PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	**07-N-12386**
MATTHEW B. WEBER,	**OPINION ON REVIEW**
A Member of the State Bar.	

BY THE COURT:[1]

The primary issue before us is the appropriate level of discipline for respondent, Matthew B. Weber, who failed to timely comply with California Rules of Court, rule 9.20 (formerly rule 955).[2] The hearing judge below recommended, inter alia, that respondent be placed on probation for three years and that he be actually suspended for one year, conditioned upon his satisfactory proof of his rehabilitation pursuant to Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).[3] The State Bar is appealing, and urges that the appropriate discipline should be disbarment.

We have independently reviewed the record (*In re Morse* (1995) 11 Cal.4th 184, 207), and we adopt the hearing judge's factual and culpability findings. Although we modify two of the hearing judge's determinations as to mitigation, we ultimately agree with his disciplinary

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[1] Before Remke, P. J., Epstein, J. and Purcell, J.

[2] All further references to "rule" or "rules" are to the California Rules of Court unless otherwise noted.

[3] All further references to "standard" or "standards" are to Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, unless otherwise noted.

recommendation, which we believe will adequately protect the public and the courts and preserve the integrity of the legal profession.

I. FINDINGS OF FACT AND CULPABILITY

Respondent was admitted to practice law on November 22, 1999. On October 31, 2006, in a default proceeding, he was found culpable in six consolidated matters of several acts of moral turpitude, failure to participate in the State Bar disciplinary investigation, trust account violations, improper withdrawal from representation, fee splitting, disobeying court orders and failure to report the imposition of sanctions.

On March 6, 2007, the Supreme Court filed its order, effective April 2, 2007, suspending respondent for two years, stayed, and actually suspending him for two years and until he paid restitution of $8,595 to a former client and provided proof of his rehabilitation pursuant to standard 1.4(c)(ii). In addition, respondent was ordered to comply with rule 9.20, subdivision (a) on or before May 5, 2007, by notifying all clients, opposing counsel, and pertinent courts about his suspension, returning all client files and unearned fees, and filing an affidavit of compliance by May 15, 2007.

At the time he was required to comply with rule 9.20, respondent was living in a Salvation Army drug and alcohol treatment facility in an effort to rehabilitate himself from a 20-year drug addiction.[4] Respondent testified that he did not have access to a computer while living at the Salvation Army sober house, and that his principal means of transportation was his bicycle. Although respondent had neither clients or other parties to notify nor fees or files to

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[4] At oral argument, the State Bar argued for the first time that respondent's addiction should have been established by expert testimony. At the hearing below, the State Bar made no objection to respondent's testimony about his addiction provided in response to the Bar's questions on cross-examination. While the lack of expert testimony may impact the weight of the evidence, it does not mean that we must reject respondent's testimony or this factor in mitigation. (*In re Brown* (1995) 12 Cal.4th 205, 222 [some mitigation to effects of attorney's illness despite lack of expert testimony].)

return, he still was obligated to timely file an affidavit of compliance. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

On June 20, 2007, respondent filed his compliance affidavit, which was 37 days late and was rejected by the Office of Probation on June 26, 2007, because it was incomplete. Two days later, on June 28, 2007, respondent filed another compliance affidavit in a form acceptable to the Office of Probation. Respondent's late compliance does not relieve him of culpability for a violation of rule 9.20. (*In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192, 200-201.)

Respondent has been drug-free since October 5, 2006, although he relapsed on a few occasions when he drank alcohol. He voluntarily entered the Lawyers Assistance Program in early August 2007, but dropped out because he was unable to comply with all of its requirements due to his living circumstances. Later in August 2007, respondent moved into an apartment complex operated by the Salvation Army Church, which was converted to a "sober living" facility in January 2008. As a resident of this facility, he was required to submit to random drug tests, attend recovery meetings such as Alcoholics or Narcotics Anonymous twice a week, abide by an early curfew, remain employed, and refrain from having visitors in his room. At the time of the hearing, respondent was employed as a clerk in a law firm.

On July 10, 2007, the State Bar filed and served respondent with a Notice of Disciplinary Charges (NDC) alleging a single count of failure to timely comply with the Supreme Court's order in case number S149265 for his late filing of his rule 9.20 compliance affidavit. Respondent filed his response on August 3, 2007. However, he did not appear at two status conferences or the pre-trial conference nor did he file a pre-trial statement. Trial was held on January 10, 2008, with respondent appearing in pro per and as the only witness. On April 7,

2008, the hearing judge filed his decision finding a willful violation of rule 9.20 and recommending the above-described discipline. The State Bar sought review on May 5, 2008.

Based upon the record, we find that respondent willfully failed to timely comply with the requirements of rule 9.20(c).

