PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed September 22, 2015

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 11-O-19427
	)	
ERIC BRYAN SEUTHE,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 90269.	)	
	)	

We are asked to decide the narrow issue of whether the State Bar Court hearing judge correctly dismissed this disciplinary proceeding after the Office of the Chief Trial Counsel of the State Bar (OCTC) presented its case, but before respondent Eric Bryan Seuthe presented his case. For the reasons below, we have decided that the hearing judge's order was incorrect, and we remand this case to the Hearing Department for further proceedings as set forth *post*.

I. PROCEDURAL BACKGROUND AND FACTS.

Because this review comes to us in the relatively infrequent situation of a dismissal prior to the respondent's case presentation, we briefly review the procedural background as well as key facts.

In December 2012, OCTC filed a Notice of Disciplinary Charges (NDC), charging Seuthe with ethical misconduct on five occasions in two matters, involving, respectively, clients Jane Finstrom and Margie Peraza.

The hearing judge granted OCTC's motions to dismiss all three counts charged in the *Peraza* matter and one of the two counts charged in the *Finstrom* matter. The remaining count in the *Finstrom* matter charged Seuthe with failing to provide an appropriate accounting of trust funds which came into his possession, as required by rule 4-100 (B)(3) of the Rules of

Professional Conduct.[1] The basic facts adduced from OCTC's case, which included testimony of Seuthe when called as an OCTC witness, showed that Seuthe represented Finstrom, starting in 2009, in recovering damages after she was seriously injured in a 2008 auto accident with an uninsured, intoxicated driver. After OCTC presented its case, Seuthe moved to dismiss the case. In a decision filed February 5, 2014, the hearing judge granted the motion and dismissed this charge with prejudice.

A. $5,000 Recovery of Medical Pay Coverage

On February 19, 2009, Finstrom's insurer sent Seuthe a $5,000 draft for her medical payment coverage. Seuthe testified that "he believed" that he deposited this sum into his trust account but, since he did not consider his handling of these medical payment funds as part of OCTC's charges against him, he stated that he was not prepared to testify how the funds were disbursed. It is undisputed that there was no accounting produced that referred to these medical pay funds. According to Finstrom, her signature endorsement of the $5,000 check was not in her handwriting. When OCTC sought to question Finstrom further on whether she had endorsed the insurer's check for this $5,000 sum, the hearing judge directed OCTC to avoid pursuing this line of questioning as the judge considered it outside the charges. Consequently, the hearing judge found that the record did not determine the disposition of those funds.

B. $115,000 Recovery as a Result of Arbitration

During early 2009, Finstrom's insurer refused to offer Seuthe what he considered an adequate amount to settle Finstrom's damages claim. Seuthe won an arbitration award against the insurer for $115,000 in uninsured motorist coverage for Finstrom. On July 29, 2009, the insurer sent Seuthe these funds.

[1] All further references to rules are to this source unless noted otherwise. As pertinent to this case, rule 4-100(B)(3) requires attorneys to maintain complete records of all funds, securities and other properties of a client coming into the attorney's possession and "render appropriate accounts to the client regarding them."

On August 9, 2009, Seuthe sent Finstrom his proposed distribution of the $115,000 proceeds. The accompanying letter omitted any reference to Seuthe's distribution of the $5,000 in medical pay funds he received in February 2009. It stated that Seuthe's fees shall be $46,000, that the amount of costs Finstrom was liable for would be reduced to $8,000, and that Seuthe would hold back $11,000 to negotiate a reduction of billings of three medical providers in Finstrom's case. The remaining $50,000 would be disbursed to Finstrom. Seuthe requested that Finstrom show her agreement to this disposition by signing the letter, and she did so.

After receiving the $115,000, Seuthe represented Finstrom in several other matters: an action against Finstrom's insurer for alleged "bad faith" refusal to resolve the uninsured motorist claim; a medical malpractice action against a physician who performed surgery on Finstrom; and a medical malpractice action against the University of California Los Angeles Hospital (UCLA Hospital). Seuthe testified that he had Finstrom's approval to apply to the costs in these cases those funds from the $115,000 not needed to satisfy medical providers' fees, which were negotiated to lower amounts.

As Finstrom's action against UCLA Hospital approached its trial date, Seuthe became ill. This made it necessary for Finstrom to find new counsel to try the matter. She hired Gary Brown, Esq., who, on June 22, 2011, requested that Seuthe provide an accounting as to the funds he was holding to negotiate with medical care providers. Finstrom sought this accounting and the return of the unused portion of the withheld funds so that she could control their distribution to the medical providers. She also cited the approximate two-year passage since Seuthe's receipt of the funds. Although Seuthe offered to provide Brown an accounting and an itemization of costs incurred earlier in the UCLA Hospital case as soon as his accountant returned in mid-July 2011, Brown testified that he never received such an accounting. Seuthe testified that he gave an oral accounting to Brown's secretary. He conceded that it was not promptly after June 2011, but

within about three to six months. The record contains no documentary evidence of such an accounting, but does include a letter Seuthe addressed to Brown in October 2011, that Seuthe held $2,000 in trust to pay one of the medical providers which held a lien of $1,992.

