FILED JUNE 5, 2013

PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 11-O-13025
	)	
ROBERT SCOTT SHTOFMAN,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 135577.	)	
	)	

After practicing law for 22 years without discipline, Robert Scott Shtofman committed misconduct during a 2011 civil trial. He violated court orders by repeatedly arriving late for trial, filing tardy jury instructions, and untimely submitting a volume of exhibits. Shtofman's misconduct arose out of a "perfect storm" of events – his inability to pay for accommodations near the courthouse during the trial led to a daily four-hour roundtrip commute and severe sleep deprivation. Also during this time, his co-counsel withdrew from the case. Despite these difficulties, Shtofman performed diligently for his client and won a jury verdict of over $1,000,000.

The hearing judge found that Shtofman: (1) disobeyed the superior court's orders; (2) failed to report judicial sanctions; and (3) failed to maintain respect for the court. The hearing judge further found that Shtofman's case was mitigated by four factors: no prior record of discipline; extreme emotional/physical difficulties; good character; and recognition of wrongdoing. The only factor found in aggravation was multiple acts of misconduct. Giving great weight to Shtofman's mitigation and lack of bad faith, the hearing judge imposed a private reproval with conditions.

The Office of the Chief Trial Counsel (State Bar) seeks review. It requests additional aggravation, less mitigation, and a minimum one-year stayed suspension with probation. Shtofman admits he disobeyed the court's orders and failed to report court-ordered sanctions, but denies he disrespected the court. He accepts the hearing's judge's order for discipline.

Upon independent review (Cal. Rules of Court, rule 9.12), we find Shtofman culpable of disobeying the court's orders and failing to report sanctions, but not culpable of disrespecting the court. We also find more mitigation and less aggravation than the hearing judge found. Shtofman's overall mitigation, particularly his 22 years of discipline-free practice, predominates over his misconduct. Further, he has shown insight into his wrongdoing by employing safeguards to avoid future misconduct. We affirm the hearing judge's order for a private reproval, but remove the conditions since Shtofman is unlikely to pose a danger to the courts, the public, or the legal profession.

I. FINDINGS OF FACT[1]

A. Shtofman Is Hired for an Out-of-Town Trial

Shtofman was admitted to practice law in 1988, and works out of his home in Encino. Although he is a sole practitioner, he normally handles cases with co-counsel.

In November 2008, Bernice Ivoko hired Shtofman to represent her in a civil lawsuit in Riverside Superior Court against her business partner (*Ivoko v. Azonobi*). According to the "Retainer Agreement," Ivoko agreed to pay $250 per hour for legal fees, costs incurred in the case, and Shtofman's "transportation, meals, lodging and all other costs of any necessary out-of-town travel." Shtofman testified that Ivoko orally agreed to pay *in advance* for his lodging in Riverside during the trial since he had financial problems.

[1] Our factual background is based on the hearing judge's findings, the parties' Amended Stipulation as to Undisputed Facts, and the trial evidence. (Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight on review].)

Prior to trial, Ivoko paid Shtofman a $10,000 advance, but costs depleted the entire amount. She then paid him $7,000 more during the trial, but $5,000 was needed for additional costs, leaving only $2,000 toward attorney fees.

Initially, Shtofman shared the workload with co-counsel, but Ivoko objected to the first attorney. Shtofman hired a second co-counsel who stopped working on the case due to illness shortly after the trial began. Ultimately, Shtofman conducted the trial on his own.

B. Shtofman Was Repeatedly Late to Court

The *Ivoko v. Azonobi* case was assigned to Judge John Molloy on January 27, 2011, for a trial to begin January 31, 2011. Despite Ivoko's agreement to pay for Shtofman's lodging in Riverside, she paid for only three nights during 18 days of trial. Since Shtofman could not afford to advance the cost of his lodging, he commuted four hours round-trip daily from his home in Encino to the Riverside court. As a result, he slept four hours each night and became severely sleep-deprived.

