

FILED

FEB 05 2014

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case Nos.: 11-O-19427-RAP (12-O-13950)
)	
ERIC BRYAN SEUTHE,)	
)	DECISION AND ORDER OF DISMISSAL
Member No. 90269,)	
)	
<u>A Member of the State Bar.</u>)	

Introduction

In this contested, original disciplinary proceeding, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initially charged Respondent **ERIC BRYAN SEUTHE** with five counts of misconduct. However, four of the five counts have been dismissed on the motions of the State Bar.¹ In the sole remaining count, the State Bar charges that Respondent willfully violated rule 4-100(B)(3) of the State Bar Rules of Professional Conduct (rule 4-100(B)(3)) by failing to render an appropriate accounting in a single client matter.

For the reasons set forth below, the court finds that the record fails to establish, by clear and convincing evidence, that Respondent willfully violated rule 4-100(B)(3). Accordingly, the court will dismiss this proceeding with prejudice.

The State Bar is represented by Senior Trial Counsel Mia Ellis (STC Ellis), and Respondent is represented by Attorney James I. Ham.

¹ On the pretrial motions of the State Bar, the court dismissed without prejudice counts two (case number 11-O-19427), four (case number 12-O-13950), and five (case number 12-O-13950). On the motion of the State Bar during trial, the court dismissed with prejudice count three (case number 12-O-13950). The sole remaining count is count one (case number 11-O-19427).



Significant Procedural History

The State Bar filed the notice of disciplinary charges (NDC) in this matter on December 20, 2012. Respondent filed a response to the NDC on January 23, 2013.

Trial in this matter was held on November 7 and 8, 2013. The matter was submitted for decision at the conclusion of trial on November 8, 2013.

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 since that time.

Credibility Determinations

With respect to the credibility of the witnesses, the court has carefully weighed and considered the witnesses' demeanor while testifying and the manner in which they testified; their personal interest or lack thereof in the outcome of this proceeding; their capacity to accurately perceive, recollect, and communicate the matters on which they testified; and their attitudes toward this disciplinary proceeding and towards their giving of testimony. (See, e.g., Evid. Code, § 780 [list of factors to consider in determining credibility].) Overall, the court found Respondent to be a very credible witness. His testimony was sincere and forthright and, for the most part, clear.

In contrast to Respondent's credible testimony, was the testimony of the State Bar's complaining witness Jane Finstrom (Finstrom). The court finds that Finstrom's testimony regarding many of the material issues lacked credibility. In fact, at times, her testimony was clearly contrived, and her demeanor was animated. She was unable to recall certain specifics of her dealings and discussions with Respondent.²

² On at least two occasions in April 2013, Finstrom attempted to persuade STC Ellis to drop the charges against Respondent so that Finstrom would not be required to testify in this proceeding. Finstrom repeatedly complained of the emotional stress and anxiety this proceeding

Case Number 11-O-19427– The Finstrom Matter

Facts

On October 18, 2008, Finstrom was seriously injured in an automobile accident caused by an uninsured drunk driver. Later that month, Finstrom retained Respondent to pursue a claim for her injuries under the uninsured-motorist-coverage portion of her automobile insurance policy, which was issued by the Liberty Mutual Insurance Company (Liberty Mutual).

Following the accident, Finstrom received medical care for her injuries from numerous health care providers including, but not limited to, doctors at the Bay Area Community Medical Group, who were Finstrom’s primary care physicians under her medical insurance coverage with Blue Cross; Dr. Philip Sobol of the Sobol Orthopedic Medical Group; and Dr. Randy Higashi of Higashi Chiropractic.³

On February 19, 2009, Liberty Mutual paid Respondent and Finstrom \$5,000 under the medical-payment-coverage portion of Finstrom’s automobile insurance. Even though the record establishes that Respondent deposited the \$5,000 med-pay benefits into his client trust account (CTA), the record does not establish what Respondent did with those funds after they were deposited into his CTA.

