

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No. 14-O-00894-LMA
)	
MARK EUGENE HUBER,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 179183,)	ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

Introduction¹

In this disciplinary proceeding, respondent Mark Eugene Huber is charged with two acts of misconduct. The charged misconduct includes a failure to obey multiple court orders between November 2013 and June 2014 and a failure to report a \$1,000 court-ordered sanction.

The court finds, by clear and convincing evidence, that respondent is culpable of the charged misconduct. Based on the nature and extent of culpability, as well as the applicable aggravating and mitigating circumstances, in conjunction with meeting the goals of attorney discipline, the court recommends that respondent be disbarred.

///

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

Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on November 7, 2014. Respondent filed his response to the NDC on December 9, 2014. The parties filed a stipulation as to facts, culpability, and the admission of documents on March 12, 2015.

A one-day trial took place on March 12, 2015. The State Bar was represented by Supervising Senior Trial Counsel Erica Dennings. Attorney Edward Lear represented respondent. On March 12, 2015, the court took this matter under submission for decision.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 11, 1995, and has been a member of the State Bar of California since that time.

Findings of Fact

Prior to November 13, 2012, respondent was hired to represent Debra Shatswell (Shatswell) in a personal injury/product liability lawsuit arising out of an injury she suffered when she bit into a Jimmy Dean product. On November 13, 2012, respondent filed a lawsuit on Shatswell's behalf, *Debra Shatswell v. Sara Lee Corporation, et al*, Sutter County Superior Court case no. CVCS 12-2273.

On November 13, 2012, the court in the Shatswell matter issued an order requiring respondent to appear at a status conference on November 18, 2013. Respondent received the order and was aware of its contents.

Respondent failed to appear at the status conference on November 18, 2013. That same day, the court issued an order requiring respondent to appear at a status conference on December 2, 2013. Respondent received the order and was aware of its contents.

Respondent failed to appear at the status conference on December 2, 2013. That same day, the court issued an order requiring respondent to appear at a status conference on December 23, 2013, and to pay \$250 in sanctions on or before December 23, 2013. Respondent received the order and was aware of its contents.

Respondent failed to appear at the status conference on December 23, 2013, and failed to pay \$250 in sanctions on or before December 23, 2013. That same day, the court issued an order requiring respondent to appear at a status conference on January 6, 2014; to pay \$500 in sanctions on or before January 6, 2014, for failure to appear on December 2, 2013; and to pay \$500 in additional sanctions for failure to pay the \$250 in sanctions by December 23, 2013. Respondent received the order and was aware of its contents.

Respondent failed to appear at the status conference on January 6, 2014, and failed to pay the aforementioned sanctions. On January 6, 2014, the court issued an order requiring respondent to appear at a status conference on February 3, 2014, and imposed sanctions of \$1,000 for failure to pay sanctions due that month. The order also stated that respondent would be reported to the State Bar. Respondent received the order and was aware of its contents.

Respondent did not report the imposition of \$1,000 in sanctions to the State Bar of California.

Respondent appeared at the February 3, 2014 status conference, but did not pay any sanctions. That same day, the court ordered respondent to appear at a status conference on April 28, 2014, and to pay sanctions due on or before April 28, 2014.

Respondent appeared at the April 28, 2014 status conference, but failed to pay any sanctions. The court ordered respondent to appear at a status conference on May 27, 2014.

On May 27, 2014, respondent failed to appear at the status conference and the court issued an order requiring respondent to appear at a status conference on June 16, 2014.² The order also stated that the court would consider imposition of a \$1,000 sanction against respondent for failing to appear at the May 27, 2014 status conference. Respondent received the order and was aware of its contents.

Respondent appeared at the June 16, 2014 status conference, but did not pay any sanctions. The court ordered respondent to appear at a status conference on October 14, 2014, and to pay \$250 in sanctions on or before October 14, 2014, for failing to appear on December 2, 2013.

On October 14, 2014, respondent appeared at the status conference. Respondent failed to pay the \$250 sanctions on or before October 14, 2014.

In October 2014, respondent was arrested for illegally possessing prescription medications. In November 2014, respondent entered a court-ordered drug court rehabilitation program where he is receiving court ordered substance abuse treatment.

