PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed October 26, 2006

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **DARNEL A. PARKER**, A member of the State Bar.	**Case No. 04-O-11877** **OPINION ON REVIEW AND ORDER**

BY THE COURT[1]

In this default proceeding, the State Bar requests review of a decision recommending that respondent, Darnel A. Parker, be actually suspended from the practice of law for three years and until he makes specified restitution and complies with Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).[2] Respondent was found culpable in one client matter of failure to communicate (Bus. & Prof. Code, § 6068, subd. (m))[3], failure to promptly pay settlement funds (Rules Prof. Conduct, rule 4-100(B)(4)),[4] and failure to cooperate in a disciplinary investigation (§ 6068, subd. (i)). The hearing judge further found several aggravating circumstances and no mitigation.

[1]Before Stovitz, P.J., Watai, J., and Epstein, J.

[2]All further references to "standard(s)" are to these provisions unless otherwise noted.

[3]All further references to "section" are to the Business and Professions Code, unless otherwise noted.

[4]All further references to "rule" are to the Rules of Professional Conduct, unless otherwise noted.

The State Bar asks us to adopt these culpability determinations and the aggravation and mitigation findings, but it seeks greater discipline, asserting that respondent should be disbarred. We agree. This is respondent's fourth disciplinary proceeding, and his most recent misconduct, which is the subject of these proceedings, occurred in 2004 – less than one year after termination of his probation in the previous discipline matter. Moreover, respondent was unwilling to cooperate in the disciplinary investigation, and he failed to appear at various pretrial proceedings and the trial of this matter. Respondent thus demonstrates a continuing lack of concern for the disciplinary process and an inability or unwillingness to adhere to the rules of professional responsibility. We therefore conclude that respondent is not a good candidate for suspension or probation, and we recommend disbarment as the appropriate discipline under these circumstances.

FACTUAL FINDINGS AND CONCLUSIONS OF LAW

We have independently reviewed the record (*In re Morse* (1995) 11 Cal.4th 184, 207), and we adopt the factual and culpability findings of the hearing judge. We summarize briefly the pertinent procedural history and the judge's key findings.

Respondent was admitted to practice in 1988. He has been disciplined on three prior occasions, as noted above. Five years after respondent was admitted, the State Bar commenced its first disciplinary matter in 1993 as the result of his convictions for driving under the influence, driving without a license and presenting false identification to a police officer. In aggravation, respondent stipulated that two bench warrants had been issued against him, the first for failure to submit proof of his attendance at his court-ordered drinking driver program, and the second for attending the program after consuming alcohol. In mitigation, respondent had no prior record. Respondent was actually suspended for thirty days, effective May 1995, and placed on one-year suspension stayed and two years' probation pursuant to Supreme Court order SO45302.

In April 1998, respondent's probation was revoked and he was suspended for 90 days by Supreme Court order SO45302, and placed on one-year stayed suspension and three years'

probation as the result of his failure to file two quarterly reports. In aggravation, respondent had a prior record and showed indifference towards rectification. In April 2001, respondent was again actually suspended by Supreme Court order SO72196, this time for 120 days, and placed on one-year stayed suspension and three years' probation, as the result of his failure to: 1) submit six probation reports; 2) attend a court-ordered alcohol dependancy program, and 3) furnish a declaration that he was in compliance with his probation. In aggravation, respondent stipulated he committed multiple acts of misconduct. In mitigation, respondent displayed candor and cooperation with the State Bar and was suffering from financial stress and family problems at the time of his misconduct.[5]

In the instant matter, Maria Sanchez Gonzalez retained respondent to represent her in a personal injury action arising from an automobile accident on or about June 28, 2001, where she was a passenger in an automobile that collided with another car that had been rented from Avis Rent A Car System, Inc. (Avis). Gonzalez initially was represented by Stephen Stewart, who withdrew on his own motion on December 30, 2002, after he settled the case with the driver of Gonzalez' car. On April 7, 2003, respondent formally substituted in as Gonzalez' attorney. There was no written fee agreement between respondent and Gonzalez. In early January 2004, respondent settled the matter with Avis, which issued a check for $10,000 on January 9, 2004, payable to Gonzalez and Parker. Respondent paid Gonzalez $2,500 on January 27, 2004, as her portion of the settlement funds, and gave her a receipt on the same date stating that an additional $1,500 was due to her "subject to negotiation w/ medical providers." Respondent kept $6,000 as

