PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed August 5, 2015

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 12-O-14863
	)	
SCOTT CUMMINGS McKEE,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 154077.	)	
	)	

This is Scott Cummings McKee's fourth disciplinary proceeding. In 2005, he was privately reproved for improperly withdrawing from representation of a client, causing significant harm to that client. In 2010, he was suspended for 60 days for failing to comply with his reproval conditions. In 2011, he was suspended for six months for intentionally misappropriating $12,000 in client funds and violating a court order. Each time, his misconduct was mitigated by a serious illness, severe depression, and financial difficulties.

This proceeding arises from McKee's conduct while he was suspended for his third discipline and working as a legal assistant for a law firm. At that time, he wrote an eight-page demand letter on behalf of his former client who was in a dispute with his landlord. In it, McKee misrepresented that the law firm had been retained on behalf of the tenant, argued the legal issues involved, and proposed a settlement. He used his employer's law firm letterhead without his employer's knowledge or permission and wrote the letter without being supervised by an attorney. After McKee sent the demand letter, the landlord's attorney brought it to McKee's employer's attention. Just a month later, McKee submitted his quarterly report to the State Bar Office of Probation (Probation), stating, under penalty of perjury, that he had not practiced law while on suspension. Thereafter, his employer terminated him.

The hearing judge found McKee culpable of the unauthorized practice of law (UPL), failing to comply with his probation conditions, and acts of moral turpitude. Finding two factors in aggravation (three prior records of discipline, multiple acts) and minimal mitigation (emotional difficulties and good character), the judge recommended disbarment.

McKee appeals. He challenges the moral turpitude findings, seeks greater mitigation for his substance abuse and depression, and requests a lesser discipline than disbarment. The Office of the Chief Trial Counsel of the State Bar (OCTC) submits that McKee must be disbarred because he has proven himself unwilling to conform his conduct to the ethical requirements of the legal profession.

Based on our independent review (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's two moral turpitude findings but dismiss the remaining counts as duplicative. We find less aggravation and no mitigation. Of particular concern here is the intentional deception that surrounded McKee's UPL and his subsequent dishonest statement to Probation under penalty of perjury that he had not practiced law while suspended. This conduct, coupled with his three prior discipline records, show there is a high risk that he will continue to offend and further indicate that he is not a good candidate for probation. We therefore recommend that McKee be disbarred in accordance with the presumptive discipline recommendation under standard 1.8(b) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.[1]

[1] Effective July 1, 2015, the standards were revised and renumbered. Because this appeal was submitted for ruling before that 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. Standard 1.8(b) provides under circumstances relevant to this case that "disbarment is appropriate" when an attorney has two or more prior disciplines.

I. FACTUAL HISTORY

McKee was admitted to the practice of law in California in October 1991. After he was diagnosed with a serious illness in 2004, he became totally disabled by depression and received Social Security disability benefits for a number of years. Through treatment, McKee's depression eventually improved, and, in 2009, he resumed the practice of law as a solo practitioner and as a part-time independent contractor for attorney Robert Amidon.

A. Relationship to Steven Gomez

In 2010, Steven Gomez retained McKee, who at the time was a solo practitioner, to represent him in an employment matter. On Gomez's behalf, McKee successfully negotiated a settlement with a severance package. In early 2011, Gomez became involved in a dispute with his landlord, and sought and received advice from McKee.

On August 25, 2011, the California Supreme Court filed its order in McKee's third discipline, placing him on probation for five years subject to conditions, including a six-month actual suspension. The order became effective on September 24, 2011, and McKee stipulated he had actual knowledge that he was suspended from the practice of law between September 24, 2011, and March 25, 2012. McKee further stipulated that he began working for Amidon as a legal assistant on September 24th.

Just prior to McKee's suspension, Gomez's landlord served Gomez with a three-day notice to quit. He turned to McKee for legal advice. McKee testified that he informed Gomez that he could not help him because of his impending suspension. Gomez continued having problems with his landlord, and in February 2012, he again sought McKee's help.

McKee reviewed the rules of professional conduct regarding the type of services suspended attorneys are permitted to provide.[2] He hoped Amidon would agree to take Gomez's case and allow McKee to work on it as a supervised legal assistant. Amidon, however, was completely occupied in an out-of-state criminal trial. McKee testified that Amidon suggested he consult a lawyer from a different firm, which he did. However, McKee admits the other attorney did not agree to represent Gomez or to supervise McKee in taking any action on the matter.

