

**PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION**

**Filed September 30, 2010**

**REVIEW DEPARTMENT OF THE STATE BAR COURT**

|                            |   |                          |
|----------------------------|---|--------------------------|
| In the Matter of           | ) | No. <b>08-J-13482</b>    |
|                            | ) |                          |
| <b>JAMES L. ROSENBERG,</b> | ) | <b>OPINION AND ORDER</b> |
|                            | ) | <b>ON REVIEW</b>         |
| A Member of the State Bar. | ) |                          |
| _____                      | ) |                          |

James L. Rosenberg has been a member of the State Bar since 1978. This is his third disciplinary proceeding and involves a federal court’s finding of misconduct in its jurisdiction. In 2008, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) found Rosenberg culpable of professional misconduct and ordered him suspended for one year and until the court grants a petition for reinstatement. Rosenberg had incompetently represented clients in a majority of the 151 immigration cases he handled before the Ninth Circuit from 2002 to 2007. The State Bar Office of Chief Trial Counsel (State Bar) filed this reciprocal discipline case based on the findings of misconduct in the Ninth Circuit. After a one-day trial, the State Bar Court hearing judge adopted the Ninth Circuit’s culpability findings and recommended disbarment under standard 1.7(b),<sup>1</sup> which calls for disbarment if an attorney has two or more prior records of discipline, absent compelling mitigation.

Rosenberg seeks review, arguing that: (1) the Ninth Circuit’s findings do not warrant discipline under the clear and convincing standard of proof; (2) he cannot be found culpable of

---

<sup>1</sup> Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to “standard(s)” are to this source.

repeatedly failing to perform legal services with competence without a finding that he recklessly disregarded his clients' causes and caused harm; (3) the five-year period of limitations precludes culpability for misconduct prior to 2003; and (4) his good faith mitigates against disbarment.

Upon our independent review (Cal. Rules of Court, rule 9.12), we find the record supports both the Ninth Circuit's culpability findings and the hearing judge's disbarment recommendation. Not only was Rosenberg's misconduct extensive and prolonged, but there were serious aggravating circumstances including his two prior discipline records, harm to clients and the administration of justice, and lack of atonement for the consequences of his misconduct. Significantly, he presented no mitigation evidence. Given these factors, we agree with the hearing judge that disbarment is warranted under standard 1.7(b).

#### **I. NINTH CIRCUIT DISCIPLINE ORDER IS CONCLUSIVE EVIDENCE OF MISCONDUCT**

On November 14, 2007, a three-judge panel of the Ninth Circuit filed an order to show cause (OSC) directing Rosenberg to show why he should not be suspended or disbarred for conduct unbecoming a member of the Ninth Circuit's Bar in most of the 151 immigration cases in which he appeared since 2002. The panel referred the matter to the Appellate Commissioner for a hearing, if requested, and a report and recommendation.

Rosenberg filed two responses to the OSC, and requested a hearing, where he testified and presented evidence. On July 2, 2008, the Appellate Commissioner filed his report and recommendation. Rosenberg was allowed 21 days to file objections, but declined to do so. On September 4, 2008, the panel filed an order adopting the Appellate Commissioner's report and suspending Rosenberg from the practice of law in the Ninth Circuit for one year and until he files, and the court grants, a petition for reinstatement.

The Ninth Circuit’s discipline order is “conclusive evidence that [Rosenberg] is culpable of professional misconduct in this state.” (Bus. & Prof. Code, § 6049.1, subd. (a).<sup>2</sup>) The limited issues to address in a proceeding based on discipline from another jurisdiction are: (1) the degree of discipline to be imposed in California; (2) whether the member’s culpability in the other jurisdiction warrants imposing discipline in California under the laws or rules applicable in California at the time of the misconduct; and (3) whether the proceeding in the other jurisdiction lacked fundamental constitutional protection. (§ 6049.1, subd. (b).) The burden is on the member to establish that the issues in subsections (2) and (3) do not warrant discipline. (*Ibid.*)

We reject Rosenberg’s argument that the hearing judge erred in adopting the Ninth Circuit’s factual findings because its burden of proof is lower than the clear and convincing evidence standard in State Bar proceedings, and therefore, the Ninth Circuit’s culpability determination does not warrant discipline in California. (§ 6049.1, subd. (b)(2).) Rosenberg alleges that the Ninth Circuit had “no burden of proof whatsoever” and discipline was “presumptive.” But he fails to cite any authority to support his position and the limited authority on Ninth Circuit discipline refutes it. (*In re Girardi* (9th Cir. 2010) 611 F.3d 1027, 1034 [findings in special master’s report on attorney misconduct were “ ‘provable by clear and convincing evidence’ ” and adopted in full]; see also *Gadda v. Ashcroft* (9th Cir. 2004) 377 F.3d 934, 943 [in reciprocal discipline cases, State Bar Court’s findings are presumed correct and attorney bears burden of demonstrating by clear and convincing evidence that there was lack of due process, insufficient proof, or other grave reason to prevent court from recognizing court’s

