

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: 13-O-11681-LMA
)
ALAN EARL FINESTONE,) DECISION AND ORDER
)
Member No. 65784,)
)
A Member of the State Bar.)

Introduction¹

In this disciplinary matter, respondent Alan Earl Finestone is charged with six counts of professional misconduct in a single client matter. Out of these six charges, the court finds that all but one should be dismissed.

Based on the nature and extent of culpability in conjunction with meeting the goals of attorney discipline, as well as the significant mitigating circumstances, the court orders, among other things, that respondent be privately reprovved.

Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on November 19, 2013. Respondent filed a response to the NDC on December 19, 2013.

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 March 18 and 19, 2014. Senior Trial Counsel Michael Glass represented the State Bar. Arthur Margolis represented respondent. This matter was submitted for decision on March 19, 2014.

Findings of Fact and Conclusions of Law

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

The following findings of fact are based on the parties' stipulation, the testimony, and the evidence presented at trial.

Facts

On August 16, 2007, Tywanshia Bowden (Bowden) employed respondent to represent her in a personal injury matter. On October 9, 2007, respondent received a letter from Bowden's insurance company, the Interinsurance Exchange of the Automobile Club (the Auto Club), which stated, in part, that Bowden's insurance policy included first party, no fault medical payments insurance coverage (med-pay coverage) up to a limit of \$2,000. The Auto Club's letter also enclosed a notice regarding reimbursement of med-pay coverage.

On March 12, 2008, respondent sent a letter to the Auto Club providing information regarding Bowden's medical expenses, requesting payment under the med-pay coverage, and requesting that the med-pay coverage draft be made payable to both Bowden and respondent.

On March 25, 2008, the Auto Club issued a med-pay coverage draft in the amount of \$2,000, made payable to Bowden and respondent. Sometime after March 25, 2008, respondent received the \$2,000 med-pay coverage draft from the Auto Club.

From March 25 to November 30, 2008, respondent did not inform Bowden that he had received the med-pay coverage draft.

Effective October 30, 2008, respondent moved offices from Wilshire Boulevard to Century Park East.

On November 30, 2008, Bowden signed a Release of All Claims in connection with the settlement of Bowden's personal injury case in the amount of \$10,222. Respondent prepared a Settlement Statement with regard to Bowden's personal injury case, *Tywanshia Bowden v. Linda Markfield*, which indicated that the total recovery was \$12,222.² On November 30, 2008, Bowden received and signed the Settlement Statement. In this document, Bowden authorized respondent to endorse the settlement check.³ Respondent retained one third of the total recovery, which came to \$4,074.⁴ After costs and attorney's fees, Bowden received \$5,079.

On December 5, 2008, respondent deposited the \$2,000 med-pay coverage draft from the Auto Club into his client trust account at 1st Century Bank (CTA), on behalf of Bowden.

On December 17, 2008, respondent deposited the \$10,222 settlement check from Bowden's personal injury matter into his CTA on behalf of Bowden. That same day, respondent issued a check drawn upon his CTA and made payable to himself in the amount of \$4,306.⁵

² Bowden's testimony that respondent did not tell her that the extra \$2,000 was her med-pay coverage was not credible. Bowden signed the release for \$10,222 and the total monies received was \$12,222. Bowden's overall credibility was further diminished by her inability to recall many events. Further, the court found credible respondent's testimony that he told Bowden that the extra \$2,000 came from the Auto Club med-pay coverage.

³ While the Settlement Statement authorized respondent to endorse "the settlement check" rather than "checks," the court did not find credible Bowden's testimony that she did not authorize the endorsement of the \$2,000 med-pay coverage check. It is implausible that she would authorize the endorsement of the \$10,222 check and not the \$2,000 check. The Settlement Statement clearly stated that the total recovery was \$12,222. Based on the supporting evidence and Bowden's inability to recall many of the details surrounding this transaction, the court finds it more probable that Bowden's authorization was for both settlement checks.