[5]In addition to these three disciplinary suspensions, respondent was suspended on the following four occasions for non-compliance with a family support order: August 31, 1998 through December 1, 2000; September 4, 2001 through August 2, 2002; November 24, 2003 to December 16, 2003; and August 23, 2004 to August 31, 2004, by Supreme Court orders SO72196, SO99345, SO99345 and SO126357, respectively. By Supreme Court order SO45302, respondent was suspended for failing to pass the Professional Responsibility Exam (PRE) from June 1997 until August 2002. He also was placed on administrative inactive status for six years, from August 12, 1996 through September 3, 2002 for failure to comply with his MCLE requirements.

his fees. At the time he gave her the receipt, respondent advised Gonzalez that she would receive the remaining $1,500 within ten days. In early March, respondent again told Gonzalez he would soon pay the $1,500 to her. From March through September, 2004, Gonzalez called respondent on several occasions and left messages asking about the money still due to her. Respondent did not return her telephone calls and never paid the $1,500 due to Gonzalez. Respondent also did not make any payments to Gonzalez' medical providers.

On or about March 17, 2004, the State Bar commenced an investigation after receiving a written complaint from Gonzalez. On April 7, 2004, and July 2 and 16, 2004, State Bar Investigator, Michael Henderson, wrote to respondent at his State Bar membership address by first class mail. The letters were not returned. In each of the three letters, Henderson advised respondent of the investigation based on Gonzalez' complaint and requested information responsive to the allegations concerning the nonpayment of the $1,500 in settlement funds. Respondent did not respond to the letters or otherwise communicate with Henderson.

The notice of disciplinary charges (NDC) was filed on November 23, 2004, and served on respondent, alleging violations of section 6068, subdivision (m), rule 4-100(B)(4), and section 6068, subdivision (i). Respondent filed his response on March 2, 2005. On that same date, respondent appeared at a status conference at which the hearing judge scheduled further pretrial proceedings and set the trial date. On March 8, 2005, respondent was served by first class mail at his official address with a notice of a settlement conference to be held on March 24, 2005. Respondent did not appear at the March 24 settlement conference, and he was thereafter served by first class mail at his official address with an order memorializing the settlement conference. Likewise, respondent failed to appear at the pretrial conference held on May 17, 2005 for which he had been given notice at his official address by first class mail. Thereafter, respondent was served by first class mail at his official address with an order memorializing the pretrial conference and again notifying him of the trial date of May 23, 2005.

Respondent did not appear at the trial on May 23, although he did file on that date a motion to continue the trial, which was denied. On May 25, 2005, the court entered respondent's

default and enrolled him inactive, which became effective three days after service of the order. On June 6, 2005, respondent filed a request to vacate the involuntary inactive enrollment and moved to set aside the default, which the court denied. On July 18, 2005, respondent filed a request for reconsideration and stay of the involuntary inactive enrollment, which was denied, and the matter was submitted for decision, which was filed on September 1, 2005.

In his decision, the hearing judge properly deemed that respondent admitted the factual allegations set forth in the NDC pursuant to Rules of Procedure of the State Bar, rule 200(d)(1)(A) and section 6088. Although no further evidence is required to establish the truth of the factual allegations in the NDC in these default proceedings (*In the Matter of Hazelkorn* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 602, 605), we have considered on review the 31 exhibits offered by the State Bar as evidence of respondent's culpability, all of which were admitted by the hearing judge.

On the basis of the admitted factual allegations set forth in the NDC and the evidence, we conclude that the hearing judge correctly found respondent culpable of three counts of misconduct involving one client matter. Specifically, respondent is culpable of violating section 6068, subdivision (m) by reason of his failure to return Gonzalez' several phone calls from March through September, 2004, when she repeatedly requested payment of her settlement funds and inquired about the status of her case. Respondent also is culpable of failing to promptly pay to Gonzalez the balance of her settlement funds in violation of rule 4-100(B)(4). Finally, respondent is culpable of a violation of section 6068, subdivision (i) by failing to cooperate in the disciplinary investigation when the State Bar requested on three occasions that he provide information in response to Gonzalez' written complaint.

