PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed August 7, 2015

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 13-O-10193
	)	
LEE WILLIS HARWELL, JR.,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 115692.	)	
	)	

THE COURT.[*]

Lee Willis Harwell, Jr., a respected attorney with over 30 years' experience without discipline, appeals a hearing judge's decision recommending he receive six months' actual suspension for a grossly negligent misappropriation amounting to moral turpitude. (Bus. & Prof. Code,[1] § 6106.) Harwell concedes he failed to maintain $2,521.41 in entrusted funds (Rules Prof. Conduct,[2] rule 4-100(A)), but challenges the moral turpitude finding and asserts public discipline is unwarranted. The Office of the Chief Trial Counsel of the State Bar (OCTC) does not appeal.

We review the record independently (Cal. Rules of Court, rule 9.12), and agree largely with the hearing judge's factual findings; however, we conclude they do not support gross negligence. In a set of unusual factual circumstances involving a client's failure to cash a check for nearly four years, Harwell miscalculated the minimum balance he was required to keep in his

[*] Before Purcell, P. J., Epstein, J., and McElroy, J., hearing judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar.

[1] All further references to sections are to this source.

[2] All further references to rules are to this source, unless otherwise noted.

client trust account (CTA), and hence, failed to maintain the necessary amount. For this negligent failure to maintain entrusted funds, we find him culpable under rule 4-100(A) only.

After considering the standards[3] and decisional law, the presence of significant mitigation, and the absence of aggravation, we conclude discipline is unnecessary to protect the public, the courts, and the legal profession. An admonition is the appropriate disposition.

I. FACTUAL BACKGROUND[4]

The hearing judge's factual findings are generally undisputed.[5] We adopt them, except where noted, and briefly summarize those essential to our analysis.

Harwell was admitted to practice law in California on December 3, 1984. In November 2007, Fred Tucker retained Harwell on a contingency basis to pursue debt collection actions against several defendants, including Miguel and Joselina Bogran. Tucker knew he was subject to a court order that enjoined him from pursuing any of these matters, but he concealed this from Harwell. Harwell prosecuted, and ultimately settled, the case against the Bograns. He received the $3,448.50 settlement check, deposited it in his CTA, and deducted his fees and costs. In July 2008, he issued Tucker a $2,521.41 check (number 1296), representing Tucker's share of the settlement. Tucker did not negotiate the check.

Months later, in the course of his continued work on the remaining collection actions, Harwell learned that all of the cases were barred by injunction. At that point, he believed he

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[3] 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 appeal was submitted for ruling before the July 1, 2015 effective date, we apply the prior version of the standards, which was effective January 1, 2014 through June 30, 2015. All further references to standards are to the prior version of this source.

[4] At the close of trial, the hearing judge stated he was submitting the case "as of today," yet the judge also ordered the parties to file closing briefs. We construe these comments as a submission of the case for all purposes, other than the filing and consideration of closing briefs. We have independently considered the entire record on review, including both closing briefs.

[5] We afford great weight to the hearing judge's factual findings. (See Rules Proc. of State Bar, rule 5.155(A).)

faced an ethical dilemma—was he permitted and/or required, after the fact, to report his client for violating the injunction in the Bograns' case? Harwell confronted Tucker and told him he would have to dismiss the remaining collection cases or find another attorney. Upon Tucker's consent, Harwell dismissed the cases. He did not report Tucker for violating the injunction, though, because he felt his duty to his client was "paramount."

Nearly two years after he issued check number 1296 to Tucker, Harwell became aware of extra funds in his CTA. He reviewed his CTA statements for the previous several months and accounted for all funds belonging to current clients. He also confirmed that each check issued over the past year had been cashed. As he could not locate any discrepancy, he believed the funds were excess fees and withdrew them in May 2010. Thereafter, his CTA reflected a balance below $2,521.41 (the amount of check number 1296) on several occasions. At trial, Harwell credibly testified that he balanced his CTA every month but somehow lost track of Tucker's check and missed the fact that it had not been negotiated.

In February 2012, more than three and a half years after Harwell issued check number 1296 and a year and a half after he withdrew what he believed to be excess funds, Tucker contacted him to request a replacement check. Tucker revealed that the check was uncashed and outdated. Harwell did not trust Tucker, given his earlier deceit in concealing the injunction. Moreover, Harwell believed that even if Tucker had not cashed the check, Harwell was equitably entitled to the $2,521.41 for his unpaid work on the injunction-barred cases. He responded skeptically, expressing surprise that Tucker had waited years to cash the check and suggesting the $2,521.41 count "as a set off" for his more than $12,000-worth of "time uselessly spent" on the enjoined cases due to Tucker's dishonesty.

