

FILED APRIL 11, 2012

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of)	Case No. 10-N-11089
)	
JAEFFREY JACK ARTZ,)	OPINION and ORDER
)	
A Member of the State Bar, No. 163141.)	
_____)	

BY THE COURT:*

This case addresses respondent Jaeffrey Jack Artz’s failure to timely comply with California Rules of Court, rule 9.20,¹ following his 2010 discipline. Artz was disciplined after he failed to perform competently in eight client matters, commingled funds in his client trust account, and was disbarred from practicing law in 2009 by the U. S. Court of Appeals for the Ninth Circuit. The Supreme Court ordered that he be suspended for a minimum of two years and until he establishes he has satisfied the requirements of Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).² As a condition of his discipline, Artz was required to timely file a rule 9.20 compliance affidavit attesting that he had notified clients, co-counsel and opposing counsel in pending matters of his suspension. Artz failed to timely file his compliance affidavit, and he was charged in this

*Before Remke, P. J., Epstein, J., and Purcell, J.

¹ Unless otherwise noted, all references to “rule(s)” are to the California Rules of Court.

² Unless otherwise noted, all further references to “standard(s)” are to this source.

proceeding with violating rule 9.20, in willful violation of a Supreme Court order. (Bus. & Prof. Code, § 6103.)³

Artz is appealing the hearing judge's finding that he violated rule 9.20, as well as the hearing judge's disbarment recommendation. He contends that his due process rights were violated because he was not served with the Supreme Court's order requiring his timely compliance with rule 9.20. Artz also claims an equal protection violation, arguing that he received disparate treatment by the Office of the Chief Trial Counsel (State Bar). Finally, he charges the hearing judge with bias. The State Bar is asking us to adopt the findings and disbarment recommendation of the hearing judge.

Upon our independent review of the record (rule 9.12), we find: (1) Artz received legally sufficient notice of his discipline conditions to satisfy due process; (2) the State Bar's treatment of him was appropriate and commensurate with that given to other attorneys who face disciplinary action; and (3) there is no evidence of judicial bias. We ultimately conclude that Artz willfully failed to timely satisfy the requirements of rule 9.20.

Disbarment is the presumptive discipline for a rule 9.20 violation, particularly where, as here, an attorney has demonstrated "ostrich-like behavior" to avoid his discipline obligations. (*In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, 388.) Accordingly, we recommend that Artz should be disbarred to protect the public, the courts, and the legal profession.

I. FACTUAL AND PROCEDURAL BACKGROUND⁴

In May 2010, Artz entered into a Stipulation with the State Bar as to the Facts, Conclusions of Law and Disposition in his discipline case. Artz failed to perform competently in

³ Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

⁴ We adopt the hearing judge's findings of fact, as summarized in this opinion and supplemented with additional relevant facts from the record.

eight client matters, commingled funds and had been disbarred from practice in the Ninth Circuit in 2009. He stipulated to a four-year stayed suspension, a four-year probationary period, and actual suspension for a minimum of two years and until he establishes he has satisfied the requirements of standard 1.4(c)(ii). Artz further stipulated that he would comply with rule 9.20 and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's discipline order.⁵

The Supreme Court's order was filed on September 15, 2010, and it mirrored the terms of the Stipulation. It became effective on October 15, 2010. According to the order, Artz should have notified all clients and co-counsel or adverse parties in pending matters of his suspension by November 14, 2010, and filed an affidavit of compliance with rule 9.20 no later than November 24, 2010. He did not file his affidavit until December 20, 2010.

Artz testified that he was not aware of the Supreme Court's disciplinary order until he called the State Bar on December 9, 2010 to discuss his fee bill. But even if, as Artz claims, he did not see the Supreme Court's order until December 9th, he had actual knowledge that his discipline commenced on October 15, 2010. He saw on the State Bar's website "in fine print . . . it said actual suspension beginning October 15th." And he said, "Hmm. Something must have happened. *I guess I am okay until the 15th*, so I did my business." (Italics added.) Later in October, he "rechecked the web page and, yeah, for sure enough that actual suspension had begun."

