PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of RICHARD ROGER HURLEY, A Member of the State Bar, No. 183440.	)	Case Nos. 15-O-12905; 15-O-14683; 16-O-14500; 16-O-15607-YDR DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

Introduction[1]

Richard Roger Hurley (Respondent) is charged with twelve counts of misconduct in four client matters. The charges include three counts of failing to perform with competence, three counts of failing to obey a court order, and one count of failing to return unearned fees and failing to promptly pay client funds. The Office of Chief Trial Counsel of the State Bar of California (OCTC) has the burden of proving these charges by clear and convincing evidence.[2] This court finds, by clear and convincing evidence, that Respondent is culpable of the misconduct alleged in 11 counts and recommends that Respondent be disbarred from the practice of law in this state.

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[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.

[2] 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.)

Significant Procedural History

On January 25, 2016, OCTC initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) in case number 15-O-12905. Respondent filed a response to the NDC on April 4, 2016. On May 11, 2016, Respondent filed a motion to abate case number 15-O-12905 because two other disciplinary investigations were pending against him. OCTC did not oppose the motion. The court granted the motion and abated the case on May 18, 2016.

On November 22, 2016, OCTC filed a NDC in case number 15-O-14683. The court unabated case number 15-O-12905 on December 21, 2016, and consolidated it with case number 15-O-14683. Respondent filed a response to case number 15-O-14683 on January 9, 2017. On January 31, 2017, OCTC filed a NDC in case number 16-O-14500. On February 24, 2017, the court granted OCTC's February 7, 2017 motion to consolidate case number 16-O-14500 with case numbers 15-O-12905 and 15-O-14683. On March 3, 2017, Respondent filed a response to the NDC in case number 16-O-14500.

On March 13, 2017, OCTC filed a NDC in case number 16-O-15607. The court consolidated case number 16-O-15607 with case numbers 15-O-12905, 15-O-14683, and 16-O-14500 on April 18, 2017. Respondent filed a response to the NDC in case number 16-O-15607 on April 14, 2017.

A two-day trial was held on May 25, 2017, and June 8, 2017. OCTC was represented by Acting Senior Trial Counsel Alex Hackert and Deputy Trial Counsel Angie Esquivel. Respondent represented himself. The case was submitted for decision on June 8, 2017. OCTC filed a closing brief on June 26, 2017.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 29, 1996, and has been a member of the State Bar of California at all times since that date.

Case No. 15-O-12905 – The Goldschmied Matter

Facts

In 2015, Respondent was hired to represent Colby Goldschmied in a criminal case where Goldschmied was charged with three felonies – driving under the influence (DUI) causing injury, driving with a blood alcohol level of .08% or more, and hit and run resulting in injury. Goldschmied was also charged with driving with a suspended or revoked license, a misdemeanor.

On March 17, 2015, Respondent appeared for Goldschmied's arraignment. On that date, the criminal trial court set a trial readiness date hearing for Aril 17, 2015, and a preliminary hearing for May 7, 2015. Respondent failed to appear at the April 17 trial readiness hearing. Respondent had not contacted the court about his inability to attend. The court reset the trial readiness hearing for May 1, 2015, reset the preliminary hearing for May 7, 2015, and ordered an appearance by Respondent. The court clerk provided Respondent with notice of the May 1 hearing by mail and by phone.

Respondent testified that he was unable to attend the April 17, 2015 trial readiness hearing because he had car trouble. Respondent contacted Goldschmied's sister for a ride to court. Respondent did not notify Goldschmied that he was unable to attend the hearing. After missing the hearing, Respondent contacted the court clerk, and he was informed about the May 1, 2015 date for the trial readiness conference. Respondent acknowledged that he did not calendar the May 1 hearing.

Respondent failed to attend the hearing on May 1, 2015. Because this was Respondent's second nonappearance, and Goldschmied indicated he was unable to contact Respondent, the court relieved Respondent as counsel for Goldschmied. The court then appointed Goldschmied a public defender.