---

<sup>2</sup>Unless otherwise noted, all further references to “section(s)” are to the Business and Professions Code.

determination].) We find that the Ninth Circuit's findings are supported by sufficient evidence and warrant the imposition of discipline.

We also find that the Ninth Circuit proceeding provided ample due process protections. (§ 6049.1, subd. (b)(3).) The OSC detailed the evidence of Rosenberg's misconduct. He filed two responses and was afforded the opportunity to testify and present evidence at a hearing. Rosenberg failed to offer a justifiable explanation for his serious misconduct. Then, after the Appellate Commissioner filed his report, Rosenberg chose not to object to it despite the opportunity to do so. In fact, he testified before the hearing judge that he did not object to the Ninth Circuit's findings primarily because he was given a "fair hearing." He was also allowed to explain the adverse evidence in the record before the hearing judge in these proceedings, but merely reiterated the unpersuasive explanations he had given to the Appellate Commissioner. (See *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 634 [petitioner failed to carry his burden of showing civil court findings against him were unsupported by the evidence].) Thus, the Ninth Circuit's findings are conclusive evidence of Rosenberg's misconduct.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In his July 2, 2008, report and recommendation, adopted in full by the Ninth Circuit, the Appellate Commissioner found that Rosenberg repeatedly violated rule 3-110(A) of the Rules of Professional Conduct<sup>3</sup> when he failed to perform competently in the majority of his 151 immigration cases since 2002. That failure can be divided into three general categories: (1) he failed to prosecute cases and to oppose government motions leading to dismissals; (2) he filed perfunctory stay motions; and (3) he filed inadequate briefs. The Appellate Commissioner noted

---

<sup>3</sup>Unless otherwise noted, all further references to "rule(s)" are to the Rules of Professional Conduct of the State Bar.

that these practices “interfered with the judicial process,” demonstrated a lack of competence, and “frequently doomed his clients’ chances of success” before the Ninth Circuit.

Rosenberg argues that misconduct before 2003 is time-barred from prosecution under rule 51 of the Rules of Procedure of the State Bar, which provides a five-year statute of limitations for cases based on a complainant’s allegations.<sup>4</sup> However, since the State Bar, not a complainant, initiated this action based on the Ninth Circuit’s discipline order, rule 51(a) does not bar any portion of this proceeding. Thus, like the hearing judge, we adopt the Ninth Circuit’s findings as summarized below.

## **A. FINDINGS OF FACT**

### **1. Dismissals for Failure to Prosecute or to Oppose Government Motions**

From 2002 to 2007, the court dismissed at least 40 of Rosenberg’s cases: 19 cases for failure to prosecute because he failed either to respond to a court order questioning jurisdiction or to file an opening brief, and 21 cases in which he failed to file a response to the government’s motions to dismiss or for summary disposition.

Rosenberg admitted in the Ninth Circuit hearing and in this proceeding that these cases had little or no merit and he initiated them to “buy time” for his clients. He also acknowledged that this practice conflicts with his duties to the court. As an officer of the court and a representative of his clients, Rosenberg was duty-bound to move for voluntary dismissal when it became clear either that the court lacked jurisdiction or that abandonment of the appeal was otherwise warranted. Conversely, his failure to oppose the government’s dispositive motions in the majority of his cases shows a lack of concern for his clients’ interests. As the Ninth Circuit

---

<sup>4</sup>Rule 51(a) provides: “A disciplinary proceeding based solely on a complainant’s allegation of a violation of the State Bar Act or Rules of Professional Conduct shall be initiated within five years from the date of the alleged violation.”

found, monitoring Rosenberg's cases and securing dismissals when he defaulted was a burden to the court and the government.

## **2. Perfunctory Stay Requests**

In most of his cases, Rosenberg filed perfunctory motions for stay of removal that failed to meet the accepted standards pursuant to *Abbassi v. INS* (9th Cir. 1998) 143 F.3d 513, 514. Specifically, the motions either failed to show a probability of success on the merits or did not identify any serious legal questions at issue.<sup>5</sup> (*Ibid.*) Consequently, a substantial number of these motions were denied. In at least four cases, the denial of the motion ended the stay of the client's voluntary departure period.

