PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed May 8, 2018

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 14-O-05580
	)	
STEVEN LEWIS WEINER,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 87553.	)	
	)	

A hearing judge found Steven Lewis Weiner culpable of three counts of misconduct: misappropriation of $17,303.56 by gross negligence constituting moral turpitude, failure to maintain client funds in his trust account, and commingling. Because Weiner has two prior discipline cases from 1997 (*Weiner I*) and 2007 (*Weiner II*), the judge considered standard 1.8(b),[1] which provides for disbarment under certain circumstances. However, the judge declined to recommend disbarment for a number of reasons: the record indicated little or no injury to the public, the legal system, or the profession; Weiner demonstrated that he is willing and able to conform to his ethical responsibilities in the future; his several mitigating factors significantly outweighed the one aggravating factor of his prior record of discipline; and, notwithstanding Weiner's prior recidivism, case law does not otherwise require disbarment. Therefore, the hearing judge recommended discipline that included a one-year actual suspension.

The Office of Chief Trial Counsel of the State Bar (OCTC) appeals, asks that we assign less mitigation, and requests that we recommend disbarment because Weiner's two prior disciplinary matters require that the case be governed by standard 1.8(b) and its two exceptions

[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.

do not apply to this case. Weiner asks that we affirm the hearing judge's discipline recommendation.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's findings of fact and culpability determinations, as well as her finding of aggravation, but find less mitigation than she did. In determining the appropriate discipline, we find that, while Weiner experienced physical and emotional distress due to his and his wife's serious illnesses, which was contemporaneous with his misconduct, he has not proven the necessary nexus between those difficulties and his misconduct. This is his third discipline stemming from trust account violations, with escalating severity, culminating in culpability for misappropriation in this matter. That, combined with Weiner's prior serious misconduct involving a common thread of commingling and failing to maintain client funds, requires us, under standard 1.8(b), to recommend disbarment as the appropriate discipline.

I. PROCEDURAL BACKGROUND

On December 28, 2016, OCTC initiated this proceeding by filing a three-count Notice of Disciplinary Charges (NDC). Trial was held on May 11, 2017. The parties filed a Stipulation of Undisputed Facts (Stipulation) on the day of trial. Notably, at the start of trial, Weiner also stipulated on the record to culpability on all three counts of charged misconduct. The hearing judge issued her decision on July 13, 2017.

II. FACTS SUPPORTING UNCONTESTED CULPABILITY[2]

The facts, as summarized herein, support the hearing judge's uncontested culpability findings. Weiner was admitted to the practice of law in California on October 29, 1979.

[2] The facts are based on the Stipulation, 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).)

On May 25, 2010, Benece Booker hired Weiner to represent her in a personal injury matter resulting from a dog attack. Booker signed a contingency fee agreement, in which Weiner was entitled to 33 1/3 percent of the gross recovery as his fee and he was to negotiate a reduction and handle payment of any medical liens. Weiner entered into prefiling settlement negotiations with The Shores at Marina Bay Community Association (Marina Bay), the apartment complex where the attack occurred.

Weiner settled with Marina Bay for $30,000. He received a settlement check from Travelers Insurance on March 8, 2012, payable to Booker and himself, which he deposited into his client trust account (CTA) at Bank of the West.[3] On that date, the balance in his CTA was $67,794.65. Weiner's share of the $30,000 settlement for his fee and costs was $10,606.91. Therefore, he should have maintained $19,393.09 in his CTA for Booker and the lienholders. However, by June 15, 2012, before he had made any payments to Booker or her medical providers, the CTA balance fell to $2,089.53.

Over the next year and a half, Weiner paid Booker a total of $9,383.09 from his CTA as her share of the settlement proceeds, as follows:

Date of Payment	**Amount**
07/03/2012	$5,000.00
03/18/2013	$1,000.00
07/10/2013	$1,200.00
08/26/2013	$2,183.09

Later, Weiner paid the medical providers and other lienholders a total of $11,535, as follows:

Date of Payment	**Amount**	**Lienholder**
10/10/2013	$3,000	CCC Health Service
11/12/2014	$2,095	Kaiser Permanente
11/12/2014	$6,440	Oasis Legal Finance

[3] Weiner also received $5,000 from the insurance company in April 2011. The use of this money was restricted to medical payments.

