PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

FILED APRIL 3, 2012

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 10-O-02758
	)	
JOSEPH ANTHONY PARKS,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 160473.	)	
	)	

During a two-year period, Joseph Anthony Parks misappropriated over $37,000 from seven clients and a credit union. He failed to notify his clients that he received their settlement funds, took these funds for his own use, lied to them about the status of the funds, and failed to promptly repay them. Although all clients were ultimately paid, the delay in payment was between two and fourteen months. He also issued a check to a client when he knew he had insufficient funds in his account and then delayed repaying the credit union that honored the check for over five months. Although this is Parks's second disciplinary matter for misappropriating client funds since his admission to practice law in 1992, the hearing judge did not recommend disbarment. Instead, the judge found Parks's mitigating factors to be compelling, particularly the emotional difficulties he was suffering at the time of the misconduct, and recommended a three-year actual suspension to continue until he established his rehabilitation, fitness to practice, and learning and ability in the law in a standard 1.4(c)(ii) proceeding.[1]

[1] Unless otherwise noted, all further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

The State Bar seeks review and requests disbarment. It asserts the hearing judge assigned too much mitigating weight to Parks's emotional difficulties and failed to find the proper factors in aggravation. The State Bar argues the standards and case law compel Parks's disbarment because his misconduct is similar to his prior record and his mitigation is not compelling. Parks asks us to affirm the hearing judge's recommendation.

The issue before us is the appropriate level of discipline since neither party disputes the culpability findings. A misappropriation case of this amount generally calls for disbarment unless "the most compelling mitigating circumstances clearly predominate." (Std. 2.2(a).) We have independently reviewed the record (Cal. Rules of Court, rule 9.12.), and we find that Parks failed to present compelling mitigation. His emotional difficulties cannot be considered mitigating because he has only begun therapy and has failed to show any meaningful period of rehabilitation. We also give less weight than the hearing judge did to Parks's cooperation, good character and remorse, and find several significant aggravating factors. Ultimately, we conclude that disbarment is necessary to protect the public, the courts and the legal profession.

I. FINDINGS OF FACT SUPPORT SERIOUS CULPABILITY FINDINGS

The parties stipulated to all material facts. We adopt and summarize the uncontested culpability findings below, adding relevant facts from the record.

A. Parks Misappropriated Over $37,000

From December 2008 through September 2009, Parks misappropriated $33,217.17 from seven clients. Essentially, he deposited settlement funds into his client trust account (CTA) and improperly withdrew the clients' portions of the settlement for his own benefit. Parks testified that he took the money to meet his family's financial needs. The dates and amounts of the seven misappropriations were as follows:

12/8/08 Parks deposited $8,900 in his CTA for James G and was required to maintain $4,000 in trust. By December 31, 2008, he misappropriated $3,773.55. Parks paid James G on January 26, 2009.

1/16/09 Parks deposited $19,500 in his CTA for James O and was required to maintain $11,203.54 in trust. By January 30, 2009, he misappropriated $10,931.28. Parks paid James O on March 4, 2009.

2/11/09 Parks deposited $7,500 in his CTA for Susan R and was required to maintain $4,500 in trust. By October 20, 2009, he misappropriated $4,436.56. Parks paid Susan R in April 2010.

2/27/09 Parks deposited $15,000 in his CTA for Tilyn B and was required to maintain $5,000 in trust. By October 20, 2009, he misappropriated $4,936.45. Parks paid Tilyn B on October 21, 2009.

4/27/09 Parks deposited $5,500 in his CTA for Sheila T and was required to maintain $3,300 in trust. By April 30, 2009, he misappropriated $3,251.55. Parks paid Sheila T on March 31, 2010.

7/6/09 Parks deposited $15,000 in his CTA for Patricia T and was required to maintain $5,000 in trust. By July 31, 2009, he misappropriated $4,951.23. Parks paid Patricia T in September 2009.

9/3/09 Parks deposited $3,900 in his CTA for Sheila M and was required to maintain $1,000 in trust. By September 30, 2009, he misappropriated $936.55. Parks paid Sheila M on April 1, 2010.

