

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD LEE ROBINS

A Member of the State Bar

[No. 86-O-14822]

Filed October 17, 1991

SUMMARY

For a number of years, respondent took in more cases than he could handle and did not supervise his staff. He stipulated to culpability on six counts of grossly negligent misappropriation of trust funds consisting of medical liens which his office failed to pay timely, and to one count each of failure to perform legal services competently and failure to return a file to a client. The hearing judge found substantial aggravating factors and compelling mitigating factors and recommended one year actual suspension. (Hon. Ellen R. Peck, Hearing Judge.)

Arguing that the recommended sanction was too severe, respondent sought review. The review department held that the recommended sanction was appropriate based on the record, the applicable disciplinary standard and comparable case law.

COUNSEL FOR PARTIES

For Office of Trials: Carol Zettas

For Respondent: Arthur L. Margolis

HEADNOTES

- [1] **221.00 State Bar Act—Section 6106**
Under the case law, the repeated dipping of a respondent's trust account below the required balance constitutes a sufficient basis for a finding of moral turpitude.
- [2] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Failure to honor medical liens violates the rule of professional conduct requiring prompt payment of client funds upon demand.

- [3] **130 Procedure—Procedure on Review**
 151 Evidence—Stipulations
 On review, a respondent cannot challenge culpability of misconduct to which the respondent stipulated at the hearing level.
- [4] **204.90 Culpability—General Substantive Issues**
 280.00 Rule 4-100(A) [former 8-101(A)]
 280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]
 280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
 420.00 Misappropriation
 430.00 Breach of Fiduciary Duty
 The duty to keep clients' funds safe is a personal, nondelegable obligation of an attorney.
- [5] **166 Independent Review of Record**
 745.51 Mitigation—Remorse/Restitution—Declined to Find
 Belated restitution is not an appropriate basis for a finding in mitigation, and review department declined to adopt such finding even though not challenged by the parties.
- [6 a, b] **106.90 Procedure—Pleadings—Other Issues**
 531 Aggravation—Pattern—Found
 Finding a pattern in aggravation is not limited to consideration of the counts pleaded. Where respondent stipulated to misconduct involving eight clients over six years, that number of cases only, in a high volume practice, might not have constituted a pattern. However, where respondent also testified to his prolonged, systematic failure to supervise his staff, his staff's inability to handle the caseload, and numerous other problems besides the ones listed in the notice to show cause, he had no grounds to challenge the finding in aggravation based thereon that a pattern of neglect existed.
- [7] **571 Aggravation—Refusal/Inability to Account—Found**
 591 Aggravation—Indifference—Found
 802.62 Standards—Appropriate Sanction—Effect of Aggravation
 822.32 Standards—Misappropriation—One Year Minimum
 Where respondent took up to two years to pay outstanding medical liens after he discovered them, such delay was the most significant factor in justifying a sanction of one year's actual suspension. Respondent's preoccupation with remedying other unspecified problems in his caseload did not justify his delay in remedying these negligent misappropriations.
- [8] **165 Adequacy of Hearing Decision**
 420.00 Misappropriation
 801.30 Standards—Effect as Guidelines
 822.32 Standards—Misappropriation—One Year Minimum
 Where hearing judge's decision was issued prior to relevant Supreme Court and review department opinions, and did not discuss whether gross negligence resulting in misappropriation should be subjected to same suggested minimum sanction of one year actual suspension as is applied for intentional misappropriation, but hearing judge's recommendation of one-year minimum was justified by facts in record making suspension appropriate for public protection, review department concluded that hearing judge's discipline recommendation was based on an analysis of the record in light of the objectives of discipline rather than on a rigid application of the Standards for Attorney Sanctions for Professional Misconduct.