Conclusions of Law

Count One – Section 6103 [Failure to Obey Court Orders]

By not complying with the November 13, 2012; November 18, 2013; December 2, 2013; December 23, 2013; February 3, 2014; April 28, 2014; and June 16, 2014 court orders requiring him to appear at status conferences and pay sanctions, respondent disobeyed or violated orders of the court requiring him to do or forbear an act or acts connected with or in the course of his profession which respondent ought in good faith to do or forbear, in willful violation of section 6103.

² Respondent attempted to notify the court that he would not appear at the May 27, 2014 status conference due to an accident he suffered during the Memorial Day weekend.

Count Two – Section 6068, Subd. (o)(3) [Failure to Report Judicial Sanctions]

By not reporting the January 6, 2014 judicial sanction to the State Bar, respondent failed to report a \$1,000 non-discovery sanction to the agency charged with attorney discipline, in writing, within 30 days of the time respondent had knowledge of the imposition of the sanction, in willful violation of section, 6068, subdivision (o)(3).

Aggravation³

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5) The court finds the following with regard to aggravating factors.

Prior Record of Discipline

Respondent has two prior records of discipline. (Std. 1.5(a).) Effective September 21, 2011, respondent was privately reprovved with conditions in State Bar Court case nos. 11-O-10379 (11-O-11105). In this matter respondent stipulated to misconduct in two matters, including failing to perform legal services with competence, failing to respond to client inquiries, and failing to refund unearned fees. This misconduct primarily occurred between 2007 and 2010. In mitigation, respondent had no prior record of discipline, cooperated with the State Bar, and was suffering from unspecified emotional/physical problems at the time of the misconduct. No aggravating factors were involved.

On February 5, 2015, the Review Department issued a decision in State Bar Court case nos. 12-O-10290, et al., recommending that respondent be suspended from the practice of law for three years, stayed, with four years' probation, including a minimum period of actual suspension of two years and until respondent makes restitution and demonstrates his rehabilitation, fitness to

³ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

practice, and learning and ability in the general law.⁴ In this matter, the Review Department found respondent culpable on twenty-eight counts of misconduct in nine matters emanating from respondent's move from California to Utah in August 2011 without informing several clients. Respondent was found culpable of failing to perform legal services with competence, failing to communicate with clients, failing to cooperate with a disciplinary investigation, failing to disclose a conflict of interest, and disobeying court orders.⁵ Most of these acts of misconduct occurred between mid-2009 and mid-2012. In aggravation, respondent had a prior record of discipline, committed multiple acts of misconduct, caused significant harm to his clients, and demonstrated indifference by failing to timely refund unearned fees. In mitigation, respondent received limited mitigation for his good character and emotional and physical difficulties stemming from his separation from his wife, his nineteen-year-old daughter's marriage, and his battles with Crohn's disease.

When misconduct in one matter occurs in or about the same time as the misconduct in a prior discipline, the aggravating effect of this prior discipline is diminished as it is not indicative of respondent's inability to conform to ethical norms and the court will consider the totality of the findings in both cases to ascertain what the discipline would have been had the matters been brought as one case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.)

Here, however, *Sklar* does not apply. The present misconduct did not occur during the same time period as respondent's prior misconduct. As noted above, the underlying misconduct in respondent's prior discipline occurred primarily between mid-2009 and mid-2012. The three

⁴ This discipline recommendation is currently pending before the California Supreme Court. (See Rules Proc. of State Bar, rule 5.106(A)(2).)

⁵ Similar to the present matter, respondent was found culpable of disobeying court orders issued on January 16, March 4, May 6, and July 22, 2010, requiring him to file a case management statement, file an Attorney Compliance Statement, pay sanctions, and appear at scheduled hearings.

NDCs in that matter were filed in September 2012, October 2012, and May 2013. And the Hearing Department decision was filed in September 2013.

By contrast, the present misconduct commenced in November 2013 and continued into 2014, well after respondent received notice of the ethically questionable nature of his prior conduct. Accordingly, the court assigns substantial weight in aggravation to respondent's prior record of discipline.

Multiple Acts (Std. 1.5(b).)

Respondent is culpable of multiple acts of misconduct.

Mitigation

It is respondent's burden to prove mitigating circumstances by clear and convincing evidence. (Std. 1.6). The court finds the following with regard to mitigating factors.

Extreme Emotional/Physical/Mental Difficulties (Std. 1.6(d).)

Respondent suffered from extreme emotional and physical difficulties during the time of the misconduct. Respondent's marriage was dissolving and he was suffering from Crohn's disease. Respondent was prescribed pain medication for the Crohn's disease, but began to abuse prescription medications. Ultimately, respondent was arrested for unauthorized possession of prescription medications. In November 2014, respondent entered a court-ordered drug court rehabilitation program where he is receiving substance abuse treatment.

