PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed August 28, 2015

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 12-O-14723
	)	
PHILLIP MONROE SMITH,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 169821.	)	
	)	

A hearing judge recommended that Phillip Monroe Smith be disbarred for committing trust account violations and willfully misappropriating $10,122.25 in personal injury settlement funds over a four-month period in 2011 and 2012. Smith used the money to pay his law office expenses and, after being credited for later paying certain costs, still owes $653.98 to his former client, now 92 years old.

Smith appeals. Initially, he admitted full culpability to the State Bar investigator, but later equivocated at trial, claiming he was inexperienced with contingency fee cases and believed the costs of his client's lawsuit exceeded the settlement amount. On review, he concedes misappropriating at least $2,247.70 that he knew was owed on a medical lien. However, he makes constitutional challenges to the Notice of Disciplinary Charges (NDC), argues disbarment is excessive, and requests an agreement in lieu of discipline or a private reproval. The Office of the Chief Trial Counsel of the State Bar (OCTC) does not appeal.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge's decision. As the Supreme Court has noted, misappropriation is serious misconduct that calls for the harshest discipline in "all but the most exceptional of cases." (*Grim*

v. State Bar (1991) 53 Cal.3d 21, 29.) Considering the standards,[1] the decisional law, and the presence of aggravation that outweighs the mitigation, disbarment is the appropriate discipline for Smith's intentional misappropriation.

I. PROCEDURAL BACKGROUND

On March 25, 2013, OCTC filed a three-count NDC that charged Smith with: (1) failure to maintain client funds in trust; (2) moral turpitude for misappropriating client funds; and (3) failure to promptly pay client funds. The parties entered into a pretrial stipulation as to facts and admission of documents. After a three-day trial, the hearing judge found Smith culpable on all counts. On review, Smith raises no factual errors except that he claims he owes $460 in restitution, not $653.98. (Rules Proc. of State Bar, rule 5.152(C) [factual error not raised on review waived by parties].) We adopt and summarize the hearing judge's factual findings, including the restitution amount due, and add relevant facts established in the record.

II. FACTUAL BACKGROUND

Smith was admitted to the practice of law in California in February 1994, and has no record of discipline. He primarily practiced business and tax law. In 2009, despite his inexperience with bodily injury claims, he agreed to represent 86-year-old Lena McFarlane in a personal injury matter arising from her slip-and-fall accident at a major chain grocery store. As the litigation commenced, Smith came to believe that his client's injuries predated the accident, which decreased the value of the case. Having obligated himself to pay all non-medical costs of the lawsuit, he began to experience financial problems when the litigation became costly and time consuming. After the case settled, Smith misappropriated over $10,000 in client funds.

[1] 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.

A. Smith's Fee Agreement

In April 2009, Smith and McFarlane entered into a written contingency fee agreement. Smith was entitled to 45 percent of the recovery if McFarlane's claims were resolved at or after the arbitration hearing, settlement conference, or trial. He was also obligated to advance all costs, including court filing fees, photocopying expenses, and process server fees; medical expenses were not considered costs. If McFarlane recovered on her claims, Smith's costs would be reimbursed before any monies were distributed to either McFarlane or Smith. McFarlane's son, Clinton, and her granddaughter, Georgette Bowen, also signed the fee agreement.[2]

B. McFarlane's Medical Expenses and Litigation Costs

McFarlane received medical treatment for her claimed injuries from several providers. In 2010, SCAN Health Plan for Medicare (SCAN) established a lien for $11,310.07, as did Riverside Medical Clinic (RMC) for $4,596.94. McFarlane was billed $2,346 for medical imaging, which was deemed a cost. The parties stipulated that Smith paid $9,577.75 in litigation costs as of November 4, 2011.

C. The Settlement and Payment of Costs

During a July 21, 2011 private mediation, Smith settled McFarlane's case for $50,000; he originally sought a $900,000 settlement. McFarlane was present and agreed to the settlement. In September 2011, Smith received and deposited the $50,000 settlement check into his client trust account (CTA), which brought the account balance to $50,020.78. Though he was entitled to 45 percent, or $22,500, on September 16, 2011, he withdrew only $20,000.[3] At this point, he was still entitled to $12,077.75 for his litigation costs ($9,577.75) and the rest of his contingency fee

[2] An amended retainer agreement authorized Clinton to act on his mother's behalf and communicate with Smith. We refer to Clinton by first name to avoid confusion.

