

Filed April 17, 2014

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	Case No. 11-O-16252
	)	
PHILLIP LEE HEEGER,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 107411.	)	
_____	)	

A hearing judge recommended that respondent Phillip Lee Heeger be disbarred for professional misconduct, including misappropriating at least \$12,135. Heeger seeks review, but does not dispute culpability. Rather, he argues the judge made procedural and factual errors and did not assign enough mitigation credit to his 26 years of discipline-free practice. He requests a “careful and full review of this miscarriage of justice.” The Office of the Chief Trial Counsel of the State Bar (OCTC) supports disbarment. After independently reviewing the record (Cal. Rules of Court, rule 9.12), we reject Heeger’s arguments and affirm the hearing judge’s recommendation.

**I. FACTS<sup>1</sup>**

In 2008, Linda Patow hired Heeger to represent her in three matters related to the death of her husband, who had been a longshoreman for over 40 years: (1) a medical malpractice claim against Kaiser Foundation for failure to diagnose lung cancer; (2) a products liability claim against third parties who produced asbestos-containing products; and (3) a federal workers’ compensation claim against several former employers. As detailed below, Heeger

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<sup>1</sup> The facts are based on the hearing judge’s findings, the trial evidence consisting solely of Heeger’s testimony, and the documents admitted into evidence. (See Rules Proc. of State Bar, rule 5.155(A) [hearing judge’s factual findings entitled to great weight on review].)

misappropriated settlement monies in the malpractice case, failed to follow through on the products liability claim, and abandoned the workers' compensation claim.

**A. The Medical Malpractice Claim**

In April 2009, Heeger settled Patow's medical malpractice claim with Kaiser for \$29,999, plus \$3,750 in funeral costs. By July 2009, he deposited the money into his client trust account (CTA). The retainer agreement provided that he would receive "40% of the first \$50,000 recovered," less costs. He was therefore required to hold \$20,249.40 (not including costs) in trust for Patow. In November 2009, his CTA balance dipped to \$301, and by February 2010, it was \$0. Heeger testified that he intentionally misappropriated the funds: "I knew what I was doing, and I took the money, and it wasn't an accident. It was on purpose."

In October 2011, an OCTC investigator wrote to Heeger informing him that Patow had complained and requesting a written response. Thereafter, Heeger deposited \$12,135 as replacement funds in a different CTA.<sup>2</sup> He then sent a check for this amount to Patow's new attorney who, for reasons not established at trial, marked it void and returned it. Heeger made no further efforts to resolve the matter. Before trial, he misappropriated another \$1,000 from the replacement funds, and has not paid Patow any settlement monies.

**B. The Products Liability Claim**

Heeger agreed to represent Patow in a products liability claim arising from her husband's death due to asbestos exposure.<sup>3</sup> Heeger testified he received settlement checks, but the products liability trust would not honor them until all defendants, including those in a related workers' compensation matter, approved the settlement. He believed that one check was renewed several

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<sup>2</sup> Heeger testified he was required to hold only \$12,135 because he incurred approximately \$8,000 in costs. However, he did not provide adequate documentation, conceding he prepared only "an inadequate handwritten accounting."

<sup>3</sup> The parties presented very limited evidence on this claim.

times and eventually paid out, but he did not know what happened to the others. At some point, he stopped working on the case, and gave it to Patow's new counsel.

### **C. The Workers' Compensation Claim**

Heeger agreed to represent Patow in a federal workers' compensation claim. He filed a claim for death benefits against her husband's former employers and their insurance carriers.

Unfortunately, Heeger was inexperienced in this type of case. Initially, he hired two attorneys to assist him but eventually pursued the claim on his own, which he was ill-prepared to do. By November 2010, the case became unmanageable for him and he abandoned it without informing Patow.

The administrative law judge in the case issued at least three orders seeking Heeger's participation. On March 21, 2011, the judge ordered him to file a statement identifying the dates of employment for each employer; he did not comply. On April 28, 2011, the judge again ordered Heeger to file the statement; he did not comply. On June 2, 2011, the judge ordered the parties to hold a conference call; Heeger did not participate. Finally, the judge concluded that Heeger abandoned Patow's claim and issued an Order to Show Cause re dismissal for failure to prosecute. Patow wrote to the judge, explained she had been unable to reach Heeger, and asked that her case be held in abeyance. The judge granted her request, and Patow obtained new counsel.

## **II. HEEGER IS CULPABLE OF SIX COUNTS OF MISCONDUCT**

The Notice of Disciplinary Charges (NDC) alleged, and the hearing judge found, that Heeger was culpable of seven counts of misconduct. On review, OCTC requests that we dismiss Count Three for lack of evidence. We agree and find Heeger culpable of six counts, which he does not contest.

