014

RICHARD A. HONN
Judge of the State Bar Court