Respondent's extreme emotional and physical difficulties warrant consideration in mitigation; however, the weight of this mitigation is limited by the lack of expert testimony on this subject. This mitigation is further limited by the fact that it has not been established by clear and convincing evidence that respondent's difficulties or disabilities no longer pose a risk that he will commit misconduct. As of the time of trial, respondent had only been sober for approximately four months.

Candor/Cooperation to Victims/State Bar (Std. 1.6(e).)

Respondent entered into a stipulation to facts and culpability. Respondent's candor and cooperation with the State Bar warrant significant consideration in mitigation.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d. 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d. 1016, 1025; Std. 1.1.)

In determining the level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d. 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628). Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d. 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors.

In this case, the standards call for the imposition of a minimum sanction ranging from suspension to disbarment. (Standard 2.8(a) and (b).) The most severe sanction is found at standard 2.8(a) which provides that disbarment or actual suspension is appropriate for disobedience or violation of a court order related to the member's practice of law.

Due to respondent's prior record of discipline, the court also looks to standard 1.8(b) for guidance. Standard 1.8(b) states that when an attorney has two prior records of discipline, disbarment is appropriate in the following circumstances, unless the most compelling mitigation circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current suspension: (1) actual suspension was ordered in any

one of the prior disciplinary matters; (2) the prior disciplinary matters coupled with the current record of discipline demonstrate a pattern of misconduct; or (3) the prior disciplinary matters coupled with the current record of discipline demonstrate the member's unwillingness or inability to conform to ethical responsibilities.

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar recommended that respondent be disbarred from the practice of law. Respondent, on the other hand, argued that he should be suspended for 60 days in addition to the two-year period of actual suspension recommended by the Review Department in respondent's prior discipline.

The Supreme Court and Review Department have not historically applied standard 1.8(b) in a rigid fashion.⁶ As the standard provides, the critical issue is whether the most compelling mitigating circumstances clearly predominate to warrant an exception to the severe penalty of disbarment. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 113 [disbarment under std. 1.7(b) imposed where no compelling mitigation]; compare *Arm v. State Bar* (1990) 50 Cal.3d 763, 778-779, 781 [disbarment under std. 1.7(b) not imposed where compelling mitigation included lack of harm and no bad faith].)

⁶ Standard 1.8(b) was previously identified as standard 1.7(b). Standard 1.8(b) is more limited than former standard 1.7(b), but is applicable here.

Here, the court notes that respondent's misconduct in the present matter occurred well after his misconduct in his prior discipline and involved a repetition of failing to obey court orders. Months before the present misconduct began, the Hearing Department issued its decision and recommendation in respondent's second discipline matter. Accordingly, respondent should have been keenly aware of his ethical responsibilities, especially in regard to his duty to obey court orders.

While respondent attributes the present misconduct to his prescription pain medication addiction, this correlation was not established by expert testimony. And while the court applauds the fact that respondent is currently in treatment for his addiction, his treatment has only been ongoing for four months and it has not been established that respondent's emotional and physical disabilities no longer pose a risk of future misconduct. Further, the court notes that respondent did not seek this treatment on his own volition, as, instead, it was court ordered.

Respondent's lack of compelling mitigating circumstances coupled with the significant factors in aggravation give the court little justification to recommend a level of discipline short of disbarment. Therefore, having considered the nature and extent of the misconduct, the aggravating and mitigating circumstances, as well as the case law, the court finds that respondent's disbarment is necessary to protect the public, the courts, and the legal community; to maintain high professional standards; and to preserve public confidence in the legal profession.⁷

///

⁷ If the California Supreme Court were to reduce the level of discipline imposed in respondent's pending prior discipline matter (State Bar Court case nos. 12-O-10290, et al.), this court would respectfully request that the present matter be remanded to this court for further consideration regarding level of discipline. (See Rules Proc. of State Bar, rule 5.106(E).)

Recommendations

It is recommended that respondent **Mark Eugene Huber**, State Bar Number 179183, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

California Rules of Court, Rule 9.20

It is further recommended that respondent 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.

Costs

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

Order of Involuntary Inactive Enrollment

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

Dated: May _____, 2015

LUCY ARMENDARIZ
Judge of the State Bar Court