Parks failed to notify Sheila T and Sheila M that he had received their settlements, waited eleven and seven months, respectively, before distributing their funds, and he lied to them about the reason for the delay. Although all clients were ultimately paid, the delay between receipt of the funds and payment was between two and fourteen months. And some clients were paid with settlement funds subsequently received on behalf of other clients.

Parks also attempted to pay one client with an insufficient funds (NSF) check drawn on his personal checking account. In October 2009, he issued a $5,000 check from his CTA and deposited it into his personal account at Redwood Credit Union. On the same day, he purchased a $5,000 cashier's check from his personal account to pay Tilyn B, to whom he had owed the money since February 2009. Parks knew his CTA and his personal account held insufficient

funds to cover the cashier's check; he had approximately $64 in his CTA and $394 in his personal account. On October 29, 2009, the credit union notified Parks that his CTA check was returned for insufficient funds, resulting in a $4,605.61 misappropriation from Redwood Credit Union. Parks did not repay the credit union until April 28, 2010 – after he was contacted by the State Bar.

Finally, from November 2008 through December 2009, Parks also commingled his personal money with his CTA funds. He made at least six deposits of personal funds into his CTA, totaling $6,030.

B. Parks Committed Serious Trust Account Violations

Clear and convincing evidence supports the hearing judge's findings that Parks is culpable of all seven counts charged in the First Amended Notice of Disciplinary Charges:

Count One	Failing to maintain funds received for the benefit of his clients in his CTA (Rules Prof. Conduct, rule 4-100(A)[2]);
Count Two	Committing acts of moral turpitude by misappropriating $33,217.28 from his clients (Bus. & Prof. Code, § 6106[3]);
Count Three	Committing acts of moral turpitude by knowingly issuing the insufficient fund check from his CTA and misappropriating $4,605.61 from the credit union (§ 6106);
Count Four	Improperly commingling his personal funds in his CTA (rule 4-100(A));
Count Five	Failing to promptly notify two clients he received their funds (rule 4-100(B)(1));
Count Six	Failing to promptly pay clients their funds (rule 4-100(B)(4)); and
Count Seven	Committing acts of moral turpitude by knowingly making false statements to two clients regarding their settlement funds (§ 6106).

[2] All further references to "rule(s)" are to this source unless otherwise stated.

[3] All further references to "section(s)" are to this source unless otherwise stated.

II. AGGRAVATION OUTWEIGHS MITIGATION

The offering party bears the burden of proof for aggravating and mitigating circumstances. The State Bar must establish aggravating circumstances by clear and convincing evidence (std. 1.2(b)), while Parks has the same burden to prove mitigating circumstances (std. 1.2(e)).

A. Three Factors in Aggravation

The hearing judge found three factors in aggravation: (1) prior discipline; (2) multiple acts of misconduct; and (3) client harm. We agree with the first two factors, but do not find significant harm for purposes of aggravation. However, we find additional aggravation based on Parks's concealment and dishonesty surrounding his misconduct. Overall, the serious aggravating factors outweigh the mitigation.

1. Prior Discipline (Std. 1.2(b)(i))

In 2004, the Supreme Court imposed a five-month actual suspension on Parks for settling a client's matter without authorization in 2001, failing to notify the client of the settlement, lying to the client about the case status, and misappropriating approximately $12,377 from the client. Parks cooperated in the matter and expressed remorse. He also received mitigating credit for not having any prior discipline. As discussed below, Parks's prior discipline strongly aggravates the case before us because the present misconduct is essentially identical to, but more extensive than, the previous misconduct.

2. Multiple Acts (Std. 1.2(b)(ii))

For almost two years, Parks committed multiple acts of misconduct by repeatedly misappropriating client funds, lying to his clients, commingling personal funds in his CTA, and issuing an NSF check. We consider the duration and extent of his misconduct to be a significant aggravating factor.

3. Dishonesty and Concealment (Std. 1.2(b)(iii))

During trial, Parks admitted that he lied to at least four additional clients about delays in distributing their settlement funds. He also admitted that he never told anyone he was concealing his misappropriations by using the funds of one client to pay another. Parks's dishonesty and concealment are serious aggravating factors.