⁴ This amount represented 33 1/3% of all monies collected or received in the event of settlement without litigation, as agreed in the parties' retainer agreement.

⁵ This figure appears to represent respondent's attorney fees (\$4,074) plus litigation expenses (\$232).

On March 5, 2009, the Auto Club sent respondent a letter seeking reimbursement of the \$2,000 med-pay coverage payment. The Auto Club sent the letter to respondent's former address and respondent did not receive the letter.

On May 7, 2009, Bowden received a letter from the Auto Club seeking reimbursement of the \$2,000 med-pay coverage payment. Shortly thereafter, Bowden contacted respondent regarding this May 7, 2009 letter.

On May 13, 2009, respondent sent a letter to the Auto Club instructing the Auto Club to direct all correspondence to respondent as Bowden's attorney in the med-pay coverage payment matter. In this letter, respondent also stated that the Auto Club's claim to reimbursement was disputed. Respondent's May 13, 2009 letter to the Auto Club was sent on letterhead which indicated that respondent's address was "1875 Century Park East, 15th Floor, Los Angeles California 90067" (the Century Park East address). However, after May 13, 2009, all letters from the Auto Club to respondent regarding Bowden were sent to respondent's former address, and not to the Century Park East address.

From late 2009 to August 2012, Bowden received pleadings, legal notices, and other documents from the Auto Club and its attorneys. Bowden ignored these documents and never forwarded them to respondent. The Auto Club sent correspondence to respondent at his former address despite having received correspondence from respondent with the Century Park East address and despite respondent having changed his address with the State Bar effective October 30, 2008.⁶ As a result, respondent did not receive any correspondence relating to Bowden's med-pay coverage from May 2009 to August 2012.

⁶ That being said, respondent shares some responsibility for this mistake considering he did not explicitly communicate his change of address or adequately follow up with the Auto Club.

On May 20, 2010, the Auto Club filed a complaint for breach of contract and unjust enrichment against Bowden in the Long Beach Superior Court. On March 30, 2011, a default judgment was entered against Bowden in the amount of \$2,319.10. Neither Bowden nor respondent have since paid any portion of that judgment.

More than two years after the issuance of the judgment, Bowden, on August 27, 2012, faxed a letter to respondent with an attached copy of the cancelled med-pay coverage draft in the amount of \$2,000 from the Auto Club. In this fax, Bowden asserted that she did not authorize the endorsement of the med-pay coverage draft or receive any portion of its proceeds. Respondent received this fax and had several conversations with Bowden between August 27 and December 21, 2012.⁷ Bowden refused to cooperate with respondent by providing him the documents she had received from the Auto Club and its attorneys.

On December 21, 2012, respondent sent Bowden a letter which stated that respondent was terminating his employment with Bowden. Bowden received respondent's December 21, 2012 letter.

Conclusions

Count One – Rule 3-110(A) [Failure to Perform with Competence]

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. The State Bar alleged that respondent violated rule 3-110(A) by: (1) failing to advise Bowden that she could be held liable for reimbursing the med-pay coverage; and (2) failing to comply with or defend against the Auto Club's med-pay coverage claim. Neither of these two factors have been established by clear and convincing evidence. As noted above, Bowden's recollection of events was limited and unreliable, and

⁷ Bowden's testimony that she only had one telephone call from respondent was not credible. Once again, Bowden had difficulty recalling events and respondent's notes corroborate his credible testimony on this subject.

respondent was not receiving correspondence from Bowden or the Auto Club at the time the Auto Club was pursuing their reimbursement claim. Accordingly, Count One is dismissed with prejudice.

Count Three – Rule 4-100(B)(1) [Failure to Notify of Receipt of Client Funds]⁸

Rule 4-100(B)(1) requires an attorney to notify a client promptly of the receipt of the client's funds, securities, or other properties. Here, respondent received the med-pay coverage check in March 2008, but did not inform Bowden of the receipt of these funds until all settlements were achieved in November 2008. By failing to promptly inform Bowden of respondent's receipt of the \$2,000 med-pay coverage check, respondent failed to promptly notify a client of respondent's receipt of funds on the client's behalf, in willful violation of rule 4-100(B)(1).

