

FILED AUGUST 7, 2012

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	Case No. 09-O-10774
	)	
JOHN MARK HEURLIN,	)	<b>OPINION AND ORDER</b>
	)	
A Member of the State Bar, No. 119899.	)	
_____	)	

This is John Mark Heurlin’s fourth disciplinary proceeding. In the present matter, the hearing judge found that Heurlin improperly held himself out as entitled to practice law while he was on disciplinary suspension. She recommended that Heurlin be disbarred after finding no mitigation and significant aggravation.

Heurlin seeks review and raises a multitude of procedural, evidentiary and constitutional issues, which he argues require reversal. The State Bar supports the hearing judge’s decision.

Having independently reviewed the record (Cal. Rules of Court, rule 9.12), we find that Heurlin repeatedly held himself out as entitled to practice law when he referred to himself as “John M. Heurlin, Esq.,” “attorney,” and “Law Offices of John M. Heurlin” in correspondence and court filings. Heurlin continues to use these references to himself in his pleadings and briefs filed in this court, even though he was admonished by the California Court of Appeal that such “gratuitous” use of these terms while he is on disciplinary suspension may be “misleading.”

Given that Heurlin has three prior impositions of discipline, the presumptive discipline in this case is disbarment under standard 1.7(b) of the Rules of Procedure of the State Bar, title IV,

Standards for Attorney Sanctions for Professional Misconduct.<sup>1</sup> Standard 1.7(b) states that when an attorney has been disciplined on two prior occasions “the degree of discipline . . . shall be disbarment unless the most compelling mitigating circumstances clearly predominate.” Here, we find no evidence in mitigation and additional evidence in aggravation. Finding no merit to Heurlin’s procedural and substantive challenges, we adopt the hearing judge’s recommendation that he be disbarred.

## **I. FACTUAL BACKGROUND**

Heurlin was admitted to practice law in California on December 10, 1985. In 2004, he and two other attorneys, David Fuller and Henry Schrenker, formed a professional corporation, FairWageLaw, to prosecute wage and hour class action lawsuits against large national corporations. Each of them was a one-third shareholder of FairWageLaw.

In January 2005, the Supreme Court ordered Heurlin suspended for two years and until he satisfies the requirements of standard 1.4(c)(ii) for serious misconduct unrelated to the class action litigation. Heurlin remains on suspension. Fuller and Schrenker learned of his suspension from opposing counsel, Keith Jacoby, who defended National Stores (National) in a class action brought by FairWageLaw. When Fuller confronted him about his suspension, Heurlin initially denied it. Fuller and Schrenker then voted to dissolve FairWageLaw and remove Heurlin as a director. In August 2005, they also filed a petition for judicial supervision of the winding up of FairWageLaw (the dissolution action). The superior court granted the petition and assumed jurisdiction. At the time of the disciplinary hearing below, the dissolution of FairWageLaw had not been resolved.

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<sup>1</sup> Unless otherwise noted, all further references to “rule(s)” are to the Rules of Procedure of the State Bar, and all further references to “standard(s)” are to title IV of the rules, Standards for Attorney Sanctions for Professional Misconduct.

While on suspension, Heurlin filed a notice of attorney's lien in August 2005 on behalf of himself and FairWageLaw in the National class action lawsuit. He identified himself in the pleading as "John M. Heurlin, Esq. SBN 119899" and listed himself and FairWageLaw as lien claimants. He also referred to himself as "attorney John M. Heurlin" in the lien notice. Heurlin did not indicate he was suspended.

