PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed March 10, 2020

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	17-O-04162
	)	
DAVID CRAIG PAQUIN,	)	OPINION AND ORDER
	)	
State Bar No. 196144	)	
	)	

THE COURT:[*]

A hearing judge found David Craig Paquin culpable of three counts of misconduct: two for failure to perform legal services with competence and one for aiding and abetting the unauthorized practice of law (UPL), in a matter in which the threshold issue was whether Paquin had formed an attorney-client relationship. The judge dismissed four other counts. In determining the recommended discipline, the judge applied standard 2.7(c),[1] which provides for presumptive discipline of suspension or reproval for performance or communications violations that are limited in scope and time. The judge found no factors in aggravation, significant mitigation for no prior discipline, and limited mitigation for cooperation. Ultimately, the judge recommended a public reproval with conditions as appropriate discipline.

Both Paquin and the Office of Chief Trial Counsel of the State Bar (OCTC) appeal. Paquin argues that the evidence failed to establish his culpability on any count. OCTC asks us to affirm the hearing judge's culpability findings but also find additional culpability. It seeks aggravation for multiple acts, substantial harm, vulnerable victim, indifference, and lack of

[*]Before Purcell, P. J., Honn, J., and McGill, J.

[1] Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to standards are to this source.

candor, as it did at trial, and requests that less mitigation be provided for Paquin's nearly 20 years of discipline-free practice. OCTC submits that the recommended discipline should be increased to a 30-day actual suspension and include restitution.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we do not find clear and convincing evidence to support culpability for any of the charged misconduct.[2] OCTC failed to prove the existence of an attorney-client relationship, without which there cannot be culpability as charged in the Notice of Disciplinary Charges (NDC). Accordingly, we dismiss this proceeding with prejudice. (See *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 843 [dismissal of charges for want of proof after trial on merits is with prejudice].)

I. PROCEDURAL BACKGROUND

On September 26, 2018, OCTC filed a seven-count NDC charging Paquin with (1) two counts of failure to perform with competence and failure to supervise, in violation of rule 3-110(A) of the Rules of Professional Conduct;[3] (2) aiding UPL, in violation of rule 1-300(A);[4] (3) failure to respond to client inquiries, in violation of Business and Professions Code section 6068, subdivision (m);[5] (4) failure to render accounts of client funds, in violation of

[2] 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.)

[3] All further references to rules are to the California Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted. Rule 3-110(A) provides that a lawyer shall not intentionally, recklessly, or repeatedly failure to perform legal services with competence.

[4] Rule 1-300(A) provides that a lawyer shall not aid any person or entity in UPL.

[5] All further references to sections are to this source. Section 6068, subdivision (m), requires lawyers to respond promptly to reasonable client status inquiries and to keep clients reasonably informed of significant developments in matters in which the attorney has agreed to provide legal services.

rule 4-100(B)(3);[6] (5) sharing legal fees with a non-lawyer, in violation of rule 1-320(A);[7] and (6) failure to refund unearned fees, in violation of rule 3-700(D)(2).[8] Each count alleged that Guadalupe Cruz was a client of Paquin. On January 11, 2019, the parties filed a stipulation as to admission of documents. Trial was held on January 24 and 25, and February 4 and 12, 2019. The hearing judge issued her decision on May 13, 2019.

II. FACTUAL BACKGROUND[9]

In September 2016, Minerva Estrada, Cruz's partner, contacted Jenny Velasco to obtain assistance for Cruz in expunging an outstanding felony bench warrant for Cruz's arrest with the goal of avoiding Cruz's deportation. Velasco is an independent contractor who provides document preparation, investigative work, translations, notary services, and paralegal work for Paquin and other criminal defense attorneys.[10] Velasco is not Paquin's employee and does not share office space with him. For about four years, he hired Velasco to help on specific cases. In addition, Velasco occasionally presented Paquin's blank retainer agreements to potential clients. Paquin described this practice to OCTC's investigator in a letter dated December 6, 2017: "Jenny Velasco has my general retainer on file, should she encounter any potential clients. The standard practice is that she gives a blank retainer to a potential client for them to review, then set [*sic*] up a meeting in our office once they have had sufficient time to read and understand the contents,

[6] Rule 4-100(B)(3) requires lawyers to maintain complete records of client funds and to provide appropriate accounts to clients regarding their funds.