Conclusions

Count One - (Rule 3-110(A) [Failure to Perform Legal Services with Competence])[3]

In Count One, OCTC charged Respondent with willfully violating rule 3-110(A) by failing to appear at the April 17, 2015 hearing, and failing to appear at the May 1, 2015 hearing after the court ordered him to be present. Respondent did not attend two court hearings on behalf of his client. There is a lack of clear and convincing evidence establishing that Respondent's conduct was intentional or reckless. (Cf. *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 950 [counsel's "most meager and incomplete effort" to address client matter after nearly a year when client was in danger of imminent deportation constitutes reckless failure to perform].) However, the rule is also violated if there is a repeated failure to perform. Here, Respondent failed to attend two court hearings and failed to inform his client or the court that he would not be in attendance, which resulted in the court relieving Respondent as Goldschmied's counsel. The court finds Respondent is culpable of willfully violating rule 3-110(A).

Count Two - (§ 6103 [Failure to Obey a Court Order])[4]

In Count Two, Respondent is charged with willfully violating section 6103 by failing to comply with the April 17, 2015 court order requiring him to appear at the May 1, 2015 hearing. The court finds Respondent culpable of the misconduct alleged in Count Two.

Respondent has maintained that he was not aware that the court specifically ordered him to appear at the hearing because he never received notice. To establish a willful violation of

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[3] Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

[4] Section 6103 provides, in pertinent part, that a willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which an attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment.

section 6103, an attorney must know that a final, binding court order exists. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787 [attorney's knowledge of a final, binding order is essential element of a § 6103 violation].) After Respondent failed to attend the April 17, 2015 trial readiness hearing, the criminal trial court ordered Respondent to appear at the hearing that was reset for May 1, 2015. Respondent knew that the hearing was reset for May 1, but he failed to appear because he did not calendar the hearing.

The criminal court clerk indicated that she provided the court's April 17, 2015 order "via mail & phone call." It is presumed that official duties have been regularly performed unless the party against whom the presumption operates proves otherwise. (Evid. Code, §§ 606, 660, 664; *In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Respondent's testimony that he did not receive notice of the court's April 17 order directing him to attend the May 1 trial readiness hearing fails to rebut the presumption that the clerk properly provided him with notice. Thus, the court finds Respondent received the court's April 17 order and failed to attend the May 1 hearing as directed. Respondent is culpable of willfully violating section 6103. Since the same facts establish respondent's culpability under section 6103 and rule 3-110(A), the court assigns no additional weight to the 6103 violation in determining the appropriate discipline.

Case No. 15-O-14683 – The Shoop Matter

Facts

On April 8, 2015, Joanna Shoop hired Respondent to file a motion for post-conviction modification of sentence in *People v. Joanna Marie Shoop*, Orange County case No. 14HM03691. At the time Joanna hired him, she was in custody and Respondent had visited her while she was in jail. On April 9, 2015, Joanna's mother, Cynthia Shoop, deposited $2,500 into

Respondent's client trust account (CTA) for Joanna's representation.[5] Respondent testified that he discussed with Joanna that her mother would pay her fees.

On April 16, 2015, Cynthia notified Respondent that she hired Lolita Kirk to represent Joanna, and she requested a $2,500 refund. Respondent never provided Joanna or Cynthia an accounting of the previously paid funds. Respondent did not provide a refund because he believed that he agreed to perform legal services on a flat fee basis. He considered the $2,500 as funds for reserving his time to perform legal services.

Cynthia filed a small claims complaint against Respondent because he failed to refund the $2,500 fee as requested. On July 20, 2015, Cynthia received a $2,550 judgment against Respondent.[6] Respondent has neither paid the judgment nor refunded any of the $2,500 fee to Cynthia or Joanna.