In light of Finstrom’s serious injuries (both physical and emotional), Respondent made a demand on Liberty Mutual for the policy limits of Finstrom’s uninsured-motorist coverage.

caused her. In one instance, she stated that she believed that her testimony could be easily discredited by Respondent or Respondent’s attorney because of her history of, what she described as, serious mental health issues. Finstrom dealt with those mental health issues during much of the time period in which Respondent represented her. In that same instance, she also stated that, if she were required to appear at trial in this disciplinary proceeding, she “would have to take some kind of medication to calm my nerves to get there, and that would also not make my testimony fair and valid to myself or Mr. Seuthe. And I don’t want to actually take those drugs either.” At trial, Finstrom testified that she now feels better.

³ Additional medical providers who treated Finstrom’s injuries included the Sports Medicine Institute of Los Angeles and Bradley TePaske, Ph.D.

Liberty Mutual refused to pay, and Respondent took Finstrom's uninsured-motorist claim against Liberty Mutual to binding arbitration.

On July 22, 2009, the arbitrator awarded Finstrom \$115,000 against Liberty Mutual to "compensate her for her medical expenses, loss of earnings, past pain and suffering and future pain and suffering as a result of the October 18, 2008 accident." And Liberty Mutual paid the \$115,000 arbitration award the very next day.

Respondent deposited the \$115,000 into his CTA and, on August 9, 2009, sent Finstrom an accounting/distribution with respect to the \$115,000 arbitration award. That accounting provided that, out of the \$115,000, Respondent would be paid \$46,000 in attorney's fees plus \$8,000 in reduced costs; that Finstrom would be paid \$50,000; and the remaining \$11,000 (\$115,000 less \$46,000, less \$8,000, less \$50,000) would remain in Respondent's CTA for medical payments and insurance reimbursements as follows "\$6,000 to pay Dr. Sobol, \$2,000 to negotiate and obtain a reduction with ... Blue Cross [on its reimbursement claim, and] \$3,000 to negotiate and attempt to obtain a reduction with Bay Area Community Medical Group. ... No other bills will be paid." Finstrom approved the foregoing accounting/distribution by signing it immediately below text stating: "So agreed and so authorized. I further authorize my attorneys to make the distribution set forth above."

Finstrom complained to Respondent about the medical care she obtained from Dr. Sobol. Accordingly, Respondent negotiated an agreement with Dr. Sobol's office under which Dr. Sobol agreed to accept \$2,500 as payment in full and final satisfaction of his medical lien that totaled more than \$8,000.

On August 25, 2009, Respondent sent Finstrom a second accounting/distribution reflecting (1) that the amount to be paid to Dr. Sobol had been reduced through Respondent's

negotiations with Dr. Sobol's office⁴ and (2) that Finstrom had requested that Respondent pay \$2,350 to Dr. Higashi out of the \$11,000 withheld to pay her medical liens/bills. Finstrom approved the August 25, 2009, accounting by signing it immediately after text stating: "So understood, so agreed, and so authorized." Thereafter, Respondent paid Dr. Sobol \$2,500 and Dr. Higashi \$2,350 on behalf of Finstrom. After those payments, Respondent held \$6,150 (\$11,000 less \$2,500 less \$2,350) in trust for Finstrom.

In November 2009, Finstrom sent Respondent a letter about the \$11,000 that he held back to pay Finstrom's medical bills/liens. In that letter, she asked Respondent to send her "check for the 5,000 or 6,000 remaining and I will negotiate with" Blue Cross over its reimbursement claim.⁵ Finstrom stated that "[t]hey [i.e., Blue Cross] have been creating problems for me with my surgery this summer and I would like the poetic justice of having their money and having them ask me for it." Respondent did not send Finstrom the \$5,000 or \$6,000 she requested because Finstrom agreed that Respondent could apply the remaining undistributed portion of the \$11,000 held back to pay medical bills to the costs incurred in three other matters in which he then represented her.

In addition to representing Finstrom in her uninsured-motorist claim against Liberty Mutual, Respondent represented Finstrom in three other matters: (1) a bad-faith claim against Liberty Mutual for its failure to promptly settle Finstrom's uninsured-motorist claim; (2) a medical-malpractice claim against a GYN/OBY surgeon; and (3) a medical-malpractice claim

⁴ The August 25, 2009, accounting incorrectly indicates that Respondent will pay Dr. Sobol \$3,500 when it should have indicated that Respondent would pay Dr. Sobol only \$2,500. Neither party raised or addressed this \$1,000 discrepancy. Accordingly, the court presumes that it was the result of an honest mistake. (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 563 [All reasonable doubts must be resolved in favor of the respondent, and if equally reasonable inferences may be drawn, the court must accept the inference which leads to a conclusion of innocence rather than guilt.]

