

FILED SEPTEMBER 4, 2013

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of)	Case No. 12-J-10708
)	
DAVID ANTHONY HARPER,)	OPINION
)	
Member of the State Bar, No. 112993.)	
_____)	

Respondent David Anthony Harper has been licensed to practice law in California since 1984 and in Florida since 1985. In 2011, the Supreme Court of Florida suspended him for 91 days and until he is reinstated based on unsubstantiated accusations he made in disqualification motions against four Florida judges as well as other misrepresentations he made to the court. The issue before us is whether Harper’s Florida discipline warrants the imposition of discipline in California.

The hearing judge found that discipline was warranted and recommended that Harper be suspended for 90 days in California. Harper seeks review and argues that the case should be dismissed because: (1) the hearing judge violated his rights by not following proper procedures and by disregarding fundamental constitutional protections; and (2) the Florida discipline order is null and void as a result of improper procedures in violation of his due process rights, including the assignment of “an unauthorized and disqualified” referee. The State Bar did not seek review, but had argued for a 90-day suspension below as recommended by the hearing judge. However,

it suggests for the first time on review that, at a minimum, we increase the discipline to add a standard 1.4(c)(ii)¹ requirement to the recommended suspension period.

After independent review of the record (Cal. Rules of Court, rule 9.12), we agree that Harper's misconduct in Florida warrants discipline in California. His challenges to the procedures in this case and to the validity of the Florida discipline order are unfounded. The hearing judge's decision presents a careful, eminently fair, and objective rendition of the record and soundly applies the governing law. We fully adopt it. Harper's misrepresentations and unfounded attacks against judges show his lack of appreciation for the ethical requirements of the legal profession. In order to promote public confidence in the profession and maintain high professional standards, we recommend that Harper be suspended for 90 days.²

I. HARPER WAS PROVIDED DUE PROCESS IN THE HEARING DEPARTMENT

We reject Harper's argument that he was denied due process in the State Bar Court hearing department. He asserts that the proof of service requirements were misrepresented to him; the trial was set at a date earlier than allowed under the rules; he was required to present his case sooner than he expected once trial commenced; and he was restricted from presenting evidence that would have established the "falsity" of the Florida discipline findings. We have reviewed each asserted violation and find that the hearing judge did not abuse his 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].)

¹ Under this standard, a suspension will continue until the member proves his present fitness to practice, learning and ability in the law and rehabilitation. All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

² We do not, however, recommend a standard 1.4(c)(ii) condition as requested by the State Bar, which condition is normally only triggered with the imposition of a lengthy suspension of two years or more. Neither the standards nor relevant case law calls for such a lengthy suspension in this case.

Despite Harper's assertion that the proof of service requirements were misrepresented to him, the record shows that the court clerk followed the proper procedures and nothing in the record supports a finding to the contrary. (Rules Proc. of State Bar, rule 5.26(A) [proof of service must accompany *any* pleading].) Likewise, in this expedited proceeding (Rules Proc. of State Bar, rule 5.350), trial timely commenced 83 days after the charges were served. (Rules Proc. of State Bar, rule 5.102 [trials to begin *no later than* 125 days after service of charges].) Harper's lack of trial preparation does not constitute a due process violation. Finally, Harper's claim that he was restricted from presenting evidence is also negated by the fact that he failed to offer any specific evidence at trial that was denied admissibility. To prevail on his claim of error, Harper must show both abuse of discretion and specific prejudice resulting from the judge's decision. (*In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 474.) He proved neither.

II. RECIPROCAL DISCIPLINE IS WARRANTED

The final discipline order from Florida is "conclusive evidence that [Harper] is culpable of professional misconduct in this state" (Bus. & Prof. Code, § 6049.1, subd. (a).)³ To show that discipline is unwarranted, Harper must establish that either: (1) the Florida discipline proceeding lacked fundamental constitutional protection; or (2) his Florida violations do not warrant discipline under California law or the Rules of Professional Conduct. (§ 6049.1, subd. (b)(2) & (3).) Harper has failed to establish either exception to the reciprocal discipline statute.

As to the fundamental constitutional protection prong, Harper contends that the Florida discipline order is unenforceable. He argues the order is null and void due to, primarily, the assignment of his case to an unauthorized and disqualified referee. However, Harper's multiple

³ All further references to sections are to the Business and Professions Code.

challenges to the referee in Florida were all considered and rejected by the Florida Supreme Court.⁴ His disagreement with the court’s rulings does not mean that he was denied “fundamental constitutional protection.” (§ 6049.1, subd. (b)(3).) Harper was provided a full and fair opportunity to raise objections to the Florida proceedings as well as to the evidence presented against him. The record does not support his ongoing challenges regarding the referee or the validity of the Florida discipline order.⁵

As to the second prong of the reciprocal discipline statute, as more fully set forth below, we find that Harper’s violations under Florida’s rules also warrant discipline under the applicable California statutes and Rules of Professional Conduct. (§ 6049.1, subd. (b)(2).) Since Harper has failed to establish either exception to the reciprocal discipline statute, the issue in this proceeding is limited to the appropriate degree of discipline. (§ 6049.1, subd. (b)(1).)