[7] Rule 1-320(A) provides that a lawyer shall not share legal fees with a person who is not a lawyer.

[8] Rule 3-700(D)(2) requires lawyers to promptly refund any part of a fee paid in advance that has not been earned.

[9] We base the factual background on trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).) We also give great weight to the judge's credibility findings. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [judge best suited to resolve credibility issues because judge alone is able to observe witnesses' demeanor and evaluate their veracity firsthand].)

[10] Velasco did not testify at trial. All facts relating to her were established by other witnesses or exhibits.

raise the retainer payment and prepare any questions for counsel." At trial, Paquin testified that Velasco had access to his retainer, but only presented it to potential clients on a few occasions.

Cruz's partner contacted Velasco on Velasco's personal cell phone. On September 20, 2016, Cruz's partner and Velasco exchanged text messages, and Velasco emailed her a retainer agreement with the heading "Ocean View Law Group" and the law firm's contact information. The agreement included a blank signature line with Paquin's name and "Attorney at Law." Paquin testified that the form and format of that retainer agreement were different from his standard retainer agreement, he did not authorize Velasco to provide the agreement to Estrada, and he did not see the agreement until it was presented to him during the disciplinary investigation.[11] Cruz's partner returned the agreement to Velasco with Cruz's signature, dated October 3, 2016. On October 5, Cruz's partner deposited $1,500 into an account at Wells Fargo Bank, as instructed by Velasco. The account belonged to Velasco or her sister and was not associated with Paquin's law office. Paquin did not receive any money from Cruz or his partner and he never spoke to either of them.

In October 2016, as a favor to Velasco, Paquin requested Cruz's criminal case file from the court clerk in Compton. He reviewed the file and determined that Cruz would have to personally appear to have the warrant issued against him expunged and quashed, because it was a felony. He informed Velasco that there was nothing to be done to help Cruz. He also told her that a sentence reduction pursuant to Proposition 47 might be possible and explained to her how to find the necessary Judicial Council form related to that.

[11] The hearing judge analyzed Paquin's statement to the State Bar's investigator versus his testimony at trial regarding his practice of allowing Velasco access to his retainer agreement, and found that Velasco did not steal Paquin's retainer agreement. She also found that Paquin credibly testified that he was not involved with and knew nothing about Velasco's initial agreement with Cruz, and that Velasco's actions were inconsistent with Paquin's stated office policy requiring that he meet with clients in person before he would sign the retainer agreement. We accord great deference to findings based on credibility evaluations. (*McKnight v. State Bar*, *supra*, 53 Cal.3d at p. 1032.)

Between September 20, 2016, and February 8, 2017, Cruz's partner continued to communicate with Velasco via text. In the texts, Velasco referred to the lawyer on the case as "David." Velasco promised Cruz's partner that she would set up a conference call with "David," but she never did. In these messages, Velasco indicated to Cruz's partner that she was working with Paquin on Cruz's matter. In February 2017, Velasco met with Paquin and his office manager (Kevin Margulis) at the Metro Courthouse. After Paquin left to make a court appearance, Velasco asked the office manager if Paquin could help her with Cruz's partner's matter. She showed him only the second page of the retainer agreement that was attached to a clipboard she was holding and disclosed that Cruz's partner still owed $500 on the matter. The office manager asked to see the entire agreement, but Velasco refused, pulling the clipboard away so he could no longer see the agreement. In a later meeting, Paquin advised Velasco that he would consider a reduced fee of about $2,000, but would need to be retained and paid before he could represent Cruz. Velasco never gave Paquin or his office manager any documents related to the case. On February 8, Velasco sent a text to Cruz's partner, saying "I have been removed from the case. Kevin has taken over."