[3] Smith testified he did so "[b]ecause I just decided that that's what I wanted to withdraw at that time, for whatever expenses I needed to pay. . . . I guess I had the intention of withdrawing some funds at a future date. That's all."

($2,500). In October 2011, Smith withdrew $12,000, which reimbursed his litigation costs and his remaining fee, leaving $77.75 still owing. On November 5, 2011, Smith paid $300 in costs from his personal account, entitling him to a total of $377.75 from McFarlane's settlement proceeds.

D. Smith Misappropriates $10,122.25 to Pay Law Office Expenses

In 2011, Smith experienced financial problems, which he attributed in large part to having to "finance" McFarlane's lawsuit. On six occasions over a four-month period, he withdrew a total of $10,122.25 from his CTA to pay his law office expenses. At the time, he had paid $7,500 to settle SCAN's lien, but the RMC lien for $4,596.94 was outstanding. In November 2011, Smith made the first three withdrawals: $7,000, leaving a balance of $3,520.78;[4] $2,000, leaving a balance of $1,520.78; and $1,000, leaving a balance of $520.78.

In early January 2012, Smith sent McFarlane and Clinton a letter and an itemized accounting of his disbursements. The letter was inaccurate and misleading in that: (1) he never revealed he had withdrawn $10,000 of the settlement proceeds to pay his office expenses; (2) he reported his attorney fees as 40 percent of the recovery rather than 45 percent; (3) he failed to include the previously received $2,346 medical imaging bill; and (4) he overstated his litigation costs as $13,328.86, rather than $9,577.75. Moreover, Smith represented that the current net settlement proceeds were $9,171.14, and the balance after costs was $1,631.70; in fact, he was holding only $500 in settlement funds. On January 26, 2012, a few weeks after Smith sent the letter, he withdrew another $350, leaving a CTA balance of $170.78.

On February 14, 2012, Clinton terminated Smith's employment by email, claiming excessive and unconscionable fees. Clinton demanded that Smith forward the undisbursed settlement proceeds to McFarlane and instructed him not to "enter into any negotiations or

[4] Of the $7,000 withdrawal, Smith misappropriated $6,622.25 because he was entitled to receive $377.75.

settlement agreement with the rest of the lien holders." Smith received the email, but did not respond or comply. Instead, two days later, on February 16, he withdrew $100, leaving a CTA balance of $70.78. Of that balance, $50 belonged to McFarlane and $20.78 belonged to Smith (as the beginning balance in the CTA before the $50,000 deposit).

On March 19, 2012, Clinton sent a follow-up email reiterating his previous requests. Again, Smith received it, but did not respond or comply. Shortly thereafter, on March 30, Smith made his final withdrawal of $60 ($50 belonging to McFarlane), leaving a CTA balance of $10.78. On May 1, Clinton warned Smith by letter that he would contact the State Bar if Smith did not disburse the remaining settlement funds. Smith did not respond and a State Bar complaint was made.

E. McFarlane's State Bar Complaint

In July 2012, Smith received correspondence from a State Bar investigator informing him of McFarlane's complaint. The investigator requested a written response. Smith promptly wrote back, admitting culpability: "I realize and accept the reality that I have violated the rules of professional conduct . . . specifically at least RPC 4-100(A), B&PC 6106, and possibly RPC 4-100(B)(4)." He stated he was willing to make restitution and conceded he had no legal justification for his actions.[5] He explained this was his first personal injury case, on which he worked hard for over two years and at significant personal financial expense. He also asserted that McFarlane misled him about her injuries, which caused "an unbearable level of financial hardship" and resulted in decisions he otherwise would not have made.

[5] Later, at trial, Smith testified that he made this concession to the investigator because "I just thought . . . the best thing to do is to fess up to whatever it is, because the State Bar is more likely to be lenient if you admit your wrongdoings and cooperate, and that's what I was trying to do. In hindsight, I went overboard."

