

Filed October 22, 2014

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case Nos. 12-O-12598 (12-O-13571)
)	
KENNETH BRUCE TISHGART,)	OPINION AND ORDER
)	
A Member of the State Bar, No. 96206.)	
_____)	

This is the fourth disciplinary proceeding for Kenneth Bruce Tishgart. In this latest matter, a hearing judge found that Tishgart engaged in the unauthorized practice of law (UPL) and committed acts of moral turpitude by holding himself out as entitled to practice law while he was on disciplinary suspension. Because Tishgart had no mitigation and three prior records of discipline, the hearing judge recommended disbarment.

Tishgart seeks review and contends that the hearing judge’s findings and conclusions are not supported by the evidence, particularly since he followed the advice of ethics counsel “to the letter” while suspended. He asserts he is “not guilty of any of the charges brought,” and urges that the hearing judge’s “decision requires reversal.” The Office of the Chief Trial Counsel of the State Bar (OCTC) did not seek review but asks that we uphold the disbarment recommendation.

Based on our independent review of the record (Cal. Rules of Court, rule 9.12), we adopt the hearing judge’s findings and conclusions that Tishgart engaged in UPL and committed acts of moral turpitude while on disciplinary suspension. We assign some mitigation credit for Tishgart’s stipulation, but, in view of the present misconduct and Tishgart’s prior disciplinary

record, we recommend that he be disbarred to protect the public, the courts, and the legal profession.

I. BACKGROUND

Tishgart was admitted to practice law in California in December 1980. His three previous records of discipline resulted in a public reproof in 1992, a 90-day actual suspension in 2010, and an 18-month actual suspension in 2011. The orders from the second and third disciplines led to his continuous suspension from the practice of law since July 25, 2010.

On September 25, 2012, OCTC filed the Notice of Disciplinary Charges (NDC) in the present case, charging Tishgart with five counts of misconduct in two client matters. In the first matter (Case No. 12-O-12598), Tishgart was charged with one count each of UPL and misleading advertising in violation of Business and Professions Code section 6068, subdivision (a),¹ rule 1-400(D) of the Rules of Professional Conduct, rule 1-400(D),² and two counts of acts involving moral turpitude for engaging in UPL and misleading advertising in violation of section 6106. The hearing judge dismissed the charges for misleading advertising and moral turpitude on the ground that rule 1-400(D) did not apply to suspended attorneys or was duplicative of the UPL charges. In the second matter (Case No. 12-O-13571), Tishgart was alleged to have failed to perform with competence in violation of rule 3-110(A). The hearing judge dismissed the incompetence charge for lack of adequate notice and insufficient evidence. On review, OCTC does not challenge the dismissals, and we affirm them.

¹ All further references to sections are to this source.

² All further references to rules are to this source unless otherwise noted.

II. FACTS

Prior to his suspension in July 2010, Tishgart consulted with ethics counsel for “suspension planning.” Counsel advised Tishgart that while suspended, he may not give legal advice; proceed under the firm name “The Law Offices of Kenneth B. Tishgart;” use stationery bearing that name; and use his likeness or voice in any capacity as an attorney. Ethics counsel also informed Tishgart that he could work in a law office, but only if it was operated by another licensed attorney and Tishgart’s non-attorney capacity was clearly indicated.

Nevertheless, as Tishgart stipulated, he paid for television advertisements while suspended that aired throughout 2011 to June 2012. These ads were broadcasted over 70 times, encouraging accident victims to call the “Tishgart Law Office” and referencing a telephone number with a recording of Tishgart’s voice message. That message confirmed to the caller that he or she had reached Tishgart, who would be returning the call. The telephone number was the same number previously used by “The Law Offices of Kenneth B. Tishgart.” No disclaimer stated that Tishgart was suspended or not entitled to practice law. No other attorney with the name Tishgart worked at the “Tishgart Law Office” at the time. There was no mention of Zach Nethercot, who was the licensed attorney hired to operate the Tishgart Law Office while Tishgart was under suspension.

Tishgart also stipulated that he maintained a website with the address www.tishgartlaw.com on the Internet from June 25, 2012 to March 5, 2013. Each of the website’s two pages had the caption “Ken Tishgart [¶] Attorney at Law.” The first page described Tishgart as a skilled attorney with experience representing individuals injured in premises liability cases.³ The second page instructed: “Contact the office of Kenneth Tishgart at

³ Under the heading “Practice Areas” and subheading “Premises Liability,” the website’s first page stated:

(800) 696-3396 or by email at [sic] to arrange for a consultation to determine the strength of your case.” The bottom of the page stated: “©2010 Kenneth B. Tishgart Attorney at Law – California Personal Injury Lawyers – serving the communities of California”

