PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed March 7, 2016

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 14-O-00751
	)	
ANTHONY WILLOUGHBY,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 137503.	)	
	)	

In this disciplinary proceeding, Anthony Willoughby's second, a hearing judge found him culpable of a single charge of violating rule 3-310(C)(1) of the Rules of Professional Conduct[1] for failing to obtain written conflict waivers in his representation of three individuals involved in a car accident. The judge assigned no aggravating weight to Willoughby's 1994 record of discipline because the prior misconduct occurred more than 20 years ago and because Willoughby was found unlikely to commit further misconduct. In mitigation, the hearing judge found no significant client harm, limited cooperation, and extensive community service. The judge admonished Willoughby rather than recommending discipline under the standards.[2]

On appeal, the Office of the Chief Trial Counsel of the State Bar (OCTC) argues for more aggravation and contends an admonition is inappropriate—particularly in light of Willoughby's prior record. It requests a one-year stayed suspension. Willoughby does not appeal and submits that we should affirm the judge's decision or, in the alternative, dismiss the case.

[1] All further references to rules are to the Rules of Professional Conduct unless otherwise noted.

[2] Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. Effective July 1, 2015, the standards were revised and renumbered. Because this request for review was submitted for ruling after that effective date, we apply the revised version of the standards, and all further references to standards are to this source.

After our independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the judge's findings in all but two respects. First, we accord the prior discipline record some weight in aggravation. Although remote in time, the earlier misconduct is similar to the current wrongdoing—it involved failing to inform Willoughby's client in writing of the client's right to independent counsel before settling a claim against Willoughby. This undercuts our belief that Willoughby is unlikely to commit misconduct again. Second, because of the prior record, an admonition is inappropriate. Considering the 20-year period between disciplines and that the present misconduct is not serious, we find a public reproval with conditions lasting two years is the appropriate discipline to protect the public, the courts, and the legal profession.

I. PROCEDURAL HISTORY

On July 22, 2014, OCTC filed a two-count Notice of Disciplinary Charges.[3] After a one-day trial on November 12, 2014, the hearing judge filed his Decision and Order of Admonition on February 2, 2015. In his response brief, Willoughby argues that OCTC's appeal should be dismissed because it filed its opening brief late. We find that OCTC's brief was timely filed and the appeal is properly before us.

II. FACTS

Anthony Willoughby was admitted to the practice of law in California on December 7, 1988, and has been a member of the State Bar at all times since that date.

The record clearly and convincingly supports the judge's factual findings, which we adopt and summarize below.[4]

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[3] The hearing judge dismissed with prejudice Count Two, which alleged that Willoughby failed to communicate a settlement offer. OCTC does not appeal that dismissal, and the record supports it. We affirm the dismissal.

[4] 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.) Rule 5.155(A) of the Rules of Procedure of the State Bar provides that the "findings of fact of the hearing judge are entitled to great weight."

On May 13, 2012, Jesus Licea was involved in an accident while driving his car with three family members as passengers: wife, Estella; daughter, Erica; and son, Jorge.[5] Due to the accident, Erica spent a week in an intensive care unit, while the others' injuries were less severe. The other driver was 100 percent at fault since there was no comparative fault by any member of the Licea family. However, the Liceas' medical bills exceeded the other driver's insurance coverage.

Knowing that the insurance was insufficient to cover his clients' damages, Willoughby refused to represent the Liceas unless they agreed to share the insurance proceeds, including their underinsured motorist (UIM) coverage, "on a pro-rata basis." On May 25, 2012, all members of the Licea family agreed and retained Willoughby, except Jorge, who retained other counsel. Neither the "pro-rata" agreement nor their agreement to waive any potential conflict and to retain a single counsel was documented in writing.

The respective insurance carriers made policy limit offers under the other driver's policy and the Liceas' UIM coverage. Disputes among the Liceas eventually arose, in part because Jorge and his counsel demanded a greater share of the settlement.