F. Smith Pays Remaining Costs

Between July 2012 and September 2013, Smith used personal funds to pay additional costs of $6,388.27 and to pay the RMC lien that he negotiated down to $3,080.[6] The later costs totaled $9,468.27. The hearing judge credited these payments, and concluded that Smith owes McFarlane $653.98 in restitution ($10,122.25 [amount withdrawn from CTA] less $9,468.27 [later costs paid]).[7]

III. SMITH IS CULPABLE OF THREE ETHICAL VIOLATIONS

A. Count One: Smith Violated Rule 4-100(A) of Rules of Professional Conduct[8] Count Two: Smith Violated Business and Professions Code Section 6106[9]

We begin with Count Two. The hearing judge found Smith culpable of moral turpitude, in violation of section 6106 for willfully misappropriating $10,122.25. (*Bate v. State Bar* (1983) 34 Cal.3d 920, 923 [willful misappropriation of client funds involves moral turpitude].) However, the judge did not specify whether it was grossly negligent or intentional, although he recommended disbarment under the discipline standard for intentional or dishonest misappropriation. (Std. 2.1(a).) The record proves that Smith's misappropriation was intentional.

To begin, when contacted by the State Bar investigator, Smith conceded culpability. Then at trial, he admitted that he used the money from McFarlane's settlement to pay his law office expenses, and acknowledged he misappropriated funds that were obligated to the

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[6] Despite the lien, Smith had failed to notify RMC that McFarlane's case settled and ignored its communications for more than a year.

[7] Although Smith argues he owes only $460 in restitution, we adopt the hearing judge's calculation of $653.98 as the amount owed because it conforms to the parties' stipulation.

[8] All further references to rules are to the Rules of Professional Conduct of the State Bar.

[9] Section 6106 states in relevant part: "[t]he commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension." All further references to sections are to the Business and Professions Code.

outstanding RMC lien: "I knew that I had – in not paying that [RMC] lien, and taking that money, I had engaged in the misappropriation of the lien money, for sure." And in his opening brief on review, he admits that if we accept his RMC lien calculations, which we do not, "the amount of funds misappropriated (if at all) could not be more than $2,247.70."

That Smith paid additional costs, including the RMC lien, *after* he wrongfully misappropriated the funds is irrelevant—he was not entitled to any of the $10,122.25 when he withdrew it. It is disturbing that he continued his wrongful withdrawals even after being terminated. We reject any claim that he believed the misappropriated money belonged to him due to his inexperience in contingency fee cases or because he thought the costs exceeded the settlement amount. To the contrary, he was well aware of and intentionally violated a fundamental ethical precept—taking trust funds obligated to a lienholder constitutes a misappropriation. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619 [attorney owes same fiduciary duty with regard to funds held in trust for medical lienholders as to clients].)

As to Count One, the hearing judge found that Smith violated rule 4-100(A) by failing to maintain $10,122.25 in his CTA to pay McFarlane, the outstanding RMC lien, and other costs.[10] We assign no additional weight to this violation because the misconduct underlying the section 6106 violation supports the same or greater discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

[10] Rule 4-100(A) requires an attorney to deposit and maintain in trust "[a]ll funds received or held for the benefit of clients."

B. Count Three: Smith Violated Rule 4-100(B)(4)

The hearing judge found Smith violated rule 4-100(B)(4) by failing to promptly pay McFarlane or satisfy the RMC lien and other costs from the settlement proceeds.[11] We agree, but again assign no weight to this rule violation for the same reason provided in Count One.

IV. SMITH'S DUE PROCESS CLAIM LACKS MERIT

The NDC alleged in Count One that Smith failed to maintain $10,184.19 in client funds in trust, and Count Two charged him with misappropriating $10,173.40. Smith argues he had insufficient notice of the factual basis for the charged misconduct because OCTC did not supply an accounting, explain why these amounts differed, or show how they were calculated. OCTC acknowledged on review that its "calculation of the amount that Smith was required to maintain in trust for [his client] and the amount he misappropriated are incorrect." However, it contends these amounts are unimportant because the overall information in the NDC placed Smith on notice of his alleged misconduct, and the variance between the allegations and the evidence is slight, given Smith's misappropriation of $10,122.25. We agree.