Over five months from May 9 through October 12, 2012, Weiner wrote 13 checks totaling $345,825 from Product Innovations, LLC, a company of which he is a part owner (Product Innovations), and deposited them into his CTA. Eight checks included the notation "loan 30 days 12% APR." Within days of making the largest deposits from Product Innovations—$175,000 on May 21, and $60,000 on June 28—Weiner wrote two large checks from his CTA to individuals, one for $125,776.01 dated May 23, 2012, and a second for $28,885.38 dated June 29, 2012. Each of these checks bore a notation that it was for a personal injury settlement. He also wrote several checks to himself.

III. WEINER IS CULPABLE ON ALL COUNTS

Based on Weiner's stipulations and the trial evidence, the hearing judge found him culpable of all charges in the NDC: (1) misappropriating $17,303.56 by gross negligence, an act involving moral turpitude, in willful violation of Business and Professions Code section 6106;[4] (2) failing to maintain his client's funds in his CTA, in willful violation of Rules of Professional Conduct, rule 4-100(A);[5] and (3) commingling his personal funds in his CTA, in willful violation of rule 4-100(A).[6] Although the judge found Weiner culpable under rule 4-100(A) for failing to maintain his client's funds in his CTA, she assigned 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

[4] All further references to sections are to the Business and Professions Code. Under section 6106, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension."

[5] All further references to rules are to the Rules of Professional Conduct, unless otherwise noted. Under rule 4-100(A), "All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled 'Trust Account,' . . . or words of similar import . . . ."

[6] Under rule 4-100(A), "No funds belonging to the member or the law firm shall be deposited [in the client trust account] or otherwise commingled therewith . . . ."

[no additional weight given to rule 4-100(A) violation when same misconduct underlies section 6106 violation].) We adopt these unchallenged findings as supported by the record, and focus on the issues OCTC raises on review: aggravation, mitigation, and level of discipline.

IV. AGGRAVATION AND MITIGATION

A. Aggravation—Prior Record of Discipline

The hearing judge assigned aggravation for Weiner's two prior records of discipline, but did not specify any weight. OCTC submits that this aggravation should be given "heavy weight" as the prior disciplines involved similar misconduct. Weiner admits that his past discipline is an aggravating factor, but submits that it can be given less weight. We conclude that Weiner's previous disciplinary matters should be given significant weight because they involve failure to maintain client funds and commingling, which are similar to the current charges. Both his second prior discipline and his current misconduct involved commingling large amounts of money ($434,537 and $345,825), occurred over a similar period of time (seven and five months), and included several discrete acts of commingling (10 deposits and 13 deposits.) Additionally, his first and second disciplines, along with his current misconduct, involve his failure to properly maintain client funds in his CTA. Such similarities between prior and current misconduct render previous discipline more serious as they signify that the prior disciplines did not rehabilitate the attorney. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444.)

***Weiner I* (Case No. 94-O-15115)**

On March 11, 1997, Weiner stipulated to a private reproval for failing to maintain client funds in his CTA, pursuant to rule 4-100(A). No aggravating factors were found, and Weiner received mitigation because the client did not suffer harm and Weiner cooperated and recognized his wrongdoing. He was required to attend the State Bar's Ethics School, pass the Multistate

Professional Responsibility Examination (MPRE), and take the State Bar's Client Trust Accounting course.

Weiner II **(Case No. 04-O-14621)**

On October 31, 2007, the Supreme Court entered an order (S155921) suspending Weiner for two years, stayed, and placing him on probation for three years, subject to conditions, including a six-month actual suspension. Weiner stipulated to culpability for failing to maintain over $30,000 of client funds and for commingling approximately $434,537 of his personal funds in a CTA by making 10 deposits over a seven-month period, both violations of rule 4-100(A). His 1997 private reproval was a factor in aggravation, along with the fact that his misconduct involved a trust account violation. He received mitigation for lack of client harm and for severe emotional difficulties caused by his son's serious mental health crisis while attending college. Weiner was again required to attend the State Bar's Ethics School, pass the MPRE, and take the State Bar's Client Trust Accounting course, as well as six additional hours of classes in law practice management and/or trust account management. Notably, he also had to comply with a condition that he either retain a professional to manage the financial affairs of his law office or become proficient himself.

