

Filed May 26, 2011

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 07-O-11955
	)	
ROBERT EATON DOWD,	)	OPINION
	)	
A Member of the State Bar, No. 93284.	)	
_____	)	

Robert Eaton Dowd requests review of a hearing judge's recommendation that he be suspended for 90 days because he sought to mislead a judge by having his office assistant sign his name to pleadings. Dowd asserts he is not culpable of any misconduct and should not be disciplined. The Office of the Chief Trial Counsel of the State Bar (State Bar) asks us to affirm the hearing judge's recommendation. After our independent review of the record (Cal. Rules of Court, rule 9.12), we adopt the hearing judge's culpability finding and discipline recommendation.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In January 2010, the State Bar filed a Notice of Disciplinary Charges (NDC) alleging that Dowd sought to mislead a judge or tribunal by making a false statement of fact when he authorized his office assistant to simulate his signature on pleadings from July 2005 through February 2007. Prior to trial, Dowd stipulated to the State Bar's exhibits and to extensive facts. The stipulated facts and Dowd's limited testimony provide clear and convincing evidence to support the hearing judge's factual findings, which we adopt and summarize below.

A. FACTS

Dowd is a solo practitioner who was admitted to practice law in 1980. Ella McDaniel is his office assistant and his only employee. She started working for Dowd in 1997. By June 2000, Dowd felt he had worked with McDaniel long enough to trust her, and he permitted her to sign his name as though it were his own signature to any document generated by his office. After he finalized a document, he considered it more expedient to allow McDaniel to sign his name to it. According to Dowd, “[i]t’s just easier for me to do that. I don’t like details. I assign those details to her.”

In May 2005, McDaniel hired Dowd on a pro bono basis to assist her as executrix of her son’s estate and to enjoin the sale of two properties by her son’s former wife.¹ In July 2005, Dowd filed a complaint on McDaniel’s behalf, seeking to set aside a joint tenancy deed on property held by McDaniel’s son and his wife, seeking to quiet title in the property, and alleging fraud against the wife. All pleadings, motions, declarations, and correspondence filed with the court and sent to opposing counsel in the case bore Dowd’s signature, but were actually signed by McDaniel. None of the documents indicated that his signature was simulated by another person. Dowd intended for the court to rely upon McDaniel’s signature simulations on the documents as if they had been done by his own hand. McDaniel replicated Dowd’s signature on at least 41 separate documents, including:

- The complaint and two amended complaints;
- Several recorded notices of pendency of action;
- Multiple motions and their corresponding, signed memoranda;

¹At the time of the son’s death, petitions for marital termination filed by both the son and his wife were pending in Merced County Superior Court.

- At least nine declarations in support of pleadings signed under penalty of perjury; and
- At least 10 proofs of service signed under penalty of perjury, declaring the signatory was “not a party to the within cause of action.”

By December 2006, opposing counsel in McDaniel’s case discovered and objected to Dowd’s practice. Despite being notified of a potential problem, Dowd allowed McDaniel to continue the practice. Consequently, on February 27, 2007, opposing counsel argued that a February 23, 2007 declaration purportedly signed by Dowd was incompetent because McDaniel signed it. The attorney asked the court to address the issue.

At the next hearing, Dowd admitted McDaniel simulated his signature on the documents. The court admonished Dowd to discontinue the practice. At a subsequent hearing, the court reiterated that “if there is any pleading signed they better be signed by an attorney.” Due to the improper signatures, the court expunged all recorded notices of pendency of action as void and invalid, and struck the challenged February 23, 2007 declaration. Dowd ultimately settled McDaniel’s matter.

B. CONCLUSIONS OF LAW

Dowd was charged with one count of violating Business and Professions Code section 6068, subdivision (d),² which prohibits attorneys from seeking “to mislead the judge or any judicial officer by an artifice or false statement of fact or law.” The State Bar charged that Dowd made false statements of fact and misled a judge by instructing McDaniel to simulate his signature on documents submitted to the court as though he signed them. We agree with the hearing judge that Dowd violated this section with respect to the sworn declarations and proofs of service. However, unlike the hearing judge, we also consider pleadings not signed under oath as evidence that Dowd violated section 6068, subdivision (d).

