PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed September 29, 2016

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of GERALD WILLIAM FILICE, A Member of the State Bar, No. 99657.	)	Case Nos. 13-O-13520; 15-O-10254 (Cons.) OPINION AND ORDER

In the span of five years, respondent Gerald William Filice has come before the State Bar Court four times for varied misconduct that includes commingling client and personal funds, failing to maintain client funds in trust, failing to cooperate with State Bar investigations, and failing to comply with terms of an earlier probation. This consolidated review involves appeals from Hearing Department decisions filed in Filice's third and fourth discipline cases (*Filice III* and *Filice IV*, respectively).

In *Filice III*, a hearing judge recommended discipline including a 75-day suspension because Filice failed to maintain client funds and did not cooperate with the State Bar investigation. The judge dismissed two moral turpitude charges for misappropriation and writing insufficiently funded checks (NSF). The Office of the Chief Trial Counsel of the State Bar (OCTC) sought review, requesting that we find culpability on the dismissed charges and increase Filice's actual suspension to at least one year. In *Filice IV*, the same hearing judge recommended that Filice be disbarred because he violated probation conditions from his second discipline case. Filice sought review, arguing disbarment is excessive because he substantially complied with his probation terms and any non-compliance was inadvertent.

We ordered *Filice III* and *Filice IV* consolidated on appeal, and instructed the parties to address the appropriate disposition for both cases in their briefs for *Filice IV*. (Rules Proc. of State Bar, rule 5.47.) OCTC argues for disbarment, citing Filice's extensive disciplinary history. Filice seeks "lesser discipline than involuntary suspension and disbarment," or that the case be remanded to the Hearing Department for further proceedings.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we affirm the culpability findings in *Filice III* and *Filice IV*. Given Filice's discipline history and his repeated violations of disciplinary orders, the risk is high he will commit future misconduct. We therefore adopt the hearing judge's disbarment recommendation in *Filice IV*.

I. *FILICE III* (Case No. 13-O-13520)

Filice was admitted to practice law in California on December 1, 1981. Prior to the matters at issue in this consolidated review, he has been disciplined twice: *Filice I* (2011) and *Filice II* (2013), discussed *infra* under aggravation.

On February 25, 2014, OCTC filed a four-count Notice of Disciplinary Charges (NDC) in *Filice III*. After a one-day trial on July 2, 2014, the hearing judge issued her decision on September 12, 2014. The judge found Filice culpable of two counts—failing to maintain client funds in trust (Rules Prof. Conduct, rule 4-100(A))[1] and failing to cooperate with the State Bar (Bus. & Prof. Code, § 6068, subd. (i)).[2] The judge dismissed two moral turpitude counts

[1] Rule 4-100(A) requires an attorney to deposit and maintain in a trust account "[a]ll funds received or held for the benefit of clients." All further references to rules are to the Rules of Professional Conduct unless otherwise noted.

[2] Business and Professions Code section 6068, subdivision (i), requires attorneys "[t]o cooperate and participate in any disciplinary investigation . . . against himself or herself." All further references to sections are to the Business and Professions Code.

(§ 6106)[3] for issuing NSF checks and for misappropriating $575. OCTC appealed and timely filed its opening brief. Filice did not file a responsive brief.

The trial evidence established the following facts: Benny Chetcuti, Jr., a long-time friend, hired Filice to register two companies with the Secretary of State for a flat fee of $1,180, including the costs of incorporation.[4] On March 7, 2013, Chetcuti deposited the $1,180 into Filice's client trust account (CTA), bringing the balance to $1,180.40. On March 14, 2013, Filice filed the Articles of Incorporation for each company and issued four checks from his CTA to the Secretary of State for incorporation fees in the amounts of $100, $350, $15, and $100, totaling $565. Before these checks cleared, Filice made several withdrawals from his CTA, and by March 18, 2013, the balance had dropped to $50.40. On March 19, 2013, Filice's bank paid the first two checks for $100 and $350, but returned the $15 and $100 checks on April 22, 2013 for insufficient funds.