III. HARPER’S MISCONDUCT WARRANTS A 90-DAY SUSPENSION

We adopt and summarize the hearing judge’s findings of fact, which are based exclusively on the Florida discipline record.

A. Findings of Fact

In the fall of 2006, Harper filed a notice of appearance in a lawsuit his mother had filed against United States Automobile Association (USAA), *Harper v. USAA*, in Seminole County, Florida. His misconduct began in 2008 with a relatively minor dispute with opposing counsel over Harper’s failure to properly coordinate the date and time of a hearing on a motion. The dispute quickly and inexplicably escalated into Harper’s relentless campaign against the judges in Seminole County.

⁴ During a three-week period, Harper sequentially filed a motion to quash the appointment, a motion to disqualify, and petitions for writ of prohibition and writ of certiorari with the Florida Supreme Court – repeating the same general arguments in each pleading, all of which were denied by the court.

⁵ Any argument raised on review that is not specifically addressed in this opinion has been considered and ruled meritless.

Over the course of ten months, from June 2008 to April 2009, Harper filed at least ten pleadings seeking to disqualify four judges who were assigned sequentially to *Harper v. USAA*: Judges Dickey, Alley, Perry, and Simmons. Each request was denied. All the pleadings contained serious accusations of bias and unfairness against the judges for which Harper did not have an objectively reasonable factual basis. As summarized by the Florida discipline referee, Harper's "statements were not legitimate, factually based criticisms of the judiciary involved in the underlying matter, but were rather his opinion, innuendo, conjecture, and outright misrepresentations regarding the motivations and integrity of the judges involved." For example, Harper asserted without any factual basis:

- Opposing counsel "made a plan to undermine the filing of [his] second amended complaint in which Judge Dickey and his staff knowingly and wrongly participated;"
- Judge Alley's "close working relationship" with Judge Dickey created a "bias and prejudice on the part of Judge Alley" against Harper, and "would lead [Judge Alley] to do what she could to 'help' rather than 'hurt' Judge Dickey and would rule in ways Judge Dickey would have ruled or would want her to rule;"
- After Judge Alley denied on the record any social or working relationship with Judge Dickey, Harper challenged Judge Alley's truthfulness and continued to assert in subsequent pleadings that she had an interest in protecting the rulings and reputation of Judge Dickey "out of loyalty or for other improper reasons;"
- Judges Dickey and Alley "colluded with Respondent's counsel to undermine the filing of [his] second amended complaint and otherwise rule in ways that help Respondent, and disadvantage [his case]."

During the same period of time, Harper made several misrepresentations to the trial court in the underlying case, *Harper v. USAA*. For example, after he filed a petition for writ of

prohibition to disqualify Judge Alley, he told Judge Alley the petition provided for an automatic stay until the writ was resolved. But the filing of a petition for writ of prohibition did not divest the trial court of jurisdiction unless the appellate court issued a show cause order. Judge Alley issued a stay in the proceeding based upon Harper's representation. Similarly, after Harper filed his third petition for writ of prohibition, he affirmatively represented to Judge Alley that the law prohibited her from proceeding further in the matter. Harper's statements were, at best, reckless misstatements of the rules and, at worst, intentional misrepresentations.

Harper also made misrepresentations to the Florida appellate court. In a petition to disqualify Judge Alley, Harper misrepresented Judge Alley's previous rulings, and he quoted only portions of her sworn testimony in response to the petition to disqualify. If quoted in its entirety, the testimony provided a completely different meaning than the one he asserted.

By the time Harper received the Florida appellate court's order denying his third petition for writ of prohibition, Judge Alley recused herself sua sponte. The underlying matter was reassigned to Judge Perry. Harper filed a petition for reconsideration of the prior orders and rulings of Judges Dickey and Alley. Judge Perry denied the motion. Harper filed a motion for reconsideration of the order denying his petition for reconsideration. The motion was denied by Chief Judge Simmons.

As he had previously done when the trial court issued an adverse ruling, Harper filed a petition for writ of certiorari with the appellate court. He alleged prejudice and misconduct on the part of Judges Alley, Dickey, Perry, and Simmons. Harper again provided no objectively reasonable factual basis for making these statements. The petition was denied.

