

FILED

MAY 12 2017

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 15-O-15636
)	
RAYMOND ROY MILLER,)	OPINION
)	
A Member of the State Bar, No. 144398.)	
_____)	

A hearing judge recommended that Raymond Roy Miller be suspended for 90 days for failing to comply with certain probation conditions ordered by the Supreme Court in a prior discipline case. Those conditions included timely submitting quarterly reports, a final report, and proof of payment of sanctions. This is Miller’s third discipline case, and disbarment is therefore appropriate under the attorney discipline standards. The judge concluded, however, that a departure from the applicable standard was justified and recommended discipline that included a 90-day actual suspension based on the misconduct, the disciplinary history, the case law, and Miller’s efforts, albeit belated, to comply with his probation conditions.

Miller appeals and argues that his late-filed quarterly reports “should be held to be *de minimus* [sic]” and insufficient to support a new disciplinary proceeding or suspension. He also argues he did not act willfully because the due date of the final report was unclear, he was financially unable to timely pay the sanctions, and the sanctions were discharged in his 2014 bankruptcy. He requests no discipline or that the case be remanded for a new trial. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal and requests we affirm.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we reject Miller’s arguments as lacking merit. In particular, we note that he did not timely seek

modification of his probation terms with the State Bar Court, for example, to extend the deadlines to pay sanctions or file his reports. We affirm the hearing judge's analysis and recommended discipline, which includes a new probation period for Miller to prove he can comply with his professional obligations and Supreme Court disciplinary orders.

I. PROCEDURAL BACKGROUND

On December 15, 2015, OCTC filed a one-count Notice of Disciplinary Charges (NDC) alleging that Miller failed to comply with certain probation conditions. After a one-day trial on April 14, 2016, the hearing judge issued her decision on June 29, 2016.

II. FACTS AND CULPABILITY¹

A. Underlying Discipline

Miller was admitted to the practice of law in California on December 12, 1989. In his first discipline case in 2013 (*Miller I*),² he was found culpable of: (1) failing to maintain a just action; (2) making misrepresentations to and concealing facts from the bankruptcy court, the trustee, and three trade creditors; and (3) violating a bankruptcy court sanctions order. In aggravation, Miller's misconduct harmed the public, the administration of justice, and several creditors. In mitigation, he had no prior record of discipline in more than 17 years of practice, and he established remorse and good faith.

On July 10, 2013, the Supreme Court ordered a 30-day actual suspension and two years' probation with conditions, including that Miller must:

1. Submit quarterly reports to the State Bar's Office of Probation (Probation) "postmarked no later than each January 10, April 10, July 10 and October 10 of the probation period," and stating whether he complied with the State Bar Act, the Rules of Professional Conduct, and all probation conditions;

¹ We base the facts on the trial testimony, documentary evidence, and factual findings by the hearing judge, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

² Supreme Court Case No. S210427; State Bar Court Case No. 11-O-16029.

2. Submit a final report “postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period”; and
3. Pay \$7,750 owed in sanctions to the trustee or its successor in interest resulting from the bankruptcy action underlying *Miller I*, and provide Probation with proof of payment by the final report’s due date (August 9, 2015).

The Supreme Court order was properly served on Miller and became effective on August 9, 2013.

On August 8, 2013, Probation sent Miller a letter reminding him of his probation terms and enclosing copies of the Supreme Court order, the probation conditions, and a quarterly report form. That form indicated that the final report was due on August 9, 2015. The letter enclosed instructions that stated: “For all conditions, being **even one day late** means that you are **not** in compliance.”³ The letter also set the deadline for submitting proof of full payment of sanctions as August 9, 2015, and made clear that any “[r]equest for extension of time or modification of the terms and conditions of the discipline order **must be filed with** the State Bar Court Hearing Department or Review Department. See, Rules of Procedure of the State Bar of California, rules 5.162 and 5.300, et seq.”

B. Miller Failed to Timely Comply with Probation Conditions

OCTC alleged in the NDC that Miller violated Business and Professions Code section 6068, subdivision (k),⁴ by failing to: (1) timely submit five quarterly reports by their due dates of October 10, 2013, April 10, 2014, October 10, 2014, January 10, 2015, and July 10, 2015; (2) timely submit a final report by August 9, 2015; and (3) provide proof of payment of the \$7,750 in sanctions by August 9, 2015. Like the hearing judge, we find Miller culpable, as analyzed below.

³ Although the probation instructions specified that Probation must receive Miller’s reports by the designated due dates, the Supreme Court’s order requiring Miller to postmark his reports by the due dates is the operative requirement.

⁴ Section 6068, subdivision (k), requires attorneys “[t]o comply with all conditions attached to any disciplinary probation.” All further references to sections are to this source.