Judge Molloy issued a standing order for the attorneys to appear no later than 9:30 a.m. so that he could address any issues that arose over the evening and seat the jury at 10:00 a.m. The judge testified at the discipline trial that Shtofman arrived late to court on all but two trial days. Most of the time, Shtofman was five to 10 minutes late, making his arrival time before 10:00 a.m. However, on a few occasions, he arrived 30 to 75 minutes late. Judge Molloy testified that the jury usually waited approximately five minutes when Shtofman was late – with two exceptions: the jury was delayed 55 minutes on February 16, 2011, and the jury was dismissed for the entire morning session on February 28, 2011. Judge Molloy was particularly concerned about wasting the jurors' time since Riverside County had recently been at risk of completely exhausting the jury pool.

The hearing judge found that a series of "unfortunate events" were partially to blame for Shtofman's late appearances. These included traffic accidents, a freeway shut-down, and bad weather during his commute. The hearing judge also found that Shtofman's sleep deprivation caused him to be preoccupied and disoriented, resulting in misplaced glasses in the courthouse restroom and lost car keys at his home. Shtofman described his circumstances during the trial as a "living nightmare," yet he never sought to withdraw from the case or inform the court that he could not afford local lodging.

C. Shtofman Did Not Timely Submit Jury Instructions

Before the trial began, Judge Molloy asked the parties to prepare a set of jury instructions and a joint exhibit list. On February 4, 2011, they agreed on the proposed instructions. The court ordered Shtofman to present a complete set of instructions by February 7, a "dark" day when the trial was not in session. Shtofman failed to provide the instructions on that date, although he notified the court clerk he would not appear. He then failed to timely submit the instructions on February 8 and February 9, after the court again ordered him to do so. On February 9, Judge Molloy warned Shtofman to bring the instructions to court by 8:30 a.m. the following day or the court would issue an order to show cause (OSC) for sanctions in excess of $1,000, and would report him to the State Bar.

Ivoko paid for lodging in Riverside that evening so Shtofman could finish the jury instructions. Initially, however, he could not access them on his laptop computer. After an assistant sent him the jury instructions in a different format, Shtofman spent the entire evening working on them, and slept only 15 minutes. The next day, Shtofman brought the completed jury instructions to court, but arrived 10 minutes late. Judge Molloy set an OSC for sanctions of $1,200 for Shtofman's late arrival.

D. Shtofman Did Not Timely Submit Volume Six of Ivoko's Exhibits

On February 4, 2011, Judge Molloy also ordered Shtofman to provide a Bates-stamped copy of Volume Six of Ivoko's exhibits by February 7, the court's "dark day." The copy store that Shtofman hired to stamp the exhibits, which consisted of six stacks of documents, made an error. As a result, the completion date was delayed, and Shtofman could not produce the exhibits on February 7, as ordered. On the morning of February 8, the exhibits were still not ready but Shtofman submitted them when they were delivered to court later that day.

E. The Court Sanctioned Shtofman

In total, Judge Molloy issued eight OSCs for Shtofman's failure to comply with court orders. The judge heard all of the OSCs on March 4, 2011, after the trial was submitted to the jury. On March 23, 2011, Judge Molloy issued his written ruling imposing sanctions pursuant to California Code of Civil Procedure section 177.5 for two of the eight OSCs – $500 for failing to provide a complete set of jury instructions on February 8, 2011, and $1,250 for arriving 50 minutes late on March 3, 2011, the day of the closing argument. Both sanctions were to be paid to the superior court clerk within 30 days of receipt of the order. In the sanctions ruling, Judge Molloy found that Shtofman made no genuine attempt to comply with the court's orders.

F. Shtofman Paid the Sanctions Late and Failed to Report Them to the State Bar

Judge Molloy reported to the State Bar that he had ordered sanctions against Shtofman for disobeying court orders in the *Ivoko v. Azonobi* case. On September 20, 2011, the State Bar sent Shtofman a letter asking him to respond. On October 5, 2011, Shtofman informed the State Bar that he had not paid the sanctions because he planned to file a motion for reconsideration, but became "side-tracked." Later that day, Shtofman paid the sanctions to the superior court and filed his motion for reconsideration, which Judge Molloy subsequently denied.