The superior court granted Fuller and Schrenker's motion to strike Heurlin's lien notice and ordered the class action defendants not to include Heurlin as a payee. In response to the court's ruling, Heurlin sent a letter on July 19, 2006 to opposing counsel, Jacoby, urging him to "place my name on any settlement draft related to attorney's fees" and warning that National would "be on the hook for [his attorney's] fees and costs" if Heurlin prevailed on appeal. Heurlin followed up with another letter on July 25, 2006, providing his analysis of the law applicable to his attorney's fee demand, and concluding: "If you pay over attorneys fees to anyone without my name on the settlement draft, there is no 'good faith belief' defense available to you since you are actually aware of the pending appeal." Both of these letters were written on letterhead from the "Law Offices of John M. Heurlin" and signed "John M. Heurlin, Esq." When Jacoby received these letters, he did not know if Heurlin was still suspended. Heurlin sent copies of the letters to Schrenker and another attorney.

Heurlin filed two interlocutory appeals from orders in the dissolution action. On December 7, 2006, the Court of Appeal dismissed both appeals as "specious" and noted in its decision: "[T]here is a strong case for imposing appellate sanctions against Heurlin for taking appeals in bad faith and for the purpose of delay." The Court of Appeal also voiced its concern over Heurlin's implied representations that he was licensed to practice by use of his letterhead and references to himself as "attorney" in his letters to defense counsel:

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 M. Heurlin” . . . 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 . . . rights, but those [of others] as well. The court then admonished: “Heurlin simply should have styled himself ‘John M. Heurlin, in pro. per.,’ as we have done.” And the court added: “[t]here is much . . . in Heurlin’s conduct that may be sanctionable, and we refer the matter to the State Bar of California for further consideration.”

Heurlin ignored the Court of Appeal’s admonition. On September 14, 2007, he filed a summary judgment motion in the dissolution action in superior court and identified himself as “John M. Heurlin, Esq. SBN 119899 [¶] Attorney Pro Se” in its caption and “John M. Heurlin, Esq.” in the signature line. He did not state he was suspended.

Heurlin filed yet another appeal in the Court of Appeal from an adverse judgment in the dissolution case and identified himself as “John M. Heurlin, Esq. SBN 119899” in his opening brief, which he filed on December 30, 2008. The brief’s caption also included his email address as “JheurlinLaw@Netscape.net.” Heurlin noted he was “Appellant, Pro Se” but he did not state he was on suspension. On the same date, Heurlin filed a request to augment the record identifying himself as “John M. Heurlin, Esq. SBN 119899.” He attached a declaration to his request attesting under penalty of perjury: “I . . . am an attorney licensed to practice before the courts of the State of California.” The Court of Appeal took exception to Heurlin’s declaration and on January 16, 2009, the court again referred Heurlin to the State Bar.

## **II. PROCEDURAL BACKGROUND**

The Office of the Chief Trial Counsel of the State Bar (State Bar) filed a Notice of Disciplinary Charges (NDC) on April 28, 2011, charging Heurlin with the unauthorized practice of law (UPL) by improperly holding himself out as entitled to practice law in willful violation of

Business and Professions Code sections 6068, subdivision (a), 6125 and 6126.<sup>2</sup> Heurlin filed a motion to dismiss on May 25, 2011. At the initial status conference on June 6, 2011, the hearing judge ordered Heurlin to file his response to the NDC prior to the judge's ruling on his motion to dismiss, which she subsequently denied on June 13, 2011. Heurlin did not file a motion for reconsideration or seek interlocutory review of the hearing judge's order. Instead, he filed his response to the NDC on June 15, 2011.

Ten days later, the State Bar served a request for discovery asking Heurlin to identify witnesses who had knowledge about the issues of culpability, aggravation and mitigation as well as their files and documents on those issues. The request also sought the identities of the witnesses Heurlin intended to call at trial. Heurlin refused to respond to the discovery requests on Fifth Amendment grounds. After Heurlin failed to respond to its "meet and confer" letter, the State Bar filed a motion to compel further responses on August 2, 2011.

On July 27, 2011, Heurlin filed a notice to appear and produce at trial in lieu of subpoena (Notice to Appear) in order to compel four State Bar employees, including the prosecutor in this case, to testify about their investigation of him and to produce their files beginning with the initial investigation in 2006.<sup>3</sup> In response, the State Bar filed a motion to quash the Notice to Appear.