Rosenberg claimed his motions for stay of removal were necessarily sparse with minimal support because his clients were frequently referred to him by other attorneys, and therefore, his knowledge of a case was limited at the time he filed the motions. The Appellate Commissioner rejected this explanation, as do we. Rosenberg was often the attorney below, and still filed inadequate motions. Also, since 2005, he rarely supplemented his stay motions, despite having 14 days after filing to do so.

## **3. Inadequate Briefs**

In at least 27 cases,<sup>6</sup> Rosenberg filed inadequate briefs, twice prompting the Ninth Circuit to take the unusual step of addressing their poor quality in the body of its dispositions. His briefs were frequently five or fewer pages with only one or two pages of argument, no application of relevant case law, and only intermittent reference to the administrative record.

---

<sup>5</sup>For example, in one stay motion, Rosenberg simply argued, "the petitioner is likely to succeed on the merits inasmuch as the Immigration Judge erred in assessing the materiality of facts."

<sup>6</sup>This includes three cases that are also identified as dismissed for failure to prosecute or failure to oppose government motions.

Moreover, the majority of Rosenberg's briefs violated rule 28(a)(9)(B) of the Federal Rules of Appellate Procedure (28 U.S.C.), by citing an incomplete or incorrect standard of review, if any. In at least 20 cases, his brief presented a waiver of an important issue on review. While waiving or pursuing issues can be a strategic decision, Rosenberg's briefs frequently waived issues that were essential to the case and thus could not be explained in terms of strategy. In several cases, he attributed the waiver to his habit of recycling briefs used for appeal to the Board of Immigration Appeals (BIA). This practice resulted in Rosenberg pursuing issues not reviewable by the Ninth Circuit and waiving others, with a corresponding detrimental effect on his clients' cases.

Rosenberg defended his meager briefs based, in part, on his secondhand understanding of a 2005 seminar presented by Ninth Circuit judges and attended by two of his employees. He claimed that at the seminar the judges emphasized a preference for shorter briefs and narrow issues. Rosenberg also believed a standard of review did not need to be included because "the law is the judge's province." The Appellate Commissioner rejected both explanations, as do we. They directly contradict the rules of the court and at least a dozen instances when Rosenberg received direct feedback to the contrary from the Ninth Circuit.

## **B. CONCLUSIONS OF LAW**

The State Bar charged Rosenberg with violating rule 3-110(A), which provides that "a member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Rosenberg's actions repeatedly demonstrated a lack of competence that has harmed his clients and a lack of diligence that interfered with the judicial process. We agree with the hearing judge that Rosenberg willfully violated this rule by failing to prosecute cases and to oppose government motions, by filing perfunctory stay motions, and by filing inadequate briefs.

We reject Rosenberg’s argument that he cannot be found culpable of incompetence without a finding that he recklessly disregarded his clients’ interests and caused them harm. That argument overlooks the Ninth Circuit’s specific findings that his actions negatively impacted the legal rights of many of his clients – colorable issues on appeal were waived, the denial of perfunctory stay motions ended the stay of the clients’ voluntary departure period, and petitions were dismissed. Furthermore, as the Ninth Circuit noted, a successful outcome is not a defense to incompetence since some successes were achieved *in spite of* Rosenberg’s inadequate representation. The record establishes that Rosenberg repeatedly failed to perform legal services with competence in most of his immigration cases before the Ninth Circuit listed in the OSC.

### **III. AGGRAVATION AND MITIGATION**

We determine the appropriate discipline in light of all relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) The State Bar must establish aggravation by clear and convincing evidence, while Rosenberg has the same burden of proof for mitigating circumstances. (Stds. 1.2(b) & 1.2(e).)

#### **A. FOUR FACTORS IN AGGRAVATION**

The hearing judge found Rosenberg’s two prior records of discipline to be significant aggravating factors in this case. (Std. 1.2(b)(i).) He also found that Rosenberg’s current misconduct constitutes multiple acts of wrongdoing or demonstrates a pattern of misconduct. (Std. 1.2(b)(ii).) We agree with both findings. We also find that Rosenberg harmed clients and the administration of justice (std. 1.2(b)(iv)), and showed a lack of atonement for the consequences of his misconduct. (Std. 1.2(b)(v).)

##### **1. Two Prior Discipline Records**

Rosenberg’s first disciplinary record involved misconduct from 1988 to 1996 in three client matters. On September 12, 1996, the Supreme Court ordered him suspended from the



practice of law for one year, stayed, subject to two years' probation with certain conditions.