II. CULPABILITY[2]

Count Two: Failure to Obey Court Order (Bus. & Prof. Code, § 6103)[3]
Count Three: Failure to Report Sanctions (§ 6068, subd. (o)(3))[4]

The Notice of Disciplinary Charges (NDC) alleges in Count Two that Shtofman willfully violated section 6103 by failing to timely provide the jury instructions, failing to timely provide the Bates-stamped exhibits, and failing to pay the $500 and $1,250 sanctions more than five months after the court's deadline. The NDC alleges in Count Three that Shtofman violated section 6068, subdivision (o)(3), by failing to report the $1,250 judicial sanction to the State Bar within 30 days. We find Shtofman culpable of both counts, which he does not challenge.

Count One: Failure to Maintain Respect Due Courts (§ 6068, subd. (b))[5]

The State Bar alleged that Shtofman violated section 6068, subdivision (b), by repeatedly arriving late to court *and* by failing to timely provide the superior court with jury instructions and Volume Six of Ivoko's exhibits. Since we found Shtofman culpable of violating section 6103 (failure to obey court orders) in Count Two for not timely filing these trial documents, we do not consider those facts again to prove a violation of section 6068, subdivision (b).[6]

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[2] Since Shtofman concedes culpability in Counts Two and Three, we consider those charges first.

[3] All further references to sections are to the Business and Professions Code. Section 6103 provides: "A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

[4] Section 6068, subdivision (o)(3), requires an attorney to report judicial sanctions in excess of $1,000 to the State Bar within 30 days.

[5] Section 6068, subdivision (b), provides that an attorney has a duty to "maintain the respect due to the courts of justice and judicial officers."

[6] *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9 (§ 6068, subd. (b) charge duplicative of § 6103 violation, which more directly addressed misconduct where only disrespect shown was violation of court order); *In the Mattter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar. Ct. Rptr. 509, 522 (violation of court order more specifically addressed under § 6103 than under § 6068, subd. (b).)

As to the allegation that Shtofman's late court appearances violated section 6068, subdivision (b), we find him not culpable. It is settled that every attorney must "punctually . . . present himself in court." (*Lyons v. Superior Court* (1955) 43 Cal.2d 755, 758.) But a violation of section 6068, subdivision (b), has uniformly been found for conduct far more egregious than repeated tardiness. Such conduct has included making disrespectful statements to or about the court, intentionally failing to appear in court, or deliberately violating court orders. (See, e.g., *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 951-952 [refusal to transfer estate assets as ordered showed disrespect for legal system in violation of § 6068, subd. (b)]; *Ramirez v. State Bar* (1980) 28 Cal.3d 402, 412 [brief accusing appellate justices of unfounded bias showed disrespect to court in violation of § 6068, subd. (b)]; *In the Matter of Tenner* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 688, 690-691 [repeated failure to attend court hearings without notifying court violated § 6068, subd. (b)]; *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 404 [willful failure to pay court-ordered sanctions violated § 6068, subd. (b) and § 6103].)

The record in this case does not clearly and convincingly establish that Shtofman's conduct was disrespectful to the court.[7] Judge Molloy testified that Shtofman never made insults or accused him of improper judicial conduct. No evidence shows that Shtofman intentionally violated the standing order to appear at 9:30 a.m. Even though his late arrivals were frustrating for the court and the parties, they caused only one significant delay, when the jury was dismissed for the morning session. While Shtofman's overall tardiness is unacceptable conduct for which he was properly sanctioned, it was not "sufficiently serious or fundamental to constitute a violation of section . . . 6068." (See *Marquette v. State Bar* (1988) 44 Cal.3d 253, 263-264 [no

[7] 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.)

violation of § 6068, subd. (b) for failing to attend debtor's examination because noncompliance with order only delayed examination two weeks].)

III. MITIGATION FAR OUTWEIGHS AGGRAVATION

The appropriate discipline is determined in light of the relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Shtofman must establish mitigation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e) (Stds.)), while the State Bar has the same burden to prove aggravating circumstances. (Std. 1.2(b).)

A. No Aggravating Factors

The hearing judge found one factor in aggravation – multiple acts of misconduct. (Std. 1.2(b)(ii).) We disagree and find no aggravating factors. Shtofman's failure to obey court orders and to report sanctions to the State Bar does not constitute multiple acts of misconduct because these acts arose from his conduct during one trial. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 839 [no aggravation for multiple acts of misconduct when it involved two counts arising from single transaction with client].)