B. Mitigation

1. Extreme Emotional and Physical Disabilities

The hearing judge found compelling mitigation under standard 1.6(d) for emotional and physical difficulties Weiner suffered around the time of his misconduct. Standard 1.6(d) provides that mitigation may be assigned for such difficulties if (1) the attorney suffered from them at the time of the misconduct; (2) they are established by expert testimony as being directly responsible for the misconduct; and (3) they no longer pose a risk that the attorney will commit future misconduct.

Weiner testified and produced exhibits to show that he suffered from extreme emotional and physical difficulties during the same period he committed his present misconduct. Both he and his wife, Katherine, suffered from life-threatening medical conditions during the latter half of 2011 through 2012. Overall, Katherine underwent 18 surgeries and 15 procedures, which required repeated hospitalizations. Weiner also suffered his own illnesses, partially due to the stress of caring for his wife. In 2011, he had an emergency procedure to place three stents in his heart, and then had to undergo further surgery to place a fourth stent. In 2012, he had surgery to repair a large hernia. Later, he discovered a lump in his chest that turned out to be cancerous, which required another surgery. He is now on a permanent regimen of chemotherapy. His wife's and his own medical difficulties cause him anxiety daily.

Weiner also experienced two stressful family crises during the time of his misconduct. His daughter informed him in February 2012 that she was going through a difficult divorce and needed his emotional support. That same year, his father-in-law, a well-respected surgeon, was diagnosed with dementia. This was particularly difficult for Weiner because his father-in-law had been part of their support system during Weiner's and his wife's illnesses.

Weiner testified that the combination of all these problems caused him to become distracted and to "lose focus" in his solo law practice, resulting in his inability to manage his practice. OCTC requests that this mitigation be given only minimal weight due to the lack of expert testimony establishing that the emotional and physical difficulties caused Weiner's misconduct. We note that mitigation for emotional difficulties can be established without expert testimony, but find that Weiner has not established a nexus between his admittedly serious emotional difficulties and his misconduct. (*In re Naney* (1990) 51 Cal.3d 186, 197 [emotional distress from marital difficulties and similar problems not mitigating unless directly responsible for misconduct].)

While Weiner testified that he mostly worked from his wife's hospital room during her illness, the record demonstrates that he was able to focus well enough to make numerous deposits to his CTA from Product Innovations. Several deposits had notations for 30-day loans, and he used those deposits to write checks for significant personal injury settlements and to himself. Given this, while we acknowledge Weiner's and his wife's serious health issues and resulting stress, we do not find that he proved that his commingling and misappropriation occurred because he lost his focus on his CTA, as he contends. Thus, we do not find clear and convincing evidence[7] that Weiner's emotional and physical difficulties were directly responsible for his misconduct, as the standard requires. (Std. 1.6(d); *In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160, 168 [no mitigative credit where attorney failed to establish causal nexus between emotional difficulties and misconduct].)

2. Cooperation

We affirm the hearing judge's finding of mitigation for Weiner's cooperation with the State Bar and assign significant weight. Standard 1.6(e) provides that mitigation may be assigned for candor and cooperation provided to the State Bar. Weiner entered into the Stipulation and stipulated to culpability on all charged counts at the beginning of trial. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more mitigating weight accorded where culpability as well as facts admitted].)

3. Good Character

Standard 1.6(f) allows mitigation for "extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct." The hearing judge assigned considerable weight based on Weiner's presentation of

[7] 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.)

five witnesses who testified to his good character, four via declaration and one by telephone. They included two attorneys, a business owner, an accountant, and a rabbi. All five spoke very highly of Weiner's honesty and strong ethics, describing him as "a man of integrity," who "has always been extremely conscientious about his practice." Another witness said he had never heard anyone say a bad word about Weiner in the 30 years they lived in the same community. Each character witness had known Weiner for many years and was aware of the particulars of the charged misconduct.