Rosenberg's conduct was aggravated by multiple acts of misconduct and mitigated for having no prior disciplinary record.

In the first case, Rosenberg was hired in 1988 to represent a client in a civil action. Nearly three years later, the case was dismissed due to his failure to prosecute. Thereafter, Rosenberg agreed to settle the client's legal malpractice claim, but failed to advise the client to consult an independent lawyer for settlement guidance. He later failed to respond to a State Bar inquiry. Rosenberg was culpable of one count each of violating rule 3-400(B) (settling malpractice claim without advising client to seek independent counsel) and section 6068, subdivision (i) (failing to cooperate in State Bar investigation).

In the second case, Rosenberg was hired in 1994 to obtain a labor certificate from the California Employment Development Department (EDD). He waited a year before submitting an incomplete and inaccurate application for his client, and then failed to respond to an EDD request for further information. Rosenberg again ignored the State Bar's request for an explanation. He violated one count each of rule 3-110(A) (failure to perform competently) and section 6068, subdivision (i).

In the third case, Rosenberg was hired in 1994 to represent a client in an immigration matter. Nearly one year later, the client terminated Rosenberg's representation and requested the return of his file. Rosenberg waited nine months before responding. He was culpable of violating rule 3-700(D)(1) (failure to promptly return file).

Rosenberg's second disciplinary record involved misconduct from 1993 to 2000 in a single client matter. On June 15, 2002, the Supreme Court ordered a one-year stayed suspension and one year of probation with conditions, including a 30-day actual suspension. Rosenberg was hired in 1993 to represent a client in a probate matter, but delegated the case to a non-attorney

employee. He neglected to monitor the case and allowed his employee to make legal decisions, which led to several illegal actions and a delay of at least three years. Rosenberg did not take action until 1998, when the State Bar began investigating the client's complaint, and allowed the estate to be closed in December 2000. He stipulated to one count each of violating rule 3-110(A) (failing to perform competently), rule 1-300(A) (aiding the unauthorized practice of law), and rule 1-320(A) (fee splitting with a non-attorney). No mitigation was assigned. In aggravation, Rosenberg's misconduct harmed his client and he had a prior record of discipline.<sup>7</sup> The earlier misconduct echoes the current misconduct.

## **2. Multiple Acts of Misconduct**

The many cases identified in the Ninth Circuit's OSC clearly reflect multiple acts of misconduct, and the consistency of Rosenberg's inadequate briefing practices demonstrates a pattern of misconduct. (Std. 1.2(b)(ii).) He argues that five of the cases included acts of misconduct that occurred before his 2002 disciplinary proceeding, and thus cannot serve as the basis for a new disciplinary hearing. We reject this argument. Even if we excluded those cases, our discipline analysis would remain unchanged given Rosenberg's extensive misconduct in the remaining immigration cases before the Ninth Circuit since 2002.

## **3. Significant Harm to Clients and the Administration of Justice**

We further find in aggravation that Rosenberg's misconduct significantly harmed several clients. (Std. 1.2(b)(iv).) In at least four cases, when Rosenberg's substandard stay motions were denied, his clients' voluntary departure periods ended prematurely. In 20 others, his nonstrategic waiver of issues in his briefs precluded any chance of success for his clients. The

---

<sup>7</sup>Although the parties stipulated in the 2002 case that Rosenberg's prior record should not be considered in aggravation because the misconduct in the first and second matters happened during the same time, the hearing judge correctly included the prior record in aggravation. Rosenberg's misconduct may have begun in 1993, but it continued until at least 1998 – after the earlier discipline matter was resolved and he should have been aware of his ethical duties.

Appellate Commissioner noted, and we agree, that “incompetent representation in asylum and immigration cases can have devastating consequences.” Rosenberg’s inadequate performance produced just such results for some of his clients.

Rosenberg’s overall misconduct also significantly harmed the public and the administration of justice by burdening the courts. In filing meritless appeals to prolong proceedings, Rosenberg forced the court and government attorneys to seek dismissals. His strategy to “buy time” for his clients in most cases usurped the court’s time and added to its caseload. We find that Rosenberg’s actions significantly harmed the public and the administration of justice.