On February 10, 2017, Cruz's partner contacted the office manager by text, asking about the case and who took it over. The office manager responded, "We took over/I'm catching up what's been done, and will be caught up by Monday!!!" He testified that he expected to obtain the case file from Velasco by Monday, but that she never provided any documents. Cruz's partner followed up with texts in March, April, and May, asking the office manager for an update and to provide her with "the paperwork." On May 10, the office manager texted Cruz's partner that Velasco had notified him that $500 was still owed before any documents would be filed. Cruz's partner responded that she had already paid $1,500 and received nothing, and she wanted to know how Velasco spent the money. On May 11, the office manager replied, "I understand. I

will get it done today." Cruz's partner again texted him on May 16, asking if he had sent her the paperwork. He answered the same day: "I'm getting the contract you signed, and will fax it tomorrow." The office manager never obtained a copy of the retainer agreement.

On July 3, 2017, the office manager responded to Cruz's partner's text asking for an update by stating, "I old [*sic*] you if you read your contact [*sic*] 500 more dollars are due, if you want to ask [Velasco] about this, please call her to confirm." After Cruz's partner indicated she would not pay more money until she got the paperwork, the office manager texted, "you know, I'm going to give this back to [Velasco], you deal with her, we have your signed fee reduction, but she handed this off to us, and 500 was in contract, and you don't control the terms of this it's in the contract." Cruz's partner replied, "First of all she was taken of [*sic*] the case [because we asked you] and [you] took over the case to help us . . . ."

At some point between December 16, 2016, and June 21, 2018, Cruz either self-deported or was deported. Paquin never performed any work on his case. He testified that he told the office manager to answer Cruz's partner's inquiries by advising her that the firm did not represent her until it had a signed retainer agreement and payment. The office manager testified that he relayed this information to Cruz's partner multiple times via phone. However, we adopt the hearing judge's finding that this testimony is contradicted by the numerous text messages from the office manager that created the impression that the law firm was working on the case.

III. CULPABILITY

A. No Clear and Convincing Evidence Exists of Attorney-Client Relationship Between Cruz and Paquin

A threshold issue in this matter is whether Paquin established an attorney-client relationship with Cruz. The hearing judge found that an attorney-client relationship was not formed between Cruz and Paquin based on the October 3, 2016 retainer agreement signed by Cruz. We agree. OCTC argues that an attorney-client relationship was created because Paquin

knew that Velasco sometimes presented his blank retainer agreement to potential clients, and because he checked on Cruz's court file for Velasco. Paquin asserts that no attorney-client relationship existed because he never communicated with Cruz, no evidence exists that Cruz had a reasonable belief that Paquin represented him, and Paquin did not know that Velasco had presented his retainer agreement to Cruz's partner for Cruz's signature.

1. No Express Contract

An attorney-client relationship "can only be created by contract, express or implied." (*Koo v. Rubio's Restaurants Inc.* (2003) 109 Cal.App.4th 719, 729.) The hearing judge found that the only potential express agreement was the retainer agreement that appeared to be signed by Cruz, which contains Paquin's name but not his signature. Finding it undisputed that Paquin never met with Cruz nor signed the retainer agreement, the judge found that no express agreement existed. We agree.