Conclusions

Count One - (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])[7]

OCTC charged Respondent with willfully violating rule 4-100(B)(3) by failing to render an appropriate accounting to the client or her mother following the termination of his employment on April 16, 2015. OCTC has clearly and convincingly demonstrated that Respondent is culpable of the alleged misconduct.

Respondent had the ethical obligation to provide an accounting to Joanna of the $2,500 that Cynthia paid (Rules Prof. Conduct, rule 4-100(B)(3)), but he failed to do so. Cynthia's

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[5] Joanna Shoop and Cynthia Shoop are referred to by their first names for the sake of clarity.

[6] Cynthia was awarded $50 in costs.

[7] Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds, securities, and other properties coming into the attorney's possession and render appropriate accounts to the client regarding such property.

payment of $2,500 paid for more than Respondent's availability and was not a true retainer. "In this case, there is no indication that the respondent made any particular provision to allot or set aside blocks of time specifically devoted to pursuing [this client's matter] or that he turned away other business in order to proceed with their matters." (*In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757.) Thus, Respondent's failure to provide Joanna with an accounting willfully violated rule 4-100(B)(3).

Count Two - (Rule 3-310(F) [Accepting Fees from a Non-Client])

OCTC charged Respondent with accepting $2,500 from Cynthia, as compensation for representing Joanna, without obtaining Joanna's informed written consent to receive such compensation, in willful violation of rule 3-310(F). Rule 3-310(F) requires, among other things, that an attorney must not accept compensation to represent a client from someone other than the client unless the attorney obtains the client's informed written consent. Respondent is culpable of willfully violating rule 3-310(F). Respondent failed to obtain Joanna's informed written consent to receive $2,500 from Cynthia for Joanna's representation.

Case No. 16-O-14500 – The Susman Matter

Facts

On September 3, 2013, Mina Susman filed a petition for dissolution of marriage. Marc Susman was the respondent in the matter.[8] On September 26, 2013, Marc hired Respondent to represent him in the dissolution proceedings and paid him $4,000. Sometime in October 2013, Respondent prepared a response to the dissolution petition on Marc's behalf but it was rejected because the ink on the document was too faded. Respondent did not correct the deficiency.

In October 2013, Mina's counsel, Brian Bayati, propounded discovery requests. Respondent did not provide responses to any of the requests. On November 21, 2013, Bayati

[8] Mina Susman and Marc Susman are referred to by their first names for the sake of clarity; no disrespect is intended.

filed a request to enter default. The superior court entered the default on November 25, 2013. Thereafter, Respondent attempted to settle the case.

It appeared to Bayati that the parties could resolve the matter because Mina was willing to settle for less than one-half of the value of the community property. On January 9, 2014, Respondent emailed Bayati. He stated that the parties agreed to stipulate to set aside the default if a settlement could not be reached. Respondent also requested that the parties participate in a settlement conference at the business properties so they could view the business equipment and inventory. On January 10, 2014, Bayati requested that Respondent propose possible dates for the settlement conference. Respondent did not respond to Bayati's January 10 email.

Bayati sent Respondent a settlement letter on February 13, 2014. The letter was sent by U.S. mail and facsimile transmission (fax). Respondent did not respond to the letter; thus, on March 3, 2014, Bayati sent a second letter regarding the settlement proposal. Bayati's letter also advised Respondent that a default prove-up hearing was scheduled for May 16, 2014. This letter was sent by fax only. Bayati believed Respondent received the communication because he received the fax confirmation.

On March 6, 2014, Bayati sent Respondent another letter by fax. He indicated that the parties had resolved the division of their business property and included a revised inventory of the property allocated to each party pursuant to the agreement. Bayati advised that unless he heard from Respondent, he would request that a default judgment be entered at the default hearing incorporating the parties' agreement.

On May 16, 2014, the court held the default prove-up hearing but Respondent did not attend. The court filed the judgment on that date.