Tucker wrote back, claiming he had tried to cash Harwell's check on several occasions, but was unable to do so because the CTA lacked sufficient funds. Harwell knew this assertion

was false, as his CTA balance remained above $2,521.41 until May 2010, nearly two years after he issued the check. Since he doubted Tucker's story and believed he had a valid lien in any case, Harwell did not respond further nor did he redeposit any monies in his CTA.

Eventually, Tucker complained to the State Bar. In January and late-April of 2013, the Bar sent Harwell two investigative letters. He responded promptly to each, explaining the events summarized above. He also furnished voluminous documentation supporting his account of the events, including deposit slips verifying that he returned the entire amount of the Bograns' settlement ($3,448.50) to his CTA on May 1, 2013. In June 2013, per the State Bar's advice, Harwell paid the $3,448.50 to the Bograns.[6]

II. CULPABILITY[7]

A. No Culpability for Moral Turpitude (Count One)

OCTC charged Harwell with committing an act involving moral turpitude by dishonest or grossly negligent misappropriation of entrusted funds between May 2010 and November 2011. The hearing judge found Harwell violated section 6106[8] by misappropriating $2,521.41 in May 2010, with gross negligence. However, the judge did not explain the basis for finding gross negligence. Harwell asserts he did not act with gross negligence amounting to moral turpitude, but concedes his withdrawal was a "negligent mistake." We agree.

When Harwell withdrew the excess funds, he honestly believed they were attorney fees. (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 332-333 [no violation of § 6106 where attorney

[6] Given that the Bograns were the proper recipients, we make no findings as to the equitable interests between Harwell and Tucker as they are irrelevant to our analysis.

[7] OCTC bears the burden of proving culpability by clear and convincing evidence. 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.)

[8] Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

acts on beliefs which, although mistaken and unreasonable, are sincerely and honestly held].) The hearing judge credited Harwell's testimony that he overlooked the fact that check number 1296 was outstanding, even though he "balances his CTA every month." We adopt this finding (*McKnight v. State Bar* (1991) 53 Cal.3d 1025,1032 [hearing judge is "best suited to resolving credibility questions"]), and conclude the evidence is insufficient to prove gross negligence (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 796 [gross negligence in trust accounting constituted moral turpitude where attorney acted with "pervasive carelessness" and exhibited "pattern of gross negligence"]). Accordingly, Count One is dismissed with prejudice.[9]

B. Failure to Maintain Client Funds in Trust (Count Two)

Harwell nevertheless violated rule 4-100(A).[10] He admits he received the $2,521.41 for Tucker's benefit, was required to maintain it in trust, and failed to do so. (*Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, 1099 [honest belief of entitlement to funds is no defense to rule violation (as applied to precursor to rule 4-100(A))].) Accordingly, he is culpable as charged in Count Two.

III. SIGNIFICANT MITIGATION AND NO AGGRAVATION[11]

We adopt the hearing judge's findings of four factors in mitigation and none in aggravation, but increase the weight for good character and find three additional mitigating

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[9] We reject OCTC's argument that Harwell violated section 6106 by failing to either refund or redeposit the funds when Tucker first requested a reissued check. The Notice of Disciplinary Charges (NDC) did not charge this theory of culpability nor was it raised before the hearing judge. (§ 6085; *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171-172 [NDC must articulate specific conduct at issue with particularity].)

[10] Under rule 4-100(A), "[a]ll funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account' or words of similar import . . . ."

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

factors. In aggregate, Harwell has proved significant mitigation. We begin with those factors credited by the hearing judge.

Harwell's over 25 years of discipline-free practice prior to the present isolated instance of misconduct warrant substantial mitigation. (Std. 1.6(a); see *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [prior record of discipline-free practice is most relevant for mitigation if it occurred during "single period of aberrant behavior" and is unlikely to recur].)

Additionally, Harwell established that his personal stress and distraction due to traumatic family events were directly responsible for his CTA miscalculation and resulting negligent misappropriation. (Std. 1.6(d) [extreme emotional difficulties that are responsible for misconduct and no longer pose a risk].) Harwell's and his wife's testimony reflect that these difficulties have manifestly subsided and do not pose an ongoing risk. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1364 [affording mitigation for emotional difficulties absent expert testimony].) Therefore, mitigation under standard 1.6(d) is appropriate.

Harwell also deserves substantial mitigation for his candor and cooperation with the State Bar (std. 1.6(e)), including: (1) stipulating to facts sufficient to support his culpability under rule 4-100(A); (2) providing thorough, forthright, and prompt responses to the State Bar's inquiries; and (3) voluntarily refunding to the Bograns the entire amount of their settlement once the State Bar advised him to do so.[12] These efforts reflect Harwell's cooperation in the Bar's investigation.