The State Bar seeks additional aggravation alleging that Shtofman's misconduct significantly harmed the administration of justice by inconveniencing the jury. (Std. 1.2(b)(iv).) This claim lacks merit. As we noted above, Shtofman's late arrivals to court did not appreciably delay the jury. Although Judge Molloy often seated the jury late because of the time spent issuing the OSCs, he acknowledged that he could have addressed Shtofman's punctuality at another time that would not have impacted the jury. (Cf. *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14 [significant harm to administration of justice where attorney's absence from hearings caused disruption of juvenile court proceedings, delayed

resolution of cases, and negatively impacted underpinnings of indigent dependency hearings].) We assign no aggravation for harm to the administration of justice.

B. Five Mitigating Factors

The hearing judge found that Shtofman proved four mitigating factors: no prior record of discipline; extreme emotional/physical difficulties; good character; and recognition of wrongdoing. We agree and find additional mitigation for his cooperation with the State Bar.

1. No Prior Record (Std. 1.2(e)(i))

Shtofman is entitled to significant mitigation for his 22 years of discipline-free practice. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant mitigation for over 10 years of discipline-free practice].)

2. Extreme Physical/Emotional Difficulties (Std. 1.2(e)(iv))

The hearing judge found that Shtofman suffered "serious stress" due to his financial straits at the time of his misconduct. The State Bar argues that the hearing judge erred in assigning any mitigation credit. To receive mitigation under this standard, an attorney: (1) must prove that he or she suffered from extreme emotional difficulties at the time of the professional misconduct, (2) which an expert establishes were directly responsible for the misconduct, and (3) he or she no longer suffers from such difficulties. The record supports moderate mitigation.

Shtofman testified that he could not afford lodging close to the courthouse, which would have eliminated his four-hour commute. Such economic stress, coupled with the pressures of trial, lack of sleep, and the daily commute, would understandably adversely affect his punctuality. Although no expert testimony was offered, the hearing judge found Shtofman's testimony credible that these stressors caused his misconduct and that he no longer suffers from them. We give great weight to this finding. (Rules Proc. of State Bar, rule 5.155(A) [all factual findings by hearing judge entitled to great weight]; see *Lawhorn v. State Bar* (1987) 43 Cal.3d

1357, 1364 [Supreme Court considered lay testimony of emotional problems as mitigation]; *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, 59-60 [mitigation for personal stress factors accorded less weight without expert testimony].)

3. Good Character (Std. 1.2(e)(vi))

Standard 1.2(e)(vi) provides mitigation credit for "an extraordinary demonstration of good character . . . attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct." Shtofman presented seven character witnesses, including five attorneys. Four of the attorneys had worked with him as co-counsel. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony because they have "strong interest in maintaining the honest administration of justice"].) The witnesses, who were aware of the full extent of the charges against Shtofman, praised him as an honest, trustworthy, candid, diligent, and dedicated attorney who places the needs of his clients first. Shtofman is entitled to significant weight in mitigation for his showing of good character.

4. Recognition of/Remorse for Wrongdoing (Std. 1.2(e)(vii))

Shtofman expressed recognition of and remorse for his wrongdoing. He testified that he would take steps to avoid any recurrence of his misconduct if he were to handle another case involving travel. For example, he would obtain local accommodations, ensure that his client timely paid him, and engage co-counsel. Alternatively, he would make a motion to be relieved if the circumstances became too difficult for him to be effective. He also now prepares all court documents months in advance to avoid untimely filings.

The State Bar asserts that Shtofman's expressions of remorse do not explain why he failed to timely pay the total sanctions of $1,750 or report the $1,250 sanction to the State Bar. But the State Bar has not cited any precedent establishing that his recognition of and remorse for

wrongdoing must apply to *all* of his misconduct to receive mitigating credit. In fact, the opposite is true. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443 [attorney culpable of 16 counts of misconduct, including failure to perform competently, failure to refund unearned fees, and trust account violations, awarded mitigating credit for recognition of wrongdoing for one instance of refunding fee immediately upon termination]; *In the Matter of Klein, supra,* 3 Cal. State Bar Ct. Rptr. at p. 12 [attorney culpable of misconduct in separate dissolution and bankruptcy matters given mitigation credit for rectification and atonement even though pro bono assistance to clients in bankruptcy matter demonstrated atonement in only one client matter].) We assign significant mitigation credit to Shtofman's recognition of and remorse for his wrongdoing.