Count Two – § 6068, subd. (m) [Failure to Inform Client of Significant Development]

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. The State Bar alleged that respondent failed to keep Bowden reasonably informed regarding the following significant developments: (1) that respondent requested med-pay coverage from the Auto Club; (2) that respondent received the \$2,000 med-pay coverage check; (3) that respondent disbursed a portion of the med-pay coverage check to himself on or about December 18, 2008; and (4) that respondent disbursed a portion of the med-pay coverage check to Bowden on or about December 24, 2008.⁹ Of these four accusations, only the second one – that respondent failed to reasonably inform Bowden of the receipt of the \$2,000 med-pay coverage check – has

⁸ To facilitate our analysis, the court takes Count Three out of order.

⁹ The NDC lists this final date as December 24, **2012**. This appears to be a typographical error.

been established by clear and convincing evidence. However, these same facts were already relied upon to establish respondent's culpability in Count Three. The appropriate resolution of this matter does not depend on how many rules of professional misconduct or statutes proscribe the same misconduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) Count Two is therefore dismissed with prejudice, as duplicative.

Count Four – Rule 3-700(A)(2) [Improper Withdrawal from Employment]

Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until the attorney has taken reasonable steps to avoid reasonably foreseeable prejudice to the client's rights, including giving due notice to the client, allowing time for the employment of other counsel, and complying with rule 3-700(D) and other applicable rules and laws. As noted above, respondent was, for the most part, out of the loop in the Auto Club's reimbursement action. He was not receiving communications from the Auto Club and Bowden was non-responsive and uncooperative. On the limited occasions when Bowden communicated with respondent, he answered and attempted to assist her. Accordingly, a violation of rule 3-700(A)(2) has not been established by clear and convincing evidence, and Count Four is dismissed with prejudice.

Count Five – § 6068, subd. (m) [Failure to Respond to Client Inquiries]

The State Bar alleged that respondent willfully violated section 6068, subdivision (m), by failing to respond to Bowden's August 27, 2012 status inquiry. This allegation was not supported by clear and convincing evidence. Consequently, Count Five is dismissed with prejudice.

Count Six – § 6106 [Moral Turpitude--Misappropriation]

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. "[A]n attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes

misappropriation. [Citation.]” (*Baca v. State Bar* (1990) 52 Cal.3d 294, 304.) Here, the State Bar alleged that respondent misappropriated \$666.66 on the theory that Bowden “was entitled to receive” those funds. The evidence before the court, however, does not establish a charge of misappropriation. Pursuant to the terms of respondent’s retainer agreement with Bowden, respondent was entitled to 33 1/3% of any and all monies collected or received in the event of settlement without litigation. Accordingly, Bowden was not “entitled to receive” the funds in question. Therefore, Count Six is dismissed with prejudice.¹⁰

Aggravation¹¹

No factors in aggravation were established by clear and convincing evidence.

Mitigation

No Prior Record (Std. 1.6(a).)

Respondent had no prior discipline for over 32 years prior to this misconduct. Respondent’s lack of a prior record over such a long period of time is entitled to highly significant mitigation. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [more than 20 years of practice with an unblemished record is highly significant mitigation].)

Good Character (Std. 1.6(f).)

Respondent presented character evidence from four character witnesses.¹² These witnesses found respondent to be diligent, helpful, honest, and trustworthy. They also

¹⁰ While respondent did not misappropriate the \$666.66, the court finds that he should have returned those funds to the Auto Club upon notice of the Auto Club’s receipt of judgment in the breach of contract action against Bowden. Accordingly, restitution in the amount of \$773.03 (one-third of the judgment) plus 10 percent interest per year from March 30, 2011, is warranted.