⁵ When she sent this letter, Finstrom knew that Respondent sent Blue Cross a letter in July 2009 contending that Blue Cross did not have a claim for reimbursement.

against the UCLA Medical Center. In the uninsured-motorist and bad-faith matters against Liberty Mutual and in the medical-malpractice matter against UCLA, Respondent represented Finstrom on a contingent fee basis. Even though Respondent's contingent-fee agreements in those matters provided that, if there is no recovery, Respondent would not receive any legal fees, the agreements also provided that Finstrom was required to reimburse Respondent for any and all costs expended regardless of whether there was a recovery. Finstrom's assertions to the contrary are incorrect.

As Respondent had done in the uninsured-motorist matter, Respondent obtained a very favorable result for Finstrom in her bad-faith claim against Liberty Mutual. Finstrom dropped her medical-malpractice claim against the GYN/OBY surgeon.

Respondent filed a medical-malpractice complaint against UCLA Medical Center for Finstrom. But Respondent was unable to continue to represent Finstrom in that lawsuit because he injured his back. Respondent properly advised Finstrom of his inability to continue as her attorney in the lawsuit against UCLA.

In June 2011, Attorney Gary Brown substituted into the lawsuit against UCLA as Finstrom's attorney of record. Finstrom gave Attorney Brown a copy Respondent's August 9, 2009, accounting of the \$115,000 in arbitration award proceeds. Even though Finstrom had previously authorized Respondent to apply the undisbursed portion of the \$11,000 he held to pay her medical bills, Finstrom apparently changed her mind once Respondent no longer represented her because, on the copy of the August 9, 2009, accounting that Finstrom gave to Attorney Brown, Finstrom wrote a note stating that Respondent has not paid the \$2,000 to Blue Cross or the \$3,000 to the Bay Area Community Medical Group and that she wanted to get these "\$5,000 +" in undistributed funds from Respondent with interest.

///

On June 22, 2011, Brown sent Respondent a letter requesting an accounting on behalf of Finstrom⁶ and a check for the remaining funds, which “should be more than \$5,000.” On June 26, 2011, Respondent sent Attorney Brown a letter in which Respondent both agreed to Brown’s requests and informing Brown that Finstrom had agreed to allow him to apply the undistributed portion of the \$11,000 withheld to pay medical bills towards the costs in Finstrom’s malpractice lawsuit against UCLA.

Additional letters were passed between Brown and Respondent about the undistributed portion of the \$11,000 that Respondent held to pay Finstrom’s medical liens/bills. In addition, Respondent twice spoke by telephone to Brown’s administrative assistant concerning the matter (Respondent was never able to speak directly with Brown). Respondent repeatedly inquired of Brown whether Finstrom was denying that she authorized Respondent to apply the undistributed portion of the \$11,000 towards costs in her other cases, but Respondent never got a direct answer.

At some point, Attorney Brown’s administrative assistant apparently threatened to report Respondent to the State Bar if he did not comply with Brown’s demands to send Brown the remaining, undistributed funds of more than \$5,000. Then, in a letter dated October 23, 2011, Attorney Brown threatened to report Respondent to the State Bar if Respondent did not concede to his demands. (See Rules Prof. Conduct, rule 5-100(A).) Needless to say, Respondent resented being threatened. In short, two pertinacious attorneys failed, if not refused, to spend a few minutes talking to each other to answer each other’s questions (e.g., what is the status of the negotiations with Blue Cross and Bay Area Community Medical Group to reduce or reject liens/claims, etc.). It is clear that Finstrom’s complaint was and is not that Respondent failed to

⁶ Finstrom testified that she wanted an accounting from Respondent because she incorrectly thought that an accounting would provide her with the status of Respondent’s negotiations with Blue Cross and Bay Area Community Medical Group.

account for the \$11,000 he withheld to pay her medical liens/bills. Instead, her real complaint is that Respondent did not give her or Attorney Brown the undistributed portion of the \$11,000. Even though Respondent was initially charged with failing to promptly payout all the remaining undistributed portion of the \$11,000 in count two, but count two was dismissed on the motion of the State Bar.