The State Bar notified Filice about the negative CTA activity in letters sent to his membership address on April 24, May 16, and May 29, 2013. No letters were returned, yet Filice failed to respond. A final letter was sent on January 3, 2014, informing Filice that his bank had closed the CTA due to its negative balance. He was instructed to provide a written response, a written CTA journal, and monthly reconciliations from December 1, 2011 through May 1, 2013, by no later than January 13, 2014. Again, Filice failed to respond. He testified that he did not receive the first three letters because he failed to check his mail due to being "on a two-month suspension." As to the fourth letter in January 2014, he asserts he did not respond because he received it after the response deadline.

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[3] Section 6106 provides in relevant part that any act involving moral turpitude, dishonesty or corruption, whether committed as an attorney or otherwise, constitutes cause for disbarment or suspension.

[4] Chetcuti did not testify because he invoked his Fifth Amendment privilege against self-incrimination.

The hearing judge found that Filice failed to maintain client funds and failed to cooperate with the State Bar investigation, but dismissed the moral turpitude counts for issuing NSF checks and for misappropriating client funds. The judge reasoned that Filice made a "careless mistake" in issuing the NSF checks and had paid two checks directly to the payee while disputing the two remaining checks with the bank. The judge concluded that such minor trust account violations did not establish moral turpitude.

We affirm the hearing judge's culpability findings as supported by the record. With respect to the dismissal of the moral turpitude charges, the hearing judge is in "an appropriate position to assess the issues of [Filice's] intent, state of mind, good faith and reasonable beliefs and actions—all important issues bearing on whether moral turpitude was involved in this matter. . . . [Thus, we] are obligated to give great weight to the hearing judge's findings and conclusions on this subject." (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 241; *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions "because [the judge] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].) For this reason and based on our review of the record, we affirm the dismissals.

II. *FILICE IV* (Case No. 15-O-10254)

On February 18, 2015, OCTC filed an NDC alleging that Filice violated certain terms of his probation that the Supreme Court ordered in *Filice II*, in violation of section 6068, subdivision (k).[5] Specifically, OCTC charged that Filice failed to: (1) timely submit a quarterly report by January 10, 2015; (2) timely submit a Client Funds Certificate by January 10, 2015; (3) timely provide the Office of Probation (Probation) with satisfactory proof of attendance at and passage of a session of Ethics School by November 28, 2014; and (4) timely provide

[5] Section 6068, subdivision (k), requires attorneys "[t]o comply with all conditions attached to any disciplinary probation."

Probation with satisfactory proof of attendance at and passage of a session of Client Trust Accounting School by November 28, 2014. Filice filed a response to the NDC, but did not appear at a March 2015 status conference or a June 2015 pretrial conference; he also failed to file his pretrial statement or trial exhibits. As a result, the hearing judge granted OCTC's motion and ordered that Filice could not present evidence at trial other than his own testimony. After a one-day trial on June 30, 2015, the judge recommended disbarment in a September 15, 2015 written decision. As noted, Filice sought review.

At trial, Probation Deputy Michael Kanterakis testified to the following facts. He was assigned to oversee Filice's probation and mailed an introductory letter to him on November 18, 2013, shortly before the discipline became effective. The letter noted the specific terms of probation and included copies of the Supreme Court order, Filice's stipulation, a sample Client Funds Certificate Form, a quarterly report form and instructions, and an enrollment form for 2013 and 2014 Ethics/Client Trust Accounting School sessions. Kanterakis testified that he held a January 13, 2014 telephone conference with Filice during which they discussed that the probation period was for two years and that Filice was required to submit quarterly reports and timely attend Ethics School and Client Trust Accounting School. On December 1, 2014, Kanterakis sent a letter to Filice, summarizing his compliance and non-compliance as a last reminder of his probation conditions, and instructed him to seek relief from the State Bar Court if he could not timely comply with the conditions.

Filice testified at trial that he submitted his 2014 quarterly reports, but did not submit the reports or the Client Funds Certificates that were due on January 10, 2015 and April 10, 2015.[6] He also claimed that he mistakenly thought his probation term lasted for only one year, through

[6] At trial, the hearing judge permitted OCTC to amend the NDC to add allegations that Filice failed to timely submit his quarterly report and Client Funds Certificate by April 10, 2015.

