PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed January 5, 2016

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 12-O-16760
	)	
LLOYD DOUGLAS BROWN,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 44908.	)	
	)	

Lloyd Douglas Brown appeals a hearing judge's decision finding him culpable of intentional misappropriation and recommending his disbarment. Brown agreed to act as an escrow agent for his client, Maximus I Trust (Maximus), and a third party, Amboseli Energy Partners LLC (Amboseli). In this role, Brown agreed to hold $22,500 in trust and distribute the funds pursuant to the terms of a Lending and Borrowing Agreement. Instead, without Amboseli's consent or knowledge, Brown disbursed the monies to himself and Maximus in clear contravention of the agreement. He then attempted to cover up his misdeeds. To date, Brown has not repaid the $22,500 despite repeated promises to do so.

Brown admits he misappropriated the escrowed monies and breached his fiduciary duties to Amboseli. However, he maintains his actions were the result of "errors of judgment rather than dishonesty" because he believed he was authorized to distribute the entrusted funds. Brown asks for a sanction less than disbarment because he asserts his misconduct is greatly mitigated by his otherwise "spotless 44[-year] career as a lawyer" and his considerable community service. The Office of the Chief Trial Counsel of the State Bar (OCTC) does not appeal and urges us to affirm the disbarment recommendation.

We review the record independently (Cal. Rules of Court, rule 9.12) and find the evidence clearly and convincingly supports the hearing judge's culpability findings.[1] Although we modify the mitigation and aggravation findings, we ultimately conclude that the presumptive discipline of disbarment, as provided by the standards,[2] should be imposed. We acknowledge Brown's long tenure of discipline-free practice and his significant commitment to public service. Nevertheless, the seriousness of his misappropriations, coupled with his surrounding dishonesty and his failure to make any restitution, compel the conclusion that a lesser sanction than disbarment will not protect the public, the courts, and the legal profession.

I. PROCEDURAL HISTORY

On November 6, 2013, OCTC filed a three-count Notice of Disciplinary Charges (NDC), alleging two counts of moral turpitude (Bus. & Prof. Code, section 6106)[3] and one count of failure to support the Constitution and laws of the United States and California (§ 6068, subd. (a)). Brown entered into a pretrial Stipulation of Facts and Documents with OCTC, which was filed on February 25, 2014. The hearing judge submitted the case on March 6, 2014.

II. FACTUAL BACKGROUND

Our factual findings are based on the hearing judge's determinations, to which we accord great weight (Rules Proc. of State Bar, rule 5.155(A)), the stipulations, the trial testimony, and the documents offered in evidence.

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

[2] Effective July 1, 2015, the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, were revised and renumbered. Because this request for review was submitted for ruling after the July 1, 2015 effective date, we apply the revised version of the standards. All further references to standards are to this source.

[3] All further references to sections are to the Business and Professions Code unless otherwise noted.

Brown was admitted to practice law in California in 1970. Prior to that time, he was in the United States Army, including service during the Vietnam War. He also served two terms as a councilman for the City of Torrance, California. In his legal career, Brown was in private practice at multiple firms but also dedicated significant periods to public service. He worked for four years as an Assistant United States Attorney and for three years as special counsel for the United States Department of Housing and Urban Development. He later headed a task force in Southeast Asia for the United States Drug Enforcement Administration before eventually resuming private practice as a solo practitioner.

In early May 2012, J. Maxim Fields, the administrator of Maximus and Brown's long-standing client, asked Brown to act as an escrow agent for a commercial transaction between Maximus and Amboseli. Fields requested that Brown hold $22,500 in escrow. The funds were to be a service fee that Amboseli agreed to pay Maximus if Maximus could arrange for the issuance of a Standby Letter of Credit (SBLC) acceptable to Amboseli's lender. Amboseli intended to use the SBLC as a credit enhancement to obtain financing for a $12.75 million international commodities transaction. At the time of his request, Fields owed Brown more than $40,000 in unpaid legal fees. Due to his poor health, Brown initially was reluctant to undertake the escrow responsibilities. However, he ultimately agreed to do so after Fields promised he would use a significant portion of the service fee Maximus received from Amboseli to satisfy Brown's outstanding legal bills.