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<sup>2</sup> 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: "No person shall practice law in California unless the person is an active member of the State Bar." Section 6126 prohibits holding oneself out as entitled to practice law while on suspension. Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

<sup>3</sup> The State Bar began its investigation of Heurlin in 2006 due to a third party complaint that Heurlin had held himself out as entitled to practice while he was on suspension. That investigation was closed in July 2006 after Heurlin agreed to refrain from holding himself out until he was entitled to practice. The State Bar commenced a second investigation in 2007 as the result of a referral by the Court of Appeal due to Heurlin's frivolous appeal and UPL. The

On August 8, 2011, the hearing judge heard Heurlin's Fifth Amendment objections to the discovery requests, which were based solely on his claim that a section 6126 violation is a misdemeanor. The hearing judge found this showing was inadequate because Heurlin failed to demonstrate that the evidence sought by the State Bar would "tend to incriminate him [or] that there was a risk of criminal prosecution . . . ." In granting the State Bar's motion to compel, the hearing judge ruled before Heurlin had the opportunity to file a written objection to the State Bar's motion as provided by rule 5.45(B). The hearing judge ordered Heurlin to respond to the State Bar's discovery requests by August 11, 2011, or he would be "precluded from presenting any evidence at trial with respect to [the discovery requests]." Heurlin neither responded to the discovery requests nor filed a motion for reconsideration or a petition for interlocutory review.

At the August 8th pretrial conference, the hearing judge also granted the State Bar's motion to quash Heurlin's Notice to Appear, based on Evidence Code sections 350, 351, 702 and 915. However, although she heard oral argument on the motion at the pretrial conference, the hearing judge ruled before Heurlin could file a written opposition to the motion to quash. Again, Heurlin did not file a motion for reconsideration and he did not seek interlocutory review.

On August 13, 2011, Heurlin filed three motions in limine seeking, inter alia, to exclude "any and all evidence, references to evidence, testimony or argument relating to [the 2006 and 2007 investigations of Heurlin]." The hearing judge granted his motions. However, Heurlin reversed his position at trial and sought to introduce evidence of the State Bar's prior investigations. The hearing judge allowed Heurlin to testify about his communications with the State Bar about its prior investigations and to read into the record the substance of three letters from the State Bar about those investigations.

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investigation in the present proceeding began in 2009 after the Court of Appeal's second referral for additional acts of UPL.

### III. HEURLIN'S DUE PROCESS AND EVIDENTIARY CHALLENGES

Heurlin asserts that he did not receive a fair trial because: (1) the Rules of Procedure of the State Bar violated his due process rights to a fair trial; (2) the hearing judge committed procedural error by prematurely ruling on various motions before he could respond; and (3) the hearing judge made various evidentiary rulings in error. Indeed, Heurlin argues that the hearing judge “singlehandedly violated every precept of due process” in these disciplinary proceedings and committed “serial error.”

#### A. Heurlin's Generalized Challenge to the Rules of Procedure of the State Bar

Heurlin makes a broad challenge to the current Rules of Procedure of the State Bar, which he claims in toto undermined his right to a fair trial. The Supreme Court has “long recognized the regulatory ability of the State Bar, and [has] found that the procedural safeguards provided by the Rules of Procedure of the State Bar are adequate to ensure that administrative due process will be observed.” (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928.)