2014, because he was focused on other things, such as taking the Multistate Professional Responsibility Examination (MPRE).

The hearing judge credited Filice's testimony that he believed his probation term was only one year. Nonetheless, the judge concluded Filice violated his probation because he still had not submitted his overdue 2015 reports and Client Funds Certificates by the time of trial on June 30, 2015, despite being notified by the February 18, 2015 NDC filing that his probation extended through 2015.

Filice also admitted at trial that he had not attended Ethics or Client Trust Accounting School since the Supreme Court order became effective in *Filice II* in November 2013. He contended that he lacked the financial resources to pay the class fees and transportation costs, and blamed Kanterakis for not informing him that he could apply for a fee waiver. Again, the hearing judge found Filice's testimony credible, but concluded that he violated these probation terms. The judge disregarded his criticism of Kanterakis, finding that Filice could have, and should have, researched for himself the available remedies to help him comply with probation.[7] Further, Filice did not attempt to modify his probation conditions based on financial hardship, nor did he submit a detailed financial declaration to Probation or the State Bar Court to explain his circumstances or request relief.[8]

Filice argues on review that he substantially complied with his probation terms. He also reiterates his trial arguments—that he did not timely file his 2015 reports and Client Funds Certificates because he believed his probation ended in 2014, and that he could not afford to attend Ethics School or Client Trust Accounting School. He maintains that the State Bar is

[7] The Application Enrollment Form for Ethics and Client Trust Accounting School that Kanterakis sent to Filice provides a contact name and telephone number to call for questions.

[8] Filice explained at trial why he did not present financial documentation to prove his difficulties: "I don't think it's the public's business what my financial situation is. And I have no intention to creating [sic] a public record of specific documents in this Court."

partially responsible for his probation violations by failing to notify him about a possible fee waiver.

Filice's arguments lack merit. Strict compliance with probation conditions is required, and substantial compliance is not a defense to culpability. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536-537; see *Grove v. State Bar* (1967) 66 Cal.2d 680, 685 [Supreme Court noted its focus is on "assurance that the public will be protected in the performance of the high duties of the attorney rather than in an analysis of the reasons for his delinquency"].) Further, financial problems did not, and do not, prevent Filice from performing the inexpensive task of filing his 2015 quarterly reports and Client Funds Certificates, which remain overdue. (See *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].)

III. AGGRAVATION OUTWEIGHS MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[9] requires OCTC to establish aggravating circumstances by clear and convincing evidence.[10] Standard 1.6 requires Filice to meet the same burden to prove mitigation.

A. Aggravation

In *Filice IV*, the hearing judge found the case was aggravated by Filice's multiple probation violations (std. 1.5(b) [multiple acts of misconduct are aggravating]), and by his indifference or lack of insight because he has yet to fully comply with his probation terms.

[9] Effective July 1, 2015, the standards were revised and renumbered. Because these requests for review were submitted for ruling after that date, we apply the revised version of the standards. All further references to standards are to this source.

[10] 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.)

(Std. 1.5(k).) In *Filice III* and *Filice IV*, the judge found that Filice's two prior records of discipline were aggravating. (Std. 1.5(a).) We assign significant weight to Filice's overall aggravation, particularly his prior records of discipline in *Filice I* and *Filice II*, because his present misconduct is similar to much of his past wrongdoing and involves a continuing disregard for court orders. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [prior misconduct similar to that found in present case must be considered as serious aggravation].)[11]

We summarize Filice's prior discipline cases below.