Bayati did not hear from Respondent until June 3, 2014, which was 17 days after the May 16, 2014 prove-up hearing. Respondent sent Bayati a June 3 email indicating that Bayati had

agreed that if the parties could not reach a settlement then they would agree to set aside the default. Respondent advised Bayati that Marc was furious because Mina took all of the "money inventory [sic] and taken machinery for under present market value as well as issues with the residence." He requested that they stipulate to setting aside the default. On June 4, Bayati responded by email and advised Respondent that he tried to communicate with Respondent but he failed to respond.

On July 1, 2014, attorney Christian Peirano emailed Respondent advising him that Marc consulted him about setting aside the default judgment. Peirano indicated that Marc provided him with a motion to set aside that Respondent drafted, and that Peirano wanted to speak with Respondent. Respondent spoke with Peirano as requested. Respondent agreed to file a motion to set aside the default and Marc advanced $508 in costs, but by July 24, 2014, Respondent had not filed the motion. By the end of July 2014, Marc had terminated Respondent.

On August 22, 2014, Peirano filed an ex parte motion to set aside the judgment on Marc's behalf. On the same date, Bayati filed a response requesting that the court deny the motion. On September 19, 2014, the court set aside the default as it pertained to the division of all property, assets and debts.

After being hired by Marc, Peirano requested a refund of the fees and costs Marc had paid Respondent. In December 2016, Respondent drafted a letter to Peirano indicating that he was refunding $508 to Marc as advanced costs, enclosing a check and enclosing a summary invoice outlining the time Respondent spent on Marc's matter. However, Respondent did not send the letter, check or invoice, and has never refunded any portion of the $4,000 advanced fee, $508 in costs nor has Respondent provided an accounting.

Conclusions

Count One - (Rule 3-110(A) [Failure to Perform Legal Services with Competence])

Respondent is charged with willfully violating rule 3-110(A) by failing to file a response to the petition for dissolution of marriage, failing to respond to opposing counsel's attempts to negotiate a settlement, and failing to file a motion to set aside the default judgment entered against Marc. The court finds Respondent is culpable of repeatedly and recklessly failing to perform with competence, in willful violation of rule 3-110(A).

In October 2013, Respondent attempted to file a response to the marriage dissolution petition but it was rejected. He never tried to refile the petition. Moreover, Respondent knew that a default had been entered against Marc on November 21, 2013, yet Respondent failed to respond to Bayati's January 10, February 13, March 3, and March 6, 2014 correspondence aimed at reaching a settlement.[9] Finally, Respondent knew that Marc was being harmed after the default judgment was entered, but Respondent failed to file the motion to set aside the default as agreed. Respondent's conduct demonstrates that he recklessly and repeatedly failed to perform with competence, in willful violation of rule 3-110(A).

The court rejects Respondent's argument that he and Bayati had an agreement that if Marc and Mina could not reach a settlement, the parties would stipulate to set aside the default. The record indicates that Bayati and Respondent agreed to set aside the default at the beginning of the case, but after Bayati failed to hear from Respondent, Bayati informed him of his intent to seek the default judgment.

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[9] Bayati testified that he had no communication with Respondent from March 6, 2014, through May 16, 2014, the date of the prove-up hearing. Based on Bayati's demeanor at trial, his ability to recall facts, and the fact that his testimony was supported by documentary evidence, the court finds Bayati's testimony credible.

Count Two - (Rule 3-700(D)(2) [Failure to Return Unearned Fees])

OCTC charged Respondent with failing to promptly refund any of the $4,000 in advanced fees received from Marc because he did not earn any or all of those fees. Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund any part of a fee paid in advance that has not been earned. Respondent is culpable of willfully violating rule 3-700(D)(2) because Marc hired Respondent to represent him in marriage dissolution proceedings; but Respondent failed to file a response to the dissolution petition, did not negotiate a settlement, and a default judgment was entered against Marc. Although the record indicates that Respondent prepared a response and a motion to set aside the default judgment, he never filed either pleading and did not provide any benefit to Marc. (See *In the Matter of Harris* (Review Dept.1992) 2 Cal. State Bar Ct. Rptr. 219, 231 ["[i]t is common in State Bar matters involving the failure to perform services to require as a rehabilitative condition, restitution of unearned fees kept by the attorney and to deem as unearned the entire fee when only preliminary services were performed which did not result in benefit to the client].) Thus, Respondent is culpable of willfully violating rule 3-700(D)(2).