The Rules of Procedure were amended by the Board of Governors, effective January 1, 2011. While the new rules modify some pretrial procedures, they continue to ensure reasonable notice and the opportunity to be heard, to present a defense, to engage in discovery, and to present evidence prior to imposition of discipline. (See rules 5.41 [notice of charges]; 5.43 [response]; 5.65 [discovery procedures] and 5.104 [evidence at trial].) Section 6085 also sets forth substantial rights for attorneys subject to discipline.<sup>4</sup>

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<sup>4</sup> Section 6085 provides:

“Any person complained against shall be given fair, adequate and reasonable notice and have a fair, adequate and reasonable opportunity and right:

- (a) To defend against the charge by the introduction of evidence.
- (b) To receive any and all exculpatory evidence from the State Bar after the initiation of a disciplinary proceeding in State Bar Court, and thereafter when this evidence is discovered and available. This subdivision shall not require the disclosure of mitigating evidence.
- (c) To be represented by counsel.
- (d) To examine and cross-examine witnesses.

“It has been repeatedly held that [State Bar proceedings] are not governed by the rules of procedure governing civil or criminal litigation [citations], although such rules have been invoked by the courts when necessary to ensure administrative due process. [Citation.]” (*Emslie v. State Bar* (1974) 11 Cal.3d 210, 225-226.) In view of the panoply of rights afforded by the rules and by statute, Heurlin’s generalized due process challenge fails without a showing of specific prejudice. (*Van Sloten v. State Bar, supra*, 48 Cal.3d at p. 928 [absent showing of specific prejudice, application of State Bar Rules of Procedure not deemed inherently unfair].)

#### **B. Heurlin’s Claims of Procedural Error by the Hearing Judge**

Heurlin argues that three of the hearing judge’s pretrial rulings were unfair because she made them before he could timely respond. We address each separately, reviewing the hearing judge’s actions for an abuse of discretion. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695 [abuse of discretion standard of review applied to procedural rulings].)

First, at the initial status conference on June 6, 2011, the hearing judge ordered Heurlin to file his response to the NDC while his motion to dismiss was still pending. However, at the time of that conference, Heurlin had not filed his response within 25 days of the service of the NDC, as required by rules 5.43(A) and 5.28(A). Therefore, filing his motion to dismiss did not extend the time in which Heurlin could file his response. (Rule 5.42(A).) Accordingly, the hearing judge acted within her discretion in ordering him to file his response before she ruled on his motion to dismiss. Furthermore, Heurlin waived this issue when he then filed his response and neither requested reconsideration in the hearing department nor sought interlocutory review.

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(e) To exercise any right guaranteed by the State Constitution or the United States Constitution, including the right against self-incrimination.

He or she shall also have the right to the issuance of subpoenas for attendance of witnesses to appear and testify or produce books and papers, as provided in this chapter.”



Next, Heurlin complains that the hearing judge granted the State Bar's motion to compel before he could timely file an opposition based on the Fifth Amendment privilege against self-incrimination. (Rule 5.45(B) [opposing party must file written response within 10 days after motion served].) Although the hearing judge erred in not allowing Heurlin to file his written opposition before she ruled, we find no prejudice. The hearing judge gave Heurlin ample opportunity at the August 8, 2011 pretrial conference to establish the evidentiary and legal bases for his Fifth Amendment assertion. Heurlin does not "have the complete immunity from testifying of the defendant in a criminal case . . . ." (*Black v. State Bar* (1972) 7 Cal.3d 676, 686.) The hearing judge thus properly required Heurlin to explain the specific bases of his assertion of the Fifth Amendment privilege with respect to each discovery request. (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 343, fn. 23 [respondent required to offer specific explanation why information sought by State Bar was incriminating].) Heurlin could not offer any reason why disclosing the names of *his* witnesses or the evidence he intended to offer in mitigation would tend to incriminate him.

The hearing judge gave Heurlin additional time to respond to the discovery requests, but Heurlin never did. Under these circumstances, the hearing judge did not abuse her discretion in granting the State Bar's motion to compel and ruling that Heurlin must respond to the State Bar's discovery requests or be precluded from presenting evidence at trial relating to those requests. Again, Heurlin did not file a motion for reconsideration or seek interlocutory review and therefore the issue is waived. (Rule 5.150 [requirements for petition for interlocutory review].)