II. DISCIPLINE

A. Aggravation

The State Bar contends that the hearing judge gave insufficient aggravating weight to respondent's discipline history. The Bar argues that his current violation of rule 9.20 and his sporadic participation in the pre-trial proceedings in this matter, when viewed together with his prior record, "evidences a pattern of ethical misconduct and disregard for the authority of courts that respondent began soon after his admission and continued into the present proceedings." We disagree. The Supreme Court's suspension order fully addressed respondent's serious misconduct in the underlying action, and the record does not establish a pattern of misconduct after the issuance of that order. Only the most serious instances of repeated misconduct over a prolonged period of time have been considered evidence of a "pattern of misconduct." (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1217; *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074, 1079-1080.) However, we consider respondent's prior misconduct as an aggravating factor in assessing the appropriate level of discipline (std. 1.2(b)(i)).

B. Mitigation

The hearing judge found in mitigation that: (1) respondent acted in good faith (std. 1.2(e)(ii)); (2) there was no harm to the public, courts or the State Bar (std. 1.2(e)(iii)); (3) respondent has demonstrated candor and cooperation with the State Bar during these proceedings (std. 1.2(e)(v)), and (4) he has taken objective steps demonstrating remorse. (Std. 1.2(e)(vii).) The State Bar contends that respondent failed to prove these mitigating circumstances by clear

and convincing evidence. We find support in the record for the hearing judge's mitigation findings, except those pertaining to good faith and cooperation during these proceedings.

The hearing judge found that respondent's failure to comply with the Supreme Court's suspension order was due to his "lack of knowledge of the order, not any bad faith on his part." He further found that respondent's explanation was both honest and reasonable. But, the absence of bad faith does not mean respondent either acted reasonably or established good faith.

Although respondent was in a rehabilitation facility when the Supreme Court order was delivered to his official membership record address and did not have access to a computer, this does not constitute clear and convincing evidence that respondent had taken all reasonable, affirmative steps necessary to ensure his timely compliance with the Supreme Court's order. (See *In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, 330-331 [miscalculation of deadline for compliance with former rule 955 was neither reasonable nor mitigating where attorney failed to consult court rules, his former counsel, or State Bar].) "In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held *and* reasonable. [Citation.]." (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653, italics added.) Thus, we do not afford any mitigation for good faith in the instant matter because "[t]o conclude otherwise would reward an attorney for his unreasonable beliefs and for his 'ignorance of his ethical responsibilities.' [Citation.]" (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 5789.)

We also do not afford mitigative weight under standard 1.2(e)(v) for respondent's cooperation in these proceedings. It is true that respondent candidly admitted to his culpability in his response to the NDC and in his testimony at trial. But, his involvement during the pre-trial proceedings was inconsistent at best, which offsets his other cooperative efforts.

C. Level of Discipline

By its express language, subdivision (d) of rule 9.20 provides that a suspended member's willful failure to comply with the rule's provisions is cause for disbarment *or* suspension. In seeking disbarment, the State Bar cited a number of cases that hold that disbarment ordinarily is the appropriate sanction for willful violation of rule 9.20. (See, e.g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Grueneich* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 439, 442; *In the Matter of Baber, supra,* 2 Cal. State Bar Ct. Rptr. at p. 322.)

In looking to the decisional law concerning rule 9.20 violations, we observe that disbarment has been imposed when the misconduct involved repeated violations of disciplinary orders or reflected an indifference to the disciplinary system. (*Dahlman v. State Bar* (1990) 50 Cal.3d 1088, 1096 [disbarment ordered where attorney ignored efforts of both State Bar and Supreme Court to obtain his compliance with rule 9.20 and "evidenced an indifference to the disciplinary system"]; *Grueneich, supra,* 2 Cal. State Bar Ct. Rptr. 439 [disbarment recommended, despite significant mitigation, for repeated probation violations and violations of former rule 955, wherein underlying misconduct involved abandonment of clients and failure to return unearned fees]; *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, 388 [disbarment recommended for attorney with two prior disciplines who demonstrated "ostrich-like behavior" by defaulting in four discipline proceedings and failing to timely file rule 955 compliance affidavit].)