- [9] **420.00 Misappropriation**
 801.30 Standards—Effect as Guidelines
 822.32 Standards—Misappropriation—One Year Minimum
 1092 Substantive Issues re Discipline—Excessiveness
 In requiring an invariable minimum of one year’s actual suspension, standard 2.2(a) is not faithful to the teachings of the Supreme Court’s decisions. Negligent misappropriation quickly and voluntarily remedied may require no actual suspension or only a short suspension.
- [10] **163 Proof of Wilfulness**
 204.10 Culpability—Wilfulness Requirement
 420.00 Misappropriation
 Misappropriation resulting from serious, inexcusable violation of a lawyer’s duty to oversee trust funds is deemed wilful even in the absence of deliberate wrongdoing.
- [11 a-c] **420.00 Misappropriation**
 571 Aggravation—Refusal/Inability to Account—Found
 591 Aggravation—Indifference—Found
 822.32 Standards—Misappropriation—One Year Minimum
 822.34 Standards—Misappropriation—One Year Minimum
 Where respondent’s gross negligence resulted in several incidents of misappropriation over a number of years, and where the record established both compelling mitigating factors and substantial aggravating factors, including prolonged delay in making restitution, discipline including one year’s actual suspension was appropriate.
- [12] **173 Discipline—Ethics Exam/Ethics School**
 Where California Professional Responsibility Examination (“CPRE”) had not yet been available when case was decided by hearing judge, review department modified hearing judge’s discipline recommendation to substitute CPRE requirement for requirement to take and pass national professional responsibility examination.

ADDITIONAL ANALYSIS

Culpability

Found

- 221.12 Section 6106—Gross Negligence
- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
- 420.12 Misappropriation—Gross Negligence

Not Found

- 213.15 Section 6068(a)

Aggravation

Found

- 582.10 Harm to Client

Mitigation

Found

- 710.10 No Prior Record
- 725.12 Disability/Illness
- 735.10 Candor—Bar

745.10 Remorse/Restitution

750.10 Rehabilitation

765.10 Pro Bono Work

791 Other

Discipline

1013.08 Stayed Suspension—2 Years

1015.06 Actual Suspension—1 Year

1017.09 Probation—3 Years

Probation Conditions

1024 Ethics Exam/School

OPINION

PEARLMAN, P.J.:

This case involves stipulated culpability on six counts of grossly negligent misappropriation of trust funds totalling over \$20,000 in medical liens that respondent's office failed to pay timely. The parties also stipulated to culpability on two other counts: violation of former rule 6-101(A)(2) of the Rules of Professional Conduct¹ for reckless or repeated failure to perform legal services competently and failure to return the file to the client in violation of rule 2-111(A)(2). Two other counts were dismissed. In aggravation, among other things, the hearing judge found that the misconduct constituted a pattern spanning several years. However, the hearing judge also found compelling mitigating evidence which justified a sanction less than disbarment, but not less than the one-year actual suspension minimum called for by the Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V.) The respondent challenges the recommendation of one year's actual suspension as too severe a sanction. We agree with the examiner that the sanction recommended below was appropriate under the relevant precedent.

PROCEEDINGS BELOW

This case involves stipulated culpability on five counts of the notice to show cause (counts two, three, four, five and seven) plus one investigative count (designated as count nine) of misappropriation of trust funds totalling over \$20,000 in medical liens, each constituting a violation of section 6106 and rule 8-101(B)(4).² The parties also stipulated to culpability on count five of violation of rule 6-101(A)(2). Counts one and eight were dismissed. Count six resulted in stipulated culpability for failure to return the file to the client in violation of rule 2-111(A)(2). A two-day hearing ensued in which the hearing judge determined that the misappropriations were the re-

sult of gross negligence rather than intentional misconduct and heard evidence in aggravation and mitigation. We adopt all of the findings made by the hearing judge in her carefully reasoned decision, and set forth a brief summary of the facts below.