Count Three - (Rule 4-100(B)(4) [Promptly Pay/Deliver Client Funds])

Respondent is charged with violating rule 4-100(B)(4) by failing to promptly pay, as requested by Marc, any portion of the $508 in Respondent's possession. Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the attorney's possession which the client is entitled to receive. Respondent is culpable of willfully violating rule 4-100(B)(4).

Marc paid Respondent $508 as advanced costs for Respondent to file a motion to set aside the default judgment. Respondent failed to file the motion, and Peirano requested a refund on Marc's behalf. Respondent never refunded the $508 advanced costs to Marc. As such,

Respondent willfully violated rule 4-100(B)(4) by failing to promptly refund the $508 in advanced costs to Marc.

Count Four - (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])

Respondent is charged with failing to provide Marc with an accounting of $4,000 in advanced fees, in willful violation of rule 4-100(B)(3). Respondent is culpable of willfully violating rule 4-100(B)(3) by failing to provide an accounting of Marc's $4,000 in advanced fees, even if "[he] never asked." (See *In the Matter of Brockway*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 952 [duty to render appropriate accounting to client does not require as a predicate that the client demand an accounting].)

Case No. 16-O-15607 – The Hill Matter

Facts

In September 2015, Respondent began representing Kimberly Alice Hill in two criminal matters. One matter involved a felony charge for the sale of controlled substances and the second involved a probation violation. On November 30, 2015, Respondent appeared for a hearing and the parties agreed that the previously set preliminary hearing would proceed as scheduled for December 8, 2015. Even though Respondent calendared the date for the preliminary hearing on December 8, 2015, Respondent failed to appear. At first, Respondent called the court to indicate he would be present in court after lunch. However, later that afternoon, Respondent called the court and indicated that he was ill and would not be in attendance. The court rescheduled the preliminary hearing for December 10, 2015, and advised Respondent of the new date for the hearing.

Respondent failed to appear at the December 10, 2015 preliminary hearing; thus, the court relieved Respondent as counsel of record based on Hill's request. Hill was appointed a

public defender. The court also set an order to show cause (OSC) hearing why sanctions should not be imposed against Respondent. The OSC hearing was set for January 4, 2016. The court clerk mailed notice of the January 4 hearing to Respondent at his State Bar membership records address.

Respondent failed to appear at the January 4, 2016 OSC hearing; thus, the court imposed $1,500 in sanctions payable within 180 days from the date of the court order. In January 2016, Respondent became aware that the court sanctioned him. Respondent then sought the assistance of another attorney to help him set aside the sanctions order. On July 13, 2016, Respondent set a hearing regarding the sanctions imposed at the OSC hearing. The hearing was set for August 12, 2016. Since the attorney who was assisting Respondent was not available on August 12, Respondent removed the matter from the calendar. Respondent took no other additional steps to address the sanctions that were imposed, did not report to the State Bar that he was ordered to pay $1,500 in sanctions, and they remain unpaid.

Conclusions

Count One - Rule 3-110(A) [Failure to Perform Legal Services with Competence])

OCTC charged Respondent with willfully violating rule 3-110(A) by failing to appear at the December 10, 2015 preliminary hearing. Although Respondent failed to attend the December 10 hearing, OCTC failed to clearly and convincingly prove that Respondent's failure to attend a single hearing was an intentional, reckless or repeated failure to perform legal services. As such, the court dismisses Count One with prejudice.