By repeatedly filing unwarranted challenges to the judges in the underlying lawsuit, Harper failed to make reasonable efforts to expedite the litigation in the interests of his client, his

mother, who was in her late 80s. At the time of his discipline proceeding in Florida in 2010, the lawsuit remained pending.

B. Florida's Conclusions of Law

The Florida Supreme Court found that Harper's misconduct constituted violations of seven of the Rules Regulating the Florida Bar:

- **Rule 4-1.1**, failing to act competently in the manner in which he attempted to have judges disqualified;
- **Rule 4-3.2**, failing to make reasonable efforts to expedite litigation consistent with the interests of the client;
- **Rule 4-3.3(a)(1)**, knowingly making false statements of material fact in his petitions to disqualify and before the court;
- **Rule 4-3.4(c)**, knowingly disobeying the court's rules and orders as to scheduling hearings;
- **Rule 4-8.2(a)**, making statements he knew to be false, or with reckless disregard as to their truth or falsity, concerning the qualifications or integrity of judges;
- **Rule 4-8.4(c)**, engaging in conduct involving dishonesty and misrepresentations; and,
- **Rule 4-8.4(d)**, engaging in conduct prejudicial to the administration of justice.

Based on his serious misconduct, the Florida Supreme Court suspended Harper on August 17, 2011 for 91 days and until he is reinstated upon a showing of his rehabilitation. Harper remains suspended in Florida pursuant to that order.

C. Violations of California Laws

The hearing judge found that Harper's violations in Florida also constituted violations of his ethical duties under the laws and rules in California. We agree and adopt the following culpability determinations:

- **Rules of Professional Conduct, Rule 3-110(A) [Failure to Perform Legal Services with Competence]:** Harper willfully violated this rule by failing to act competently in the manner in which he attempted to have the judges disqualified; and by failing to make reasonable efforts to expedite the litigation consistent with the interests of his client;
- **Section 6068, subdivision (d) [Attorney's Duty to Employ Means Consistent with Truth]:** Harper willfully violated this section by making statements, without an objectively reasonable factual basis, impugning the integrity and motivation of the judges in his numerous motions to disqualify and his petitions;
- **Section 6103 [Failure to Obey a Court Order]:** Harper willfully violated this section by failing to properly schedule hearings after the judge had explicitly ordered him to coordinate hearing dates and times with opposing counsel;
- **Section 6106 [Moral Turpitude]:** Harper willfully violated this section by making false statements to the tribunal regarding the conduct of the judges in his numerous motions to disqualify and petitions; making misrepresentations as to the statements made by the judges in Seminole County; and making statements he knew were false, or with reckless disregard as to their truth or falsity, concerning the qualifications or integrity of the Seminole County judges.

D. Aggravation Outweighs Mitigation

The hearing judge found two factors in aggravation and one in mitigation. On review, Harper does not address these findings. “Any factual error that is not raised on review is waived by the parties.” (Rules Proc. of State Bar, rule 5.152(C).) We adopt the aggravating and mitigating findings, which the record supports by clear and convincing evidence.

1. Two Factors in Aggravation

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii))

Harper committed multiple acts of misconduct. He filed at least ten unsupported motions to disqualify, and made misrepresentations to the Florida trial and appellate court over a ten-month period of time. We assign moderate weight to this factor.

Lack of Insight and Indifference toward Rectification/Atonement (Std. 1.2(b)(v))

We agree with the hearing judge that Harper demonstrated a lack of insight and indifference about his misconduct. During the Florida disciplinary proceedings, he asserted claims that the referees assigned to the matter were biased, without an objectively reasonable factual basis to support the truth of the statements or with reckless disregard as to their truth. Harper continued his misconduct in the present case by filing unsupported motions to disqualify the hearing judge. And although he does not have a legitimate good faith argument that the Florida proceeding lacked fundamental constitutional protection, he continues to attack its validity. We assign significant weight to this factor.

2. One Factor in Mitigation

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

Harper practiced law for more than 27 years without discipline before he committed the misconduct at issue. Normally, his discipline-free practice would be entitled to significant mitigation. However, standard 1.2(e)(i) provides mitigation credit for a lengthy practice without discipline where the present misconduct is not serious. When the misconduct is serious, a discipline-free record is most relevant when the misconduct is aberrational and unlikely to recur. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029, 1030.) Here, Harper's misconduct is serious. In addition, given his ongoing unsupported disqualification motions, his misconduct is not aberrational. Accordingly, we assign modest weight to his lengthy discipline-free practice.