Willoughby's clients later agreed to settle the claim against the other driver with Erica receiving $15,000 and Jesus and Estella each receiving $4,000. On October 25, 2013, the UIM carrier offered a global settlement of $20,000 for all of the Liceas, including Jorge, leaving it to the family to determine the allocation of the funds. Since the family members could not agree, the UIM carrier proposed, in a letter dated November 8, 2013, a "pro-rata" settlement of $10,000 to Erica, $6,000 to Estella, $3,200 to Jesus, and $800 to Jorge. Willoughby relayed the proposal to his clients and Jorge, all of whom initially agreed. Willoughby confirmed the agreement with the UIM carrier, who then issued settlement checks. However, the clients changed their minds

[5] When discussing individual members of the Licea family, we refer to them by their first names to avoid confusion.

after receiving the checks on November 25, 2013. They decided that the policy proceeds were insufficient compensation for their damages, and demanded more money. Erica was also displeased that attorney fees were deducted from her share. Due to this discord, one of the parties complained to the State Bar, resulting in this proceeding.

III. CULPABILITY

Like the hearing judge, we find that Willoughby failed to comply with rule 3-310(C)(1) by not obtaining a written waiver of his potential conflict in representing the Liceas. That rule requires an attorney to obtain each client's informed written consent before representing "more than one client in a matter in which the interests of the clients potentially conflict."

Willoughby represented the driver and two passengers involved in an accident that none of them caused, but in which they were all injured. A third passenger retained another attorney. The available insurance was insufficient to make all of them whole. As such, the possibility of conflict existed among the clients and with potential claims by the non-client passenger as to the appropriate distribution of the limited proceeds. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 614-617 [failure to disclose potential conflict among driver and passengers and to obtain their written consent to joint representation in automobile accident case violates former rule 5-102(B), predecessor to current rule 3-310(C)(1)].)

While Willoughby did secure his clients' oral agreement that he represent them all, he did not obtain their "informed written consent," as required by the rule.

IV. WILLOUGHBY'S SIGNIFICANT MITIGATION OUTWEIGHS HIS MODERATE AGGRAVATION

Unlike the hearing judge, we find that Willoughby's misconduct was aggravated by his record of a prior discipline (std. 1.5(a)). In that matter, he stipulated to a public reproval with conditions for one year for violating rule 4-100(A) by commingling funds in his client trust account. He did so by leaving personal funds in his client trust account longer than was proper,

and then by writing checks from that account to pay personal expenses. In a separate matter filed in the same case, he also stipulated to violating rule 3-400(B) by failing to provide his clients with written notice that they were entitled to seek the advice of independent counsel before settling a claim against him.

The prior discipline warrants aggravation because the rule 3-400(B) violation closely resembles the misconduct here—both matters involve the failure to properly notify his clients of conflicting interests. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [earlier discipline serious aggravating circumstance where prior and present misconduct very similar because prior discipline did not rehabilitate].) On the other hand, the previous wrongdoing occurred approximately 20 years before this misconduct, and both were relatively minor. We thus find Willoughby's prior discipline merits only limited weight in aggravation.

We reject OCTC's arguments that Willoughby's misconduct represented multiple acts of wrongdoing (std. 1.5(b)) and that the surrounding circumstances evidenced indifference on his part (std. 1.5(k)). The misconduct was a single violation of rule 3-310(C)(1) for failure to obtain a written conflict waiver from his clients. The fact that the violation involved three clients does not multiply this single act of wrongdoing into several acts since having "more than one client" is necessarily contemplated by the language of the rule. Further, all of these acts arose from the same transaction. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 839 [two counts of misconduct arising from one transaction did not constitute multiple acts of misconduct].)

Willoughby's protestations of his innocence do not constitute "indifference toward rectification or atonement for the consequences of [his] misconduct." He did obtain the oral consent of his clients. Therefore, he had a reasonable basis to assert at trial and on appeal that

there was no potential conflict under the rule. His argument did not reflect a complete failure to understand and accept the charges against him. (*Calaway v. State Bar* (1986) 41 Cal.3d 743, 747, quoting *Hall v. Committee of Bar Examiners* (1979) 25 Cal.3d 730, 744 [attorney not required "to become the fraudulent penitent for his own advantage"].)

