FILED OCTOBER 17, 2011

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **JOHN MARK HEURLIN** **Member No. 119899** A Member of the State Bar.	)	Case No.: **09-O-10774-PEM** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

Introduction[1]

In this contested disciplinary proceeding, respondent **John Mark Heurlin** is charged with engaging in the unauthorized practice of law and improperly holding himself out as entitled to practice law when he was not an active member of the State Bar of California. This court finds, by clear and convincing evidence, that respondent is culpable of the alleged misconduct.

In view of respondent's misconduct and the aggravating factors, which include three prior records of discipline, and the lack of mitigating circumstances, the court recommends that respondent be disbarred from the practice of law.

Significant Procedural History

The State Bar of California, Office of the Chief Trial Counsel (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on April 28, 2011. On May 25,

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

2011, respondent filed a motion to dismiss without filing a response to the NDC. On June 13, 2011, the court denied respondent's motion to dismiss; and, on June 15, 2011, respondent filed a response to the NDC

On August, 2, 2011, the State Bar filed its Motion to Compel Further Responses from Respondent regarding a discovery request that it had propounded, as respondent had objected to the State Bar's request based upon the Fifth Amendment. On August 8, 2011, the court held a hearing requiring respondent to explain with respect to each request why he thought the Fifth Amendment applied. Respondent did not give any reason other than the fact that a violation of section 6126 is a misdemeanor; nor did he make any showing that the evidence requested would tend to incriminate him. The court, therefore, ordered respondent to comply with the State Bar's discovery request by August 11, 2011. Respondent did not comply.

A two-day trial was held on August 16 and August 17, 2011. The State Bar was represented by Deputy Trial Counsel Michael Glass. Respondent represented himself at trial.

The court took this proceeding under submission on August 17, 2011, after the parties presented their closing arguments.

Findings of Fact and Conclusions of Law

Case No. 09-O-10774 – The UPL Matter

The following findings of fact are based on the evidence and testimony introduced at this proceeding.

Jurisdiction

Respondent was admitted to the practice of law in California on December 10, 1985, and has been a member of the State Bar of California at all times since that date.

Facts

In April 2004, respondent and two other attorneys, David J. Fuller (Fuller) and Henry P. Schrenker (Schrenker) formed a professional corporation, FairWage Law A P.C. (FairWage Law) to prosecute class actions. Each of the three attorneys received one-third of the shares in the professional corporation. Beginning in February 2004, the three attorneys through FairWage Law prosecuted a class action lawsuit against National Stores, Inc.

On January 20, 2005, the California Supreme Court issued an order (S128831), effective February 19, 2005, whereby respondent was actually suspended from the practice of law for two years and was to remain suspended until having shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. On January 20, 2005, the California Supreme Court properly served a copy of its January 20, 2005 order on respondent at his State Bar membership records address. Respondent received the order.

Respondent has been actually suspended and not entitled to practice law from February 19, 2005 to the present.

At some point between the time when the Supreme Court issued its order (S128831) and February 2005, Fuller and Schrenker became aware of the fact that respondent was suspended from the practice of law.[2] However, respondent did not voluntarily tell Fuller and Schrenker, that he had been suspended. Rather, they had to find out from opposing counsel and the State Bar website. After learning of respondent's suspension, Fuller and Schrenker voted to voluntarily dissolve FairWage Law. From 2005 to the present, respondent, Fuller, and Schrenker have had

[2] Fuller testified that he first learned of respondent's suspension from the practice of law from opposing counsel. After being informed by opposing counsel, Fuller confronted respondent regarding the suspension. According to Fuller, respondent initially denied that he was suspended. This court finds Fuller's testimony to be credible and believes that Fuller testified truthfully.

an ongoing and protracted legal dispute over FairWage Law's assets, which to this day has not settled.