B. March 2, 2012 Letter

Despite knowing that he could not represent Gomez, and that Amidon had not agreed to do so, McKee testified he spent hours researching and drafting an eight-page formal demand letter on Gomez's behalf. He wrote the letter on Amidon's law firm letterhead and addressed it to Gomez's landlord with a copy to the property owner. Dated March 2, 2012, the letter begins: "Mr. Gomez has retained the services of this firm to represent him in addressing your on-going harassment of him and transparent illegal efforts to force him to vacate the premises." In the letter, McKee used the word "we," implying that McKee was speaking on behalf of the Amidon law firm.

McKee included documentation of what he characterized as "various illegal tactics . . . used to try to force Mr. Gomez to vacate the premises." He also detailed a list of purportedly "illegal actions" taken by the landlord, citing to specific municipal and civil code sections and regulations for support. He further outlined Gomez's legal rights and his possible recourse, including filing suit and seeking a hearing before the rent stabilization board. McKee specified the dollar amount of the liability faced by the landlord and the property owner and advised that his client would also be entitled to punitive damages if the matter went to trial. He closed the

[2] Specifically, he reviewed rule 1-311(C)(1) of the California Rules of Professional Conduct, which provides that a member may employ a suspended attorney to perform legal work "of a preparatory nature, such as legal research . . . [and] drafting of pleadings, briefs, and other similar documents."

letter with the suggestion that legal action was imminent: "Any further attempts by you to use illegal tactics to force Mr. Gomez to vacate the premises will immediately be addressed by legal action." He then suggested that the property owner contact him at the law firm's telephone number. McKee signed the letter without indicating that he was a legal assistant or that he was not entitled to practice due to his suspension.

Soon after McKee sent the letter, the landlord's attorney, Stanley Green, called Amidon to complain because he had learned McKee was suspended. McKee apologized to Green, explaining that he had been working as Amidon's assistant. At Amidon's direction, McKee drafted a March 28, 2012 letter to Green, in which he stated that the firm would take no further action on Gomez's behalf. McKee testified that he thought Green was satisfied with his explanation and would "let the matter pass." Subsequently, Amidon terminated McKee as a result of this incident.

C. April 2012 Probation Report

McKee's third discipline required him to submit quarterly reports to Probation, attesting to his compliance with his probation conditions. On April 6, 2012, McKee submitted a quarterly report for the period of January 1, 2012 through March 31, 2012, stating, under penalty of perjury: "I did not practice law at any time during the reporting period noted above or applicable portion thereof during which I was suspended pursuant to the Supreme Court order in this case."

II. MCKEE IS CULPABLE OF TWO COUNTS OF MISCONDUCT

On May 13, 2013, OCTC filed a four-count Notice of Disciplinary Charges. We affirm the hearing judge's culpability findings on two counts and dismiss two counts as duplicative.

A. Count One: Acts of Moral Turpitude in Representation of Gomez
Count Two: Unauthorized Practice of Law
Count Three: Probation Violation

OCTC charges that McKee committed acts of moral turpitude in violation of Business and Professions Code section 6106[3] by sending a demand letter in which he "knowingly gave the false impression" that he was an attorney entitled to practice law and falsely represented that Gomez had retained the Amidon law firm. We affirm the hearing judge's finding that McKee is culpable as charged.

McKee argues on appeal that he genuinely believed he had permission to send the demand letter on Amidon's letterhead and that he was acting in the capacity of a supervised legal assistant. His argument is directly contradicted by his own testimony, which established his intentional conduct in drafting the demand letter without an attorney's supervision and then using his employer's letterhead stationery without his knowledge or permission to do so.

Moreover, the content of the demand letter underscores McKee's intentional dishonesty. He began with the unequivocal misrepresentation that Gomez had retained the Amidon law firm. He wrote as if he were authorized by Amidon's law firm to tender a demand on Gomez's behalf, referencing the supporting legal and factual bases for the demand. Finally, McKee did not identify himself as a suspended attorney or suggest in any way that he was acting as an unsupervised legal assistant.