Finally, Heurlin complains that the hearing judge granted the State Bar's motion to quash his Notice to Appear before he could file a written response. (Rule 5.45(B).) Heurlin maintains that the witnesses and documents that were the subject of his Notice to Appear would have established that the State Bar was well aware of his UPL and acquiesced to it. He argues that in

quashing his notice, the hearing judge precluded him from establishing his defense of waiver or estoppel, and he was unable to rely on this evidence in mitigation of his good faith.

The hearing judge again erred in ruling before Heurlin could timely file his opposition to the State Bar's motion to quash. (Rule 5.45(B).) However, Heurlin failed to show this error caused prejudice, particularly since the hearing judge permitted Heurlin to testify at his discipline trial about his discussions with the State Bar concerning its prior investigations of his conduct. Moreover, Heurlin was allowed to read into the record the substance of the three letters from the State Bar that explained its position about its prior investigations of his UPL. Finally, the witnesses and documents that Heurlin now claims were essential to his defense are the very same witnesses and documents that were the subject of his in limine motions. He has therefore waived his right to complain that he was prejudiced because the hearing judge excluded this evidence.

In sum, we find the hearing judge clearly erred in making her precipitous rulings before expiration of the time allowed for Heurlin to respond. Although we find no prejudice to Heurlin, the hearing judge's errors unfortunately eroded his perception of impartiality and fairness in these proceedings. Nonetheless, we reject Heurlin's generalized claim that the hearing judge made these rulings because she was biased against him as he provided no specific evidence of bias. (*In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 688-689 [rejecting overbroad bias claim].)

### **C. Heurlin's Challenge to the Hearing Judge's Evidentiary Rulings**

Heurlin also contends that the hearing judge made several erroneous evidentiary rulings at trial. We review those rulings under an abuse of discretion standard. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 499 [hearing judge has broad discretion to determine admissibility and relevance of evidence].) First, Heurlin challenges the hearing judge's admission of hearsay evidence, which he claims lacked proper foundation. We disagree.

The hearing judge properly admitted hearsay evidence that was relevant, reliable and in compliance with the requirements for admission of evidence. (Rule 5.104(D).) Second, Heurlin argues that the hearing judge improperly admitted evidence that had not been authenticated. He specifically objected at trial to the admission of four pieces of evidence: his State Bar records showing his address history; his State Bar registration card; a certified copy of his record of prior discipline; and a letter he sent to Jacoby on July 19, 2006. Of these four documents, the first three were certified records and were properly admitted. (*People v. Brucker* (1983) 148 Cal.App.3d 230, 241 [public record properly admitted when certified by its public custodian].) As to the fourth document, Jacoby testified that he recognized the letter Heurlin wrote to him, remembered its subject matter and had no reason to believe that he didn't receive it. The hearing judge did not abuse her discretion in admitting the evidence, all of which was relevant, properly authenticated and reliable.

#### **IV. CULPABILITY FOR UPL**

The hearing judge found Heurlin culpable of UPL in willful violation of sections 6125, 6126 and 6068, subdivision (a). We agree. "The unauthorized practice of law includes the mere holding out by a [respondent] that he is practicing or is entitled to practice law." (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 666 [citing § 6126].) An attorney simply may not hold himself or herself out as entitled to practice during a suspension period and "[b]oth express and implied representations of ability to practice are prohibited." (*In re Naney* (1990) 51 Cal.3d 186, 195.)

We find clear and convincing evidence<sup>5</sup> that Heurlin improperly held himself out as entitled to practice law when he: (1) filed the August 2005 notice of attorney's lien in the superior court; (2) sent two letters to Jacoby and copied others in July 2006; (3) filed the

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<sup>5</sup> 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.)

September 2007 summary judgment motion in superior court; (4) filed the December 2008 appellant's opening brief in the Court of Appeal; and (5) filed a request to augment the record in the Court of Appeal. He used the honorific "Esq." or referred to himself as "attorney" or "Law Offices of John N. Heurlin" in these documents.