Count Two - (§ 6103 [Failure to Obey a Court Order])

Respondent is charged with willfully violating section 6103 by failing to attend the January 4, 2016 OSC hearing as the criminal court ordered on December 10, 2015. When Respondent did not attend the December 10, 2015 preliminary hearing, the criminal court set a

January 4, 2016 hearing for Respondent to show cause why sanctions should not be imposed against him for failing to attend the December 10, 2015 preliminary hearing. The criminal court clerk sent Respondent notice of the OSC. Respondent testified that he did not attend the OSC hearing because the order that the court sent was held by the U.S. Postal Service. Respondent has failed to provide any evidence to corroborate his testimony that the U.S. Postal Service held his mail and has failed to rebut the presumption that the clerk sent him notice (Evid. Code, §§ 606, 660, 664; *In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) As such, the court finds that Respondent received notice of the criminal court's December 10 order to show cause, and he failed to obey the order, in willful violation of section 6103.

Count Three - (§ 6103 [Failure to Obey a Court Order])

Respondent is charged with willfully failing to obey the criminal court's January 4, 2016 order directing him to pay $1,500 in sanctions that was payable within 180 days of the January 4 order. Respondent became aware of the court's sanction order in January 2016 and did nothing to address it after he took his motion to set aside the order off calendar in August 2016. Respondent testified that he never paid the sanctions order because he lacked the ability to pay. However, Respondent acknowledged that he never made a motion for relief from the sanctions order based on his inability to pay. Financial hardship is not a defense to nonpayment of sanctions when the attorney knows about the sanctions order and fails to seek relief from the order. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868.) Thus, Respondent is culpable of willfully violating section 6103.

Count Four - (§ 6068, subd. (o)(3) [Failure to Report Sanctions])[10]

Respondent is charged with willfully violating section 6068, subdivision (o)(3), by failing to report to the State Bar in writing within 30 days that he was sanctioned $1,500 on January 4, 2016. The time to report judicial sanctions pursuant to section 6068, subdivision (o)(3), is from the time the attorney knows the sanctions were ordered. (*In the Matter of Respondent Y, supra,* 3 Cal. State Bar Ct. Rptr. at p. 866.) It is immaterial that Respondent thought he would successfully get the sanctions reduced. (See *ibid.* [attorney required to report $1,000 judicial sanctions order even if order is on appeal].) Respondent is culpable of willfully violating section 6068, subdivision (o)(3).

Aggravation[11]

OCTC must establish aggravating circumstances by clear and convincing evidence. (Std. 1.5.) The court finds three aggravating circumstances.

Prior Record of Discipline (Std. 1.5(a).)

Hurley I

Respondent has two prior records of discipline. On May 25, 2007, the Supreme Court suspended Respondent from the practice of law for three years, stayed, with five years of probation subject to a two-year actual suspension and until he complied with the requirements of former standard 1.4(c)(ii). In this first proceeding, pursuant to a stipulation as required for entry into the Alternative Discipline Program (ADP), Respondent stipulated to misconduct in 11 client matters. Respondent was terminated from ADP on November 1, 2006, for failing to comply with the terms of his State Bar Lawyer Assistance Program Participation Agreement. As such,

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[10] Section 6068, subdivision (o)(3), provides that within 30 days of knowledge, an attorney has a duty to report, in writing, to the State Bar the imposition of judicial sanctions against the attorney of $1,000 or more which are not imposed for failure to make discovery.

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

Respondent was disciplined for the stipulated misconduct. Respondent was culpable of 15 acts of misconduct – writing checks against insufficient funds; failure to perform legal services with competence (seven counts); failure to promptly pay client funds; failure to maintain client funds in trust; misappropriation; improper withdrawal from employment (two counts); and failure to refund unearned fees (two counts).[12] Respondent's misconduct took place from 1999 through 2002.