4. No Client Harm (Std. 1.2(b)(iv))

The hearing judge found client harm because Parks did not promptly disburse funds. However, this fact forms the basis for Parks's rule 4-100(B)(4) violation, and the State Bar failed to provide any additional evidence to establish specific harm the individual clients suffered. A failure to promptly disburse client funds does not establish *significant* client harm as required under the standard, especially where there is no testimony from the clients or any other supporting evidence. (See *Kelly v. State Bar* (1991) 53 Cal.3d 509, 519-520 [in absence of additional facts, attorney's failure to promptly pay client funds constitutes genuine monetary injury, albeit not particularly severe or grievous].)

B. Three Factors in Mitigation

The hearing judge found four mitigating factors: (1) extreme emotional difficulties; (2) cooperation; (3) good character; and (4) remorse. We do not agree that Parks's emotional difficulties constitute mitigation, and give nominal weight to the three remaining factors.

1. Extreme Emotional Difficulties (Std. 1.2(e)(iv))

Standard 1.2(e)(iv) provides that an attorney may receive mitigating credit if he or she suffered from (1) extreme emotional difficulties at the time of the misconduct, (2) that were directly responsible for the misconduct, (3) provided he or she no longer suffers from such difficulties. The State Bar argues that the hearing judge improperly assigned considerable weight to Parks's emotional difficulties since he failed to satisfy any of the three elements. We

find that Parks sufficiently satisfied the first two prongs (i.e., diagnosed emotional difficulties and nexus), but failed to show any meaningful rehabilitation.

Parks established that he suffered from emotional difficulties that impaired his judgment and either "caused or contributed to [his] misconduct . . . ." (*In re Naney* (1990) 51 Cal.3d 186, 197.) He presented expert testimony from his treating psychiatrist, Dr. Barry Pierce, a specialist in treating depression and anxiety. Dr. Pierce began treating Parks in February 2011 and diagnosed him with dysthymic (low-grade depression), and a characterologic disorder resulting from his unmet dependency needs. These conditions existed at the time Parks committed the misconduct, impaired his judgment and, according to Pierce, "contributed to [Parks's] misuse of funds." He characterized Parks as someone who is "treatment ready" and has a "good" prognosis for overcoming his condition.

But Parks failed to prove clearly and convincingly that he has his emotional difficulties under control. "A psychological disorder that has caused or contributed to misconduct is mitigating only if the attorney establishes . . . that he has so overcome or controlled the disorder that it is unlikely to cause further misconduct. [Citations.]" (*In re Naney, supra,* 51 Cal.3d at p. 197.) As his therapist noted, Parks has "just barely begun therapy." Parks started therapy three months before trial and had completed only seven weekly sessions. Dr. Pierce cautioned that the average treatment for someone like Parks is between two and three years of, at least, weekly therapy. Absent evidence of "successful therapeutic rehabilitation or a strong prognosis for future rehabilitation," we cannot be sure Parks will avoid similar mistakes in his practice. (*Ballard v. State Bar* (1983) 35 Cal.3d 274, 289.) We therefore do not assign mitigation credit for his emotional difficulties. (*In re Lamb* (1989) 49 Cal.3d 239, 246 [due to serious nature of attorney's felony conviction for posing as husband to take bar exam, proof of complete,

sustained recovery and rehabilitation had to be exceptionally strong before emotional difficulties could serve as mitigating circumstance].)

2. Cooperation (Std. 1.2(e)(v))

Parks cooperated with the State Bar by stipulating to material facts. While his willingness to stipulate to the trust account violations certainly reduced the time of trial, the facts were easily provable based on the CTA records. We therefore assign limited mitigation for cooperation. (Compare *In the Matter of Silver* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 902, 906 [attorney afforded substantial mitigation for cooperation by stipulating to facts not easily provable].)

3. Good Character (Std. 1.2(e)(vi))

The State Bar does not contest the hearing judge's finding that Parks's seven character witnesses demonstrated his good character. These witnesses, consisting of a dentist, psychologist, salesman, counselor, business owners, and Parks's wife, credibly testified that Parks is a fair, intelligent and compassionate person. Two of the witnesses had hired Parks in the past, believed he was a good attorney, and would hire him again. We assign limited weight to this mitigating evidence because it was neither extraordinary nor representative of a wide range of references in the general *and* legal community, as required by the standard. (See *In the Matter of Kittrell* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 615, 624 [little mitigation weight for two witnesses who were social friends]; *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387 [limited mitigation weight for three client and three attorney witnesses].)