Heurlin maintains that he was entitled to include the sobriquets "attorney" and "Esq." and to refer to the "Law Offices of John N. Heurlin" because he was representing himself. He is incorrect. We acknowledge that "any 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.) Even so, Heurlin was not entitled to give the false impression that he had the present ability to practice law while he was on suspension, which the totality of evidence establishes. (*In re Naney, supra*, 51 Cal.3d 186 [suspended attorney implied he was entitled to practice by using bar admission date on resume when seeking employment]; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 88, 91 [suspended attorney created false impression of current ability to practice by using terms "Member of the State Bar" and "ESQ." next to his signature when applying for job].) Moreover, Heurlin engaged in UPL when he filed a lien in the National class action lawsuit seeking fees, costs and expenses on behalf of FairWageLaw, thus representing a corporation and not just himself as a client.

Heurlin further argues that the word "Esquire" has many meanings, including that of property owner and subscriber to the magazine Esquire. This argument is unconvincing because we do not focus on a single usage of a particular word when determining UPL. Instead, we consider the context of the words and the general course of conduct. (*Crawford v. State Bar, supra*, 54 Cal.2d at pp. 666-667 [individual acts not necessarily determinative; consideration given to entire pattern of conduct].) Here, Heurlin affixed the label "Esq." next to his name and included references to himself as "attorney" and "Law Offices of John M. Heurlin" in pleadings

and correspondence to opposing counsel. As the Court of Appeal observed, this course of conduct may well have created “the misleading impression” that Heurlin *presently* is licensed to practice law and *currently* maintains a functioning law office. And Heurlin underscored his misrepresentations of his status as an attorney when he filed his declaration in the Court of Appeal attesting: “I am an attorney licensed to practice before the courts of the State of California . . . .”

We also reject Heurlin’s argument that he is entitled to the defense of waiver or estoppel because the State Bar purportedly advised him that it would not discipline him for his use of the terms “attorney,” “Esq.,” and “Law Offices of John N. Heurlin.” We note that except in unusual instances when necessary to avoid grave injustice, “[e]stoppel will not ordinarily lie against a governmental agency if the result will be the frustration of a strong public policy.” (*Bib’le v. Committee of Bar Examiners* (1980) 26 Cal.3d 548, 553; accord *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 793.) In light of this record, we find no such injustice has occurred here.

Heurlin has failed to demonstrate that he justifiably relied on the State Bar’s communications (*Kelley v. R. F. Jones Co.* (1969) 272 Cal.App.2d 113, 120-121 [justifiable reliance essential element of estoppel doctrine]) or that he reasonably changed his course of conduct as a result of the State Bar’s actions. (*Id.* at p. 121.) The State Bar investigator advised Heurlin in July 2006 that it had completed its investigation of his UPL activities and would take no action because “it appears you are representing yourself in pro per, and *you agreed to refrain from holding yourself out* to be a licensed California attorney until such time as you are active again.” (Italics added.) In June 2007, the State Bar advised Heurlin it had opened another investigation in response to the Court of Appeal’s referral for his UPL. Yet, in spite of the Court of Appeal’s decision that expressly admonished Heurlin that his use of “Esq.,” “attorney,” and

“Law Offices of John M. Heurlin” were “misleading” and likely to give the impression that he was entitled to practice law, Heurlin continued to use those terms.

Finally, Heurlin argues that his actions did not constitute holding himself out as entitled to practice law because the court and his former partners knew he was suspended. Whether or not a third party knew about or relied on Heurlin’s misrepresentations is not material to the issue of truthfulness. (*In the Matter of Wyrick, supra*, 2 Cal. State Bar Ct. Rptr. at p. 91.) As the Court of Appeal recognized, Heurlin’s conduct was “designed to magnify the force of his threats to defense counsel in the class action lawsuits.” We find overwhelming evidence of his UPL.