The hearing judge found that respondent's prior history of discipline was an aggravating circumstance, and we agree. Indeed, since he was admitted to practice in 1988, respondent has been on disciplinary or administrative suspension for a total of nearly three years pursuant to seven Supreme Court orders, in addition to a five year suspension for failure to pass the PRE and

six years on administrative inactive status for failure to comply with his MCLE requirements.[6] (Some of these suspensions overlapped with his inactive status.)

We adopt the hearing judge's finding as aggravation that respondent committed multiple acts of misconduct under standard 1.2(b)(ii) in that he failed on numerous occasions to respond to Gonzalez' phone calls and failed to respond to the State Bar investigator's three separate requests for information.

The hearing judge also found that respondent's failure to appear, resulting in the entry of default, was a "serious" aggravating factor. (Std. 1.2(b)(vi).) Here, too, we agree. Respondent failed to appear at two pretrial proceedings below, in addition to his failure to appear at his trial, notwithstanding his obligation to do so pursuant to Rules of Procedure of the State Bar, rule 210.

The hearing judge found there was no evidence in mitigation since respondent did not participate in the proceedings.

On September 30, 2005, the State Bar requested summary review by this court, which we granted on October 17, 2005. On November 1, 2005, respondent requested a stay of his involuntary inactive enrollment and filed a request for review. Because respondent is precluded from participating in these default proceedings except for the filing of a motion to set aside or vacate the default (Rules Proc. of State Bar, rules 203 and 204), we deemed his request to be a petition for interlocutory review by order dated November 2, 2005. Respondent's petition for interlocutory review was denied by order of this court on November 14, 2005. That order is final as respondent did not seek review in the Supreme Court.

[6]Although his failure to pass the PRE does not constitute a prior discipline, it may be considered by us for purposes of the appropriate discipline. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Respondent's MCLE noncompliance does not constitute a prior discipline and therefore we do not give it consideration for disciplinary purposes. (See *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 699; Cf. *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 576.)

LEVEL OF DISCIPLINE

After considering the relevant standards and case law, the hearing judge acknowledged that respondent could be disbarred for his misdeeds, but instead recommended three years' actual suspension because "the nature and extent of the prior [discipline] cases lacked sufficient severity to warrant [disbarment]."

Although the State Bar recommended as appropriate discipline two years' actual suspension in the proceedings below, it now seeks disbarment. This court has the obligation to conduct de novo review and to increase discipline, if appropriate to do so, whether or not the State Bar has urged a lesser sanction. (*In re Morse, supra,* 11 Cal.4th at p. 207; *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Here, the State Bar urges that standard 1.7(b) justifies its recommendation of disbarment. Standard 1.7(b) provides that when an attorney who is found culpable of misconduct "has a record of two prior impositions of discipline . . . , the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate."[7]

We afford the standards "great weight" (*In re Silverton* (2005) 36 Cal.4th 81, 92). Nonetheless, "under guiding case law, we look to the standards not reflexively, but, with regard to standard 1.7, with an eye to the nature and extent of the prior record. [Citations.]" (*In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 217.) Indeed, even when, as in the instant case, an applicable standard utilizes seemingly mandatory language, we balance the unique factors of each case and consider the relevant case law in recommending a

[7]There are two other applicable standards. Standard 2.2(b) provides that violation of rule 4-100, not involving a wilful misappropriation, shall result in at least a three-month actual suspension. Standard 2.6 provides in relevant part: "Culpability of a member of a violation of [Business and Professions Code section 6068, subdivisions (i) and (m)] shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline . . . ." We focus our attention on standard 1.7(b) because it provides the most severe of the applicable sanctions. (Std. 1.6(a).)

particular discipline. (*In re Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr ___ [interpreting language of standard 2.7].)