1. Untimely Quarterly Reports

The hearing judge found that Miller failed to timely submit four of the five quarterly reports listed in the NDC. We agree.

Three reports were submitted several days late. Probation rejected the other two that were due on October 10, 2013, and October 10, 2014, because Miller failed to mark an “x” next to the compliance section of either report. He filed late amended reports within the month.

As to the report due October 10, 2013, however, the judge found no probation violation, reasoning that “[s]ince respondent’s original report was received by [Probation] on October 10, albeit defective, it does not reflect his willful failure to timely file the report when he filed the amended report on October 28.” OCTC does not challenge this finding, and we affirm. Further, we note that despite Miller’s failure to mark the “x” in his original October 2013 report, he provided the following narrative information in a blank-lined corresponding area: “State Bar Ethics School[;] Multi-State PRE[;] not paid sanctions yet[;] & see declaration.”

2. Untimely Final Report and Proof of Sanctions Payment

Under his probation terms, Miller was to file a final report at the end of his probationary period (August 9, 2013–August 9, 2015) and provide proof of payment of the \$7,750 in sanctions. Shortly after his probationary period began, on September 6, 2013, Miller filed a petition for relief from the Supreme Court’s order assessing costs against him or for an extension of time to pay them. On October 30, 2013, the hearing judge extended the time to pay costs (October 30 Order). The judge did not extend the deadline to pay sanctions or to file the final report. Importantly, Miller did not seek to modify these probation terms during his two-year probation period.

On August 19, 2015, after the probation period ended, Probation notified Miller that he had yet to file the final report or provide proof of the sanctions payment. Miller responded that

he thought the August 9, 2015, deadline had been extended to January 2018 by the October 30 Order. Probation explained that the order did not modify these conditions and reiterated this point in subsequent emails.

On September 14, 2015, Miller belatedly sought an extension of time to pay sanctions and to file a final report. On October 26, 2015, the hearing judge denied Miller's request and made clear that: (1) Miller's probation had terminated in August 2015; (2) the Supreme Court had ordered him to pay the \$7,750 sanctions by the end of his probation; and (3) the October 30 Order had granted him an extension of time *only* to pay disciplinary costs. Miller was ordered to pay the sanctions and file his final report immediately.

Meanwhile, on October 10, 2015, Miller postmarked a report to Probation, which deemed it noncompliant because it was untimely. Miller postmarked another report on October 30, 2015, and stated that he had not yet been able to pay the sanctions. Probation also deemed this report noncompliant.

After the NDC was filed in December 2015, Miller received fees due in other client cases, and paid the \$7,750 sanctions in full on March 17, 2016. The hearing judge found that Miller made this payment when he had the financial ability to do so. Miller did not provide proof of payment to Probation; instead, he submitted it at trial. Based on these facts, we, like the hearing judge, find Miller culpable as charged for failing to file his final report and failing to provide proof of payment of the sanctions by August 9, 2015.

3. Miller's Arguments on Review

Miller challenges culpability on three grounds; each is unavailing. First, he asserts the due date for his final report was unclear. But the Supreme Court order and the Hearing Department decision in *Miller I* make it clear that Miller had to file a final report and provide proof of payment to Probation by the last day of his two-year probation (August 9, 2015).

Moreover, Probation's August 8, 2013, letter clearly stated that August 9, 2015, was the deadline to submit proof of payment. Moreover, the quarterly report form identified August 9, 2015, as the due date for the final report.

Second, Miller argues that he was financially unable to timely pay the sanctions until he was paid on other outstanding cases. Yet he did not ask the Hearing Department during his two-year probation to modify his probation terms to extend the time for payment. And he has failed to explain why he did not do so in light of Probation's written reminder that he must seek modification of probation terms from the State Bar Court. (Cal. Rules of Court, rule 9.10(c); Rules Proc. of State Bar, rule 5.161(A) [State Bar Court authorized to modify terms of probation].) Further, Miller has not submitted evidence of income and expenses for 2014 or 2015. Whatever his financial circumstances, he has not made any showing of a good faith effort to acquire the ability to pay nor has he made even partial payments consistent with his claimed limited ability to pay.

Finally, at trial, Miller testified that a bankruptcy petition extinguished his obligation to pay additional sanctions (beyond those issued against him personally) owed by his partner and law firm jointly and severally. On review, he argues for the first time that his bankruptcy petition discharged his obligation to pay the \$7,750 in sanctions, and that the hearing judge erred by considering his late payment of a debt he claimed had been discharged. His claim fails because it is untimely; Miller neither sought to modify his probation conditions on this ground nor articulated it as a defense to culpability at trial. (See *In the Matter of Wolfgram* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 355, 361 [Review Department is "very reluctant to consider his claim made for the first time on review"].) On the merits, the claim also fails for lack of corroborating documentary evidence—i.e., Miller failed to provide proof of his purported bankruptcy discharge.