While discipline may be imposed for violations alleged in an NDC (*Gendron v. State Bar* (1983) 35 Cal.3d 409, 420), "adequate notice requires only that the attorney be fairly apprised of the precise nature of the charges before the proceedings commence." (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929, citing *In re Ruffalo* (1968) 390 U.S. 544, 551.) A reading of the NDC reveals adequate notice of the charged violations, despite the minor discrepancy in the dollar amounts. Further, Smith failed to show that his defense was compromised since "a slight

[11] Rule 4-100(B)(4) provides that upon a client's request, an attorney shall promptly pay any funds which the client is entitled to receive. This rule applies to an attorney's obligation to pay third parties from funds held in trust, including those holding medical liens. (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979.)

variance in the evidence that relates to the noticed charge does not, in itself, deprive him of adequate notice." (*Van Sloten v. State Bar, supra,* 48 Cal.3d at p. 929.)

V. AGGRAVATION OUTWEIGHS MITIGATION[12]

A. Aggravation

The hearing judge found several aggravating factors, most of which we adopt and assign significant aggregate weight, as detailed below.

First, Smith's six improper CTA withdrawals constitute multiple acts of misconduct. (Std. 1.5(b); *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594 [multiple acts for one count of moral turpitude involving 11 misrepresentations over two years].)

Second, Smith concealed his misappropriations. (Std. 1.5(d).) His January 6, 2012 letter to McFarlane and Clinton was inaccurate and misleading. Most notably, he did not reveal he had withdrawn $10,000 in settlement funds to pay his law office expenses.

Third, Smith committed uncharged misconduct by failing to withdraw his entire $22,500 contingent fee from the settlement proceeds in September 2011. (Std. 1.5(d).) He knowingly allowed $2,500 of his fee to remain in his CTA after his interest in the $22,500 became fixed, in violation of rule 4-100(A)(2) (portion of funds belonging to law firm must be withdrawn at earliest reasonable time after member's interest in that portion becomes fixed). Even though we do not consider this uncharged, but proved, violation as an independent basis for discipline, we properly consider it in aggravation because Smith testified about it. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.)

Fourth, Smith has not made full restitution to McFarlane. (Std. 1.5(i).) Even if he disagrees with the hearing judge's finding that his client is entitled to restitution of $653.98, Smith admits he still owes her at least $460. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025,

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

1036-1037 [failure to make restitution suggests lack of appreciation of seriousness of misconduct and absence of remorse for violation of trust account fiduciary obligations].)

Fifth, Smith lacks remorse and insight. (Std. 1.5(g); *Bach v. State Bar* (1991) 52 Cal.3d 1201, 1208 [aggravation based on persistent lack of insight into deficiencies of attorney's professional behavior].) He excuses his misconduct for lack of experience and rationalizes his withdrawals due to financial problems. Although he claims to have learned his lesson, has taken a client trust accounting course, and does not intend to accept personal injury cases in the future, Smith fails to recognize that making unauthorized withdrawals from his CTA is serious misconduct. While the law does not require false penitence, he must "accept responsibility for his acts and come to grips with his culpability." (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Smith has not done this.[13]

B. Mitigation

The hearing judge afforded Smith significant mitigating credit for his nearly 18 years of discipline-free practice when he committed his first act of misconduct in 2011 (std. 1.6(a) [absence of prior record over many years mitigating where present misconduct not deemed serious]). We find that Smith's misconduct was serious, and do not adopt our dissenting colleague's view that it was aberrational and unlikely to recur. This was not a case of a single mistake or wrongdoing. Smith made six improper withdrawals totaling over $10,000 during four months. At the same time, he concealed his misappropriation from his client, and has yet to pay her the $653.98 she is owed from the settlement funds. (See *Kelly v. State Bar* (1988) 45 Cal.3d 649, 657, fn. 9 [taking $20,000 in client funds over five months not isolated act]; *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1071 [$29,000 misappropriation of partnership funds over eight months not aberrational because it was part of purposeful design to defraud partners].) Thus, we

[13] We do not find that Smith overreached by negotiating a reduction of RMC's lien after he was terminated since he was liable for any nonpayment.

assign reduced weight in mitigation to Smith's discipline-free record because it does not persuade us he will avoid future misconduct. (See *Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [lengthy record of discipline-free practice considered as "strong" mitigating factor where serious misconduct is aberrational and future misconduct is unlikely].)