Although Artz knew of his October 15th suspension, he did not contact the State Bar or the Supreme Court to clarify his status, nor did he review his Stipulation to confirm the agreed-upon conditions of his discipline. Instead, he left on an extended trip to Canada, after stopping

⁵ Rule 9.20(a) requires, inter alia, that notification of suspension or disbarment be given to clients, co-counsel and opposing counsel in pending matters; rule 9.20(c) requires an affidavit of compliance with this rule to be filed with the Clerk of the State Bar Court.

for four or five days in Fresno, where he appeared in Superior Court on behalf of a client on October 15, 2010, knowing his suspension was in effect on that date.

Artz also received a notice of the Supreme Court's discipline order from the Office of Probation (Probation). On October 13, 2010, a Probation deputy mailed a letter to Artz's official address, advising him: "On September 15, 2010, the Supreme Court of California filed an Order, **effective October 15, 2010**, suspending you from the practice of law" (Bold in original.) A copy of the Supreme Court's order was enclosed and the letter warned: "Your affidavit of compliance must be timely filed with the State Bar Court no later than **November 24, 2010** **Failure to comply with the provisions of rule 9.20 may result in disbarment or suspension.**" (Bold in original.)

Artz does not dispute that he received this letter at his official address, but he maintains that he left town before it arrived and he did not read it until two months later. Artz made no arrangements to monitor his mail or his telephone calls while he was gone, and he did not review his mail even after he returned from his vacation in early November. Instead, he testified: "I went home and I watched television [for the entire] month of November for the holidays." In late November, he started to read his mail on a piecemeal basis and it was then that he noticed a fee bill from the State Bar.

When he finally spoke to a Probation deputy on December 9, 2010, Artz learned that he had been referred to the State Bar for possible disciplinary action. He claims only then did he read the State Bar's October 13, 2010 letter advising him of his rule 9.20 obligations. Yet, Artz still did not file his affidavit until December 20, 2010.

The State Bar filed a Notice of Disciplinary Charges (NDC) on January 27, 2011, alleging one count of misconduct due to Artz's failure to timely file a rule 9.20 affidavit in

violation of the Supreme Court's order. After a one-day trial, the hearing judge found him culpable as charged and recommended disbarment.

II. DISCUSSION

A. Due Process Claim

Artz claims that he filed his rule 9.20 affidavit late because the Supreme Court failed to serve him with a notice of the filing of its September 15, 2010 disciplinary order. He argues that his due process rights were violated because he had insufficient notice of his discipline conditions. We disagree.

We start with the evidentiary presumption under Evidence Code section 664 that the Supreme Court clerk properly performed his or her official duty in serving Artz and his attorney as provided in rule 9.18(b).⁶ Artz failed to rebut this presumption because the hearing judge did not believe Artz's testimony that the Supreme Court had not properly served him with its order. We give the hearing judge's credibility determinations great deference. (Rules Proc. of State Bar, rule 5.155(A); *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 121.)⁷ The hearing judge also properly found that the absence of a proof of service of the Supreme Court's order did not rebut the presumption of proper service, after taking judicial notice that the Supreme Court does not attach written proofs of service to its disciplinary orders. (Evid. Code, § 452, subd. (h).)

The hearing judge also properly gave no weight to a letter to Artz from an attorney representing the Clerk of the Supreme Court, which opposed Artz's discovery subpoenas of the

⁶ Rule 9.18(b) provides that the Supreme Court Clerk shall "mail notice of [the filing of a discipline order] to the member and his or her attorney of record, if any, at their respective addresses" The hearing judge erroneously cited rule 8.532 as the source of the Clerk's duty rather than rule 9.18(b).

⁷ The hearing judge found Artz's credibility throughout trial was "poor." He further found Artz frequently lacked candor, noting that he often changed his testimony about critical events and was often evasive. The record supports the hearing judge's credibility and candor determinations.

Supreme Court's records. Although the letter noted that Artz's counsel had been served with the Supreme Court's order in the instant matter, it was silent about whether the Supreme Court had effected service on Artz himself. In the absence of testimony by the attorney, we find her letter has little relevance and even less weight in rebutting the presumption of proper service on Artz.

Even if we were to accept Artz's claim that he was not served with the Supreme Court's discipline order, there is clear and convincing evidence⁸ establishing that Artz had actual notice of his suspension when he saw the notation on the State Bar's website about his "actual suspension beginning October 15th." The letter from Probation on October 13, 2010, enclosing the Supreme Court's order constitutes additional actual notice. As the Supreme Court aptly observed in *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186: "[I]t is disingenuous for petitioner to demand actual, timely notice . . . when he admittedly tried to insulate himself from the outside world."