Even if his bankruptcy discharge were properly before us, bankruptcy proceedings do not discharge a member's obligation to comply with the terms of disciplinary probation. (See *Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1008-1009.) Miller cited *In re Scheer* (9th Cir. 2016) 819 F.3d 1206, which is readily distinguishable. There, the federal court concluded that an arbitration fee award between a member and a former client was dischargeable in bankruptcy because the award was "purely compensatory" and "not disciplinary." (*Id.* at p. 1211.) Here, the probation condition that Miller pay \$7,750 in sanctions—a payment analogous to restitution and one that the Supreme Court ordered before Miller allegedly filed his bankruptcy petition—was disciplinary and was thus "designed to effectuate [Miller's] rehabilitation and to protect the public from similar future misconduct." (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044.) The Supreme Court has concluded that "nothing in the Bankruptcy Act, or the cases interpreting that act, prevents imposing restitution as a condition of probation in an attorney disciplinary matter—even if the underlying subject of the restitution has been discharged in bankruptcy. . . ." (*Brookman v. State Bar, supra*, at p. 1009.) *Scheer* does not change that conclusion, and, in fact, it expressly acknowledges the difference between debts that can be discharged and those that cannot. (*In re Scheer, supra*, at pp. 1211-1212.) Consistent with this analysis, Miller's claim that the hearing judge erred by considering his late payment of a debt he alleges had been discharged lacks merit, and we deny his request to remand.

III. SIGNFICANT AGGRAVATION AND NO MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct⁵ requires OCTC to establish aggravating circumstances

⁵ All further references to standards are to this source.

by clear and convincing evidence.⁶ Standard 1.6 requires Miller to meet the same burden to prove mitigation. The judge correctly found, and Miller does not challenge, two factors in aggravation and none in mitigation.

A. Two Prior Records of Discipline

Standard 1.5(a) provides that a prior record of discipline may be an aggravating factor. The hearing judge properly found that Miller's two prior records of discipline constituted aggravation, but did not specify the weight to be assigned. We assign significant weight because both records of discipline are recent and *Miller I* involved serious misconduct.

Miller I is discussed in detail above. It included acts of moral turpitude for making misrepresentations to a bankruptcy court and to three creditors, and the misconduct was aggravated because it harmed the public, the administration of justice, and several creditors. The Supreme Court ordered a 30-day actual suspension on July 10, 2013.

In his second discipline case (*Miller II*),⁷ effective April 25, 2014, Miller was found culpable of less serious misconduct—for commingling when he deposited \$700 in personal funds in his client trust account (CTA), and used that account to pay personal/business expenses of \$530.12. The misconduct occurred between May 4 and June 6, 2012. In aggravation, he had one prior discipline record (*Miller I*) and uncharged misconduct for maintaining personal funds in his CTA. The aggravating force of *Miller I* was reduced because Miller committed the misconduct underlying *Miller II*, which ended June 6, 2012, about a week *before* OCTC filed the June 12, 2012, NDC in *Miller I*. In mitigation, Miller caused no client or other harm. The Supreme Court imposed discipline that included a two-year stayed suspension and two years' probation with conditions.

⁶ 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.)

⁷ Supreme Court Case No. S216034; State Bar Court Case No. 12-O-15500.

B. Multiple Acts of Wrongdoing

The hearing judge correctly found that Miller's multiple acts of wrongdoing constitute an aggravating factor. (Std. 1.5(b) [multiple acts of wrongdoing constitute circumstance in aggravation].) Given that Miller failed to timely file four quarterly reports and a final report, and failed to timely pay sanctions and provide proof of payment, we assign moderate aggravating weight to this factor. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered multiple acts].)

IV. DISCIPLINE⁸

Miller maintains that his minimal misconduct in the present case warrants no discipline. Despite his two prior discipline records, OCTC sought a six-month actual suspension at trial, but on review contends that the hearing judge's recommendation for a 90-day actual suspension should be affirmed. We agree.

Our disciplinary analysis begins with the standards, which are not binding but are entitled to great weight (std. 1.1; *In re Silverton* (2005) 36 Cal.4th 81, 91-92), and should be followed whenever possible. (Std. 1.1; *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.)

Standard 1.8(b) establishes disbarment as appropriate discipline here because Miller has two prior records of discipline, one of which resulted in an actual suspension.⁹ We are mindful that although disbarment is appropriate under standard 1.8(b), it is not mandatory. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [disbarment not imposed despite two prior disciplines and no compelling mitigating circumstances (analysis under former std. 1.7(b))].) The Supreme Court did not apply former standard 1.7(b) in a rote fashion, nor do we apply standard 1.8(b) in

⁸ The purpose of attorney discipline is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain high professional standards; and to preserve public confidence in the legal profession. (Std. 1.1.)

