STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **KENNY NORMAN GIFFARD,** **Member No. 101727,** A Member of the State Bar.	Case No.: **12-O-16522-PEM** **DECISION AND ORDER**

Introduction[1]

In this contested disciplinary proceeding, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) charged respondent Kenny Norman Giffard with three counts of professional misconduct in a single client matter. The alleged misconduct included failing to return unearned fees, accepting fees from a non-client without consent, and failing to account. The court finds, by clear and convincing evidence, that respondent is culpable of the latter two charges. Based upon the nature and extent of culpability, as well as the applicable mitigating and aggravating circumstances, the court recommends, among other things, that respondent receive a public reproval.

Significant Procedural History

The State Bar initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on November 7, 2013. On November 20, 2013, respondent filed his response.

[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.

A two-day trial was held on April 24 and 25, 2014. The State Bar was represented by Senior Trial Attorney Suzan Anderson and respondent represented himself. On May 12, 2014, following closing briefs, 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 1, 1981, and has been a member of the State Bar of California at all times since that date.

Case No. 12-O-16522 – The Whitehead Matter

Facts

On October 27, 2011, David Whitehead (Whitehead) was found guilty of first degree murder with special circumstances by a jury in the Sacramento Superior Court. On October 31, 2011, Whitehead's grandmother, Doris Leggett (Leggett), came to respondent's office on behalf of Whitehead.[2] Leggett retained respondent to represent Whitehead in a motion for new trial and writ of habeas corpus or appeal.

While in his office, Leggett signed a legal services contract with respondent, whereby she agreed to pay respondent a retainer of $55,000. On that date, she gave him $40,000 and agreed to pay the balance of $15,000 within two months of the making of the contract. By the terms of the contract the fees paid constituted a "true retainer." Specifically, the contract stated that all fees were non-refundable as respondent was "making himself available for the client." Furthermore, the contract stated that the client agrees that in the event the attorney refuses representation, or client wished to terminate the services of the attorney, all fees were non-refundable.

The contract also stated that respondent's services would include representation in a motion for new trial and representation in a writ of habeas corpus or an appeal of the judgment

[2] Whitehead could not be present because he was in county jail.

and sentence. The contract specified that if Whitehead wanted respondent to perform any services not included in the contract, such as post-trial proceedings or remedies not specifically addressed in the contract, a separate written agreement would be required.

Although respondent was representing Whitehead, only Leggett signed the contract for respondent's services. Respondent did not obtain Whitehead's written consent to accept $40,000 from Leggett for his representation.

Respondent filed a motion to continue the sentencing originally set for December 9, 2011, so that he could later file a motion for a new trial. The motion for continuance was filed on December 6, 2011. Prior to the filing of the motion for continuance, respondent visited Whitehead in the county jail on three occasions. Respondent also did a cursory review of 2,700 pages of police records and transcripts provided to co-defendants.[3] Respondent did not file a motion for a new trial, because he reasonably thought the court would grant him a continuance given the life term Whitehead faced and the fact that respondent had only been in the case for little over a month. At the December 9, 2011 sentencing hearing, the trial judge insisted that there were no grounds upon which Whitehead could possibly be entitled to a new trial and, as such, he would not entertain even a short continuance.

After the motion to continue was denied, Whitehead was sentenced to state prison for the term of life without the possibility of parole, for a violation of Penal Code section 187, subdivision (a), murder in the first degree with special circumstances. Respondent filed an appeal on December 16, 2011. This initiated the process of the court preparing the record on appeal, which included the reporter's transcript. On December 19, 2011, Leggett paid respondent another $15,000 in advanced fees on behalf of Whitehead. Again, respondent did not get Whitehead's informed written consent to accept the $15,000 from Leggett.

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[3] Another lawyer in respondent's office had represented a co-defendant in the case.

On January 19, 2012, Whitehead mistakenly signed a document that was sent to him in prison requesting appointment of appellate counsel. Whitehead thought that in signing the document he was helping respondent with the appeal. That document was filed by the Court of Appeal for the Third Appellate District (Court of Appeal) on March 9, 2012. That same day, the Court of Appeal appointed Michael Satris (Satris) to represent Whitehead, even though respondent had filed the appeal.

On March 26, 2012, respondent wrote to the clerk of the Court of Appeal and informed the court that he had been retained and would represent Whitehead in the appeal. On April 5, 2012, the Court of Appeal issued an order recognizing respondent as counsel and directing Satris to transfer the record on appeal to respondent's office, as the opening brief was due on May 8, 2012.