Hurley II

In Respondent's second discipline, on August 10, 2007, the Supreme Court suspended Respondent from the practice of law for three years, stayed, with five years of probation. Respondent stipulated to misconduct in a single client matter. Respondent was culpable of failing to perform legal services with competence because he did not attend a pretrial hearing; failing to communicate with his client; and failing to refund unearned fees. The misconduct occurred from 2001 through 2006. *Hurley I* was not considered an aggravating factor because it was "still pending and the misconduct occurred contemporaneously with the misconduct in [*Hurley II*]." The discipline in *Hurley II* ran concurrently with *Hurley I*.

The aggravating weight of Respondent's prior discipline record is significant.

Multiple Acts (Std. 1.5(b).)

Respondent committed 11 ethical violations in four client matters. Respondent failed to perform with competence, obey court orders, provide accountings to clients, accepted fees from non-clients, refund unearned fees, promptly pay client funds, and report court-ordered sanctions. As such, Respondent committed multiple acts of wrongdoing. This is a significant aggravating factor.

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[12] In the improper withdrawal and failure to perform counts, Respondent's misconduct involved the failure to attend court hearings in at least six instances.

Significant Harm to Client/Public/Administration of Justice (Std. 1.5(j).)

In the Goldschmied and Hill matters, Respondent failed to attend hearings in criminal matters that caused the court to relieve Respondent as counsel, appoint new counsel and continue criminal proceedings. Respondent harmed the administration of justice by causing delays in Goldschmied's and Hill's cases. In addition, Respondent harmed Marc Susman. Respondent's inaction forced Marc to hire and pay for new counsel to set aside the default in his dissolution matter. The harm caused by Respondent's misconduct is afforded significant weight.

Mitigation

It is Respondent's burden to prove mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds Respondent has established one mitigating factor.

Family/Financial Problems

Respondent testified that he has experienced a great deal of stress due to his daughter's heroin addiction. In May 2013, he gained custody of one granddaughter upon his daughter's arrest. On March 15, 2015, his daughter had a second child, and he now has custody of both granddaughters. In addition to his daughter's drug problem, raising and supporting his two granddaughters has caused additional financial strain. The court affords moderate weight to Respondent's family and financial problems, as no expert testimony was provided on this issue. (*In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, 60 [personal stress factors given less weight than would otherwise be appropriate where no expert testimony given].)

No Mitigation for Attention Deficit Disorder (ADD)

Respondent testified that he missed the hearings in the Goldschmied and Hill matters because he had problems staying focused. In March 2015, he sought treatment from a psychiatrist who prescribed him medication for ADD, but because Respondent did not have

medical insurance, he was unable to continue therapy. The court does not afford any mitigation for Respondent's mental or physical disability because he failed to provide any evidence of an ADD diagnosis from an expert, and no proof that he no longer suffers from such difficulties or is able to manage his problems. (cf. *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 29 [mitigation credit given for extreme emotional or physical problems when expert establishes such problems were directly responsible for misconduct]; see also *In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 281[extreme emotional difficulties constitute mitigating circumstance if clear and convincing evidence establishes that attorney no longer suffers from such difficulties].)

On balance, Respondent's significant aggravating circumstances far outweigh his single mitigating circumstance.

Discussion

OCTC argues that the appropriate level of discipline for Respondent's misconduct is disbarment, and this court agrees.

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. 1.1.) The discipline analysis begins with the standards, which promote the consistent and uniform application of disciplinary measures and are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91 [Supreme Court will not reject recommendation arising from standards unless grave doubts as to propriety of recommended discipline].) Standards 1.8(b) and 2.12(a) are the most apt.[13]

[13] OCTC asserts that standard 1.8(a) is the applicable standard, but although *Hurley I* and *Hurley II* overlapped, Respondent had the opportunity to heed the import of his two prior disciplines before committing the present violations. (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619 ["part of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to