¹¹ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

¹² One of respondent’s character witnesses testified in person. The other three wrote declarations.

demonstrated a clear understanding of the present misconduct. Respondent's good character evidence warrants some mitigation credit.

The court also acknowledges respondent's service in the military. Respondent is a Vietnam Veteran and served with distinction.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d. 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d. 1016, 1025; Std. 1.1.)

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). Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d. 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors.

Standard 2.15 is applicable to the misconduct in this matter. Standard 2.15 provides that culpability of a member of a violation of rule 4-100(B)(1) shall result in reproof 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.)

Respondent has been found culpable of a single violation of rule 4-100(B)(1). In mitigation, respondent had been admitted to practice law in California for more than 32 years before the misconduct and he presented evidence of his good character. No aggravating factors were involved.

After reviewing the case law, the court notes the lack of supporting authorities directly on point. Therefore, the court turns to analogous decisions for guidance. The court finds *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, to be instructive. In *Hanson*, the attorney, in a single client matter, failed to promptly provide his client with a refund of unearned fees in the amount of \$769. Additionally, the attorney failed to reply to a letter from opposing counsel seeking confirmation that the attorney no longer represented his former client. As a result, the attorney was found culpable of failing to promptly return an unearned legal fee and failing to take reasonable steps to avoid foreseeable prejudice to his client upon termination of his employment. In aggravation, the attorney had a prior record of discipline consisting of a private reproof. The Review Department, however, found that the attorney's prior record did not merit significant weight in aggravation because it had occurred some 19 years earlier and was minimal in nature. The Review Department found no evidence in mitigation. The attorney received a public reproof.

The court also finds *In the Matter to Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, to be somewhat analogous to the instant misconduct. In *Cacioppo*, the attorney, in a single client matter, was found culpable of failing to render a proper accounting and failing to communicate with his client. In mitigation, the attorney's excellent reputation and good character were demonstrated through the testimony and letters of numerous persons of high standing in the community. In aggravation, the attorney had a prior public reproof and failed to fully cooperate with the State Bar. The Review Department noted that if the attorney – who had

been practicing for 17 years – had no prior record of discipline, then a reproof would have been justified. However, since the attorney had been previously reproofed, the court recommended a six-month stayed suspension with a one-year period of probation.

The misconduct in the instant case is less egregious than *Hanson* and *Cacioppo*. In addition, the instant case involves more mitigation and no aggravation. Respondent's lack of a prior record of discipline in over 32 years of practice leads the court to believe that the instant misconduct is aberrational and unlikely to be repeated. Therefore, after considering the case law, the standards, and the individual circumstances of this case, the court concludes that a private reproof is sufficient to protect the public, the courts, and the legal profession.

Discipline Order

It is ordered that respondent **Alan Earl Finestone**, State Bar Number 65784, is privately reproofed. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, the private reproof 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 private reproof imposed in this matter. Failure to comply with any condition(s) attached to the private reproof 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 private reproof for one year following the effective date of the private reproof:

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 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 attached to his private reproof. 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. During the period in which these conditions are in effect, 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 period in which these conditions are in effect. 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 conditions attached to his reproof 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 the reproof 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 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 reproof.
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. Within one year after the effective date of the discipline herein, respondent must make restitution to the Interinsurance Exchange of the Automobile Club in the amount of \$773.03 plus 10 percent interest per year from March 30, 2011 (or reimburse the Client Security Fund to the extent of any payment from the fund to the Interinsurance Exchange of the Automobile Club, in accordance with Business and Professions Code section 6140.5) and furnish satisfactory proof to the State Bar's Office of Probation in Los Angeles. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

8. The period during which these conditions are in effect will commence upon the date this decision imposing the private reproof becomes final.

In light of the level of discipline imposed, it is not ordered that respondent take and pass the Multistate Professional Responsibility Examination.

Dated: May _____, 2014

LUCY ARMENDARIZ
Judge of the State Bar Court