#### **4. Indifference to Wrongdoing**

Rosenberg has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He asserted before the Ninth Circuit and the hearing judge that his behavior is justified by the nature of immigration law, terse BIA decisions, and his zealous advocacy for his clients. In Rosenberg’s words, he was a “rebel” who “was trying to get [the system] to work.” Each of these excuses failed in the Ninth Circuit, but he maintains them nonetheless. They fail here as well. First, he never argued for the changes in immigration law that would give his appeals a chance for success; instead, he merely ignored the law. And second, circuit courts across the country have noted that balancing duties to the court and client advocacy is well-established and clearly defined – a balance Rosenberg failed to achieve. (See *In re Bithoney* (1973) 486 F.2d 319 [filing meritless appeals in immigration cases solely to delay deportation orders, especially after warning from court, is clear abuse of court system].)

## **B. NO FACTORS IN MITIGATION**

The hearing judge properly found no mitigating factors in this case, and we reject Rosenberg's current contention that he acted in good faith. "In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held and reasonable. [Citation.]" (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653.). Rosenberg admits that he used the Ninth Circuit Court as a "pawn" to prolong proceedings. In doing so, he repeatedly and willfully burdened the court. Moreover, he acknowledges that this conduct "may be a violation of something" and may indicate an "ethical trespass." Rosenberg's awareness that his practices were unethical contradicts any finding that he honestly believed his actions were appropriate. But even if he did, that belief was unreasonable as it was clearly contrary to both well-stated law and his ethical duties to the court.

## **IV. LEVEL OF DISCIPLINE**

"The primary purposes of disciplinary proceedings conducted by the State Bar of California and of sanctions imposed upon a finding or acknowledgment of a member's professional misconduct are the protection of the public, the courts, and the legal profession . . . ." (Std. 1.3.) In determining the degree of discipline to recommend, we consider the standards, which serve as guidelines, as well as prior decisions imposing discipline based on similar facts. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) Standard 2.4 provides for a broad range of discipline for failing to perform services, starting at a reproof for an individual matter and ending with disbarment for a pattern of abandoning causes. However, Rosenberg's prior discipline history requires us to consider standard 1.7(b), which provides for "disbarment unless the most compelling mitigating circumstances clearly predominate" when an attorney has a record of two or more impositions of discipline.

Rosenberg contends that we should not strictly apply standard 1.7(b) because there is no repetition of misconduct. Although a repetition or pattern of misconduct is not *required* for disbarment under standard 1.7(b), we find such a repetition in the present case. Rosenberg has failed to fulfill his professional obligations for over two decades in numerous cases, and his overall disciplinary record since 1988 shows “pervasive carelessness” regarding compliance with ethical rules. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 796.)

Nonetheless, to avoid rigidly applying standard 1.7(b) or any other standard, we consider all of the facts and circumstances of the case in making our recommendation for discipline. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11 [standards not required to be strictly followed in every case].) After carefully evaluating all relevant factors, including Rosenberg’s record of discipline and his underlying misconduct, we recommend that he should be disbarred. His repeated misconduct over a prolonged period and his continued attempts to justify it demonstrate that he does not understand his ethical obligations and is either “unwilling or unable” to conform his behavior to the rules of professional conduct. (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 111.)

We recommend that Rosenberg be disbarred under standard 1.7(b) to protect the public and courts and maintain the high standards of the profession. Our recommendation is supported by case law imposing disbarment under that standard for two or more prior disciplines where there is no compelling mitigation. (*Barnum v. State Bar, supra*, 52 Cal.3d 104 [three prior disciplines and no compelling mitigation]; *Morgan v. State Bar* (1990) 51 Cal.3d 598, 607-608 [four prior disciplines showed pattern of misconduct and indifference to court’s disciplinary orders; mitigation did not predominate]; *Morales v. State Bar* (1988) 44 Cal.3d 1037, 1048 [two prior disciplines and no mitigation where attorney lacked remorse].)

## **V. RECOMMENDATION**

We recommend that James L. Rosenberg be disbarred and that his name be stricken from the roll of attorneys.

We further recommend that he 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 herein.

Finally, we recommend that costs be awarded to the State Bar in accordance with Business and Professions Code, section 6086.10, such costs being enforceable both as provided in section 6140.7 of that code and as a money judgment.

## **VI. ORDER OF INACTIVE ENROLLMENT**

Because the hearing judge recommended disbarment, he properly ordered that Rosenberg be involuntarily enrolled as an inactive member of the State Bar as required by section 6007, subdivision (c)(4), and Rules of Procedure of the State Bar, rule 220(c). The hearing judge's order of involuntary inactive enrollment became effective on November 22, 2009, and Rosenberg has remained on involuntary inactive enrollment since that time and will remain on involuntary inactive enrollment pending the final disposition of this proceeding.

REMKE, P. J.

We concur:

EPSTEIN, J.

PURCELL, J.