4. Remorse (Std. 1.2(e)(vii))

We also agree that Parks has shown remorse and a willingness to accept responsibility for his misconduct. During the trial, he repeatedly expressed remorse and presented evidence that he

has begun to address his emotional problems. He also paid all clients who were owed funds.[4] However, the weight we give to his repayment efforts is significantly diminished because at times he used other client funds to make the payments. (*In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185 [no credit for restitution where funds used were funds which respondent had no right to use].)

III. MISCONDUCT CALLS FOR DISBARMENT

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. 1.3.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

Our analysis begins with the standards. While we recognize that they are not binding on us in every case, the Supreme Court has instructed that we should follow them "whenever possible" (*In re Young, supra,* 49 Cal.3d at p. 267, fn. 11), and give them great weight to promote "the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91, internal quotations and citation omitted.) Several standards call for suspension to disbarment.[5] But we focus on standard 2.2(a), which is the most severe and deals specifically with misappropriations.

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[4] We grant Parks's motion to strike the State Bar's references in its opening brief to Exhibit 6 (a spreadsheet summarizing Parks's CTA transactions), which was never admitted into evidence.

[5] Standards 1.6(a), 1.7(a), 2.2(b) and 2.3 also apply: 1.6(a) directs that when multiple acts of misconduct call for different sanctions, we apply the most severe one; 1.7(a) provides that if a "member has a record of one prior imposition of discipline . . . the degree of discipline imposed in the current proceeding shall be greater . . . . "; 2.2(b) calls for a minimum suspension of three months for trust account violations; and 2.3 calls for actual suspension or disbarment for

Under standard 2.2(a), misappropriation of entrusted funds calls for disbarment *unless* "the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate . . . ." Neither exception applies. Parks misappropriated more than $37,000, a significant sum. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367-1368 [misappropriation of $1,355.75 considered significant].) He also failed to establish that the "most compelling mitigating circumstances clearly predominate." (Std. 2.2(a).)

Perhaps most importantly, Parks's mitigation is not compelling when weighed against his prior discipline for identical misconduct – misappropriating significant client funds. And even though Parks completed the State Bar Ethics School and Client Trust Accounting School as required in his prior discipline, he began misappropriating funds again just two years after his probation ended. He has taken commendable steps in addressing his mental health issues, but his rudimentary rehabilitation does not assure us that he will refrain from misappropriating client funds in the future. Under the circumstances, the public and the legal profession are best protected if Parks is required to establish his sustained rehabilitation in a reinstatement proceeding following disbarment. (*In re Lamb, supra,* 49 Cal.3d at p. 248 [reinstatement proceeding is procedure to demonstrate clear rehabilitation absent present showing of complete and sustained rehabilitation].) Looking to comparable case law, we conclude disbarment is the appropriate discipline.[6]

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acts of moral turpitude depending on the extent of harm and degree to which the misconduct relates to the practice of law.

[6] *Grim v. State Bar* (1991) 53 Cal.3d 21 (attorney disbarred for misappropriating $5,546 from client, despite good character, candor and cooperation); *Kaplan v. State Bar* (1991) 52 Cal.3d 1067 (attorney disbarred for misappropriating $29,000, despite 11 years of practice without priors, payment of restitution, severe emotional problems, and good character); *In the Matter of Spaith* (1996) 3 Cal. State Bar Ct. Rptr. 511 (attorney disbarred for misappropriating $40,000 and lying to client, despite emotional problems, repayment of money, 15 years of

IV. RECOMMENDATION AND ORDER

We recommend that Joseph Anthony Parks, Member No. 160473, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys admitted to practice in this state.

We recommend that Parks 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.

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

In accordance with section 6007, subdivision (c)(4), it is ordered that Parks be involuntarily enrolled as an inactive member of the State Bar of California effective 30 calendar days after service of this opinion and order. (Rules Proc. of State Bar, rule 5.111(D)(1).)

REMKE, P. J.

WE CONCUR:

EPSTEIN, J.

PURCELL, J.

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discipline-free practice, candor and cooperation by stipulating to culpability, community service and good character).