Count One alleged that Heeger violated rule 4-100(A) of the Rules of Professional Conduct,<sup>4</sup> which requires that “funds received or held for the benefit of clients” shall be deposited in a CTA. Heeger is culpable because he failed to maintain at least \$12,135 in his CTA for Patow’s share of the malpractice settlement.

Count Two alleged that Heeger violated Business and Professions Code section 6106,<sup>5</sup> which prohibits attorneys from engaging in any act involving moral turpitude, dishonesty, or corruption. Heeger is culpable of committing an act of moral turpitude by intentionally misappropriating at least \$12,135 in trust funds that he should have held for Patow as settlement monies in the malpractice action. (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020–1021 [willful misappropriation finding supports conclusion of moral turpitude and violation of § 6106].)

Count Three alleged that Heeger violated rule 4-100(B)(3), which requires an attorney to maintain complete records of client funds, securities, and other properties and to render an accounting. Although the hearing judge found culpability, OCTC requests that we dismiss this count because the evidence does not support it. We agree, and dismiss it with prejudice.

Count Four alleged that Heeger violated rule 3-110(A), which states that attorneys “shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” Heeger is culpable because he failed to provide any services of value to Patow during his representation in the products liability claim.

Count Five alleged that Heeger also violated rule 3-110(A) with respect to the federal workers’ compensation claim. He is culpable because he admittedly abandoned that case.

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<sup>4</sup> All further references to rules are to the Rules of Professional Conduct of the State Bar of California unless otherwise noted.

<sup>5</sup> All further references to sections are to the Business and Professions Code unless otherwise noted.

Count Six alleged that Heeger violated section 6068, subdivision (m), which requires attorneys to “respond promptly 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.” Heeger is culpable because he failed to advise Patow he had stopped working on the workers’ compensation claim.

Count Seven alleged that Heeger violated section 6103, which states that “willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear . . . constitute[s] cause[] for disbarment or suspension.” Heeger is culpable because he wilfully disobeyed the administrative law judge’s orders in the workers’ compensation case.

### **III. NO MERIT TO HEEGER’S PROCEDURAL CHALLENGES**

Heeger claims that he was denied a fair trial because the hearing judge: (1) imposed an evidentiary sanction prohibiting him from presenting evidence or calling witnesses at trial; and (2) made factual errors. Both arguments lack merit.

#### **A. The Sanction Was Proper**

In November 2012, the hearing judge ordered the parties to file pretrial statements and attend a pretrial conference. Heeger failed to do both. OCTC moved for sanctions and the judge deferred his ruling until the trial. Heeger appeared at trial without a pretrial statement or a good cause reason for not attending the pretrial conference. The judge ordered that Heeger could not call witnesses or present evidence, but permitted him to testify. Heeger asserts the judge’s order was an abuse of discretion because public policy favors a trial on the merits.

Rule 5.101(E) of the Rules of Procedure of the State Bar provides that if a party does not file a pretrial statement, the judge may order sanctions, including disallowing evidence or witnesses. Heeger failed to comply with the pretrial order and on the day of trial, stated he had

“no good cause reason for not appearing.” Only then did the judge grant the motion for sanctions. Given the court’s authority, we find the judge properly exercised his broad power to manage admissibility of evidence after Heeger violated the pretrial orders. (*In the Matter of Navarro* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 192, 198 [Supreme Court applies abuse of discretion standard in reviewing procedural motions in State Bar Court]; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 [discretion abused where court exceeds bounds of reason, considering all circumstances]; *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1251 [no abuse of discretion in excluding trial evidence for violation of local rules on submitting trial readiness report].)

**B. Any Factual Errors Did Not Prejudice Heeger**

Heeger argues that the hearing judge “made a handful of factual errors — some serious; some less so,” which he claims denied him fair process. First, he alleges the judge incorrectly found that Patow filed her State Bar complaint on August 19, 2011. While OCTC’s October 27, 2011 letter to Heeger confirms she made the complaint before that date, no evidence establishes the complaint came in on August 19, 2011. Nonetheless, Heeger suffered no prejudice from such an error since the precise date Patow complained to the State Bar is not relevant to any issue in this proceeding. Second, Heeger claims the judge incorrectly concluded that he admitted abandoning the products liability case. To the contrary, the judge’s conclusion is accurate based on Heeger’s testimony that he received checks on behalf of Patow, did not know what happened to them, and eventually stopped working on the case.

#### IV. AGGRAVATION AND MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence<sup>6</sup> (std. 1.5).<sup>7</sup> Heeger has the same burden to prove those factors in mitigation (std. 1.6). In aggravation, the hearing judge found that Heeger: (1) committed multiple acts of misconduct (std. 1.5(b)); (2) caused significant harm to the public and the administration of justice by not performing in the workers' compensation case and requiring the court to undertake extensive additional procedures to manage the complex matter (std. 1.5(f)); and (3) displayed indifference toward rectification or atonement for the consequences of his misconduct by misappropriating \$1,000 of the replacement funds from his CTA and failing to pay restitution. (Std. 1.5(g); see *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr 896, 913 [failure to refund unearned fees by time of hearing is aggravation based on indifference].) We agree and assign significant aggregate weight to these three circumstances in aggravation.