In addition, Tishgart agreed in January 2011 to represent a former client, Rebecca Anne Deleon Ambrosio, in a car accident case without informing her of his suspension or that the firm was being operated by Nethercot. Tishgart had her sign a Fee and Representation Agreement that also did not include either fact. Despite Nethercot’s signature on the agreement, Ambrosio believed she had retained Tishgart as her attorney. On Ambrosio’s behalf, from January 2011 through February 2012, Tishgart corresponded with Farmers Insurance, the defendant’s insurance company, and with Douglas R. Patterson, D.C., who was Ambrosio’s treating chiropractor. Tishgart never disclosed that he was suspended or that Nethercot was representing Ambrosio in his stead. In March 2012, Tishgart negotiated a settlement for Ambrosio and endorsed the settlement check made payable to Ambrosio and the Law Offices of Kenneth B. Tishgart.

Ambrosio testified that she did not know that Tishgart was suspended until she initiated an Internet search of his name in 2012, nor did she have any knowledge of Nethercot. She denied that she received letters from Tishgart in January 2011 and October 2011 purportedly informing her of Tishgart’s suspension. Throughout the case, she referred to Tishgart as her attorney in her correspondence with various parties.

If you have been seriously injured as the result of a premises liability accident in California, it is important that you contact an experienced premises liability lawyer to protect your rights. Skilled California slip and fall accident attorney Kenneth Tishgart is dedicated to representing clients who have suffered bodily injuries as a result of negligence on the part of property owners. If you have been the victim of a premises liability injury in the state of California, contact Tishgart Law Office for a free consultation.

III. CULPABILITY

We adopt the hearing judge's conclusion that Tishgart violated section 6068, subdivision (a),⁴ by engaging in UPL in contravention of sections 6125 and 6126,⁵ and committed acts of moral turpitude prohibited by section 6106.⁶

A. Violation of Section 6068, Subdivision (a), for Engaging in UPL

An attorney on "actual suspension" is disqualified from the practice of law and from holding himself or herself out as entitled to practice during the suspension period. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1);⁷ *Arm v. State Bar* (1990) 50 Cal.3d 763, 775.) Accordingly, a suspended attorney commits UPL by holding himself or herself out as practicing or as entitled to practice law. (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 666.) "Both express and implied representations of ability to practice are prohibited. [Citation.]" (*In re Naney* (1990) 51 Cal.3d 186, 195.)

We find clear and convincing evidence⁸ that Tishgart is culpable of UPL by giving a false impression of his ability to practice law when he: (1) paid for television advertisements between 2011 and June 2012 for "Tishgart Law Office" and referenced the same telephone number he

⁴ Section 6068, subdivision (a), provides that it is the duty of an attorney "[t]o support the Constitution and laws of the United States and of this state."

⁵ A violation of section 6068, subdivision (a), is predicated on violations of sections 6125 and 6126. (*In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 236-237.) Section 6125 provides: "[n]o person shall practice law in California unless the person is an active member of the State Bar." Section 6126 prohibits an individual who is not an active member of the State Bar from holding himself or herself out as entitled to practice law.

⁶ 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."

⁷ All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

⁸ 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.)

used for the “Law Offices of Kenneth B. Tishgart;” (2) recorded his voice message for Tishgart Law Office informing the caller that he or she had reached Tishgart, who would return the call; (3) failed to provide a disclaimer in the advertisement or voice message that he was not entitled to practice law; (4) failed to identify Nethercot or any other licensed attorney in the advertisement or voice message; (5) maintained a website with the heading “Ken Tishgart, Attorney at Law” that described his abilities, qualifications, and contact information as an attorney, and encouraged the public to “[c]ontact the office of Kenneth Tishgart” for a consultation; (6) did not inform Ambrosio that he was not entitled to practice law; (7) took no steps to correct the false impression Farmers Insurance and Ambrosio’s chiropractor had that he was Ambrosio’s attorney; and (8) failed to ensure that the Tishgart Law Office used no stationery that identified him as an attorney.

Taken as a whole, these acts create a false impression that Tishgart had the ability to practice law while he was on suspension. “[A]n attorney cannot expressly or impliedly create or leave undisturbed the false impression that he or she has the present or future ability to practice law when in fact he or she is or will be on suspension.” (*In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar. Ct. Rptr. 83, 91 [suspended attorney created false impression of present ability to practice by using terms “Member, State Bar of CA” and honorific “ESQ.” next to his signature on job application].)

In addition, Tishgart actually practiced law while on suspension. Ambrosio testified that “[h]e said that he’s going to take my case” during their initial conversation about her accident. Tishgart then communicated with Medicare and Farmers Insurance on her behalf, negotiated her settlement, discussed it with Ambrosio, and endorsed the reissued settlement check from Farmers Insurance. The practice of law embraces a wide range of activities, including giving legal advice and preparing documents to secure legal rights. (*People v. Merchants Protective Corp.* (1922)

189 Cal. 531, 535.) Tishgart's actions constitute the actual practice of law, which independently establishes his UPL. (See *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543 [activity constitutes practice of law if it involves application of legal knowledge and technique]; *Farnham v. State Bar* (1976) 17 Cal.3d 605, 612 [suspended attorney committed UPL by informing client he would accept his case and prepare complaint].)