5. Cooperation (Std. 1.2(e)(v))

Shtofman stipulated to facts that established his culpability in Counts Two (violating court orders) and Three (failure to report sanctions). (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation accorded those who admit culpability and facts].) On review, Shtofman also concedes his culpability for these charges. He is entitled to considerable mitigation for his cooperation.

IV. 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, to preserve public confidence in the profession, and to maintain high professional standards for attorneys. (Std. 1.3.) We must balance all relevant factors on a case-by-case basis to recommend the appropriate discipline. (*In re Young* (1989) 49 Cal.3d 257, 266; *Gary v. State Bar, supra,* 44 Cal.3d at p. 828.)

The Supreme Court instructs us to follow the standards "whenever possible." (*In re Young, supra*, 49 Cal.3d at p. 267, fn. 11.) Although not binding on us, we give great weight to

them to promote consistency and uniformly apply disciplinary measures. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) The applicable standard in this case is 2.6, which calls for suspension to disbarment for violations of sections 6068 and 6103, depending on the gravity of the offense or harm, if any, to the victim.

The hearing judge imposed a private reproval with conditions because it would have been unfair to strictly apply standard 2.6. In support of this decision, the hearing judge gave great weight to Shtofman's 22 years of discipline-free practice and other strong mitigation. He found that Shtofman's misconduct primarily stemmed from his financial inability to obtain lodging close to the courthouse. The hearing judge also considered the unrebutted testimony of Shtofman's character witnesses, who confirmed his dedication to his clients above all else, as a considerable mitigating factor. For these reasons, we find "that the public, courts and legal profession would be adequately protected by a more lenient degree of sanction that set forth in" standard 2.6. (Std. 1.2(e).)

We next look to case law for guidance as to the proper discipline. The State Bar asserts that Shtofman's misconduct "sets a poor example for the members of the legal profession" and offers *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, to support its request for a stayed suspension and probation. *Riordan* is not applicable because Shtofman's misconduct was much less serious, as detailed below.

Riordan was appointed to represent a criminal defendant in a death penalty appeal. (*Riordan* at p. 53.) Despite eight extensions of time and two Supreme Court orders, he failed to file the opening brief. The Supreme Court subsequently found Riordan in contempt and relieved him as counsel. His misconduct delayed the appellate process for two years. During disciplinary proceedings, Riordan was found culpable of failing to act with competence, failing to obey court orders, and failing to report judicial sanctions. His conduct was aggravated by multiple acts of

misconduct and harm to the administration of justice, but tempered by 17 years of discipline-free practice, good character, and cooperation. He received a stayed suspension and probation.

In contrast, Shtofman performed diligently for his client in a civil matter and obtained a favorable verdict in excess of $1,000,000, including $400,000 for punitive damages. He did not cause lengthy delays during the trial. He placed his client's interests above his own and fulfilled his ethical obligations to her. In the end, the superior court imposed a monetary sanction to punish Shtofman for his tardiness and to deter him from committing similar misconduct. (See *In re Woodham* (2001) 95 Cal.App.4th 438, 443-444, [purpose of California Code of Civil Procedure section 177.5 sanctions is to punish and deter violations of lawful court orders and compensate judicial system for cost of unnecessary hearings].) Our goal is to determine a proper discipline that will protect the public, the courts, and the legal profession without further punishing Shtofman.

Like the hearing judge, we find *In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592 to be instructive. In *Respondent X*, an attorney received a private reproval without conditions for willfully violating a confidentiality provision of a court order. The misconduct was mitigated by 18 years of discipline-free practice and the attorney's sincere belief that he acted in support of sound public policy despite disagreement and pressure from his client and co-counsel. Although Shtofman violated several court orders, he presented greater mitigation than Respondent X did. Since Shtofman has demonstrated insight into his misconduct and paid the sanctions, albeit late, he should not receive a greater discipline than that imposed in *Respondent X*. We conclude that a private reproval without conditions will adequately protect the public, the courts, and the legal profession.

V. ORDER

It is ordered that Robert Scott Shtofman, State Bar Number 135577, is privately reproved with no conditions. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, the private reproval will be effective when this opinion becomes final.

PURCELL, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.