In mitigation, the hearing judge gave significant weight to Heeger's 26 years of discipline-free practice. (Std. 1.6(a) [mitigation for no prior record of discipline over many years coupled with present misconduct that is not serious].) Heeger argues for even greater weight. We do not agree and assign only limited weight since Heeger committed serious misconduct, including misappropriating client monies, and then misappropriated replacement funds. Under these circumstances, his discipline-free past does not persuade us that his misconduct was aberrational or unlikely to recur. (See *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029

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<sup>6</sup> 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.)

<sup>7</sup> All references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. Effective January 1, 2014, the standards were amended. Since this case was submitted after the effective date, we apply the new version. We note that the amendments do not impact our analysis in this case.

[exemplary conduct and distinguished career may be relevant factors indicating misconduct will not likely recur].)

We also reject Heeger’s request for additional mitigation for: (1) his “candor” at trial; (2) the effects of the “Great Recession” on American commerce; and (3) his “extreme and selfless effort” on Patow’s behalf. Although he candidly admitted his wrongdoing at trial, witnesses are expected to testify truthfully. Participating at trial as required is not “clear and convincing evidence of cooperation deserving of mitigative credit.” (*In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160, 168.) Heeger also failed to prove that economic hardship caused his misconduct; even if he had, it does not excuse his misappropriation. (*Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 709 [misappropriation not excused or substantially mitigated by attorney’s needs, no matter how compelling].) Finally, Heeger decidedly did not act selflessly in handling Patow’s matters — he failed to communicate with his widowed client, abandoned her claims, and twice misappropriated her money.

## V. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; maintain high professional standards; and preserve public confidence. (Std. 1.1.) We begin our analysis with the standards. (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

Standard 2.1(a) is most apt because it deals specifically with misappropriation. It states that disbarment is appropriate for intentional misappropriation “unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case actual suspension of one year is appropriate.” Here, Heeger intentionally misappropriated at least \$12,135, which is a significant amount. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367–1368 [misappropriation of \$1,355.75 deemed



significant[.]) And his single factor in mitigation (discipline-free record) is not compelling nor does it clearly predominate when weighed against his overall misconduct and three aggravating factors (multiple acts, harm to the administration of justice, and indifference).

The Supreme Court has instructed that “misappropriation generally warrants disbarment” and “[e]ven a single ‘first-time’ act of misappropriation has warranted such stern treatment.” (*Kelley v. State Bar* (1988) 45 Cal.3d 649, 656–657; see also *Edwards v. State Bar* (1990) 52 Cal.3d 28, 38 [misappropriation is grave misconduct for which disbarment is usual form of discipline].) Heeger’s misconduct is particularly egregious since he *twice* misappropriated funds from the same client, committed other serious misconduct, and has not paid any restitution. Accordingly, we affirm the hearing judge’s disbarment recommendation as the discipline necessary to protect the public, the courts, and the legal profession.<sup>8</sup>

## VI. RECOMMENDATION

We recommend that Phillip Lee Heeger be disbarred and that his name be stricken from the roll of attorneys.

Within 30 days of the effective date of the discipline herein, Phillip Lee Heeger must make restitution to Linda Patow in the amount of \$20,249.40, plus 10 per cent per annum from July 1, 2009 (or reimburse the Client Security Fund to the extent of any payment from the Fund

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<sup>8</sup> Our recommendation is consistent with comparable case law. (See, e.g., *Kelley v. State Bar*, *supra*, 45 Cal.3d 649 [disbarment for \$20,000 misappropriation, moral turpitude, dishonesty, and improper communication with adverse party with no prior record in mitigation and no aggravation]; *In re Abbott* (1977) 19 Cal.3d 249, 253–254 [disbarment for \$29,500 misappropriation in a single client matter with mitigation for 13 years’ discipline-free practice and emotional problems undergoing treatment]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [disbarment for attorney with no prior disciplinary record, whose misappropriation was isolated incident, but who made no effort to reimburse, and lacked candor].)

to Linda Patow, in accordance with Business and Professions Code, section 6140.5) and must provide satisfactory proof to the State Bar.<sup>9</sup>

We also recommend that Phillip Lee Heeger be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, 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.

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 Phillip Lee Heeger be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective May 2, 2013, will continue, pending the consideration and decision of the Supreme Court on this recommendation.

PURCELL, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.

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<sup>9</sup> Since Heeger failed to prove his costs, we recommend restitution in the amount of Patow's full share of the malpractice settlement proceeds.