⁹ The two stated exceptions to standard 1.8(b) do not apply because Miller's present misconduct did not overlap in time with his prior misconduct and there is no mitigation, let alone compelling mitigation that clearly predominates over the aggravating circumstances.

such a manner either. Rather, we examine the nature and chronology of prior discipline records in standard 1.8(b) cases, recognizing that “[m]erely declaring that an attorney has [two prior] impositions of discipline, without more analysis, may not adequately justify disbarment in every case.” (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.)

Here, we find clear reasons to recommend a discipline less than disbarment. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) To begin, Miller’s two prior records of discipline overlapped in time since *all* of the misconduct underlying *Miller II* occurred *before* the NDC was filed in *Miller I*. Next, although an actual suspension was previously ordered, it was for only 30 days, which is generally the shortest period imposed.¹⁰ As for the present misconduct, Miller ultimately filed the required probation reports, paid the sanctions he owed, and has recognized his misconduct. (*Potack v. State Bar* (1991) 54 Cal.3d 132, 139 [compliance with probation terms considered in determining appropriate discipline].) As such, we are not dealing with a common thread of repeated misconduct that has increased in severity. Under these circumstances, we find Miller is not a recidivist offender who is unwilling to conform to ethical norms, or the type of attorney that standard 1.8(b) was intended to remove from the practice of law.

We rely instead on standard 2.14, which directly applies to the current misconduct, and provides that “[a]ctual suspension is the presumed sanction for failing to comply with a condition of discipline. The degree of sanction depends on the nature of the condition violated and the

¹⁰ Standard 1.2(c)(1) (actual suspension generally for period of 30 days, 60 days, 90 days, six months, one year, 18 months, two years, three years, or until conditions met).

member's unwillingness or inability to comply with disciplinary orders."¹¹ We also take into account the principle of progressive discipline embodied in the standards.¹²

Miller argues that his filing of late and incomplete quarterly reports by a few days is a de minimis violation not worthy of discipline. We do not agree. He has two prior records of discipline and now has failed to timely comply with several probation conditions despite receiving reminders and warnings from Probation. His many failures constitute willful, repeated, and serious probation violations. (See *Potack v. State Bar*, *supra*, 54 Cal.3d at p. 139 [failure to abide by terms and conditions of probation is serious violation].) Accordingly, we find that Miller's misconduct merits discipline including an actual suspension, as directed by standard 2.14, which is progressive from his past 30-day actual suspension.

The recommendation of a 90-day actual suspension, to which OCTC does not object, is consistent with the case law. (*Snyder v. State Bar* (1980) 49 Cal.3d 1302, 1310-1311 [case law provides guidance on discipline].) We find that the factual circumstances of Miller's case are comparable to the cases the hearing judge cited, despite their default status. They each involved similar misconduct, minimal or no mitigating circumstances, and the attorney had a disciplinary history. (See *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 [90-day actual suspension for the failure to comply with private reproof conditions after default; no mitigation and aggravation for two records of discipline resulting in private reproofs, multiple acts, indifference, and failure to cooperate]; *Conroy v. State Bar* (1990) 51 Cal.3d 799 [60-day actual suspension, after default, for violating private reproof condition to pass Professional Responsibility Examination; aggravation for single prior record outweighed mitigation for belatedly passing exam].)

¹¹ The hearing judge incorrectly cited standard 2.10 as the applicable standard.

¹² Standard 1.8(a) states that where a member has a single prior record of discipline, the sanction must be greater than that previously imposed.

Overall, the standards, the case law, and the weight of aggravating factors when compared to Miller's lack of mitigation, support discipline including a 90-day actual suspension. We further recommend a new probationary period during which Miller will have the opportunity to prove he can strictly comply with his probation terms. (See *In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452 [one goal of disciplinary probation is to rehabilitate attorney].)

V. RECOMMENDATION

For the foregoing reasons, we recommend that Raymond Roy Miller 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 one year on the following conditions:

1. He must be suspended from the practice of law for the first 90 days of the period of his 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 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.
4. Within 30 days after the effective date of discipline, he must contact the Office of Probation 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, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.
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.)

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 period of stayed suspension will be satisfied and that suspension will be terminated.

VI. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Miller 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 the Supreme Court order 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).)

VII. RULE 9.20

We further recommend that Miller 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.

VIII. 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.

PURCELL, P. J.

WE CONCUR:

HONN, J.

McGILL, J.