OCTC argues that Weiner's good character evidence should not be given significant weight because five witnesses do not meet the standard's requirement of a "wide range of references," citing *In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668, 674 (testimony of four character witnesses, one physician and three attorneys, given less weight because they were "few" in number). Weiner asserts that his character witnesses should be given significant weight because each had known him for years and provided detailed testimony regarding his good character. We affirm the hearing judge's finding of mitigation for good character and assign significant weight. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591–592 [significant weight in mitigation given to good character testimony of three witnesses (two attorneys and fire chief)—"testimony of acquaintances, neighbors, friends, associates, employers, and family members on the issue of good character, with reference to their observation of the respondent's daily conduct and mode of living, is entitled to great weight"]; *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].)

4. Community Service

The hearing judge assigned mitigation for Weiner's community service. She noted his testimony that he was a founding member of a synagogue in Walnut Creek, California, and that he devoted many years of service in establishing the synagogue, providing free legal advice and raising funds. He was also actively involved in his children's schools and sports activities, served as a coach of sports teams for each of his three children, and was on the boards of the softball and soccer leagues. Additionally, Weiner's testimony regarding his community service was corroborated to varying degrees by all five character witnesses.

OCTC submits that Weiner should not receive substantial mitigation for these activities because they fail to demonstrate that his conduct is not aberrational. OCTC does not provide authority to support this assertion, and we have found none. Therefore, we affirm the hearing judge's findings and assign considerable mitigation for Weiner's community service. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [service to community is mitigating factor entitled to considerable weight].)

5. Remorse and Recognition of Wrongdoing

Standard 1.6(g) provides that mitigation may be assigned for "prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement." The hearing judge assigned mitigation, but did not specify its weight. Weiner testified that he understood his mistake and was remorseful. In addition, to prevent similar future misconduct, Weiner entered into a partnership in early 2017 with another attorney, Bradley Fell, to handle all future client trust accounting. However, while Weiner expressed remorse, he did not do so in a timely fashion, but only after OCTC filed the NDC in this disciplinary proceeding in December 2016. Likewise, his partnership with Fell did not take place until a couple of months before his

trial. Accordingly, he did not pay Booker her settlement proceeds or pay the lienholders for at least a year and a half after he misappropriated their portions of the settlement funds.

We conclude that the record only supports minimal mitigation for this factor because his actions of remorse took place long after the misconduct occurred. (See *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 519 [greatly reduced mitigating weight attached to respondent's confession of misdeeds to client a year later, as it was not "an objective step 'promptly taken' spontaneously demonstrating remorse and recognition of the wrongdoing"]; *Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fns. 2, 3 [while expressing remorse is elementary moral precept that deserves no special consideration on its own, engagement of management firm to handle law office's financial affairs is objective step taken to avoid future misconduct, and to accept responsibility].)

V. DISCIPLINE[8]

The hearing judge found that disbarment is not appropriate because Weiner's mitigating circumstances clearly outweigh the aggravation, his misconduct did not harm his client or the administration of justice, and he has shown that he is willing and able to conform to his ethical responsibilities in the future. The judge recommended discipline that includes a one-year actual suspension. Weiner asks that we affirm the judge's discipline recommendation. OCTC submits that standard 1.8(b) calls for a disbarment recommendation given Weiner's two prior records of discipline.