On April 9, 2012, Whitehead wrote to Satris requesting that he represent him instead of respondent. On April 19, 2012, Satris replied and requested that Whitehead sign substitution of counsel forms. On or about that same date, Robert Gonzalez (Gonzalez), an attorney representing Leggett, sent respondent a letter requesting that he cease working on Whitehead's post-conviction appeal immediately and reimburse the $50,000 retainer Leggett paid. On April 25, 2012, Gonzalez sent another letter to respondent insisting that he issue a reimbursement check of $50,000 to Leggett.[4]

After receiving the letters from Gonzalez, respondent traveled to the state prison in Delano, California, on April 26, 2012, to visit Whitehead and determine if he wanted respondent to work on his appeal. During that prison visit, Whitehead signed a declaration prepared by

[4] Although Leggett paid $55,000 in fees to respondent, Gonzalez repeatedly requested a refund of the "$50,000 retainer."

respondent stating that Whitehead still wanted respondent to represent him in his appeal and writ of habeas corpus (the April 26 declaration).

On April 30, 2012, Satris received a letter from Whitehead stating that he got talked into signing the April 26 declaration indicating that he still wanted respondent to represent him. In this letter, Whitehead clearly stated that he wanted Satris to be his lawyer.

On April 30, 2012, Gonzalez sent another letter to respondent demanding the return of $50,000. That same day, Gonzalez also sent respondent an email stating that respondent is no longer representing Whitehead. Respondent did not respond to Gonzalez's communications, as Leggett was not his client.

On May 2, 2012, respondent sent Satris a letter concerning the representation of Whitehead, indicating that the substitution of counsel forms signed by Whitehead predate Whitehead's signing of the April 26 declaration, and, as such, he needed another substitution of counsel form. In this letter, respondent also states that since the due date for the opening brief was May 8, 2012, he would request an extension of time through June 7, 2012, to complete the opening brief.

On May 3, 2012, Satris sent Whitehead a letter asking that he sign a new consent form that post-dates the April 26 declaration. On or about May 9, 2012, Whitehead signed the substitution of counsel forms and respondent was formally terminated from representing Whitehead.

On May 16, 2012, respondent sent Satris his draft of the opening brief. The draft was 53 pages. Satris testified that the brief was a good introduction to the case and, as a draft, it was fine. On the other hand, Margaret Littlefield, an associate of Satris, testified that she did not use respondent's draft brief because she disagreed with it.

Respondent did not provide Whitehead with an accounting. Respondent also did not refund any of the fees paid to him by Leggett on Whitehead's behalf.

Conclusions

Count One – 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 visited Whitehead three times in county jail prior to his sentencing. During those visits he discussed the retainer contract, the appellate process, and the potential appellate issues as well as the sentencing and contents of the probation report. After speaking with the district attorney, respondent filed a motion to continue the sentencing. Respondent also reviewed 2,700 hundred pages of police reports, transcripts, and other discovery provided to the co-defendants. After the motion to continue was denied, respondent's strategy was to file an appeal of the sentencing. Satris testified that it was an appropriate strategy and most attorneys would not have filed a writ on the court's denial of the motion to continue, as it was an appellate issue.[5]

Respondent received the record on appeal from Satris in early April 2012, and began further review of Whitehead's case. Respondent estimated that his review of the record took as much as 80 hours. He also sent Satris an incomplete draft of his opening brief after he was terminated.

Clearly, respondent performed significant work on Whitehead's behalf. The issue comes down to whether or not all the fees paid to respondent by Leggett were earned.[6] Essentially, this boils down to a fee dispute and does not belong before this court. (*In the Matter of*

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[5] Thirty-four pages of Satris's appellate brief addressed the prejudice to Whitehead due to the denial of the motion to continue the sentencing.

[6] As addressed below, the court does not agree with respondent's assertion that the present case involved a true retainer causing the attorney fees to be earned upon receipt.