We agree with the hearing judge that Smith is entitled to mitigation for cooperating with the State Bar by entering into an extensive stipulation of facts and admission of documents. (Std. 1.6(e).) However, he did not stipulate to culpability, and he withdrew the admission he first made to the State Bar investigator. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more mitigating weight accorded when culpability as well as facts admitted].) We therefore assign limited weight to Smith's cooperation.

The hearing judge correctly assigned slight weight to Smith's community service and pro bono activities. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [pro bono work and community service are mitigating factors].) Smith testified only that he provided on-line legal guidance by answering questions on the "Avvo" website, and one witness confirmed he had done "pro bono work in the black community or for clients who did not have the funds." From this evidence, we cannot assess the true nature, quantity, or quality of his community service. (See *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 287 [little mitigation for minimal testimony regarding pro bono activities].)

We also agree with the hearing judge that Smith's evidence does not merit mitigation for an extraordinary showing of good character. (Std. 1.6(f) [mitigation for extraordinary good character established by wide range of references in legal and general communities who are aware of full extent of misconduct].) Smith produced three witnesses: a long-term attorney friend, a prior tax auditor co-worker, and a former clerical employee. However, the witnesses knew little, if anything, about Smith's misconduct. (*In the Matter of Katz* (Review Dept. 1995) 3

Cal. State Bar Ct. Rptr. 430, 438 [no mitigation for testimony from two attorneys and one client because not considered wide range of references]; *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 508-509 [no good character mitigation given for testimony of two attorneys who did not know scope of charges].)

Finally, we reject Smith's request to assign mitigating credit for his inexperience with contingency fee litigation. Inexperience is "irrelevant where an attorney has misappropriated clients' funds." (*Amante v. State Bar* (1990) 50 Cal.3d 247, 254.) Even "young and inexperienced attorneys in this state, whatever difficulties they may understandably encounter, never resort to taking their clients' money." (*Ibid*.)

VI. DISBARMENT IS APPROPRIATE DISCIPLINE[14]

Our disciplinary analysis begins with the standards (*In re Silverton* (2005) 36 Cal.4th 81, 91). Standard 2.1(a) provides 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 an actual suspension of one year is appropriate." Smith misappropriated $10,122.25, a significant amount (see *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367-1368 [misappropriation of $1,355.75 deemed significant]), and his mitigation is not compelling nor does it clearly predominate when weighed against his misconduct and the aggravating circumstances.

Disbarment, although severe, is the proper discipline here. Misappropriation of client trust funds is particularly serious misconduct because it "breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession." (*Kelly v. State Bar, supra,* 45 Cal.3d at p. 656.) As we stated at the outset, the

[14] 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.)

Supreme Court has declared that misappropriation generally warrants disbarment. More specific to the matter before us, the high court has noted that "[e]ven a single 'first-time' act of misappropriation has warranted such stern treatment." (*Id.* at p. 657.) Our research reveals that in similar cases where attorneys have taken advantage of clients to misappropriate entrusted funds, particularly where concealment or dishonesty is present, the result has been disbarment.[15]

Smith argues that disbarment is unwarranted here because he has practiced law for 18 years without discipline, has educated himself on the rules governing CTAs, and has vowed not to take another personal injury case. We reject his argument. Disbarment is appropriate because Smith's misconduct is significantly aggravated—he misappropriated funds on six occasions, hid his misconduct from his client, did not pay the RMC lien and other costs until after the State Bar contacted him, and has yet to pay full restitution to his elderly client.