In early May 2012, Brown, Fields, and Amboseli's two managing directors, Samuel Chasia and Thomas Abilla, participated in a conference call, during which they agreed that:

1. Amboseli would initially deposit a $10,000 installment of the service fee into an account held in Brown's name designated "the Escrow Account," and Brown would act as the escrow agent;

2. Through its bank, Maximus would deliver the SBLC to Amboseli's bank via courier;

3. Within three banking days after delivery of the SBLC to Amboseli's bank, Amboseli would deposit an additional $12,750 into the Escrow Account;

4. Amboseli's bank was obligated to send Amboseli confirmation of receipt of the SBLC; and

5. The funds would remain in the Escrow Account until Amboseli's bank confirmed it had verified and accepted the SBLC, and Amboseli sent Brown authorization to release the funds. Only at that point was Brown permitted to disburse the service fee to Fields on behalf of Maximus.[4]

These terms were later memorialized in a Lending and Borrowing Agreement, which Chasia and Fields signed on May 24, 2012. Brown authorized Fields to sign his name to the agreement on the same date. Chasia emailed Brown a copy of the executed written agreement on May 25, 2012.[5]

Amboseli transferred $22,500 into the Escrow Account in two payments—$10,000 on May 7, 2012 and $12,500 on May 25, 2012.[6] Immediately after each deposit, Fields instructed Brown to distribute portions of the wired funds to Fields and the rest to Brown as partial

[4] Chasia testified about the details of the conference call as described herein. Brown testified that he had no recollection of this conference call; however, the hearing judge found Chasia's testimony credible that the call occurred. We accord great deference to the judge's credibility findings. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025,1032 [hearing judge "is best suited to resolving credibility questions, because [he] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].)

[5] Brown testified that due to poor health, he did not personally review the Lending and Borrowing Agreement until June when Amboseli requested a refund. The hearing judge found this testimony not credible because Brown was able to take a trip to the United Kingdom for a business presentation during this time. In addition, Brown later changed his testimony and admitted that he must have reviewed the agreement on May 25, 2012, but did not recall doing so.

[6] The Lending and Borrowing Agreement provided for a service fee of $22,750; however, the record establishes that the actual amount wired to Brown was $22,500.

satisfaction of Fields's outstanding legal bills. Brown complied without obtaining Amboseli's authorization or notifying it of his actions.

Thus, on May 7, 2012, Brown disbursed $3,100 to Fields. He then made six additional withdrawals on May 7 and May 8 for his personal use, depleting the remainder of the funds. On May 25, 2012, when Brown received the additional $12,500 from Amboseli, he distributed $3,400 to Fields and $7,100 to himself. Between May 26 and June 4, 2012, Brown made 25 additional withdrawals for his personal use until the account reached a negative balance of $173.40.

Amboseli's bank never received, verified, or accepted the SBLC. Therefore, on June 1, 2012, Chasia emailed Brown and formally requested the return of the escrowed funds. Although Brown knew of this request as of June 1, 2012, he made five withdrawals from the Escrow Account between June 1 and 4, reducing the balance to a negative $173.40. In total, Brown paid $6,500 to Fields and $16,000 to himself, which he used for personal expenses.

Brown did not respond to Amboseli's request for return of the funds until June 9, 2012 after Amboseli sent a follow-up email. On that date, the Escrow Account was overdrawn by $313.40. Still, Brown did not inform Amboseli that the funds were gone. Instead, he stated that he was in the United Kingdom on business and would wire Amboseli the escrowed funds upon his return home in a few days. Brown did not wire the funds as promised.

Over the following weeks, Amboseli sent multiple follow-up email requests, which Brown ignored. Finally, on July 17, 2012, when Amboseli emailed Brown a copy of a State Bar complaint it intended to file, Brown disclosed that the account had been depleted. Even then, he misrepresented the situation, telling Amboseli that "shortly after [he] received the escrowed funds, [he]was instructed by Maxim to wire the funds to a third party" when, in fact, he had distributed the funds to Fields and to himself.