Accordingly, we find McKee culpable of acts of moral turpitude. (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 910 [moral turpitude "includes creating a false impression by concealment as well as affirmative misrepresentations [citation]"]; see *Grove*

[3] Business and Professions Code section 6106 states that "[t]he 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, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." All further references to sections are to this source.

v. State Bar (1965) 63 Cal.2d 312, 315 [for purposes of moral turpitude, no distinction between concealment, half-truth, and false statement of fact].)

Based on these same facts, OCTC charged McKee in Count Two with improperly holding himself out as entitled to practice law and actually practicing law while not entitled to do so, in violation of section 6068, subdivision (a), and in Count Three with violating his probation by practicing law while on suspension. We dismiss both counts as duplicative of Count One. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose is served by duplicate allegations of misconduct in State Bar proceedings].)

B. Count Four: Act of Moral Turpitude in Misrepresentation to Probation

Finally, McKee is charged with committing an act of moral turpitude by falsely stating in his April 6, 2012 quarterly report, that he had not practiced law while on suspension. He argues that he did not intentionally make this misrepresentation because he was not aware at the time that drafting the demand letter constituted practicing law. We reject his argument because McKee reviewed the rules of professional conduct prior to writing the letter and yet, without supervision, prepared and sent it, citing the legal and factual bases for, and legal consequences of, the landlord's liability. The form and content of the letter was intended to convey the impression that McKee was authorized by the law firm of Robert Amidon to make the settlement demand on behalf of Gomez and to negotiate a resolution of the dispute. Attorney Green complained about McKee's conduct *before* McKee submitted his quarterly report, yet McKee failed to disclose his UPL in his probation report. We affirm the hearing judge's moral turpitude finding on Count Four.

III. SIGNIFICANT AGGRAVATION AND NO MITIGATION[4]

The hearing judge correctly found two factors in aggravation. Most significantly, McKee's present misconduct is aggravated by his three prior disciplines that have not prevented his progressively more serious misconduct. (Std. 1.5(a).) In *McKee I*,[5] due to his failure to take action on his client's behalf, the superior court dismissed his client's wrongful termination matter and awarded the defendant costs and fees of $4,682.25. McKee stipulated that he was culpable of failing to notify his client of his withdrawal and to take reasonable steps to avoid prejudicing his client. His misconduct was mitigated because of a serious illness, and he was privately reproved with conditions, including making restitution.

In *McKee II*,[6] he stipulated to culpability for failing to comply with numerous reproval conditions in *McKee I*, including making restitution. Further, the parties stipulated that McKee began suffering from a severe depression, making it "impossible to maintain a full time law practice and earn the funds necessary to timely pay restitution." He received a 60-day actual suspension with conditions, including restitution.

Finally, in *McKee III*,[7] he stipulated to culpability for intentional misappropriation of $12,000 and violation of a related court order. In 2006, McKee settled a client's personal injury claim for a six-figure amount, and deposited the settlement funds into his trust account. The court ordered McKee to maintain a portion of the funds in trust pending resolution of the lienholders' claims, including a $12,500 lien held by prior counsel. McKee issued a $500 partial

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

[5] State Bar Court case No. 04-O-15360, private reproval effective August 23, 2005.

[6] Supreme Court case No. S181032; State Bar Court case No. 07-H-11874, Order effective June 19, 2010.

[7] Supreme Court case No. S194072; State Bar Court case No. 09-O-14555, Order effective September 24, 2011.

payment to the prior counsel, but withdrew the remaining $12,000 in early 2007 "to meet his personal expenses while he was suffering from a debilitating and life-threatening illness, without an honest, reasonable or good faith belief that he was entitled to the $12,000, but without any evil intent or intent to permanently deprive [prior counsel] of the funds due to him." His misconduct was aggravated by his prior disciplines and his indifference, and mitigated by his cooperation, remorse, and severe depression and financial problems. He received a six-month actual suspension with conditions.

We ascribe significant aggravation to McKee's prior disciplinary records because he has continued to commit misconduct over a six-year period, most often while he was on probation from his previous discipline. (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 564 [prior misconduct constitutes serious aggravation where attorney notified of ethically questionable nature of present misconduct].) Moreover, his third discipline involved intentional misappropriation of a substantial amount of money, which is serious misconduct that generally results in disbarment absent compelling mitigation. (See std. 2.1(a).)