On August 25, 2005, respondent filed a "Notice of Attorneys [sic] Lien" in *Jimmie Luciano et al. v. National Stores, Inc., a California Corporation*, Orange County Superior Court, case No. 04CC00601 (wage action). Respondent included the following address above the caption on the first page of the Notice of Attorney Lien at lines one through five:[3]

> John M. Heurlin, Esq. SBN119899
> FAIR WAGE LAW, A PC [sic]
> 13681 Newport Ave., Ste. 8, No 191
> Tustin, Ca [sic] 92880
> Telephone: (949) 289-1658
>
> Lien Claimant

Additionally, in the Notice of Attorney Lien, respondent referred to himself as an attorney, i.e., "attorney John M. Heurlin." He also executed the Notice of Attorney Lien above a signature line, which states, " By: JOHN M. HEURLIN, ESQ." Moreover, in the text of the Notice of Attorney Lien, respondent claimed "an interest in the proceeds, fees, costs and expenses," not only for himself, but also for FairWage Law, A P.C., which was a distinct legal entity. By so doing respondent implied that he was acting not only on behalf of himself, but also on behalf of FairWage Law. (Exh. 4, p. 00002.) Respondent did not indicate that he was not entitled to represent FairWage Law. Respondent served the Notice of Attorney Lien on the parties in the wage action.

On July 19 and July 25, 2006, respectively, while respondent was actually suspended from the practice of law, he sent letters to Keith A. Jacoby (Jacoby), defense counsel in the wage action, regarding the attorney lien. The letters were sent on letterhead that stated "Law Offices

[3]The evidence provided in this disciplinary proceeding clearly and convincingly shows that the address provided by respondent for FairWage Law in his Notice of Attorney Lien (Exh. 4) was not the address of FairWage Law and was, therefore, misleading.

of John M. Heurlin." Respondent signed the July 19, 2006 letter, as well as the July 26, 2006 letter as "John M. Heurlin, Esq."

On December 7, 2006, the California Court of Appeal, Fourth Appellate District, Division Three, filed its Opinion in *In the Matter of FairWage Law, in Voluntary Dissolution, David Fuller, et al. v. John M Heurlin*, case Nos. G037378; GO37412 (Cons.), wherein it noted that respondent had signed documents as "John M. Heurlin, Esq." and continued to use the letterhead of the "Law Offices of John M. Heurlin," although he was suspended from the practice of law. The Court of Appeal set forth its concern in its Opinion, as follows:

> Particularly disquieting are Heurlin's aggressive letters to settling counsel in the National Stores lawsuit. Notwithstanding his suspension, he made repeated (and wholly gratuitous) use of the letterhead of the "Law Offices of John Heurlin, Attorney at Law," and "John M. Heurlin, Attorney at Law," and signs his written communications, "John M. Heurlin, Esq." This may give the misleading impression that Heurlin is an actively practicing attorney who maintains a functioning law office, not only representing his own lien rights, but those FairWage Law (a distinct legal entity) as well. One can posit that these references are designed to magnify the force of his threats to defense counsel in the class action lawsuits. (Exh. 7, p. 00017.)

Additionally, in a footnote to its Opinion, the court advised that, "Heurlin simply should have styled himself, `John M. Heurlin, in pro. per.,' as we have done." (*Ibid.*)

However, ignoring the Court Of Appeal's suggestion and warning with respect to his use of the self-appellations, "attorney" and "Esq."[4] and despite the fact that he was not entitled to practice law due to his suspension, respondent, on December 30, 2008, filed an appellant's opening brief on his own behalf, which he captioned, "*In the Matter of FairWage Law, A PC*

[4] During the trial in this disciplinary matter, respondent maintained that he did not practice law as an attorney while suspended, but was simply representing himself. Respondent, however, did not merely argue that he had the right to self-representation; he also argued that irrespective of his suspension, his use of the self-appellation "Esq." does not constitute the practice of law or the act of holding himself out as being able to practice law. He asserted that his use of the term "Esq." could not provide a basis for the conclusion that he is or was holding himself out as practicing law or entitled to practice law.

[sic] *et. al. v. John M Heurlin, Esq.*" in the California Court of Appeal, Fourth Appellate District, case No. G040506 (the "appellate action"). Respondent signed the brief above a signature line, which states, "By: John M. Heurlin, Esq. Respondent, Pro Se." And, remarkably, on December 30, 2008, while still suspended from the practice of law, respondent also filed a Request to Augment the Record in the appellate action in which his supporting declaration, made under penalty of perjury, states that he is "an attorney licensed to practice before the courts of the State of California . . . ." (Exh. 10, p. 00004.)

Conclusions

Count One – (§§ 6068, Subd. (a), 6125 and 6126 [Unauthorized Practice of Law])

Section 6068, subdivision (a), provides that a member of the State Bar has the duty to support the Constitution and laws of the United States and of the State of California.