Standard 1.8(b) provides that, if a member has two or more prior records of discipline, disbarment is appropriate if: (1) an actual suspension was ordered in any of the prior matters; (2) the prior and current matters demonstrate a pattern of misconduct; or (3) the prior and current matters demonstrate an unwillingness or inability to conform to ethical responsibilities. Respondent's case meets at least two of these criteria. He has been actually suspended in one prior case – two years and until he met the requirements of former standard 1.4(c)(ii) (*Hurley I*). Also, Respondent has committed the same misconduct as in his priors (failing to perform legal services with competence, promptly pay client funds, and failing to refund unearned fees), which demonstrates an inability or unwillingness to conform to ethical responsibilities. Section 1.8(b) provides for a departure from the presumptive discipline of disbarment, where "the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct." Here, the sole mitigating circumstance of family and financial problems is neither compelling nor predominate compared to the significant weight of the aggravating factors.

The court is mindful that disbarment is not mandatory in every case of two or more prior disciplines, even where compelling mitigating circumstances do not clearly predominate. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [disbarment is not mandatory in every case of two or more prior disciplines, even where no compelling mitigating circumstances clearly predominate].) But, Respondent has provided no reason for this court to depart from the standards. (See *Blair v. State Bar* (1989) 49 Cal.3d 762, 776 [if the court deviates from the presumptive discipline, the court must explain the reasons for doing so].)

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conform his or her conduct to ethical norms"].) Standard 1.8(b) applies unless the prior misconduct occurred during the same time period as the *current* misconduct. None of the misconduct in this third disciplinary matter intersects with Respondent's previous misconduct.

In addition to standard 1.8(b), the court considers standard 2.12(a), which provides that, "[d]isbarment or actual suspension is the presumed sanction for disobedience or violation of a court order related to the member's practice of law." Respondent failed to obey three court orders – to attend a trial readiness hearing, to show cause why he should not be sanctioned, and to pay $1,500 in sanctions. The orders he disobeyed were all directly related to Respondent's practice of law. "Other than outright deceit, it is difficult to imagine conduct in the course of legal representation more unbefitting an attorney." (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.)

The Supreme Court has already sanctioned Respondent with a two-year actual suspension and until he could prove his rehabilitation, fitness to practice and present learning and ability in the general law. Even with that substantial discipline, Respondent has committed the same misconduct as in his priors; misconduct which caused harm to his clients and the administration of justice. As such, there is considerable risk that Respondent will repeat his misconduct if he is allowed to continue to practice. "Further, because the lesser sanctions of probation and suspension 'have proven inadequate to prevent [Respondent] from continuing his injurious behavior towards the public' [citation], [this court] would be remiss in [its] duty to the public, the legal profession and the courts if [it] were to approve any sanction less severe than disbarment. [Citations.]" (*Twohy v. State Bar* (1989) 48 Cal.3d 502, 516.)[14]

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[14] See also *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427 (disbarment where attorney with two prior disciplines committed act of moral turpitude by engaging in unauthorized practice of law and had significant aggravation that outweighed limited mitigation); *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63 (disbarment where attorney with two prior disciplines incompetently represented several clients in criminal matters and had multiple aggravating factors and no mitigation).

Recommendations

It is recommended that Respondent Richard Roger Hurley, State Bar Number 183440, be disbarred from the practice of law in California and Respondent's name be stricken from the roll of attorneys.

It is further recommended that Respondent make restitution to the following individuals (or to the Client Security Fund to the extent of any payment from the Fund to any of them, in accordance with and is enforceable as provided in Business and Professions Code section 6140.5):

(1) Cynthia Shoop in the amount of $2,500 plus 10 percent interest per year from April 16, 2015; and

(2) Marc Susman in the amount of $4,508 plus 10 percent interest per year from July 31, 2014.

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: August 28, 2017

YVETTE D. ROLAND
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on August 30, 2017, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

RICHARD R. HURLEY
RICHARD R. HURLEY ESQ.
12574 VISTA PANORAMA
SANTA ANA, CA 92705 - 1314

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Alex J. Hackert, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on August 30, 2017.

Angela Carpenter
Case Administrator
State Bar Court