## **V. MITIGATION AND AGGRAVATION**

Heurlin must establish mitigating circumstances by clear and convincing evidence (std. 1.2(b)), while the State Bar has the same burden to prove aggravating circumstances (std. 1.2(e)). We find no factors in mitigation and three significant factors in aggravation.

### **A. No Mitigation**

We agree with the hearing judge that the record establishes no mitigation factors.

### **B. Factors in Aggravation**

We adopt the hearing judge’s two factors in aggravation, and we also find additional aggravation because Heurlin committed multiple acts of misconduct.

#### **1. Prior Record of Discipline (Std. 1.2(b)(i))**

Heurlin’s record of three prior disciplines is significant aggravation.

First, Heurlin was privately reprovved on May 5, 1998, after he failed to pay a \$1,000 sanction, which a superior court ordered under Code of Civil Procedure section 128.5 because Heurlin filed meritless pleadings on behalf of the defendants in a civil matter. The hearing judge in the disciplinary matter found that Heurlin disobeyed the superior court’s sanction order in violation of section 6103. Second, Heurlin was again privately reprovved on January 30, 2001,

for failing to comply with the conditions of his previous reproof. He was 16 months late in completing ethics school, and failed to provide proof that he paid the sanction or passed the Multistate Professional Responsibility Examination.

Heurlin's third discipline is the most concerning because it involved serious dishonesty to a client, the superior court, the Court of Appeal, and this court. In July 2002, the Court of Appeal sanctioned Heurlin \$6,000 for prosecuting a frivolous appeal arising from a fee dispute with a former client. As in the instant matter, Heurlin attempted to impose a lien on settlement proceeds to prevent them from being distributed to his client, which the Court of Appeal described as "litigation abuse." The Court of Appeal described Heurlin's conduct as "disgraceful" and found he had "followed a path of artifice and deceit with single-minded determination."

In August 2004, Heurlin stipulated that: (1) he improperly withheld settlement funds as a fee, thereby charging an unconscionable fee in violation of rule 4-200(A); (2) he filed and maintained an appeal for corrupt motives to cover up his deceit in his mishandling of client trust funds and his dishonesty to the superior court in misreporting the status of his trust account in violation of section 6068, subdivision (g); and (3) committed acts of moral turpitude in violation of section 6106 by following a path of artifice and deceit in his handling of the trust account funds and his litigation with a client. In aggravation, Heurlin has two prior disciplines that are similar to the misconduct at issue, and he demonstrated a lack of candor in misrepresenting the nature and substance of the Court of Appeal proceedings to this court.

In January 2005, the Supreme Court ordered that Heurlin be suspended for two years and until he satisfies the requirements of standard 1.4(c)(ii).

## **2. Indifference to Rectification or Atonement (Std. 1.2(b)(v))**

We agree with the hearing judge that Heurlin has demonstrated indifference to his misconduct. This indifference is a continuation of his attitude which the Court of Appeal noted in its December 7, 2006 opinion: “We are troubled by Heurlin's breezy and lackadaisical dismissal of his serious misconduct in [the prior case involving Heurlin].” And despite specific instructions by the Court of Appeal, he refuses to abandon the terms identifying himself as a practicing attorney. In fact, in his pleadings filed in this court, he refers to himself as “John M. Heurlin, Esq., SBN 119899 . . . ¶ Attorney for Respondent ¶ Appearing Pro Se,” and continues to sign these pleadings as “John M. Heurlin, Esq.” Heurlin’s obstinacy “reflects a seeming unwillingness even to consider the appropriateness of [his misconduct] or to acknowledge that at some point his position was meritless or even wrong to any extent.” (*In re Morse* (1995) 11 Cal.4th 184, 209.) Heurlin’s indifference shows that he does not recognize the serious nature of his wrongdoing and therefore the strong likelihood of his recidivism is a danger to the public.