The State Bar charges that respondent violated section 6068, subdivision (a), by improperly holding himself out as entitled to engage in the practice of law in violation of sections 6125 and 6126.

Section 6125 provides that no person shall practice law in California unless he or she is an active member of the State Bar. Section 6126, subdivision (b), provides that any person who has been involuntarily enrolled as an inactive member of the State Bar or who has been suspended from practice and thereafter practices or attempts to practice law, advertises or holds himself out as practicing or otherwise entitled to practice law is guilty of a crime.

Charging an attorney with a violation of the duty to support the constitution and laws, by reason of the attorney's violation of the statutes prohibiting practicing law while suspended, provides the basis for imposition of discipline for the unauthorized practice of law (UPL). (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 574-575; *In the Matter of Tady* (Review Dept.1992) 2 Cal. State Bar Ct. Rptr. 121, 126.)

When respondent filed the Notice of Attorney Lien in the wage action on August 25, 2005, sent letters to defense counsel Jacoby on July 19 and July 25, 2006, filed his opening brief in the appellate action on December 30, 2008, and filed a Request to Augment the Record in the appellate action, also on December 30, 2008, respondent knew or should have known that he could not practice law or hold himself out as being able to practice law while suspended. Yet, when in 2005, he filed the Notice of Attorney Lien in the wage action under his name and that of FairWage Law, when in 2006, he sent the two letters to attorney Jacoby, when in December 2008, he filed his brief in the appellate action, and when in December 2008, he filed his motion to augment the record, as well as his accompanying declaration that was made under penalty of perjury, respondent was holding himself out as entitled to practice law and was making representations that he was an attorney entitled to practice law in California.

Respondent was correct when he argued that he was entitled to represent himself and to file pleadings on his own behalf in the Court of Appeal, while suspended from the practice of law. "'[A]ny person may represent himself, and his own interests, at law and in legal proceedings. . . .' [Citation]" (*J.W. v Superior Court* (1993) 17 Cal.App.4th 958, 965.)

Nonetheless, it was clearly impermissible under section 6126, subdivision (b) for respondent to represent under penalty of perjury, in his supporting declaration that accompanied his Request to Augment the Record in the appellate action, that he is "an attorney licensed to practice before the courts of the State of California. . . ." This misrepresentation, as well as the other representations that he made over the years, including, the use of his State Bar membership number next to his name on the Notice of Attorney Lien, his use in both pleadings and letters of the honorific term "Esq.," his use of the address for FairWage Law, A P.C. as his address in the caption of a pleading in the wage action (Exh. 4) that implies he was still a lawyer for and at FairWage Law, and his use of letterhead, which states "Law Offices of John M. Heurlin, Esq.,"

all constitute UPL. (*Crawford v. State Bar* (1960) 54 Cal.2d 659,666 [UPL includes mere holding out that one is entitled to practice law]; (*In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83,88-89, 91 [suspended attorney found to have created the false impression that he was currently able to practice by using term "Member, State Bar of CA" and honorific "Esq." next to his signature on job application].) An attorney "cannot expressly or impliedly create or leave undisturbed the false impression that he or she has the present. . .ability to practice law." (*In the Matter of Wyrick, supra,* 2 Cal. State Bar Ct. Rptr. at p. 91.)

Although the Court of Appeal and some of the parties understood that respondent was appearing in pro per as a suspended attorney, respondent's misrepresentations about his status as entitled to practice constitute a violation of section 6126, subdivision (b). The act of holding himself out was sufficient to establish culpability; it does not matter that the court and the parties did not rely on those misrepresentations or were not in fact deceived. (*In the Matter of Wyrick, supra*, 2 Cal. State Bar Ct. Rptr. at p. 91-92.)

Moreover, as the evidence shows, respondent did not misrepresent that he was entitled to practice law in just one document or on one occasion. Rather, his misrepresentations occurred over a period of years from 2005 through at least 2008. Given respondent's status as a suspended attorney with three prior disciplines and the fact that his declaration in his Request to Augment the Record in the appellate matter was made under penalty of perjury, respondent was at the very least grossly negligent in failing to carefully review the Request to Augment the Record and his accompanying declaration to ensure their accuracy in every respect, including the description of his status as an attorney on suspension. (*In the Matter of Wyrick, supra*, 2 Cal. State Bar Ct. Rptr. at p. 91 [finding UPL based on gross negligence].)