We agree with the hearing judge's mitigation findings of lack of harm (std. 1.6(c)), candor and cooperation (std. 1.6(e)), and community service. Because Willoughby advised his clients orally of the potential conflict and obtained their agreement to retain him regardless of that possibility, they suffered no cognizable harm from his failure to document that agreement in writing, as required by the rule. Further, he entered into a stipulation as to facts regarding the circumstances of the alleged misconduct. While he did not admit culpability for his actions, his stipulation shortened the time necessary for trial, and is entitled to some mitigating effect. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [limited mitigation appropriate for stipulation to facts, but more mitigation granted for stipulation as to both facts and culpability].) Finally, Willoughby presented evidence of his extensive community service, including mentoring students at the University of California through the Black Alumni Association, working with children at the Boys & Girls Club, and serving on the governing boards of the Department of Water and Power and the Water Appeals Board. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [pro bono work and community service are mitigating].)

Thus, we find that the limited aggregate weight of the aggravation evidence is outweighed by the significant mitigation evidence.

V. A PUBLIC REPROVAL OF TWO YEARS IN DURATION IS THE APPROPRIATE LEVEL OF DISCIPLINE

We determine the appropriate level of discipline by first looking to the standards. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to maintain high

professional standards; and to preserve public confidence in the profession. (Std. 1.1.) Standard 2.19 is applicable and provides for a reproval or suspension of up to three years for a violation of the Rules of Professional Conduct not specifically identified in the standards.

The hearing judge found that no discipline should be imposed, and ordered an admonition. He also found that the misconduct was not likely to recur. While we disagree with the hearing judge as to whether discipline should be imposed, we agree that Willoughby's misconduct is minor, especially when balanced by the net effect of his mitigation and aggravation. In examining case law involving conflicts of interest under rule 3-310(C)(1), we note that violation of this rule is seldom brought as the only charge. But even when coupled with other, more serious charges, we have identified this charge as relatively minor. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 6-7, 16 [attorney representing husband and wife in dissolution and bankruptcy proceedings without written waiver by wife and with misleading written consent signed by husband violated former rule 5-102(B), but violation "relatively minor" where no conflict materialized and neither client harmed; 60-day stayed suspension imposed]; *In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 616-617 [failure to disclose potential conflict and to secure clients' written consent to joint representation not serious violation where unclear whether clients would not have retained attorney if disclosed].)

This case represents a single count of failing to disclose a potential conflict in writing, with a remote and minor prior record of discipline and significant mitigation. As such, we do not find that standard 1.8(a) calling for progressive discipline applies.[6] Nonetheless, because of the similarity between Willoughby's misconduct underlying his prior discipline and his present

[6] Standard 1.8(a) provides: "If a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust."

misconduct, discipline is necessary; we do not share the hearing judge's confidence that Willoughby will not reoffend. Accordingly, we impose a public reproval with conditions for two years.

VI. ORDER

Anthony Willoughby is ordered publicly reproved, to be effective 15 days after service of this opinion and order. (Rules Proc. of State Bar, rule 5.127(B).)

Further, Willoughby must comply with the specified conditions set forth in this order. (Cal. Rules of Court, rule 9.19; Rules Proc. of State Bar, rule 5.128). Failure to comply with any condition may constitute cause for a separate proceeding for willful breach of rule 1-110.

Willoughby is ordered to comply with the following conditions for a period of two years following the effective date of this order:

1. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his reproval.

2. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

3. Within 30 days after the effective date of this public reproval, he must contact the Office of Probation and schedule a meeting with a probation deputy to discuss these conditions attached to his reproval. Upon the direction of the Office of Probation, he must meet with a probation deputy either in person or by telephone. During the period in which these conditions are in effect (reproval period), he must promptly meet with probation deputies as directed and upon request.

4. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the reproval period. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his reproval during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the reproval period and no later than the last day of the reproval period.

5. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him, personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

6. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

VII. COSTS

We further order that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

HONN, J.

WE CONCUR:

PURCELL, P. J.

STOVITZ, J.*

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