Filice I

On October 19, 2011, Filice entered a stipulation in *Filice I*. Between August 2010 and May 2011, he commingled funds in his CTA, in violation of rule 4-100(A).[12] (State Bar Court Nos. 10-O-10073 et al.) His misconduct was aggravated by multiple acts of wrongdoing, and mitigated by no prior discipline, no harm, and candor/cooperation. A public reproval was issued (effective November 9, 2011) with conditions lasting for one year that included:

1. Contact Probation to schedule a meeting with the probation deputy within 30 days of the effective date of the discipline;

2. Submit written quarterly reports to Probation stating compliance with the State Bar Act, the Rules of Professional Conduct, and all probation conditions;

3. Attend and pass the State Bar Ethics School and Client Trust Accounting School within one year of the effective date of the discipline;

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[11] In *Filice IV*, the judge did not consider *Filice III* as a prior record of discipline because it was pending on review. But rule 5.106(A) of the Rules of Procedure of the State Bar provides that a prior record of discipline includes decisions, final or not, that recommend discipline. (*In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 434-435 [hearing judge must consider previous disciplinary order as prior record even though it was not yet final].) As OCTC notes, however, the issue is moot on appeal because we consider *Filice III* in its entirety in this consolidated case, and do not need to issue alternate discipline recommendations pursuant to rule 5.106(E) of the Rules of Procedure of the State Bar.

[12] Rule 4-100(A) requires an attorney to deposit into an identifiable CTA all funds held for the benefit of a client, including advances for costs and expenses.

4. Provide proof of passage of the MPRE within one year of the effective date of the discipline; and,

5. Comply with financial reporting conditions as to any trust funds and accounts.

Filice II

On June 20, 2013, Filice entered a stipulation in *Filice II*. Beginning in mid-2011 through early 2013, he failed to inform his client that he did not have professional liability insurance, in violation of rule 3-410,[13] failed to cooperate in the State Bar investigation, in violation of section 6068, subdivision (i), and failed to comply with the conditions listed above in *Filice I*, in violation of rule 1-110.[14] (*In re Gerald William Filice* (S212773), State Bar Court Nos. 12-O-17874 and 12-H-18229.) Filice's misconduct was aggravated by his prior record of discipline, indifference, and multiple acts of misconduct. No mitigating circumstances were present.

The stipulated discipline included a 60-day suspension, a two-year stayed suspension, and two years' probation, with conditions similar to those imposed in *Filice I*, including:

1. Submit written quarterly reports to Probation stating compliance with the State Bar Act, the Rules of Professional Conduct, and all probation conditions;

2. Attend and pass the State Bar Ethics School and Client Trust Accounting School within one year of the effective date of the discipline;

3. Provide proof of passage of the MPRE within one year of the effective date of the discipline; and,

4. Comply with financial reporting conditions as to any trust funds and accounts.

The Supreme Court's corresponding discipline order issued on October 29, 2013 (effective November 28, 2013).

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[13] Rule 3-410 requires an attorney who does not have professional liability insurance to so inform a client in writing at the time of engagement where it is reasonably foreseeable that the legal representation will exceed four hours.

[14] Rule 1-110 provides that an attorney must comply with conditions attached to a public or private reproval or other discipline administered by the State Bar.

B. Mitigation

In *Filice III*, the hearing judge properly assigned mitigation for lack of harm (std. 1.6(c)) because Filice promptly paid two of the undisputed NSF checks, and for Filice's community service and pro bono work. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Filice testified that he provided leadership in the community, has raised money for charity, provided pro bono services for firefighters, and has supported and been an officer of rotary clubs since 1995. No mitigating factors were present in *Filice IV*.

We assign moderate weight to the overall mitigation evidence.

IV. DISBARMENT IS THE APPROPRIATE DISCIPLINE[15]

Our disciplinary analysis begins with the standards which, although not binding, are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) The Supreme Court has instructed that we follow them whenever possible (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and to look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

Standard 1.8(b) provides that disbarment is appropriate if a member has two or more prior records of discipline, if, inter alia, an actual suspension was ordered in any prior matter, or if the prior disciplines coupled with the current misconduct demonstrate the member's unwillingness or inability to conform to ethical responsibilities.[16] Standard 1.8(b) applies here because Filice has two prior records of discipline (*Filice I* and *Filice II*), a 60-day actual suspension was imposed in *Filice II*, and Filice has demonstrated over that past five years that he

[15] 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. (Std. 1.1.)