Brown then promised Amboseli that he would repay the "full amount due" plus a "$5,000 premium for interest and [Amboseli's] time and effort" within five banking days. This was the first of Brown's numerous empty promises. Amboseli repeatedly agreed to delay submitting its State Bar complaint to give Brown the opportunity to make good on his guarantee. After more than two months of broken promises, Amboseli finally complained to the State Bar. Brown continued to promise repayment during 2013, but he has not paid any of the $22,500 to date.

III. CULPABILITY

A. Count One: Moral Turpitude and Breach of Fiduciary Duty [Section 6106]

In Count One, OCTC charged that "[b]y failing to return the service fee to Amboseli [Brown] breached his fiduciary duty to Amboseli, and thereby . . . committed an act involving moral turpitude, dishonesty or corruption."[7] The hearing judge correctly found Brown culpable of the charged misconduct.

Fundamentally, "[a]n escrow holder must comply strictly with the instructions of the parties" and owes fiduciary duties to the escrow parties to do so. (*Summit Fin. Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711; see also *Crooks v. State Bar* (1970) 3 Cal.3d 346, 355 [attorney acting as escrow breached fiduciary duty to third party involved in transaction by distributing funds in violation of escrow agreement].) We reject Brown's claim that he did not act "willfully" because he was proceeding under instructions from Fields to disburse the funds. The record clearly establishes that Brown knew of the specific obligation owed to Amboseli under the Lending and Borrowing Agreement to, inter alia, hold the escrowed funds "until the receiving bank has confirmed that the SBLC has been accepted." Yet he intentionally disregarded those instructions and distributed the funds without first confirming he

[7] Section 6106 provides, in pertinent part: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension."

was authorized by Amboseli to do so. Indeed, he withdrew a portion of the escrowed funds even after Amboseli sent a formal request for their return.

Given the level of intent reflected by Brown's frequent acts of dishonesty, his breach of his fiduciary duty constitutes moral turpitude as charged in Count One. (*Galardi v. State Bar* (1987) 43 Cal.3d 683, 689, 691 [breach of fiduciary duty to non-client joint venturers constituted moral turpitude]; *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 126-127, 130 [breach of fiduciary to non-client lienholder constituted moral turpitude].) Nevertheless, as the hearing judge correctly determined, the facts underlying the misconduct charged in Count One are the same as those supporting moral turpitude in Count Three. We therefore assign no additional weight as a consequence of Brown's culpability under Count One. (*In the Matter of Sampson, supra,* 3 Cal. State Bar Ct. Rptr. at p. 127 [declining to assign weight to lesser-included violation for purposes of assessing discipline].)

B. Count Two: Failure to Comply with Laws [Section 6068, subd. (a)]

OCTC charged Brown in Count Two with failing to support the laws of the United States and California by breaching his common law fiduciary duty to Amboseli.[8] The hearing judge dismissed this count as duplicative of Count One. OCTC does not challenge the dismissal, and we adopt it. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose is served by duplicate allegations of misconduct in State Bar proceedings].)

C. Count Three: Moral Turpitude and Misappropriation [Section 6106]

Brown was charged in Count Three with committing an act involving moral turpitude by "misappropriating the service fee held as escrow agent on behalf of Amboseli . . . ."

Brown made multiple distributions of escrowed funds to Maximus and himself without Amboseli's knowledge or authorization and despite explicit written instructions to the contrary.

[8] Section 6068, subdivision (a), provides: "It is the duty of an attorney to . . . support the Constitution and laws of the United States and of this state."

Accordingly, Brown is culpable of misappropriation amounting to acts of moral turpitude as charged in Count Three. (*Bate v. State Bar* (1983) 34 Cal.3d 920, 923 [willful misappropriation of entrusted funds involves moral turpitude]; *In the Matter of Sampson, supra,* 3 Cal. State Bar Ct. Rptr. at pp. 126-127, 130 [misappropriation of entrusted funds in violation of fiduciary duty to non-client may constitute moral turpitude].)

IV. AGGRAVATION AND MITIGATION

Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Brown to meet the same burden to prove mitigation.