[1] The conclusion that the repeated dipping of respondent's trust account below the required balance constituted a basis for a finding of moral turpitude under section 6106 is well supported in the case law. (See, e.g., *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474-475.) [2] Failure to honor medical liens is also a violation of former rule 8-101(B)(4). (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 10, recommended discipline adopted Nov. 28, 1990 (S016265).) Nonetheless, the evidence presented on the trust account violations was that none of the misappropriations were for respondent's own personal use. (R.T. p. 176.) Respondent generally dealt with very poor uneducated clients whom he often paid a few days before the settlement check cleared. Sometimes, he made substantial advances to them before the settlement check came in. These advances came out of his trust account. (R.T. p. 172.) Respondent himself was unaware of any specific problem with his trust account balance because he had an arrangement with his bank for overdraft protection on the trust account and it never returned a check. (R.T. pp. 170-172.) He had no knowledge of the impropriety of such arrangement or any background knowledge of how trust accounts should properly be handled when he opened his own practice. He has since learned the seriousness of the responsibility and has instituted procedures to ensure that his trust account is properly maintained. However, during the lengthy time in question, he simply let his staff oversee payments without his personal supervision. (R.T. p. 191.)

In aggravation, the hearing judge found: (1) that the misconduct evidences or demonstrates a pattern of misconduct from late 1983 to 1990 (std. 1.2(b)(ii), Stds. for Atty. Sanctions for Prof. Misconduct, Trans.

1. Unless otherwise noted, all further references to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989, and all further statutory references are to the Business and Professions Code.

2. The hearing judge also concluded that respondent violated Business and Professions Code section 6068 (a) in counts 2-7 and 9. We are unable to find in the record a sufficient factual basis for such a conclusion separate and distinct from the other statute and rule violations. (See *Middleton v. State Bar* (1990) 51 Cal.3d 548, 561.)

Rules Proc. of State Bar, div. V [hereinafter "standard(s)" or "std."]); (2) that respondent was grossly negligent in accounting for client funds in addition to his culpability for gross negligence in failure to disburse such funds (std. 1.2(b)(iii)); and (3) that respondent significantly harmed one client who was sued by a collection agency for failure to pay a medical lien. (Std. 1.2(b)(iv).)

In mitigation, the hearing judge found that: (1) respondent had no prior record of discipline (std. 1.2(e)(i)); (2) respondent had extreme physical disabilities at the time of the misconduct in counts seven and nine (std. 1.2(e)(iv)); (3) respondent was candid and cooperative (std. 1.2(e)(v)); (4) respondent made belated restitution; (5) respondent performed extensive pro bono legal services (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667; *Hawk v. State Bar* (1988) 45 Cal.3d 589, 602); (6) after the problems were brought to light, respondent diligently worked to improve his law office management practices; (7) respondent has changed his values through a spiritual reawakening; and (8) respondent evinced sincere remorse for his wrongdoing. (Decision p. 37.)

The hearing judge rejected disbarment because of the compelling mitigation and because respondent had no dishonest intent, but rather was grossly negligent in managing his trust account and supervising staff and acted with reckless disregard of whether his clients' medical bills were paid. She also rejected respondent's argument for no actual suspension because of the lengthy time period of his misconduct; his continued failure to pay medical liens long after demand was made and two years after his spiritual reawakening; the fact that he knowingly subjected his client to a collection action; and his delay in returning another client's file. (Decision pp. 38-39.)

DISCUSSION

[3] On review, the respondent cannot challenge his culpability of trust account violations and other stipulated misconduct. [4] The duty to keep clients' funds safe is a personal obligation of the attorney (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 795), which is nondelegable (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 680). He argues that the trial judge erroneously concluded there was a pattern of mis-

conduct; erroneously considered the delay in rectifying problems as an aggravating circumstance; and was unduly influenced by the one-year minimum of actual suspension set forth in standard 2.2(a), since disapproved in *Edwards v. State Bar* (1990) 52 Cal.3d 28. His brief also summarizes at great length character witness testimony that was accepted by the hearing judge and taken into account in rendering her decision. It concludes by arguing that at most respondent should receive no more than 60 days actual suspension and no rule 955 requirement should be imposed. (Cal. Rules of Court, rule 955.) The examiner defends the hearing judge's decision as supported by the case law as well as the standards.

[5] The findings in mitigation are essentially not challenged. We adopt them, except for the finding in mitigation based on belated restitution. (See, e.g., *Rosenthal v. State Bar* (1987) 43 Cal.3d 658, 664.)