Accordingly, the court finds by clear and convincing evidence that respondent engaged in the unauthorized practice of law by holding himself out as entitled to practice law when he was

not an active member of the State Bar of California, thereby willfully violating section 6068, subdivision (a).

Aggravation[5]

Prior Record of Discipline (Std. 1.2(b)(i).)

Respondent has three prior records of discipline. By decision filed on May 15, 1997, respondent was privately reproved with conditions. The State Bar Court discipline ordered in the Hearing Department decision was upheld in a Review Department opinion filed on May 5, 1998, effective July 9, 1998. (State Bar Court case No. 95-O-15585.) The Review Department found respondent culpable of violating section 6103, as did the Hearing Department, by failing to pay $1,000 in sanctions as ordered by the superior court. Additionally, the Review Department also found that respondent violated section 6068, subdivision (o)(3), by not timely reporting the sanctions order to the State Bar. There were no factors in aggravation. In mitigation, respondent had no prior record of discipline and cooperated with the State Bar during the proceedings.

On January 30, 2001, the State Bar Court filed an order privately reproving respondent. (State Bar Court case No. 00-H-11137.) Respondent stipulated to violating section 6103 and rule 1-110 of the Rules of Professional Conduct by failing to comply with two of the reproval conditions that were ordered by the court in case No. 95-O-15585. Specifically, respondent failed: (1) to provide proof of payment of the $1,000 sanction imposed by the superior court and failed to request a probation monitor to develop a payment plan and (2) to provide proof of passage of the Multistate Professional Responsibility Examination by July 9, 199, to the Probation Unit (currently called the Office of Probation), as he had been ordered to do. In aggravation, respondent had a prior record of discipline. No mitigating factors were found.

[5] Unless otherwise indicated, all references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

On January 20, 2005, the California Supreme Court filed an order (S12831) that, among other things, suspended respondent from the practice of law for five years, stayed, and placed him on probation for five years on condition that he be actually suspended for two years and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. Respondent stipulated to misconduct in two matters (State Bar Court case Nos. 00-O-12632 and 02-O-15961.) Respondent stipulated to misconduct in violation of rule 4-200(A) of the Rules of Professional Conduct and sections 6068, subdivision (g) and 6106. In aggravation, respondent had two prior records of discipline; trust funds or property were involved; his misconduct was surrounded by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct; respondent's misconduct significantly harmed a client, the public or the administration of justice; respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct; and respondent's misconduct involved multiple acts of wrongdoing. No mitigating circumstances were found.

Indifference Toward Rectification/Atonement (Std. 1.2(b)(v).)

Respondent's demonstrated lack of insight into the nature and seriousness of his misconduct is troubling to this court. Respondent continues to claim in the face of overwhelming facts and legal authority that his conduct was justified, which demonstrates indifference toward rectification of or atonement for the consequences of his misconduct, which is an aggravating factor.

As early as 2006, respondent was warned by the California Court of Appeal that it was troubled by respondent's "cavalier" dealing with what respondent "artfully termed" his "disability," i.e., his suspension from the practice of law. (Exh. 7, pp. 00016-00017.) In the

court's Opinion, respondent was specifically warned that ". . .Heurlin is barred from holding himself out as practicing or otherwise entitled to practice law. (Bus. & Prof. Code,§ 6126, sub. (b).) 'A suspension order "disqualifies the attorney not only from practicing law but also from holding himself or herself out as entitled to practice during the suspension period. . . .' [Citations.]" (*Id.* at p. 00017.)