OCTC argues that Paquin somehow undertook the agreement that Velasco presented to Cruz's partner for Cruz's signature. However, Paquin credibly testified that he did not authorize Velasco to present the agreement to Cruz, it differed in form and format from his standard retainer, and he did not see the agreement until OCTC presented it to him during the disciplinary investigation. Given that Paquin's testimony was found credible by the hearing judge, we find no express contract existed to form an attorney-client relationship between Paquin and Cruz. (See *McKnight v. State Bar*, *supra*, 53 Cal.3d at p. 1032 [great deference given to findings based on evaluation of credibility].) OCTC did not present clear and convincing evidence to refute Paquin's testimony that he neither saw nor knew about the signed retainer agreement. In State Bar disciplinary matters, all reasonable doubts will be resolved in favor of the respondent and, where equally reasonable inferences may be drawn from a proven fact, the inference leading to

innocence must be chosen. (*Himmel v. State Bar* (1971) 4 Cal.3d 786, 793–794; *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 240.)

2. No Implied Contract

An implied contract is one where the existence and terms of the agreement are manifested by conduct. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1732; see also *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 444 [contract between attorney and client can arise by implication]; Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2018) ¶ 3:45 [factors relevant to determining implied attorney-client relationship include whether prospective client disclosed confidential information; whether client reasonably believed he or she was consulting attorney for legal advice; whether attorney's actions or statements led client to believe attorney was representing him or her; whether client paid fees].) The hearing judge found that the text communications between Paquin's office manager and Cruz's partner were sufficient to lead Cruz and his partner to believe that they were being represented by Paquin. OCTC agrees. Paquin asserts that no implied attorney-client relationship was formed with Cruz because neither he nor his office manager had any communications with Cruz. Cruz did not testify, so the only evidence in the record about whether Cruz reasonably believed that Paquin represented him is the signed retainer agreement.

Given the uncontroverted finding that Paquin had no contact with Cruz,[12] and the limited evidence regarding Cruz's belief that Paquin was his attorney, OCTC has failed to meet its burden in proving an implied contract between Cruz and Paquin by clear and convincing evidence. (See *Responsible Citizens* v. *Superior Court*, *supra*, 16 Cal.App.4th at pp. 1732–1733 [kind and extent of contacts between parties determines whether there is implied contract manifested by conduct].)

[12] We note that Paquin and his office manager had no contact information for Cruz and thus no way to communicate directly with him. They also could not ensure that messages would be conveyed to Cruz by his partner.

To the extent that OCTC argues that doubts about Paquin's testimony exist, we must resolve these in favor of Paquin where no evidence can be found in the record to disprove them. (*Himmel v. State Bar*, *supra*, 4 Cal.3d at pp. 793–794; *In the Matter of Respondent H*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 240.) Further, to the extent that the hearing judge concludes, and OCTC agrees, that Cruz's partner's communications with Paquin's office manager established an attorney-client relationship with Cruz, this argument also fails because no evidence exists in the record that Cruz's partner was authorized to speak for Cruz in February 2017. (Evid. Code § 951 [client is person who, directly or through authorized representative, consults lawyer for purpose of retaining lawyer]; see also *Zimmerman v. Superior Court* (2013) 220 Cal.App.4th 389, 401 [agency relationship is question of fact that must be established with evidence].)

B. The NDC Did Not Allege Attorney-Client Relationship with Cruz's Partner

Each of the seven counts in the NDC allege misconduct based on an attorney-client relationship between Cruz and Paquin. Although OCTC's trial approach shifted from Cruz being the client to contending that Cruz's partner was also a client, OCTC never amended the NDC to reflect that contention. (See *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171–172 [NDC must articulate specific conduct at issue, correlating alleged misconduct with rule allegedly violated]; *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35 [as general rule, attorney may not be disciplined for violation not alleged in NDC].)

C. Count One—Rule 3-110(A) (Failure to Perform with Competence)
Count Two—Rule 3-110(A) (Failure to Supervise)

Having found an attorney-client relationship between Paquin and Cruz based on the office manager's text communications with Cruz's partner, the hearing judge found that Paquin was culpable of failing to perform and failing to supervise his office manager because no services were performed for Cruz or his partner between February and July 2017. However, we find no culpability because OCTC did not establish an express or implied attorney-client

relationship with Cruz, and the NDC did not allege that Cruz's partner was Paquin's client. Further, we note the unrebutted testimony by Paquin and his office manager that Paquin regularly met with his office manager and appropriately supervised him as to his communications with Cruz's partner. Therefore, we dismiss counts one and two with prejudice.