EVIDENCE SUPPORTING A PATTERN OF MISCONDUCT

[6a] Respondent's counsel argues that "the misconduct in this case involved a total of eight clients over a period of about six years," during which time respondent's law office processed "literally thousands of cases." Negligence in only that number of cases over that many years in a high volume practice might well not constitute a pattern, but the evidence here was that the negligence was far more pervasive. Indeed, his counsel also argues that respondent's lengthy delay in responding to the complaining witnesses was due to numerous other client problems caused by his office which he had to correct. By his own admission, his staff could not handle his overwhelming caseload, 95 percent of which was for Spanish-speaking clients. (R.T. p. 146.) When he finally reviewed his 3,500 cases personally, he was "taking care of lots of other problems" (R.T. p. 231), which would have resulted in new State Bar complaints for mishandled cases other than the ones to which he stipulated culpability. (R.T. pp. 231-232.) To quote from his own counsel's brief before us, "Some settlements were distributed improperly, some files were closed without closing numbers, some medical liens were missed, and his trust account dipped below the levels it should have been at for various periods of time." (Citing R.T. pp. 146-147.)

Respondent's counsel summarized the pervasiveness of the problem as follows: "In short, faced with a problem greater in scope than just the eight complaints at issue here, Respondent chose to tackle the problems globally, and remedy them in a systematic, hands-on fashion. By necessity, this process took a long time to complete."

[6b] Finding a pattern in aggravation is not limited to consideration of the counts pleaded. (*Grim v. State Bar* (1991) 53 Cal.3d 21, 34.) Since respondent himself testified to his prolonged, systemic failure to supervise his staff, his staff's inability to handle the caseload and numerous other problems besides the ones listed in the notice to show cause, he has no grounds to challenge the finding in aggravation based thereon that a pattern of neglect existed. (*Id.*; cf. *Edwards v. State Bar, supra*, 52 Cal.3d at pp. 35-36.)

[7] The delay in rectifying the problem was also properly taken into account in aggravation. Indeed, we agree with the hearing judge that this delay is the most significant factor in justifying the length of the suspension. After respondent found out about his office's failure to pay liens, he still took up to two years to pay them. Respondent's preoccupation with other unspecified problems involving his prior caseload is no justification for his delay in remedying the negligent misappropriations set forth in the charges heard below. (See, e.g., *Garlow v. State Bar* (1988) 44 Cal.3d 689, 711; *Farnham v. State Bar* (1988) 47 Cal.3d 429, 445.)

Finally, respondent's counsel argues that the hearing judge was unduly influenced by standard 2.2(a) which calls for a minimum of a one-year actual suspension for misappropriation. [8] The hearing judge issued her decision prior to *Edwards v. State Bar, supra*, 52 Cal.3d 28 and *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404 and does not address the question of whether gross negligence resulting in misappropriation should be subject to a suggested one-year minimum actual suspension the same as is applied in intentional misappropriation cases. Nor does the decision make reference to any prior cases involving grossly negligent misappropriation. Rather, in applying the suggested guideline of one year actual suspension, the

hearing judge justified her decision based on facts in the record making some suspension appropriate for public protection (decision pp. 38-39), stating that such factors "preclude my departure from the Standards." (*Id.* at p. 39.) Despite such language, we do not find her to have rigidly applied the standards, but to have reached her discipline recommendation based on an analysis of the record in light of the objectives of discipline for protection of the public, the legal profession and the courts.