E. Appropriate Degree of Discipline

The main issue on review is the appropriate degree of discipline. Harper continues to argue that he did nothing wrong, the Florida discipline is null and void, and this case should be dismissed. The State Bar requested a 90-day suspension at trial, which the hearing judge recommended. We agree with the recommended discipline.⁶

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.) Our analysis begins with the standards. The Supreme Court has instructed that we should follow them “whenever possible” (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and give them great weight to promote “the consistent and uniform application of disciplinary measures.” (*In re Silverton* (2005) 36 Cal.4th 81, 91, internal quotations and citation omitted.)

The hearing judge correctly looked to standard 2.3, which is the most relevant to Harper’s misconduct. This standard provides for actual suspension or disbarment for violations involving an act of moral turpitude, depending upon the extent of the harm to the victim, the magnitude of the act of misconduct, and the degree to which it relates to the member’s acts within the practice of law. Harper’s misconduct was serious and directly related to his practice. Therefore, we find it calls for a period of suspension.

⁶ The State Bar asserts in its responsive brief that it “mistakenly” did not seek review. It also acknowledges that it did not ask for a standard 1.4(c)(ii) condition below because it had not properly reviewed the Florida discipline rules and therefore overlooked the condition in the Florida discipline order that Harper remain suspended until he moves to be reinstated. Thus, for the first time on review, the State Bar argues that a similar condition should be attached to any California discipline order to “protect the public.” However, it failed to present any additional evidence occurring after the evidentiary hearing below to warrant its change in position. Under the circumstances, the State Bar’s request for an increase in discipline at this late date raises concerns of due process and fairness. Nonetheless, our duty is not to duplicate Florida’s discipline, but to decide the appropriate discipline under California law, which, in this case, does not support a standard 1.4(c)(ii) condition. (§ 6049.1, subd. (b)(1).)

In light of the broad range of potential discipline, we also look to case law for further guidance. We find the hearing judge properly relied on *In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446. Scott received a 60-day suspension after he was found culpable of filing and pursuing frivolous actions in bad faith and for a corrupt motive. Scott filed and pursued a series of four related lawsuits. The first was against another attorney and the attorney's firm, arguing the attorney had interfered with Scott's relationship with a client and made defamatory remarks about him. After Scott lost the action, he pursued litigation against both the attorney and the judge who heard the case. He asserted that the judge was biased and participated in inappropriate ex parte communications with the defendants. After each action was resolved unfavorably to Scott, he filed the next one, making the same unsupported allegations. In mitigation, Scott had no prior record of discipline in eight years of practice, and he proved his community service and good character. In aggravation, Scott's misconduct harmed the judge and the administration of justice, and he showed no recognition of wrongdoing.

Harper's misconduct is analogous to Scott's. Harper's "dogged pursuit of questionable claims," like Scott's, continued despite repeated opportunities to reflect on his misconduct and take corrective action. (*In the Matter of Scott, supra*, 4 Cal. State Bar Ct. Rptr. at p. 456.) And although Harper has a longer discipline-free record, we are concerned with his unsupported allegations of bias against both the referee in Florida and the hearing judge below. Harper's misconduct has spanned approximately six years. In addition, he has less mitigation than Scott, but roughly the same aggravation. In sum, we think Harper's misconduct is worthy of slightly more discipline and find that a 90-day suspension is fully supported by applicable case law. (*Conroy v. State Bar* (1991) 53 Cal.3d 495 [one-year suspension for failure to act competently and misrepresentations involving moral turpitude, even though no mitigation and two prior disciplines and failure to cooperate]; *Bach v. State Bar* (1987) 43 Cal.3d 848 [60-day suspension

for misleading a judge, in aggravation a prior public reproof and behavior that threatens public and undermines confidence in profession, and no mitigation]; *Hallinan v. State Bar* (1948) 33 Cal.2d 246 [90-day suspension for simulating client's signature on settlement release with no priors].)

IV. RECOMMENDATION

For the foregoing reasons, we recommend that David Anthony Harper be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for a period of one year subject to the following conditions:

1. He must be suspended from the practice of law for the first 90 days of probation.
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.
3. Within 30 days after the effective date of the Supreme Court order in this proceeding, he must contact the State Bar's Office of Probation in Los Angeles and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, Harper must meet with the probation deputy either in-person or by telephone. Thereafter, Harper must promptly meet with the probation deputy as directed and upon request of the Office of Probation.
4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.
6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)
8. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the one-year period of stayed suspension will be satisfied and that suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Harper be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of discipline in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VI. RULE 9.20

We further recommend that Harper 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. Failure to do so may result in disbarment or suspension.

VII. 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.

REMKE, P. J.

WE CONCUR:

EPSTEIN, J.

PURCELL, J.