A. Significant Harm [Std. 1.5(j)]

The hearing judge found that Brown's $22,500 misappropriation caused significant harm to Amboseli. Without question, Brown misappropriated a substantial amount of money, but OCTC offered no evidence that his actions caused significant harm to Amboseli within the context of a $12.75 million commercial transaction. For example, we do not know if the transaction failed due to loss of the funds or whether Amboseli was insured against such losses. Absent such evidence, OCTC failed to clearly and convincingly prove significant harm under standard 1.5(j).

B. Failure to Make Restitution [Std. 1.5(m)]

We assign significant weight in aggravation under standard 1.5(m) for Brown's failure to make any restitution payments, however modest, to Amboseli during the past three years. Although Brown argues he was unable to make such payments, the record contains no documentary evidence to support his assertion.[9]

[9] On April 6, 2015, Brown filed a motion for leave to submit supplemental evidence, including tax returns evidencing his financial status. We denied his motion on May 13, 2015, both as untimely and for lack of good cause, given that the intended supplemental evidence was available at the time of trial.

C. Misrepresentation [Std. 1.5(e)] and Concealment [Std 1.5(f)]

We find additional aggravation under standards 1.5(e) and (f), based on Brown's concealment and affirmative misrepresentations to Amboseli after the misappropriations. Not only did Brown conceal the fact that the entrusted funds were gone, he misrepresented that they had been transferred "to a third party" rather than to himself and Maximus. We also note Brown's letter responding to the State Bar's investigation in which he stated: "All of the money went to the lender and no portion of the $22,500 went to me or to any person or entity to whom I am related." At trial, Brown testified that this statement was an honest mistake, as he had confused the transaction of concern to the State Bar with another matter. We adopt the hearing judge's finding that Brown's claim of an honest mistake is not credible. Collectively, these acts of concealment and misrepresentation support quite significant aggravation.

D. Absence of Prior Record [Std. 1.6(a)]

The hearing judge afforded Brown considerable mitigation based on his lack of discipline for over 42 years. Brown asserts such mitigation is justified because he committed this misconduct during a "single period of aberrant behavior" in a life otherwise "characterized by honesty and commitment to the law." OCTC argues less mitigative weight should be afforded due to the seriousness of the misconduct.

Standard 1.6(a) provides mitigation based on the "absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur." Here, Brown has admitted his misconduct in failing to maintain the funds in escrow and is "mortified" by his lapse. But his repeated and detailed, yet improbable, explanations to Amboseli of various circumstances that would allow him to repay the missing funds, and his multiple broken promises to do so by specific dates, cast doubt on whether Brown fully understands the high standards of truth and accuracy to which he is held when acting as a

fiduciary. We thus remain concerned about the risk of further violations of fiduciary duties, and we credit only moderate mitigation for Brown's long professional history without discipline. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [where wrongdoing is serious, discipline-free record is most relevant when misconduct is aberrational and unlikely to recur].)

E. Cooperation with State Bar [Std. 1.6(e)]

The hearing judge assigned Brown limited mitigation for entering into a partial stipulation of facts, which saved the court time and resources. We adopt this finding. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [factual stipulation merits less mitigating weight than stipulation to culpability].)

F. Extreme Emotional and Physical Difficulties [Std. 1.6(d)]

The hearing judge credited nominal mitigation for physical difficulties, based on Brown's testimony that he had a heart attack, underwent open heart surgery in March 2012, and suffered from type-II diabetes, depression, and alcoholism during the time of his misconduct. Under standard 1.6(d), extreme emotional and/or physical difficulties may be mitigating if expert testimony establishes the difficulties were "directly responsible for the misconduct," and "the member establishes by clear and convincing evidence that the difficulties or disabilities no longer pose a risk . . . ." Even assuming Brown's physical difficulties contributed to the misconduct, they warrant little mitigation as he provided no evidence that they no longer pose a risk. To the contrary, Brown acknowledges his health issues are ongoing and that "chronic alcoholism . . . plagues [him] to this day."