Further, Harwell presented testimony from nine character witnesses: family members; attorney colleagues, friends, and mentees; and a long-time client. We find that these witnesses constituted a wide range of references in the legal and general communities, as required by

[12] Harwell is not entitled to mitigation under standard 1.6(j) for making restitution without the threat of disciplinary proceedings because he did not pay the Bograns until he was aware of the State Bar's investigation.

standard 1.6(f). They understood the charges against him and, nevertheless, offered unequivocally positive testimony regarding his honesty and ethics. Of particular relevance to the trust accounting error is Harwell's client's testimony that his monthly billing statements were accurate "to the penny." The quality and quantity of Harwell's character evidence warrant significant mitigating weight, especially for the testimony of attorneys, who have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.)

On review, we find that the record establishes three additional mitigating factors. First, Harwell's wrongful CTA withdrawal did not harm his client, the public, or the administration of justice. (Std. 1.6(c).) Tucker had no right to collect the Bograns' settlement in the first place, and the Bograns obtained a full refund they would likely not have received from Tucker. Next, we credit Harwell for his remorse and recognition of wrongdoing, as shown by his ready admission of the mistaken withdrawal, candid and regretful attitude throughout these proceedings, and comprehensive after-the-fact review of his CTA records to confirm their accuracy and ensure that his money-management procedures are robust and effective. Finally, we afford mitigation for pro bono and community service based on Harwell's testimony that he handles asylum cases at reduced rates and his wife's testimony that he voluntarily takes pro bono cases. (See *Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Though the record contains few details about these activities, we find they warrant at least modest mitigation.

IV. ADMONITION SERVES PRIMARY PURPOSES OF DISCIPLINE

Our analysis begins with the standards. (*In re Silverton* (2005) 36 Cal.4th 81, 91 [standards promote consistent application of discipline].) Based on Harwell's rule 4-100 violation, standard 2.2(b) applies and provides that suspension or reproval is appropriate. Suspension or reproval is similarly appropriate, under standard 2.1(c), for a "misappropriation

that does not involve intentional misconduct or gross negligence." By withdrawing excess CTA funds without first confirming their definitive origin, Harwell acted unreasonably. (See *Palomo v. State Bar*, *supra*, 36 Cal.3d at p. 795 ["rules for the safekeeping and disposition of client funds" are "critically important"].) His concededly negligent failure to maintain entrusted funds amounted to a simply negligent misappropriation. (See *City of Santa Barbara v. Superior Court*, 41 Cal.4th 747, 753-754 [failure to exercise reasonable care, relative to the circumstances, constitutes ordinary negligence].) Accordingly, we apply both standards 2.1(c) and 2.2(b).

Given the unique circumstances before us, we also look to standard 1.7(c), which directs that, where the net effect of mitigating and aggravating circumstances demonstrates a lesser sanction will fulfill the primary purposes of discipline, it is appropriate to impose that lesser sanction.[13] "On balance, a lesser sanction is appropriate in cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the member is willing and has the ability to conform to ethical responsibilities in the future." (Std. 1.7(c).) Such is the case here. Harwell has been practicing law for more than three decades without discipline. Although he erred in balancing his CTA after his client failed to cash a check for nearly four years, his misconduct is substantially mitigated. Moreover, the hearing judge found, and the record as a whole establishes, that his misconduct was aberrant and unlikely to recur. Thus, the net result of Harwell's mitigation and lack of aggravation, the limited scope of his violation, and the lack of harm or risk of recurrence show that discipline is unnecessary and would be punitive.

Thus, we are guided by rule 5.126 of the Rules of Procedure of the State Bar, which allows us to resolve a matter by admonition if: (1) it does not involve a client security fund

[13] 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.)

matter or serious offense; (2) the violation either was not intentional or occurred under mitigating circumstances; and (3) no significant harm resulted. (Rules Proc. of State Bar, rule 5.126(A), (B) [serious offense "means conduct involving dishonesty, moral turpitude, or corruption . . ."].) Each requirement is satisfied here, making an admonition the proper discipline. (See *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442, 445 [admonition appropriate where single violation of permitting improper solicitation letter to be mailed was not intentional and no harm resulted]; *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, 444, 455 [admonition appropriate for single violation of failing to communicate with client where no harm resulted and misconduct mitigated by lengthy discipline-free record].)

V. ORDER OF ADMONITION

Lee Willis Harwell, Jr., is hereby admonished. (Rules Proc. of State Bar, rule 5.126.) Because an admonition does not constitute the imposition of discipline (Rules Proc. of State Bar, rule 5.126(D)), the State Bar is not entitled to an award of costs under Business and Professions Code section 6086.10, subdivision (a). And because Harwell has not been "exonerated of all charges," he is not entitled to an award of costs under Business and Professions Code section 6086.10, subdivision (d).