[16] Also applicable are standard 2.2(b), which provides for suspension or reproval for rule 4-100 violations, and standard 2.12(b), which provides that reproval is the presumed sanction for a section 6068, subdivision (i), violation. We apply standard 1.8(b) because it calls for disbarment. (Std. 1.7(a) [most severe sanction must be imposed].)

cannot perform his ethical duties. Though we may depart from recommending disbarment under standard 1.8(b) if the most compelling mitigating circumstances clearly predominate or the current misconduct occurred during the same time as the misconduct in the prior discipline (std. 1.8(b)), such circumstances are not present here. (*In the Matter of Carver*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 435-436.)

Filice's present misconduct occurred after he was disciplined, and his overall mitigation is neither compelling nor does it predominate over his repeated failure to abide by ethical rules, the extent of his disciplinary record, and the other aggravating factors. Given these circumstances, we find no reason to depart from applying standard 1.8(b), which is directed to address recidivist misconduct, as is present here. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].)

Filice argues that disbarment is inappropriate because his actions were merely "administrative failings and inadvertencies." He is incorrect. Filice's failure to comply with disciplinary orders of this court and of the Supreme Court demonstrate his "lapse of character and a disrespect for the legal system that directly relate to an attorney's fitness to practice law and serve as an officer of the court. [Citation.]" (*In re Kelley* (1990) 52 Cal.3d 487, 495.)

Filice also argues that his failings have "never placed the public in jeopardy or harmed a client," which distinguishes his case from those disbarment cases cited by OCTC, including *In re Tishgart* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 338; *Morgan v. State Bar* (1990) 51 Cal.3d 598, and *Barnum v. State Bar* (1990) 52 Cal.3d 104. Our review of these authorities, however, reveals they support Filice's disbarment as the appropriate discipline because they each involve repeated misconduct and an attorney's inability to abide by required ethical duties. In *Tishgart* and *Morgan*, the attorneys were disbarred in their fourth discipline cases, and the attorney in *Barnum* was disbarred for committing serious misconduct including refusing to

participate in the proceedings where he performed poorly on probation in a prior case. Further, several other cases where attorneys repeatedly committed misconduct and were unable to abide by ethical guidelines have resulted in disbarment.[17]

In sum, Filice does not grasp the importance of strict compliance with probation conditions, despite reminders and warnings from the State Bar and even the filing of the NDC in *Filice IV*. (See *Potack v. State Bar* (1991) 54 Cal.3d 132, 139 [failure to comply with probation terms is serious]; *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530-531 [multiple violations of same probation condition warrant more severe discipline].) Timely filing quarterly reports plays an important role in the rehabilitative process "because it requires the attorney, four times a year, to review and reflect upon his professional conduct . . . [and] to review his conduct to ensure that he complies with all of the conditions of his disciplinary probation." (*In the Matter of Wiener* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763.) Of equal importance is timely attending and reporting completion of Ethics and Client Trust Accounting School, which assures the State Bar that the attorney has reviewed and considered anew his professional responsibilities.

Given Filice's repeated misconduct, additional probation and suspension would not prevent him from committing future violations. (See *Barnum v. State Bar*, *supra*, 52 Cal.3d at pp. 112-113 [disbarment imposed where attorney's probation violations left court no reason to believe he would comply with lesser discipline].) In fact, when Filice was questioned at trial to confirm that this was his fourth discipline case, he responded: "I guess that must be true, yes. . . . One loses count over time." Considering all the circumstances of this case, the guidance of

[17] See, e.g., *Farnham v. State Bar* (1988) 47 Cal.3d 429 (disbarment where attorney with prior discipline record habitually ignored ethical duties to clients); *McMorris v. State Bar* (1983) 35 Cal.3d 77 (disbarment where attorney habitually failed to perform in five client matters and was twice previously suspended for similar misconduct); *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 80 (disbarment where attorney had two prior records of discipline, violated probation, and was unable to conform conduct to ethical norms).

standard 1.8(b), and the relevant decisional law, we find that the public and the profession are best protected if Filice is disbarred.

V. RECOMMENDATION

We recommend that Gerald William Filice be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

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

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

VI. ORDER

The Hearing Department's order that Gerald William Filice be enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective September 18, 2015, will remain in effect pending the decision of the Supreme Court on this recommendation.

PURCELL, P. J.

WE CONCUR:

HONN, J.

STOVITZ, J.*

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