## **3. Multiple Acts of Wrongdoing (Std. 1.2 (b)(ii))**

We find additional aggravation in Heurlin’s multiple acts of wrongdoing. This is not a lone instance of inadvertently holding oneself out as entitled to practice. Rather, Heurlin repeatedly and consciously flouted the authority of the courts of record by continuing to file pleadings misrepresenting himself as a licensed attorney in good standing and entitled to practice law when clearly he is not.

# **VI. DISCIPLINE ANALYSIS**

The purpose of attorney discipline is not to punish the attorney but to protect the public, the courts and the legal profession. (Std. 1.3.) To determine the appropriate discipline, we begin with the standards, and follow these guidelines “whenever possible” (*In re Young* (1989) 49



Cal.3d 257, 267, fn. 11) in order to ensure consistency in attorney disciplinary cases. (*In re Brown* (1995) 12 Cal.4th 205, 220.)

The most relevant standard to our disciplinary analysis is standard 1.7(b) because this is Heurlin's fourth disciplinary proceeding. Standard 1.7(b) calls for disbarment for an attorney with two or more prior records of discipline unless the most compelling mitigating circumstances clearly predominate. We are mindful that disbarment is not automatically applied in every instance when there have been multiple prior disciplines. (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.) Therefore, we have considered all of the circumstances surrounding Heurlin's misconduct. (*In re Young, supra*, 49 Cal.3d at p. 268.)

The circumstances here do not warrant deviation from standard 1.7(b). First, this matter involves significant aggravation and no mitigation. Further, Heurlin has shown a pattern of litigation abuse and disregard for the courts which provided the bases for his three prior disciplines and is the gravamen of these proceedings. When the Court of Appeal sanctioned Heurlin in 2002, it found his "degree of objective frivolousness and delay is high and the need to discourage like conduct in the future is compelling." (*DeRose v. Heurlin* (2002) 100 Cal.App.4th 158, 182.) Yet, four years later, Heurlin again filed two appeals in the FairWageLaw dissolution matter that the Court of Appeal found to be specious and frivolous. He also failed to comply with Supreme Court disciplinary orders arising from his first discipline.

Presently, Heurlin continues to hold himself out as entitled to practice law despite warnings from the Court of Appeal and the hearing judge below. Apparently, he is either "unwilling or unable" to conform his behavior to the rules of professional conduct. (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 111.) Looking to comparable case law, we conclude disbarment is the appropriate discipline to protect the public, the courts and the legal profession. (*Morgan v. State Bar* (1990) 51 Cal.3d 598, 607 [attorney disbarred for UPL while on suspension engaged in

“pattern of professional misconduct and an indifference to this court's disciplinary orders”]; *McMorris v. State Bar* (1983) 35 Cal.3d 77, 85 [attorney disbarred after four prior disciplines where disciplinary record demonstrated “habitual course of misconduct” of disregarding client interests]; *Barnum v. State Bar, supra*, 52 Cal.3d 104 [attorney disbarred on fourth discipline under standard 1.7(b) where no mitigation and most recent discipline involved repetition of prior misconduct including willfully violating court orders]; *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179 [30-year attorney disbarred on first discipline after sanctions for filing frivolous motions and appeals over a 12-year period; lacked insight and refused to change].)<sup>6</sup>

## **VII. RECOMMENDATION**

For the foregoing reasons, we recommend that John Mark Heurlin be disbarred and that his name be stricken from the roll of attorneys.

## **VIII. RULE 9.20**

We further recommend that John Mark Heurlin be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to 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 order in this proceeding.

## **IX. COSTS**

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

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<sup>6</sup> Having independently reviewed all of the arguments raised by Heurlin, those not specifically addressed herein have been considered and are rejected as lacking merit.

## **X. ORDER OF INACTIVE ENROLLMENT**

The order that Heurlin be enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective October 20, 2011, will continue, pending the consideration and decision of the Supreme Court on this recommendation.

EPSTEIN, J.

WE CONCUR:

REMKE, P. J.

PURCELL, J.