D. Count Three—Rule 1-300(A) (Aiding Unauthorized Practice of Law)

Citing *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, OCTC argued that, by failing to supervise Velasco's and the office manager's actions, Paquin was culpable for aiding and abetting UPL. The hearing judge found that Velasco's access to Paquin's retainer agreement did not constitute an initial client consultation that could result in UPL. The judge distinguished *In the Matter of Scapa and Brown*, noting that the attorneys in that case did more than just allow non-attorney staff access to their retainer agreements. Instead, the non-attorney staff explained complex details of the agreements, and signed clients up before they had consulted with the attorneys. (*Id.*, at p. 651.)

Nonetheless, the hearing judge found that Paquin's failure to supervise his office manager constituted UPL because the office manager conducted an extended initial legal consultation with Cruz's partner. We disagree and find that the office manager's series of text messages with Cruz's partner was not an extended initial legal consultation. The contents of the messages do not contain any legal analysis or even questions about Cruz's legal issue. Rather, they appear to be a series of miscommunications about whether the office manager would be able to obtain the details of the case from Velasco, and Cruz's partner asking for paperwork that neither Paquin nor his office manager possessed. We find that this does not constitute a legal consultation resulting in culpability for aiding UPL. (Cf. *In the Matter of DeClue* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 437, 445 [attorneys' complete failure to supervise employees, including allowing them to provide legal advice, enter into retainer agreements, and charge related fees, supports finding of

culpability for aiding and abetting UPL]; *In the Matter of Huang* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 296, 303–304 [attorney culpable of aiding and abetting UPL where he delegated all loan modification work to staff without supervision]; see also In *the Matter of Scapa and Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 651–652 [where non-attorneys explained complex retainer agreement to clients and obtained their signature on agreements prior to consultation with attorneys, attorneys were culpable of moral turpitude for failing to comply with client solicitation rules].) Therefore, we dismiss count three with prejudice.

E. Count Four—Section 6068, subdivision (m) (Failure to Respond to Client Inquiries)

OCTC alleged in count four that Paquin violated section 6068, subdivision (m), by failing to respond to inquiries made by Cruz or on his behalf between October 3, 2016 and July 3, 2017. The hearing judge first limited the scope of communications at issue to those occurring after February 10, 2017, when Cruz's partner first contacted Paquin. The judge then found that OCTC failed to prove this count by clear and convincing evidence because the office manager did respond to several text messages from Cruz's partner, and also testified that he had multiple phone conversations with her. The judge dismissed the count with prejudice. On review, OCTC did not challenge the dismissal. We affirm the dismissal of this count as supported by the evidence.

F. Count Five—Rule 4-100(B)(3) (Failure to Render Accounts of Client Funds)
Count Six—Rule 1-320(A) (Sharing Fees with Non-Lawyer)
Count Seven—Rule 3-700(D)(2) (Failure to Refund Unearned Fees)

The hearing judge dismissed counts five, six, and seven because each related to the $1,500 that Cruz's partner paid Velasco. Since the judge found that Paquin never received any fees, she found no culpability for failure to render accounts of client funds, failure to refund unearned fees, or sharing fees with a non-lawyer. OCTC argued that the judge should have found culpability on all three counts because Paquin had formed an attorney-client relationship with Cruz's partner. Since we do not find that Paquin had an attorney-client relationship with

Cruz or his partner and agree that Paquin did not receive any of the $1,500, we affirm the hearing judge's dismissal of these counts.

IV. ORDER

As David Craig Paquin is not culpable of the charges alleged in the NDC, we order this case dismissed with prejudice.

Paquin may move for reimbursement of costs in accordance with section 6086.10, subdivision (d), and rule 5.131 of the Rules of Procedure of the State Bar.