Respondent H (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 237 ["a disciplinary proceeding is seldom the proper forum for attorney fee disputes"].) Since the focal point of the present proceeding was not a fee dispute, the court lacks the clear and convincing evidence necessary to affirmatively determine what, if any, portion of respondent's fees were unearned. Accordingly, Count One is dismissed with prejudice.[7]

Count Two – Rule 3-310(F) [Accepting Fees from a Non-Client]

Rule 3-310(F) provides that an attorney must not accept compensation from a non-client for representation of a client without obtaining the client's informed written consent to receive such compensation. By accepting a total of $55,000 from Leggett as compensation for representing Whitehead without obtaining Whitehead's informed written consent to receive such compensation, respondent willfully violated rule 3-310(F). This misconduct, however, was attributable to respondent's belief that he was being paid with Whitehead's profits from his tribe's casino. Further, respondent's violation of rule 3-310(F) did not harm Whitehead or interfere with respondent's independence of professional judgment or his lawyer-client relationship. To this point, the court notes that respondent's actions with respect to Leggett's attorney were consistent with his understanding that Leggett was not his client. Accordingly, respondent's violation of rule 3-310(F) is not significant misconduct, as it was more technical than substantial.

Count Three – 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 accounts to the client regarding such property. "[T]he obligation to 'render appropriate accounts

[7] The court's finding does not preclude the parties from seeking to resolve this issue in the proper forum.

to the client' found in rule 4-100(B)(3) does not require as a predicate that the client demand such an accounting." (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 952.) The duty to account applies whenever an attorney receives client funds.

Respondent argued that he had no obligation to provide an accounting to Whitehead because his retainer agreement was a true retainer. And with a true retainer, the fees were earned upon receipt and therefore not applicable for accounting purposes. Consequently, the pertinent issue before the court is whether or not respondent was actually operating under a true retainer.

Even when an attorney fee is designated in the contract as a "true retainer fee," the court looks beyond this characterization to determine the obligations of the parties. (*In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 923 [characterization of a "non-refundable retaining fee" not determinative].) A true retainer has been defined as "a sum of money paid by a client to secure an attorney's availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client." (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164.)

Here, the record does not demonstrate that respondent ensured his availability over a given period of time, as the legal services agreement makes no mention of such. (See also *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757 [fee not a true retainer because no provision to set aside available blocks of time].) Respondent acknowledged in his own testimony that he did not turn down other clients to represent Whitehead. And further, while a true retainer secures the attorney's availability over a given period of time, respondent's legal services agreement was task oriented, dictating the limited services respondent was to provide and mandating a separate written agreement for any services beyond those specifically laid out in the legal services agreement.

Accordingly, the court concludes that despite respondent's terminology, his retainer agreement was not a true retainer, and he was required to comply with rule 4-100(B)(3). And by failing to render an appropriate accounting to Whitehead, respondent willfully violated that rule.

Aggravation[8]

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

Respondent has one prior record of discipline. Effective October 8, 1992, respondent was privately reproved with conditions in State Bar Court case no. 89-O-12350. In this matter, respondent was found culpable of failing to competently perform legal services in a single client matter. In mitigation, respondent recognized his misconduct and took steps to insure that it would not reoccur. No aggravating circumstances were identified.

Due to the minimal nature of respondent's prior discipline and the fact that it occurred nearly 20 years before the present misconduct, it is too remote in time to merit significant weight in aggravation. (*In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96, 105.)

Multiple Acts/Pattern of Misconduct (Std. 1.5(b).)

Respondent has been found culpable of two acts of misconduct. Two acts of misconduct, however, do not necessarily constitute multiple acts of misconduct. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646.) Here, respondent's two acts of misconduct are based on particular and distinct facts. Consequently, the court finds that they do establish multiple acts of misconduct and therefore warrant limited consideration in aggravation.

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

Mitigation

Lack of Harm (Std. 1.6(c).)

The present misconduct did not cause harm to the client, the public, or the administration of justice. The present lack of harm merits some consideration as a mitigating circumstance.

Good Character (Std. 1.6(f).)

Respondent presented testimony and/or statements from nine character witnesses attesting to his professionalism, honesty, and good character. These witnesses demonstrated an understanding of the charges against respondent and came from a wide range of references, including present and former superior court judges, a town commissioner, attorneys, an insurance broker, and a former client who is now employed by respondent. Several of these character witness have known respondent for an extended period of time. Respondent's positive character evaluations warrant significant consideration in mitigation.

Discussion

Standard 1.1 provides that the primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

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.) Standard 1.7 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.7(a).)

Standards 2.2(b) and 2.15 apply in this matter. Standard 2.2(b) states that reproval or suspension is appropriate for a violation of rule 4-100 not constituting commingling or failing to promptly pay out entrusted funds. Standard 2.15 provides that culpability of a member of a violation of any rule not specified in the standards should result in reproval or suspension.