Our disciplinary analysis begins with the standards. While they are guidelines for discipline and are not mandatory, we give them great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.) Importantly, the Supreme Court has instructed us to

[8] 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.)

follow the standards "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We also look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

We use a three-step approach to analyze the standards applicable here. (*In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 435.) First, we determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) Here, standard 2.1(b) is the most severe because it provides that actual suspension is the presumed sanction for misappropriation involving gross negligence.[9]

However, given Weiner's disciplinary history, we also look to standard 1.8(b), which provides that disbarment is appropriate where an attorney has two or more prior records of discipline if (1) an actual suspension was ordered in any of the prior disciplinary matters; or (2) the prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) the prior and current disciplinary matters demonstrate the attorney's unwillingness or inability to conform to ethical responsibilities. Weiner's case meets two of these criteria: a prior actual suspension and an inability to conform to ethical duties. In *Weiner II*, the Supreme Court imposed a six-month actual suspension. Moreover, his past and current misconduct, including a common thread of failing to maintain client funds and commingling, demonstrates his unwillingness or inability to conform to his ethical responsibilities. (Std. 1.8(b); see *Barnum v. State Bar* (1990) 52 Cal.3d 104, 111.) Weiner's prior discipline also involved commingling of a large amount of money, $434,537, and his probation conditions in that case required him to "retain the services of a professional qualified to handle his law office financial matters, or become proficient in those

[9] Standard 2.2(a) provides that a three-month actual suspension is the presumed sanction for commingling. Standard 2.2(b), which provides that suspension or reproval is the presumed sanction for any other violation of rule 4-100, also applies.

matters." Clearly, Weiner did not do either and should have been extra vigilant at that point. His repeated failures can only be seen as willful and serious ethical violations.

We next analyze whether Weiner's case falls within exceptions to standard 1.8(b), which permits us to deviate from recommending disbarment where "the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct." Weiner does not qualify for either exception. His present misconduct did not occur at the same time as the misconduct in his two prior discipline cases. While he has established substantial mitigation for cooperation, good character, community service, and minimal mitigation for remorse, we do not find that these factors equate to the most compelling mitigating circumstances that clearly predominate, as required by standard 1.8(b), particularly since Weiner has not proved a nexus between his emotional and physical difficulties and his misconduct, and has significant aggravation for his two prior records of discipline containing a common thread of similar misconduct.

Finally, we consider whether any reason exists to depart from the discipline called for by standard 1.8(b). We acknowledge that disbarment is not mandatory as a third discipline under this standard, even where compelling mitigating circumstances do not clearly predominate. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506–507 [disbarment not imposed despite two prior disciplines and no compelling mitigating circumstances (analysis under former std. 1.7(b))]; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136 [to fulfill "purposes of lawyer discipline, we must examine the nature and chronology of respondent's record of discipline"].) However, if we do not recommend the presumptive discipline of disbarment, we must articulate our reasons. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) Here, we cannot articulate any reasons to justify deviating from the presumptive discipline of disbarment. This is Weiner's third discipline. In each of his prior disciplinary matters,

he committed violations involving his CTA and was ordered to attend the State Bar's Client Trust Accounting Course. In his most recent prior misconduct, he was also ordered to either retain a professional to manage, or otherwise become proficient in managing, his law office financial matters. Despite all this, he committed the same misconduct (commingling and failing to maintain client funds) as he did in *Weiner II*, and grossly negligently misappropriated client funds. Under these circumstances, disbarment represents the only appropriate discipline to adequately protect the public, the courts, and the legal profession.[10]

VI. RECOMMENDATION

We recommend that Steven Lewis Weiner be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that Weiner 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.

VII. ORDER OF INACTIVE ENROLLMENT

Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1) of the Rules of Procedure of the State Bar, Steven Lewis Weiner is ordered enrolled inactive. The order of

[10] The decisional law also supports our recommendation. (Compare *Barnum v. State Bar*, *supra*, 52 Cal.3d at p. 113 [disbarment for three prior disciplines; depression was not "most compelling" mitigation when weighed against risk of recurrence of misconduct] and *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 80 [disbarment for two prior disciplines and attorney unable to conform conduct to ethical norms; no mitigation] with *In the Matter of Lawrence* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 239, 245–248 [three-year actual suspension and until proof of rehabilitation for three prior disciplines; attorney suffered extreme physical disabilities that caused or contributed to misconduct for 30 years and mitigation outweighed aggravation].)

inactive enrollment is effective three days after service of this opinion. (Rules Proc. of State Bar, rule 5.111(D)(1).)

McGILL, J.

WE CONCUR:

PURCELL, P. J.

HONN, J.