We are guided by several cases where the attorney failed to comply with the reporting requirements of rule 9.20, but was not disbarred. In *In the Matter of Rose, supra,* 3 Cal. State Bar Ct. Rptr. 192, an attorney with two prior records of discipline involving serious misconduct was ordered to comply with rule 9.20 in both matters. He timely filed his rule 9.20 affidavit in the first matter. However, he believed he did not need to comply with the rule 9.20 order in the

second proceeding because he did not practice law and had neither clients nor co-counsel to notify. (*Id.* at p. 200.) After receiving a letter from the Office of Probation, the attorney attempted to file his rule 9.20 affidavit, albeit late, but the clerk refused to accept it. In addition, the attorney failed to timely file three quarterly probation reports and two client trust account audits. (*Id.* at p. 201.) His misconduct was mitigated by his recognition of his wrongdoing, his pro bono activities and the lack of harm to clients as well as his compliance with the conditions of his probation for two years prior to the proceedings. (*Id.* at pp. 205-206.) We recommended two years' actual suspension for the probation violations and nine months' actual suspension in the rule 9.20 matter, and that the disciplines run concurrently. (*Id.* at pp. 208-210; see also *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527 [recommendation of 30-day actual suspension for 14-day delay in filing 955 affidavit where attorney had "awakened" to his responsibilities to participate in proceedings]; *Shapiro v. State Bar* (1990) 51 Cal.3d 251 [one-year actual suspension for rule 955 violation for filing compliance affidavit five months late, plus culpability for client abandonment]; *Durbin v. State Bar* (1979) 23 Cal.3d 461 [attorney who notified parties of his suspension but failed to file 955 compliance affidavit was suspended for six months or until he filed affidavit].)

We are mindful that standard 1.7(a) suggests that the discipline in this case should be greater than that imposed in respondent's prior matter. Although the standards are to be given great weight because they promote consistency in the application of discipline (*In re Silverton* (2005) 36 Cal.4th 81, 91-92), we do not follow them in a talismanic fashion. Indeed, "we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender.' [Citations.]." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) For this reason, we look to standard 1.6(b)(ii), which suggests that a lesser degree of discipline is appropriate when "[m]itigating circumstances are found to surround the

particular act of misconduct . . . and the net effect of those mitigating circumstances, by themselves and in balance with any aggravating circumstances found, demonstrates that the purposes of imposing sanctions set forth in standard 1.3 will be properly fulfilled if a lesser degree of sanction is imposed."

Although we have found a willful violation of rule 9.20, this is not a case of a failure to file an affidavit, but one of untimely filing. Moreover, respondent's violation of the rule did not cause harm to any clients. He has continued to participate in a drug treatment program, and has been candid about the status of his recovery.

Respondent's recent conduct evidences a sincere effort toward rehabilitation in order to regain the opportunity to practice law. Even though he has not yet established by clear and convincing evidence his rehabilitation from drug addiction for a meaningful and sustained period of time (*In re Billings* (1990) 50 Cal.3d 358, 367), we nonetheless consider that disbarment would be punitive under the circumstances. The purpose of discipline is not to punish the attorney, but to protect the public. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856.) We believe that a three-year probationary period, coupled with an additional one-year actual suspension, conditioned on respondent's showing of rehabilitation pursuant to standard 1.4(c)(ii) before he may be reinstated, will achieve the disciplinary purposes set forth in standard 1.3. We also adopt the hearing judge's additional recommendations that respondent attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation. He is not currently subject to these obligations.

III. RECOMMENDATION

For the foregoing reasons, we recommend that respondent MATTHEW B. WEBER be suspended from the practice of law in the State of California for two years, that execution of that

suspension be stayed, and that respondent be placed on probation for three years on the following conditions:

1. Respondent shall be actually suspended from the practice of law during the first year of probation and until he provides satisfactory proof of his rehabilitation pursuant to standard 1.4(c)(ii).

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation, including the conditions of probation set forth by the Hearing Department of the State Bar Court in its Decision filed April 7, 2008.

IV. PROFESSIONAL RESPONSIBILITY EXAMINATION

Because respondent was previously ordered by the Supreme Court to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in Supreme Court matter S149265, it is not recommended that this requirement be repeated in this matter.

V. RULE 9.20

Because respondent has been continuously suspended at all times since the Supreme Court's previous order, which included his required compliance with rule 9.20, it is not recommended that he be ordered again to comply with that rule. (See, e.g., *In the Matter of Rose, supra*, 3 Cal. State Bar Ct. Rptr. at p. 207; *In the Matter of Friedman, supra*, 2 Cal. State Bar Ct. Rptr. at p. 535.)

VI. COSTS

It is recommended 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 Business and Professions Code section 6140.7 and as a money judgment.

CERTIFICATE OF SERVICE
[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on April 9, 2009, I deposited a true copy of the following document(s):

OPINION ON REVIEW FILED APRIL 9, 2009

in a sealed envelope for collection and mailing on that date as follows:

[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

MATTHEW B. WEBER
LAW OFFICE OF DAVID BATES
2141 ROSECRANS AVE STE 1130
EL SEGUNDO, CA 90245

[X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

CHRISTINE A. SOUHRADA, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on April 9, 2009.

Rosalie Ruiz
Case Administrator
State Bar Court