Attorney Brown lost the medical malpractice lawsuit against UCLA. And, shortly before they were to go to binding arbitration on the fee agreement in the uninsured-motorist matter, Respondent and Finstrom settled the dispute over the undistributed portion of the \$11,000 withheld to pay Finstrom's medical liens/bills.

Conclusions

Count One - (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])

In count one, the State Bar charges that Respondent willfully violated rule 4-100(B)(3), which 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. Specifically, in count one, the State Bar charges that "By failing to provide Brown or Finstrom with an accounting of funds held in trust, Respondent failed to render appropriate accounts to a client regarding all funds coming into Respondent's possession."

Even though, as noted *ante*, the record does not establish what Respondent did with the \$5,000 in med-pay benefits after he deposited them into his client trust account, Finstrom does not complain that Respondent failed to properly account for or disburse those benefits. Finstrom's complains only about Respondent's accounting of the \$115,000 in arbitration award proceeds. Accordingly, the court presumes that Respondent properly accounted for the \$5,000 in med-pay benefits. (*Bushman v. State Bar, supra*, 11 Cal.3d at p. 563 [All reasonable doubts

must be resolved in favor of the respondent, and if equally reasonable inferences may be drawn, the court must accept the inference which leads to a conclusion of innocence rather than guilt.].)

With respect to Respondent's accounting for the \$115,000 in arbitration award proceeds, it is clear that Finstrom complains only about Respondent's accounting for and handling of the \$11,000 that he withheld and retained to pay Finstrom's medical liens/bills. (See, e.g., ex. 9.) The record, however, clearly establishes that Respondent appropriately accounted to Finstrom for that \$11,000 in his August 9, 2009, and August 25, 2009, accountings/distributions, both of which Finstrom approved in writing.

Moreover, because Respondent had already accounted to Finstrom for the \$11,000 that he retained to pay Finstrom's medical liens/bills in his August 9, 2009, and August 25, 2009, accountings/distributions, Respondent was not required to provide copies of those accounting to Attorney Brown. Respondent was, however, required to disclose to Brown the fact that Finstrom had authorized him to apply the undistributed portion of the \$11,000 to the costs he advanced on her other cases. And Respondent did so.

As noted above, the August 25, 2009, accounting mistakenly indicated that Respondent would pay Dr. Sobol \$3,500 when it should have indicated that Respondent would pay him \$2,500. That \$1,000 discrepancy, which was not raised or addressed by the parties and which the court must presume was the result of an honest mistake (*Bushman v. State Bar, supra*, 11 Cal.3d at p. 563), does not make Respondent's otherwise appropriate accountings inappropriate. In other words, the \$1,000 discrepancy does not establish, by clear and convincing evidence, that Respondent failed to account to Finstrom for the \$115,000 in arbitration award proceeds in willful violation of rule 4-100(B)(3).

In short, count one is dismissed with prejudice.

///

ORDER OF DISMISSAL WITH PREJUDICE

Because the record does not establish any of the charged misconduct by clear and convincing evidence, the court orders that this proceeding is **DISMISSED WITH PREJUDICE** for want of proof. Because Respondent **ERIC BRYAN SEUTHE** has been **EXONERATED** of all charges following a trial on the merits, he may, upon the finality of this decision and order, file a motion seeking reimbursement for costs under Business and Professions Code section 6086.10, subdivision (d). (See Rules Proc. of State Bar, rule 5.131.)

Dated: February 4, 2014


RICHARD A. PLATEL
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 February 05, 2014, I deposited a true copy of the following document(s):

DECISION AND ORDER OF DISMISSAL

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

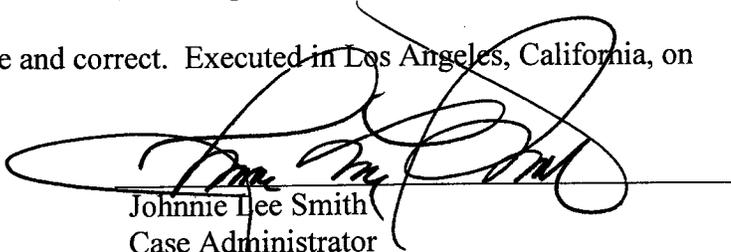
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

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:

MIA ELLIS, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on February 05, 2014.


Johnnie Lee Smith
Case Administrator
State Bar Court