Tishgart maintains that he is not culpable of engaging in UPL because he followed the advice of ethics counsel. However, the opinion of another attorney is not a defense to a violation of the rules or sections governing attorney ethics. (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 [opinion of "fellow attorney" no defense to wrongdoing].) Moreover, Tishgart did not follow the ethics counsel's advice since he continued to use his designation as an attorney in television advertisements, a website marketing his legal services, and on his stationery. The totality of the evidence in this case leaves no doubt that Tishgart engaged in UPL. (See *Crawford v. State Bar, supra*, 54 Cal.2d at p. 669 ["The individual acts . . . are not necessarily determinative. A consideration of the entire pattern of conduct is necessary"].)

B. Violation of Section 6106 by Engaging in UPL

Section 6106 provides that an act involving moral turpitude "constitutes a cause for disbarment or suspension." Moral turpitude "includes creating a false impression by concealment as well as affirmative misrepresentations." (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 910; see *Grove v. State Bar* (1965) 63 Cal.2d 312, 315 [for purposes of moral turpitude there is no distinction between concealment, half-truth, and false statement of fact].) The hearing judge found Tishgart culpable of moral turpitude.

Tishgart claims that Ambrosio's testimony denying knowledge of his suspension is not believable since evidence showed that two letters he claimed he sent to Ambrosio informed her of his suspension and the fee agreement she signed bore Nethercot's signature. However, the

hearing judge found that Ambrosio credibly testified that she only found out that Tishgart was suspended when she searched for his name on the Internet in February 2012. Despite Tishgart's claim on review that Ambrosia was a "confused and self-contradicting witness," the hearing judge's credibility determination to the contrary is entitled to great weight. (See *Conner v. State Bar* (1990) 50 Cal.3d 1047, 1055 [credibility determinations made by judge who heard and saw witness entitled to great weight]; see also Rules Proc. of State Bar, rule 5.155(A) [hearing judge's findings of fact entitled to great weight on review].)

We agree with the hearing judge's finding of moral turpitude.⁹

IV. AGGRAVATION AND MITIGATION

Standard 1.5, Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, requires OCTC to establish aggravating circumstances by clear and convincing evidence.¹⁰ Standard 1.6 requires Tishgart to meet the same burden to prove mitigation.

A. Aggravating Circumstances

The hearing judge found two factors in aggravation based on Tishgart's prior records of discipline and multiple acts of misconduct. We agree.

1. Three Prior Records of Discipline (Std. 1.5(a))

We consider Tishgart's prior records of discipline as significant aggravation, particularly since he committed the present misconduct while still on suspension and probation. (*In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888, 892-893 [record of three prior disciplines was serious aggravating factor].)

⁹ Having independently reviewed all arguments set forth by Tishgart, those not specifically addressed have been considered and rejected as having no merit.

¹⁰ All further references to standards are to this authority.

Tishgart I (1992 – public reproof)

In October 1992, Tishgart was publicly reproofed for violating rule 5-200(A).¹¹ He stipulated that while he was representing a defendant in an eviction proceeding in October 1989, he obtained a three-day stay of the writ of execution of eviction that the municipal court inadvertently signed after an ex parte application. Despite the court’s contrary order denying the stay after the noticed hearing, Tishgart filed the three-day stay of the writ of execution with the court clerk and presented it to the Sheriff’s Office to stop defendant’s eviction. Tishgart was given mitigation for no prior record of discipline, candor and cooperation, and severe stress due to serious personal matters. In aggravation, Tishgart was found to have harmed the effective administration of justice.

Tishgart II (2010 – 90-day suspension)

On June 25, 2010, the Supreme Court ordered Tishgart suspended from the practice of law for two years, stayed, and placed him on probation for two years on the condition that he be actually suspended for 90 days. Tishgart was found to have violated rule 3-110(A)¹² by failing to competently perform legal services in two client matters between July 2004 and December 2005. In the first matter, Tishgart failed to supervise an inexperienced contract attorney, who was unprepared for trial, resulting in the dismissal of the case. In the second matter, the client’s case was dismissed because Tishgart failed to prosecute the matter, appear for hearings, and pay sanctions. His prior public reproof, multiple acts of misconduct, and harm to clients were considered as aggravation. There were no mitigating factors.

¹¹ Rule 5-200(A) requires that an attorney “employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth.”

¹² Rule 3-110(A) provides that an attorney “shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.”