[9] Respondent's counsel is correct that the Supreme Court rejected the one-year minimum actual suspension in *Edwards v. State Bar*: "In requiring that a minimum of one year of actual suspension invariably be imposed . . . the standard is not faithful to the teachings of this court's decisions." (*Edwards v. State Bar, supra*, 52 Cal.3d at p. 38, emphasis supplied.) Negligent misappropriation quickly and voluntarily remedied may not require any actual suspension (*Waysman v. State Bar* (1986) 41 Cal.3d 452), or only a short suspension (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, recommended discipline adopted Feb. 14, 1991 (S017463)). [10] Nevertheless, in *Edwards v. State Bar*, the Supreme Court specifically reaffirmed that misappropriation caused by serious, inexcusable violation of a lawyer's duty to oversee entrusted funds is deemed willful even in the absence of deliberate wrongdoing. Even with Edwards's 18-year clean discipline record, full restitution and voluntary steps to improve his management of trust funds, the Supreme Court ordered one year of actual suspension. (*Edwards v. State Bar, supra*, 52 Cal.3d at pp. 38-39.) Thereafter, we recommended six months actual suspension of respondent Bouyer for grossly negligent misappropriation resulting from mishandling four cases and not correcting the problem for a year. Bouyer's gross negligence was for a far lesser period and merited a shorter period of suspension than the misconduct demonstrated here.

The attempts of respondent's counsel to distinguish *In the Matter of Bouyer, supra*, 1 Cal. State Bar Ct. Rptr. 404, and *Edwards v. State Bar, supra*, 52 Cal.3d 28, are unpersuasive. [11a] There is far more mitigation evidence here in terms of respondent's subsequent religious conversion, pro bono activities and character witness testimony, but there were also

far more incidents of misappropriation over a far greater period of time. Indeed in *Rose v. State Bar* (1989) 49 Cal.3d 646, extensive pro bono activities prevented disbarment, but did not preclude two years actual suspension for multiple serious acts of misconduct. Here, apart from the gross negligence which resulted in the original misappropriations, there was prolonged delay in making restitution after knowledge of the problem. That was not true in *In the Matter of Bouyer* or *Edwards v. State Bar*.

Edwards was charged with misappropriating funds of one client for a short period of time, writing her a check drawn on insufficient funds, which he repaid within three months. The misappropriation in *Edwards v. State Bar* was not proved to have been intentional. Rather Edwards testified that "he had believed there were sufficient funds in the account to cover the check, but that he had not known the exact balance. He said he 'would kind of keep a mental idea' as to the balance, rather than maintaining a record of the exact balance. . . . [H]e did not maintain a chart of the client funds in his trust account and did not promptly withdraw funds to which he became entitled as fees or as reimbursement for costs. He would allow his own funds to accumulate in the account and would draw on them as needed, sometimes by means of automated teller machines." (*Edwards v. State Bar, supra*, 52 Cal.3d at p. 33.) The Supreme Court cited with approval the hearing department's findings that "petitioner's dealings in his trust account, by his own admission, involve multiple acts of inappropriate record keeping and use of funds for personal matters." (*Id.* at p. 34.) This evidence of uncharged misconduct was properly considered in aggravation.

As here, Edwards thereafter greatly improved his handling of the trust account, voluntarily employed a certified public accountant to manage his trust account and ceased the practice of commingling his own funds in that account. The hearing panel took this into account as well as Edwards's lengthy prior period of law practice without any discipline and recommended no actual suspension. The former volunteer review department instead recommended two years actual suspension. The Supreme Court rejected the former recommendation as too lenient and the latter as too harsh, deeming one year of actual

suspension necessary for the protection of the public, the courts and the legal profession. (*Edwards v. State Bar, supra*, 52 Cal.3d at p. 39.)

[11b] We conclude that respondent should be suspended for a similar period. By his own admission, for a number of years he took in more cases than he could handle and failed to supervise his staff in derogation of his responsibilities as an attorney toward his clients and lienholders. His belated reformation is a giant step in the right direction, but is not enough to justify reducing the suspension recommendation, particularly in light of his failure to make complete restitution until after the State Bar proceedings were instituted.

CONCLUSION

[11c] For the reasons discussed herein, we therefore recommend that the Supreme Court adopt the hearing judge's recommendation of two years suspension, stayed, and three years probation, on the conditions set forth in her decision, including one year of actual suspension, and compliance with rule 955 of the California Rules of Court. [12] We also recommend a requirement of passage of the new California Professional Responsibility Examination within one year instead of the examination given by the National Conference of Bar Examiners which was recommended by the hearing judge at a time when the California Professional Responsibility Examination was not yet available.

We concur:

NORIAN, J.
STOVITZ, J.