Like the dissent, we acknowledge and have considered that Smith lacked experience with personal injury cases and faced financial difficulties. Yet, none of this permits him to resort to misappropriating client funds to resolve his personal problems nor does it excuse his misconduct. (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221 [willful misappropriation of client funds is theft].) In a time of financial crisis, Smith chose to pay his law office bills at the expense of his professional and ethical duties to his client. Many attorneys experience comparable financial difficulties, and, "[w]hile these stresses are never easy, we must expect attorneys to cope with them without engaging in dishonest activities." (*In the Matter of Spaith, supra,* 3 Cal. State Bar

[15] See, e.g., *Chang v. State Bar* (1989) 49 Cal.3d 114 (disbarred for $7,898 misappropriation and misrepresenting circumstances of theft to State Bar; no prior discipline); *Kelly v. State Bar*, *supra*, 45 Cal.3d 649 (disbarred for $20,000 misappropriation, moral turpitude, dishonesty, and improper communication with adverse party despite no prior record in mitigation and no aggravation); *Gordon v. State Bar* (1982) 31 Cal.3d 748 (disbarred for $27,000 misappropriation, despite 13 years of discipline-free practice, financial difficulties, emotional difficulties due to divorce, remorse, and lack of harm); *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511 (disbarred for $40,000 misappropriation, intentionally misleading client despite mitigation for emotional problems, repayment of money, 15 years of discipline-free practice, strong character evidence, and candor and cooperation with State Bar).

Ct. Rptr. at p. 522.) "Misappropriation of a client's funds simply cannot be excused or substantially mitigated because of an attorney's needs, no matter how compelling." (*Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 709; see also *Grim v. State Bar, supra,* 53 Cal.3d at p. 31 ["It is precisely when the attorney's need or desire for funds is greatest that the need for the public protection afforded by the rule prohibiting misappropriation is greatest"].)

In sum, Smith deliberately took entrusted funds for his personal use knowing they belonged to his client or to lienholders. We find that the record does not establish exceptional circumstances as a basis for us to depart from recommending the appropriate discipline of disbarment under standard 2.1(a). (See *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [clear reasons for departure from standards should be shown].) To protect the public and the courts and to maintain the integrity of the legal profession, we affirm the hearing judge's disbarment recommendation.

VII. RECOMMENDATION

We recommend that Phillip Monroe Smith be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in the State of California.

We further recommend that Smith be ordered to pay restitution to Lena McFarlane in the amount of $653.98 plus 10 percent interest per year from September 16, 2011 (or reimburse the Client Security Fund to the extent of any payment from the Fund to McFarlane, in accordance with Business and Professions Code section 6140.5).

We further recommend that Smith comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 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.

VIII. ORDER

The order that Phillip Monroe Smith be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective June 12, 2014, will continue, pending the consideration and decision of the Supreme Court on this recommendation.

PURCELL, P. J.

I CONCUR:

STOVITZ, J.*

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

Smith's misconduct is serious, but it occurred during a single four-month period of aberrant behavior. After practicing business and tax law for almost 18 years without discipline, he accepted a personal injury case, which resulted in financial stresses that were at least partially attributable for his misconduct. When contacted by the State Bar, he immediately admitted culpability and began repayment of the $10,122.25 he misappropriated. To date, only $653.98 remains unpaid.

Viewed holistically, the record demonstrates that the threat of future misconduct is unlikely. Accordingly, the disbarment recommended by the majority is unwarranted in view of the prophylactic purposes of attorney discipline, i.e., protection of the public, the courts, and the profession. I would instead recommend a three-year actual suspension conditioned upon Smith's satisfactory proof of rehabilitation, pursuant to standard 1.2(c)(1). (*Friedman v. State Bar, supra,* 50 Cal.3d 235 [three years' actual suspension for intentional misappropriation of $27,000 involving moral turpitude, failure to perform, abandonment of clients, and failure to return fees; mitigated by 20 years of discipline-free practice]; *Weller v. State Bar* (1989) 49 Cal.3d 670 [three years' actual suspension for misappropriation of $14,000, and failures to maintain, perform, account, and promptly pay; mitigated by good character and restitution]; *In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185 [three years' actual suspension for intentional misappropriation of $20,000, commingling, and dishonesty; mitigated by 21 years of discipline-free practice].)