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.) As the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn.2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar recommended, among other things, a six month minimum period of actual suspension. Respondent, on the other hand, argued for a dismissal, urging that no culpability be found.

In support of its recommended discipline, the State Bar cited *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459. In *Nees*, the attorney was actually suspended for six months and until he completes restitution for abandoning an incarcerated client and failing to return unearned fees, return the client's files, and cooperate with the State Bar. In aggravation, the attorney caused significant harm to the client, failed to acknowledge the impropriety of his actions, and failed to participate in the underlying disciplinary proceeding. No mitigating factors were found.

While *Nees* and the present case both involve representation of a criminal defendant on appeal, this is where the similarities end. The misconduct in *Nees* is considerably more

egregious than the present matter, as the attorney abandoned an incarcerated client.[9] *Nees* is further distinguished in terms of mitigation and aggravation. *Nees* involved considerably more aggravation, including a failure to participate in the disciplinary proceedings, significant client harm, and a failure to recognize the impropriety of his actions. What is more, the present case involves extensive mitigation including respondent's character evidence and lack of harm. *Nees*, on the other hand, did not contain any factors in mitigation.

A review of the case law reveals that although there are several cases involving a violation of rules 4-100(B)(3) or 3-310(F), these violations are not the crux of the case and are routinely overshadowed by more serious misconduct. While no case law is directly on point, the court found *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, to be somewhat helpful.

In *Dudugjian*, the attorneys retained client settlement funds in their general account and refused to pay them to clients, in the mistaken belief that said funds were partial payment of the attorneys' fee. The attorneys were found culpable of depositing client funds into a non-trust account and failing to promptly payout said funds. In mitigation, the attorneys honestly believed that their clients had given them permission to retain the settlement funds, the misconduct was unlikely to reoccur, the attorneys did not have a prior record of discipline, and they exhibited good moral character. No aggravating circumstances were found. The California Supreme Court ordered that the attorneys receive a public reproval.

Similar to *Dudugjian*, the court finds that respondent did not intentionally set out to violate any ethical rules, but that the aforementioned misconduct was more a byproduct of mistaken beliefs and the misapplication of existing rules. While *Dudugjian* involved more

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[9] The Review Department focused on the issue of client abandonment in determining the proper level of discipline to recommend. (*In the Matter of Nees*, *supra*, 3 Cal. State Bar Ct. Rptr. 459, 465-466.)

serious misconduct, it also contained more mitigation and less aggravation than the present matter. Accordingly, the court finds that a level of discipline similar to *Dudugjian* is warranted.

Therefore, having considered the evidence, the standards, and the case law, the court concludes that a public reproval is appropriate to protect the public, the courts, and the legal profession.

Discipline Order

It is ordered that respondent **Kenny Norman Giffard**, State Bar Number 101727, is publicly reproved. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, the public reproval will be effective when this decision becomes final. Furthermore, pursuant to rule 9.19(a) of the California Rules of Court and rule 5.128 of the Rules of Procedure, the court finds that the interests of respondent and the protection of the public will be served by the following specified conditions being attached to the public reproval imposed in this matter. Failure to comply with any condition(s) attached to the public reproval may constitute cause for a separate proceeding for willful breach of rule 1-110 of the State Bar Rules of Professional Conduct. Respondent is ordered to comply with the following conditions attached to his public reproval for one year following the effective date of the public reproval:

1. During the one-year period in which these conditions are in effect, respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions attached to his public reproval.

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 attached to his public reproval. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the one-year period in which these

conditions are in effect, 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 during the period in which these conditions are in effect. 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 attached to his reproval 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 period in which these conditions are in effect and no later than the last day of that 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 the conditions attached to this reproval.

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.)

7. The period during which these conditions are in effect will commence upon the date this decision imposing the public reproval becomes final.

Multistate Professional Responsibility Examination

It is further ordered that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the public reproval imposed 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.

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Costs

It is ordered 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: July 15, 2014

Pat McElroy
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 San Francisco, on July 15, 2014, I deposited a true copy of the following document(s):

DECISION AND ORDER

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 San Francisco, California, addressed as follows:

DONALD MASUDA
LAW OFFICE OF DONALD MASUDA
2214 21ST ST
SACRAMENTO, CA 95818

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

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

Suzan J. Anderson, Enforcement, San Francisco
Terrie Goldade, Probation, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on July 15, 2014.

George Hue
Case Administrator
State Bar Court