We have reviewed the record de novo in search of particular circumstances that might form a basis for an exception to the application of standard 1.7(b). Simply put, we find no justification to deviate from the disbarment recommendation in standard 1.7(b). There is no mitigating evidence in this case, much less "compelling evidence" of mitigation. (Cf. *Arm v. State Bar* (1990) 50 Cal.3d 763 [because of "compelling" mitigating circumstances, disbarment rejected pursuant to standard 1.7(b) in spite of three prior disciplinary proceedings].) Moreover, although we agree with the hearing judge that the nature and extent of respondent's prior discipline does not fall on the more serious end of the continuum, what ***is*** serious is the repetitive nature of his misconduct. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841.) Respondent has repeatedly disregarded court orders, including his court-ordered obligation in his criminal proceedings to participate in an alcohol rehabilitation program, resulting in the issuance of two bench warrants. Two of respondent's prior disciplines involved a disregard of court-ordered probation conditions. On four other occasions, the Supreme Court ordered respondent to be suspended after he failed to comply with court-ordered family support. In the instant matter, respondent ignored the hearing judge's orders requiring him to participate in pretrial proceedings and in the trial in this matter.

The decisional law reinforces our conclusion that disbarment is the appropriate discipline. In *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, we recommended disbarment of an attorney who had been disciplined once before for trust account violations and the unauthorized practice of law. Thereafter, the attorney failed to perform competently or to communicate with four clients and violated conditions of his disciplinary probation by failing to file his first quarterly report, failing to communicate with his probation monitor, and failing to notify the probation department of his change of address. We found no mitigating circumstances to counter the attorney's multiple acts of misconduct, failure to cooperate with the State Bar, significant harm to a client and significant harm to the administration of justice. In applying

standard 1.7(b), we observed that the attorney committed misconduct in 1985, 1987, 1988, 1991, and 1992 and that the matters under review represented the attorney's second and third disciplinary matters. Because the attorney's misconduct reflected his disdain for the rule of law and his inability to conform his conduct to the most basic duties of an attorney, we concluded that disbarment was appropriate. (*Id*. at p. 79.)

In *Barnum v. State Bar, supra,* 52 Cal.3d 104, an attorney collected an unconscionable fee, disobeyed four court orders compelling him to return the fee, and failed to cooperate with the State Bar's investigation. The attorney previously had been disciplined three times for failing to perform competently, failing to return unearned fees, for probation violations and failing to timely pass the Professional Responsibility Examination. No mitigating circumstances were found. The court was concerned that the repetition of essentially the same misconduct was indicative that the attorney was "unwilling or unable to learn from past professional mistakes." (*Id*. at p. 111.) Perhaps of greatest concern to the court was the attorney's wilful violation of court orders. As it stated: "Other than outright deceit, it is difficult to imagine conduct in the course of legal representation more unbefitting an attorney." (*Id*. at p. 112.) Additionally, the court focused on the attorney's failure to cooperate with the State Bar's investigation, finding that his subsequent default in his disciplinary proceedings was evidence of the attorney's lack of cooperation was not aberrational. (*Ibid.*) Ultimately, the court applied the sanction of disbarment provided by standard 1.7(b), after concluding that the risk of recurrence of professional misconduct was high. (*Id.* at p. 113.)

Here, respondent's history of discipline began in 1993, only five years after he was admitted to practice, and spans thirteen years, during which he has been on suspension or inactively enrolled for the vast majority of the time. His failure to learn from his past misdeeds creates a grave risk that additional misconduct will recur. Furthermore, as the hearing judge correctly observed: "[respondent] has demonstrated his contemptuous attitude toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the court to participate therein . . . ." Respondent's manifest indifference to the disciplinary process and to

the necessity to adhere to and respect court orders, coupled with the absence of any mitigation evidence, compel us to conclude that the three years' actual suspension and five years' stayed suspension recommended by the hearing judge is inadequate to protect the public, preserve public confidence in the profession and maintain the highest possible standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

RECOMMENDATION

We recommend that respondent Darnel A. Parker be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys licensed to practice. We further recommend that he be ordered to comply with the provisions of rule 955 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. We further recommend that the State Bar be awarded costs pursuant to section 6086.10 of the Business and Professions Code, such costs being enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

ORDER OF INACTIVE ENROLLMENT

Pursuant to the provisions of Business and Professions Code section 6007, subdivision (c)(4) and Rules of Procedure of the State Bar, rule 220(c), respondent is ordered enrolled inactive upon personal service of this opinion or three days after service by mail, whichever is earlier.[8]

[8]Respondent's inactive enrollment under Business and Professions Code section 6007, subdivision (e), effective May 28, 2005, shall continue in effect.