B. Equal Protection Claim

We also reject Artz's argument that he received disparate treatment by the State Bar. Artz failed to provide any evidence that other attorneys have not been similarly prosecuted when they have filed late rule 9.20 affidavits. Nor did he offer any evidence that rule 9.20 has been applied discriminatorily against him. Absent such evidence, Artz has not made the required showing to sustain his contention that he has been denied equal protection of the laws under the United States Constitution. (*Snowden v. Hughes* (1944) 321 U.S. 1, 8 [intentional or purposeful discrimination must be shown to claim discriminatory application of state statute that is fair on its face].)

⁸ 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.)

C. Claim of Judicial Bias

We next consider Artz's claim that he was denied fundamental fairness in the proceedings below because of the hearing judge's extensive questioning at trial. Artz maintains that the judge "appeared to be intent on finding guilt based on his own leading questions and assumption of the prosecutorial role."

Artz correctly notes that the hearing judge asked numerous questions, many of them lengthy. But we observe that the questioning by the judge was mainly intended to clarify his own confusion about some of the testimony. "A trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony." (*People v. Cook* (2006) 39 Cal.4th 566, 597.)

We do not agree with Artz that the hearing judge assumed a role as a partisan advocate. His questioning was indeed extensive, but it was intended to fully develop the facts of the case. Moreover, the hearing judge's questions caused no prejudice in this non-jury trial. Although it is unfortunate that the judge's actions eroded Artz's perception of impartiality and fairness in these proceedings, we find no evidence of bias.

D. Culpability for Violation of Rule 9.20(c)

Artz admits that he took no steps to assure that someone would monitor his mail while he was on his extended vacation, nor did he contact the State Bar or the Supreme Court to clarify his disciplinary status once he learned from the website that his suspension was in effect. But he argues that "he had no duty to take any steps to discover a court order issued against him." He further maintains that it is "irrational and unlawful" for the State Bar to require that he "take reasonable, affirmative steps to ensure his timely compliance" We disagree.

Artz lacks a fundamental understanding of his duty to comply with the conditions of his discipline. His failure to exert even the most modest effort to assure his compliance with his

discipline resulted in his ultimate violation of the Supreme Court’s order. “[G]iven the pattern of neglect of his professional responsibilities in the face of circumstances that should have led him to be vigilant” (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 681), we find Artz’s late filing of his rule 9.20 compliance affidavit was willful as charged in Count One of the NDC. (*In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, 329 [avoidance tactics constitute willful violation of rule 9.20].)⁹

III. DISCIPLINE ANALYSIS

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence (std. 1.2(b)). Artz has the same burden of proving mitigating circumstances. (Std. 1.2(e).)

A. Aggravation

The hearing judge found three factors in aggravation: Artz’s prior record of discipline (std. 1.2(b)(i)); his lack of candor during his testimony at trial (std. 1.2(b)(vi)); and uncharged misconduct for the unauthorized practice of law (UPL) in violation of sections 6068, subdivision (a), 6125 and 6126.

The evidence supports these findings in aggravation, including the evidence of uncharged misconduct. Artz committed UPL when he appeared in Superior Court in Fresno, knowing that he was suspended. (*In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 506 [violations of §§ 6125 and 6126 constitute violation of § 6068, subd. (a)].) The hearing judge properly considered UPL as an aggravating factor because the evidence was elicited for a relevant purpose and is based on Artz’s own testimony. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.)

⁹ We have considered the other procedural and substantive issues Artz raised in his brief. To the extent they are not specifically addressed here, we have determined that they are without legal or factual basis and reject them.

We find an additional factor in aggravation: Artz's indifference to his professional responsibilities. (Std. 1.2(b)(v).) The record repeatedly shows Artz's unwillingness to accept responsibility for the consequences of his conduct. For example, when asked if he was aware of the terms of his Stipulation, he testified "Well, frankly, I'm hardly aware of them now . . . and I certainly did not read them at the time [I signed the Stipulation]." Also, without any evidence, Artz asserted in his brief: "It is common knowledge State Bar judges are fired if they do not bring in the money by finding guilt of each attorney so that administrative costs to recoup their salaries and benefits are imposed." He also made unsupported statements against the State Bar, stating that it places an "emphasis on prosecuting attorneys in order to obtain coerced guilty pleas and the cash for itself through extortion and threats of severe financial harm." And he accused the hearing judge of "retaliatory disbarment in which [he] fabricates and invents non-existent evidence." Such statements demonstrate Artz's contempt for the State Bar and the discipline system.