G. Financial Difficulties

Brown claims he suffered financial hardship at the time of his misconduct, which "contributed to his bad conduct in this matter." His testimony regarding his financial difficulties conflicts with his own emails indicating he was still traveling, working, and closing business

deals during 2012 and 2013. We therefore adopt the hearing judge's finding that Brown's assertion of extreme financial difficulties was not established by clear and convincing evidence. (*Amante v. State Bar* (1990) 50 Cal.3d 247, 255 [no mitigation for financial difficulties where record did not demonstrate misconduct was response to financial pressures].)

H. Community Service

The hearing judge found minimal mitigation based on Brown's uncontroverted testimony regarding his history of military service, government employment, two terms as city councilman, and participation as a coach and mentor in various youth organizations. We find his record of public and community service commendable and entitled to significant weight.

V. DISCIPLINE

Our disciplinary analysis begins with the standards, which provide guidance and are intended to promote consistent application of discipline. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Initially, we consider standard 1.1, which acknowledges that the purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. Here, we find the most relevant guidance in standard 2.1(a). It provides: "Disbarment is the presumed sanction for intentional or dishonest misappropriation of entrusted funds or property, unless the amount misappropriated is insignificantly small or sufficiently compelling mitigating circumstances clearly predominate."[10]

Although standard 2.1(a) is not an inflexible rule (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1022 [noting that former standard 2.2(a) "should be viewed as a guideline"]), we are

[10] Standard 2.11 also applies and provides that "[d]isbarment or actual suspension is the presumed sanction for an act of moral turpitude" with the "degree of sanction depend[ing] on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim . . . ; the impact on the administration of justice, if any; and the extent to which the misconduct related to the member's practice of law." Standard 1.7(a) provides that when multiple sanctions apply, the most severe shall be imposed.

mindful that "[i]n all but the most exceptional of cases, [willful misappropriation] requires the imposition of the harshest discipline." (*Grim v. State Bar* (1991) 53 Cal.3d 21, 29 [disbarment warranted for willful misappropriation where compelling mitigating circumstances did not clearly predominate and restitution made three years later only at demand of client's attorney].)

Citing to *Edwards v. State Bar* (1990) 52 Cal.3d 28, Brown argues that disbarment "is rarely appropriate when [an] attorney's only misconduct is a single act of misappropriation, unaccompanied by acts of deceit or other aggravating factors." However, this case does not present such a scenario. Brown's misappropriation of $22,500 involved at least 36 improper withdrawals from the Escrow Account during a four-week period. In each instance, he had the opportunity to consider the wrongfulness of his misconduct, which he nevertheless continued unabated until the funds were completely depleted. Notably, he did not advise Amboseli of his actions for weeks and continued to withdraw the entrusted funds even after he learned of Amboseli's request for repayment. He then followed this misconduct with acts of concealment and misrepresentations to Amboseli and the State Bar. In spite of numerous promises, he has failed to pay any restitution in over three years.

On this record, we do not find sufficiently compelling mitigating circumstances that clearly predominate in order to justify departure from standard 2.1(a)'s presumed sanction of disbarment. The decisional law supports this conclusion. (*Kelly v. State Bar* (1988) 45 Cal.3d 649 [disbarment for misappropriating $20,000, moral turpitude and dishonesty, despite lack of prior record and no aggravation]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511 [disbarment for $40,000 misappropriation and intentionally misleading client, despite mitigation for emotional problems, repayment, history of discipline-free practice, strong character evidence, and candor and cooperation with State Bar].)

VI. RECOMMENDATION

We recommend that Lloyd Douglas Brown be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We also recommend that Brown be ordered to make restitution to Amboseli Energy Partners LLC in the amount of $22,500, plus 10 percent interest per year from June 4, 2012 (or reimburse the Client Security Fund to the extent of any payment from the Fund to Amboseli Energy Partners LLC, in accordance with Business and Professions Code, section 6140.5).

We further recommend that he must comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

We further recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable as provided in section 6140.7 and as a money judgment.

VII. ORDER

The order that Lloyd Douglas Brown be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective April 21, 2014, will remain in effect pending the consideration and decision of the Supreme Court on this recommendation.

EPSTEIN, J.

WE CONCUR:

HONN, J.

STOVITZ, J.[*]

[*] Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.