In contrast to the hearing judge, we find that McKee engaged in two rather than four acts of wrongdoing and therefore we give no weight in aggravation for multiple acts of misconduct under standard 1.5(b). (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646 ["two matters of misconduct may or may not be considered multiple acts"].)

As for mitigation, we conclude that McKee is entitled to none. To begin, he did not establish that he suffers from physical and emotional disabilities "directly responsible for [his] misconduct" and that "no longer pose a risk that [McKee] will commit misconduct." (Std. 1.6(d).) McKee testified at trial, and argues on appeal, that at the time he wrote the demand letter, "my judgment was impaired often from substance abuse and depression" and by extension, that these problems caused his misconduct. Yet the demand letter, cogent and well-

argued, hardly appears to be the work product of a person impaired by substance abuse. We do not find he established that his problems rendered him incapable of recognizing he was clearly violating his suspension.

Furthermore, as observed by the hearing judge, McKee admitted in these proceedings that he still suffers from depression. Thus, the record does not provide assurance that his depression and related substance abuse are sufficiently under control so as to no longer pose a risk that he will commit additional misconduct.

Finally, the two non-attorney witnesses who attested to his good character do not represent a "wide range of references in the legal and general communities" required to demonstrate "extraordinary good character." (Std. 1.6(f); see *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 they are not wide range of references].)

IV. DISBARMENT IS THE ONLY APPROPRIATE DISCIPLINE[8]

Our disciplinary analysis begins with the standards. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Standard 1.8(b) provides, inter alia, that when a member has two or more prior records of discipline, disbarment is appropriate if actual suspension was ordered in any of the prior matters, or if the prior disciplines coupled with the current misconduct demonstrate the member's unwillingness or inability to conform to ethical responsibilities. A departure from the presumptive recommendation of disbarment is permitted if the most compelling mitigating circumstances clearly predominate or if the misconduct underlying the prior discipline occurred during the same period as the current misconduct. Such is not the case here.[9]

[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.)

[9] Also applicable, standard 2.7 provides that disbarment or actual suspension is appropriate for an act of moral turpitude.

McKee's argument that the standards serve as guidelines and are not mandatory is well-taken. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [disbarment is not mandatory in every case of two or more prior disciplines, even where no compelling mitigating circumstances clearly predominate].) But, if we depart from the standards, we must articulate clear reasons for doing so. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.) Here, we cannot do so. McKee's numerous ethical violations span almost a decade, and his dishonesty has increased. In his most recent discipline, McKee was given a most reasonable six-month suspension based in part on his guarantee that his health no longer posed a risk of further misconduct. Nevertheless, he was unable to conform his conduct to the ethical requirements of his profession during the six-month period of his suspension.

The State Bar Court has been required to intervene four times to ensure that McKee adheres to the professional standards expected of those who are licensed to practice law in the State of California. We conclude that additional probation and suspension are inadequate to prevent him from committing future misconduct that would endanger the public and the legal profession. Standard 1.8(b) and the decisional law support our conclusion that the public and the profession are best protected if McKee is disbarred.[10]

[10] *Farnham v. State Bar* (1988) 47 Cal.3d 429 [disbarment where attorney with prior discipline record habitually ignored ethical duties to clients]; *McMorris v. State Bar* (1983) 35 Cal.3d 77 [disbarment where attorney habitually failed to perform in five client matters and was twice previously suspended for similar misconduct]; *Barnum v. State Bar* (1990) 52 Cal.3d 104, 113 [disbarment where attorney was previously placed on probation followed by suspension and probation revocation, and where depression was not "most compelling" mitigation when weighed against risk of recurrence of misconduct]; *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 80 [disbarment where attorney had two prior records of discipline and was unable to conform conduct to ethical norms].

V. RECOMMENDATION

We recommend that Scott Cummings McKee be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys admitted to practice in this state.

We also recommend that McKee be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

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

VI. ORDER

The order that Scott Cummings McKee be involuntarily enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (c)(4), effective January 30, 2014, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

EPSTEIN, J.

WE CONCUR:

PURCELL, P. J.

McELROY, J.