Artz has been unwilling even to consider the appropriateness of his conduct, and this evidence in aggravation weighs heavily in favor of disbarment. As with the attorney in *In re Morse* (1995) 11 Cal.4th 184, 209, Artz's conduct throughout these proceedings "went beyond tenacity to truculence."

B. Mitigation

The hearing judge found three factors in mitigation, which we do not adopt. First, the hearing judge gave mitigating weight for Artz's partial compliance with his obligations to provide notice to his clients and opposing counsel under rule 9.20(a), as well as his belated filing of his compliance affidavit, citing *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192, 205 and *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527, 532-533. However, there is no evidence to establish that notice was timely given to Artz's

clients other than his own testimony, which was inconclusive at best. Furthermore, Artz should not have been credited for belatedly filing his compliance affidavit, since he only did so after learning that his case was being referred for possible disciplinary proceedings.

The hearing judge also incorrectly gave mitigation credit because no harm resulted from Artz's delayed affidavit. (Std. 1.2(e)(iii).) Artz did not present clear and convincing evidence of the absence of harm.

Finally, although the hearing judge gave "nominal" credit for Artz's good character evidence, we assign no weight to it. Only two individuals testified on his behalf – an interpreter Artz had used in his immigration cases and Artz's wife. They do not constitute "a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct." (Std. 1.2(e)(vi); *In the Matter of Kittrell* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 615, 624 [two character witnesses insufficient].)

C. Level of Discipline

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.) A rule 9.20 violation is deemed a serious ethical breach for which disbarment generally is considered the appropriate discipline. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.)¹⁰ But, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059.) Lesser discipline has been imposed on occasion where the late filing of a compliance affidavit was the only issue *and* the attorney has demonstrated good faith, significant mitigation

¹⁰ Rule 9.20(d) provides: "A suspended member's willful failure to comply with the provisions of this rule is a cause for disbarment or suspension and for revocation of any pending probation."

and little or no aggravation.¹¹ Such is not the case here as there is no mitigation and serious aggravation due to Artz's UPL, lack of candor and indifference in these proceedings. We find no reason to deviate from a disbarment recommendation.

Artz asserts that it is unconstitutional to harshly discipline him merely because he filed his affidavit only 26 days after it was due. The Supreme Court rejected a similar argument in *Lydon v. State Bar, supra*, 45 Cal.3d at page 1187: "An obvious flaw in this reasoning is that it seeks to minimize petitioner's current wrongdoing. Nothing on the face of rule [9.20] or in our prior practice distinguishes between 'substantial' and 'insubstantial' violations of rule [9.20]." Like the Supreme Court, we take a strict view of rule 9.20 violations because of the rule's "critical prophylactic function" in notifying clients, counsel, adverse parties and the courts of an attorney's discipline. (*Ibid.*) Moreover, "failure to comply with the rule causes serious disruption in judicial administration of disciplinary proceedings . . . designed to protect the public, the courts, and the legal profession." (*Durbin v. State Bar, supra*, 23 Cal.3d at p. 468.) Artz's intentional avoidance tactics and his disdain for the disciplinary system make a mockery of the very prophylactic function of rule 9.20 that the Supreme Court and this court value so highly.

Finally, the decisional law strongly points to disbarment when, as here, the misconduct reflects 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"]; *In the Matter of Pierce, supra*, 2 Cal. State Bar Ct. Rptr. 382, 388 [disbarment

¹¹ See *Shapiro v. State Bar* (1990) 51 Cal.3d 251; *Durbin v. State Bar* (1979) 23 Cal.3d 461; *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192; *In the Matter of Friedman, supra*, 2 Cal. State Bar Ct. Rptr. 527.

recommended for attorney with two prior disciplines who demonstrated “ostrich-like behavior” and failed to timely file rule 955 compliance affidavit].)

We conclude that a recommendation less than disbarment would demean the integrity of our disciplinary system and the legal profession.

IV. RECOMMENDATION

We recommend that Jaeffrey Jack Artz be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys admitted to practice in this state.

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

ORDER

The order of the hearing judge below that Jaeffrey Jack Artz be enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), shall continue in effect pending the consideration and decision of the Supreme Court on this recommendation.