The hearing judge determined that Seuthe had accounted adequately to Finstrom in August 2009, as to the distribution of her $115,000 recovery, including the $11,000 of funds held back for negotiation with medical providers. In the judge's view, there was no reason to require Seuthe to re-distribute to Brown the earlier accounting, especially as Seuthe had informed Brown of Finstrom's consent that Seuthe should be able to satisfy costs incurred for Finstrom in later litigation from the withheld funds after medical provider bills were resolved. The hearing judge therefore dismissed this proceeding upon Seuthe's motion prior to Seuthe's presentation of his defense case, and OCTC's appeal followed.

II. THE HEARING JUDGE ERRED IN DISMISSING THIS CASE

A. The $5,000 Medical Pay Proceeds

As OCTC's case showed that Seuthe failed to provide an accounting of the $5,000 medical pay funds, the hearing judge erred in dismissing the matter. Seuthe's alleged failure to account for this sum was within the terms of the NDC. The NDC expressly alleged the disbursement of this $5,000, the request in June 2011 by Finstrom's then-counsel Brown to Seuthe to account for all funds received, and that Seuthe had not provided Finstrom or Brown with an accounting. We further find that the hearing judge erred in instructing OCTC not to question Finstrom about this subject.

At oral argument before us, Seuthe contended that OCTC's pretrial statement did not place in issue the lack of an accounting for this $5,000 sum. We disagree with Seuthe's claim. Nothing in OCTC's statement limited the disputed issues to an accounting of only the $115,000 arbitration award. Rather, OCTC framed the disputed issues as to whether Seuthe rendered an

appropriate accounting of all funds received by him for Finstrom. The $5,000 medical pay funds are recited as one of the two sums of money Seuthe received for Finstrom.

Finally, the hearing judge's correct finding that this record fails to show the disposition of these funds emphasized the import of an appropriate accounting to Finstrom. Had Seuthe rendered such an accounting, the court could have easily resolved the disposition of these trust funds years ago.

B. **The $115,000 Uninsured Motorist Arbitration Award**

As to the $115,000 arbitration award, the issue of whether Seuthe rendered an appropriate accounting turns essentially on whether his August 2009 proposed distribution statement, and his October 2011 letter to Brown as to the disposition of $2,000 of funds withheld from Finstrom's recovery, were appropriate accountings. We hold that they were not.

Rule 4-100(B)(3) does not by its terms specify the form or necessary elements of an appropriate accounting. However, this rule does not exist in isolation. Rather, it is an integral part of all of the duties prescribed by rule 4-100 for members of the Bar when handling client trust funds and property. (See *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 758 [Review Department consulted other provisions of trust account rules when determining what property was required to be subject of accounting].)

Rule 4-100(A) defines the nature of client funds which must be placed in a trust account and not be commingled with funds belonging to the member. Rule 4-100(B)(3) requires members to maintain complete records of all client property coming into the attorney's or law firm's possession. The same subdivision requires those records to be preserved for at least five years after the attorney or firm has made final distribution of such funds. The attorney's duty to provide appropriate accounts follows immediately those requirements of rule 4-100(B)(3), which we just noted, that the attorney maintain prescribed records. Viewing the "appropriate accounts"

requirements of rule 4-100(B)(3) as part of the entirety of trust fund regulations, we hold that, at a minimum, an appropriate account would reference any trust account balance owed the client, reflect any interim deposits of trust funds, set forth as deductions any interim payments identified by nature, and reflect the remaining or interim closing balance.

Indeed, since 1993, the former Board of Governors of the State Bar (now Board of Trustees) has required that attorneys handling trust funds maintain specific records in specific forms, including written ledgers for each such client specifying the date, amount, and source of all funds received and disbursed, as well as the current trust balance. (Trust Account Record Keeping Standards, adopted by the Board on July 11, 1992.) These records should permit all attorneys to quickly provide appropriate accountings to clients.

Just as the basic provisions of rule 4-100(A) serve as a prophylactic measure to guard against the possibility of mishandling or, in the worst case, the actual loss of trust funds (e.g., *Silver v. State Bar* (1974) 13 Cal.3d 134, 144-145), so rule 4-100(B)(3)'s requirement of providing appropriate accounts to clients serves to demonstrate readily the client's trust balance at the time of the accounting and provide ready notice to clients of the flow of trust funds. Such an accounting would have eliminated the very uncertainty in this case demonstrated by the unclear testimony of Seuthe and his client about the disposition of Finstrom's funds. We conclude that Seuthe did not provide an appropriate accounting when Brown requested one on Finstrom's behalf. Nor were any oral updates Seuthe claims he furnished to Brown about trust funds or incremental updates as to the resolution of one or two of the health care provider liens for which Seuthe was holding funds appropriate accounts either.

Under the facts, OCTC presented a prima facie case that Seuthe did not furnish an appropriate accounting when requested. The hearing judge therefore erred in dismissing this case prior to the presentation of Seuthe's defense.

III. DISPOSITION AND ORDER

For the foregoing reasons, we vacate the order of the hearing judge filed February 5, 2014, dismissing this proceeding, and we remand the matter to the Hearing Department for a new trial. As the hearing judge who heard the matter is no longer a member of the court, we shall direct that this matter be set before another hearing judge. As always, the parties are encouraged to reach stipulations which streamline the proceedings, commensurate with the elements of a fair hearing. (See, e.g., rules 5.53–5.58, Rules Proc. of State Bar.)

STOVITZ, J.*

We concur:

PURCELL, P. J.

EPSTEIN, J.

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