Tishgart III (2011 – 18-month suspension)

On February 2, 2011, the Supreme Court ordered Tishgart suspended from the practice of law for four years, stayed, and placed on probation for five years on the condition that he be actually suspended for 18 months and until he complied with former standard 1.4(c)(ii).¹³ Tishgart stipulated that he violated section 6103¹⁴ by willfully disobeying a court order. He also violated section 6106 by misappropriating through gross negligence \$4,805 of the client’s funds as attorney’s fees between July 2009 and December 2009. Tishgart’s two prior disciplines were considered as aggravation, while his candor, cooperation, and remorse were found in mitigation.

2. Multiple Acts of Misconduct (Std. 1.5(b))

Tishgart’s numerous acts of UPL and moral turpitude for engaging in UPL establish multiple acts of misconduct. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered aggravating as multiple acts].)

B. Mitigating Circumstances

Although the hearing judge found no mitigation, under our duty to independently review the record, we assign some mitigation credit for Tishgart’s stipulation as to facts and admission of documents. (Std. 1.6(e); *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation accorded to those who admit culpability as well as facts].) But we assign only minimal mitigation since Tishgart provided limited details and stipulated to facts that were easily provable. (*In the Matter of Kaplan* (Review Dept. 1996) 3

¹³ The standards were amended in 2014. Since this case was submitted after the effective date, we apply the new version.

¹⁴ Section 6103 provides that “willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.”

Cal. State Bar Ct. Rptr. 547, 567 [limited mitigating weight for belated stipulation concerning easily provable facts].)

V. DISCUSSION

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.) We balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266; see *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

The standards provide us with guidelines in determining the appropriate level of discipline to recommend and should be followed “whenever possible.” (*In re Young, supra*, 49 Cal.3d at p. 267, fn. 11.) We give them great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) In addition to the standards, we look to comparable cases for assistance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

Because the trial in this case occurred in 2013, the hearing judge properly based her disbarment recommendation on former standard 1.7(b), which stated that disbarment “shall” be imposed on any attorney who has been disciplined on two previous occasions “unless the most compelling mitigating circumstances clearly predominate.”

Although the standards were amended and renumbered effective January 1, 2014, our consideration of the new standards compels the same discipline as recommended by the hearing judge. Former standard 1.7(b) was replaced by standard 1.8(b), which provides that “[i]f a member has two or more records of discipline, disbarment is appropriate in the following circumstances, unless the most compelling mitigating circumstances clearly predominate. . . . [¶]

1. Actual suspension was ordered in any one of the prior disciplinary matters; [¶] 2. The prior

disciplinary matters coupled with the current record, demonstrate a pattern of misconduct; or [¶] 3. The prior disciplinary matters coupled with the current record demonstrate the member's unwillingness or inability to conform to ethical responsibilities.” We find that standard 1.8(b) is applicable to Tishgart’s misconduct.¹⁵

Tishgart committed the present misconduct while still under actual suspension and on probation for his 2010 and 2011 disciplinary matters. His continued poor performance on probation even after previously being suspended gives this court no reason to believe that a lesser discipline than disbarment is warranted. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112 [disbarment imposed when attorney’s probation violations left court no reason to believe he will comply with lesser discipline].) Tishgart’s previous public discipline and actual suspensions put him on notice and gave him the opportunity “to reform his conduct to the ethical strictures of the profession.” (*Arden v. State Bar* (1987) 43 Cal.3d 713, 728.) His culpability in the present action “indicates either his unwillingness or inability to do so.” (*Ibid.*) Thus, “the risk of petitioner repeating this misconduct would be considerable if he were permitted to continue in practice.” (*McMorris v. State Bar* (1983) 35 Cal.3d 77, 85.) In view of Tishgart’s prior actual suspensions, his unwillingness or inability to conform to his ethical responsibilities, and his lack of compelling mitigation, we adopt the presumptive discipline suggested by standard 1.8(b) and recommend Tishgart’s disbarment to protect the public, the courts, and the legal profession.¹⁶

VI. RECOMMENDATION

We recommend that Kenneth Bruce Tishgart be disbarred and that his name be stricken from the roll of attorneys.

¹⁵ Other applicable standards are 2.6(a), which provides for disbarment or actual suspension when an attorney engages in UPL while on actual suspension, and 2.7(a), which requires disbarment or actual suspension for an act of moral turpitude.

¹⁶ Since Tishgart failed to present compelling mitigation, his disbarment is warranted under both the former and the new standards. (See *Barnum v. State Bar, supra*, 52 Cal.3d at p. 113 [disbarment under former std. 1.7(b) imposed where no compelling mitigation].)

We further recommend that he must 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's order in this matter.

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

VII. ORDER

The order that Kenneth Bruce Tishgart be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective June 20, 2013, will remain in effect pending the final disposition of this proceeding.

HONN, J.

WE CONCUR:

PURCELL, P. J.

EPSTEIN, J.