Respondent, however, did not heed the appellate court's warning and ignored the legal authority cited in its Opinion. Rather, respondent used specious and unsupported arguments in his trial brief in this disciplinary matter and during the course of the trial in an attempt to evade culpability. Despite the appellate court's clear warnings and the legal authority it had provided to him, respondent argued before this court that terms such as "Esq.," and "counselor at law," "have no meaning in the State of California." (Respondent's Trial Brief, p. 10, filed August 16, 2011.) At trial, respondent cross-examined witnesses about Esquire magazine in an attempt to show that the use of the honorific "Esq." after the name of a suspended attorney does not violate section 6126, subdivision (b) and has no legal significance when used by a suspended lawyer in a pleading or a letter regarding ongoing litigation.[6]

Such specious arguments and meritless contentions show a "persistent lack of insight by respondent into the deficiencies of his professional behavior." (*Bach v. State Bar* (1991) 52 Cal.3d 1201,1208.) The Supreme Court's conclusions regarding another errant attorney apply equally here: "[Respondent's] defense did not rest on a good faith belief that the charges were unfounded, but on a blanket refusal to acknowledge the wrongfulness of [his] . . . conduct." (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1101.) Thus, respondent's apparent unwillingness

[6] All of the attorneys, who appeared as witnesses at trial, testified that "Esq." is a convention used by attorneys and that they (the witnesses) understood the term "Esq." to be used in reference to an attorney who is practicing law.

or inability to acknowledge or even recognize his professional obligations constitutes an aggravating factor in this matter.

Mitigation

The record establishes no factors in mitigation by clear and convincing evidence. (Std. 1.2(e).)

Discussion

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession." (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016,1025.)

In addition, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards call for the imposition of a minimum sanction ranging from actual suspension to disbarment. (Standards 1.7(b) and 2.6.) Standard 1.7 provides that when an attorney has been found culpable of misconduct in any proceeding in which discipline may be imposed and the attorney has a record of two prior records of discipline, the degree of discipline in the current proceeding "shall be disbarment unless the most compelling mitigating circumstances clearly predominate." Standard 2.6 relates to cases involving violations of sections 6068, 6125, and 6126. It states that culpability of such a violation "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 set forth in standard 1.3."

Here, respondent has been found culpable of violating section 6068, subdivision (a). Aggravating factors include three prior records of discipline and respondent's demonstrated lack of insight into the nature and seriousness of his misconduct. No mitigating circumstances were found to exist.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) The standards are not mandatory; they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) There is no reason, however, to deviate from the standards in this case.

Respondent's present and past misconduct demonstrate respondent's extreme indifference to complying with court orders and an inability to conform his conduct to the ethical requirements of the profession. In 1998, the Review Department upheld a Hearing Department decision finding that respondent violated section 6103, among other things, when he failed to comply with a court order imposed by the San Diego Superior Court. In January 2001, respondent was again disciplined for having violated section 6103, by failing to comply with the Review Department's 1998 order. Thereafter, in 2005, the California Supreme Court again imposed discipline on respondent for serious misconduct, involving, among other things trust account violations and dishonesty. And, in the current matter, respondent, has yet again failed to comply with a court order – that of the California Supreme Court, suspending him from the practice of law.

Respondent argues that he never held himself out as entitled to practice law and that the court should not find him culpable of any violation in this matter. The State Bar recommends

disbarment. Having considered the evidence, the legal authority, and the risk to the public, this court agrees with the State Bar.

The court is troubled by the fact that respondent engaged in misconduct while on probation for earlier misconduct. The court believes the risk of respondent engaging in further misconduct would be considerable if he were permitted to continue in practice. As respondent has demonstrated, the public and the legal profession would not be sufficiently protected if respondent was merely, once again, suspended from the practice of law.

An additional matter of concern to the court is that respondent's failure to comply with his professional duties has repeatedly burdened the resources of this court and the State Bar disciplinary system. Respondent had ample opportunity to conform his conduct to the ethical requirements of the profession, but has repeatedly failed or refused to do so. Probation and suspension have proven inadequate to prevent respondent's continued misconduct. (See *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646.)

Moreover, lesser discipline than disbarment is inadequate because there are no extenuating circumstances that clearly predominate in this case. The similar and prolonged nature of the misconduct in this and the three prior instances of discipline suggest that respondent is capable of future wrongdoing and raise concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar.

It is evident that the prior instances of discipline have not served to rehabilitate respondent or to deter him from further misconduct. He has not learned from the past despite repeated opportunities to do so. Having considered the evidence, the standards, and other relevant law, the court believes that disbarment is the only adequate means of protecting the public from further wrongdoing by respondent.

Recommendations

Accordingly, the court recommends that respondent **John Mark Heurlin** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.[7]

Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order of Involuntary Inactive Enrollment

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: October _____, 2011

PAT McELROY
Judge of the State Bar Court

[7] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)