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

The hearing judge relied on the State Bar's statement at trial that no authority barred Dowd from allowing his office assistant to simulate his signature on pleadings not signed under oath. The Code of Civil Procedure clearly states otherwise. All pleadings must be signed by an attorney or by a party if unrepresented. (Code Civ. Proc., § 128.7, subd. (a) [every pleading shall be signed by attorney in his name or party if unrepresented], and § 446, subd. (a) [every pleading shall be subscribed by party or his attorney].) The word "subscribe" is defined as signing with one's own hand. (*Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1165.) Thus, when a pleading bears the signature of a plaintiff's attorney, "the plain language of section 446 requires [the pleading] to be signed . . . by the hand of the plaintiff's attorney.[fn.]" (*Ibid.*) Pleadings that do not adhere to this requirement "shall be stricken" (Code Civ. Proc., § 128.7, subd. (a); see *Board of Trustees v. Superior Court*, *supra*, 149 Cal.App.4th 1154 [where plaintiff's father subscribed plaintiff's name to complaint at plaintiff's direction, complaint was defective for failure to comply with subscription requirement of Code Civ. Proc., § 446 and subject to being stricken if not promptly corrected].) For this reason, in addition to his declarations and proofs of service, we also consider Dowd's unsworn pleadings as evidence that he violated section 6068, subdivision (d).

Whether Dowd violated section 6068, subdivision (d), "depends first upon whether his representation to the . . . court was in fact untrue, and secondly, whether he knew that his statement was false and he intended thereby to deceive the court." (*Vickers v. State Bar* (1948) 32 Cal.2d 247, 252-253.) An attorney's honest but unreasonable belief rebuts a specific finding that he intended to deceive the court. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173 [attorney's good faith in making false statement is defense to § 6068, subd. (d), violation].)

The first element of the violation is met since Dowd filed pleadings that represented he had signed them, which “was in fact untrue.” (*Vickers v. State Bar*, *supra*, 32 Cal.2d at p. 253.) As to the intent element, although Dowd admitted he had not signed the pleadings, he testified he never intended to mislead the court because he honestly believed he was authorized to permit McDaniel to simulate his signature.³ The hearing judge rejected Dowd’s testimony and instead accepted the stipulated fact that he “intended for the court to rely upon the McDaniel simulations on each of the documents to be viewed as his own personal signature as if it had been by his own hand.” Because Dowd intended the court to rely on McDaniel’s simulations as his own, the hearing judge concluded that Dowd’s “conduct was necessarily intended to mislead the court” We agree.

The weight of the evidence supports the hearing judge’s determination of Dowd’s intent. For example, Dowd’s conduct with regard to the proofs of service was clearly intended to mislead the court. Since McDaniel was an interested party in the proceeding, she was precluded from serving the documents. (Code Civ. Proc., § 1013a, subd. (1).) The hearing judge rejected as not credible Dowd’s testimony that McDaniel signed the proofs of service, but then he performed the clerical task of serving the documents. We give great weight to the hearing judge’s credibility determinations. (Rules Proc. of State Bar, former rule 305(a)⁴; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 121 [findings based on testimony given great weight since trier of fact was in better position to evaluate conflicting statements after observing demeanor of witnesses and character of their testimony].) By allowing McDaniel to sign his name to the

³Dowd testified that before beginning this practice, he consulted an administrative law judge who stated that it would be appropriate. Dowd also claimed he reviewed the law of agency in the California Civil Code and concluded the practice was permitted since the rules indicated that “a principal can authorize his agent to do any act the principal can do.”

⁴The Rules of Procedure of the State Bar were amended effective January 1, 2011. However, the former rules apply to this proceeding as the request for review was filed prior to the effective date. (Rules Proc. of State Bar (eff. Jan. 1, 2011), Preface, item 2.)

proofs of service, Dowd circumvented the rule prohibiting service by a party, and he misled the court.⁵

“[W]e cannot approve or condone a law office practice or procedure according to which the signature of a person making a sworn affidavit, declaration or other statement or making an unsworn declaration or other statement under penalty of perjury is subscribed by a person other than the one making the sworn or unsworn statement, as the case may be.” (*Vaughn v. State Bar* (1972) 6 Cal.3d 847, 858.) Dowd’s conduct was intended to mislead the court and we adopt the hearing judge’s culpability finding. (See *Aronin v. State Bar* (1990) 52 Cal.3d 276, 286-287 [attorney culpable of misconduct where he simulated clients’ signatures on verification and intended trial court and opposing parties to believe his clients had verified their answer]; *Hallinan v. State Bar* (1948) 33 Cal.2d 246, 248-249 [attorney culpable of misconduct where he simulated client’s signature on settlement papers and opposing party was misled to believe client had personally signed, despite attorney’s belief he had legal authority under power of attorney to sign client’s name].)

II. DISCUSSION

We determine the appropriate discipline in light of all relevant circumstances, including any factors in aggravation or mitigation. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) The State Bar must establish aggravation by clear and convincing evidence (Rules Proc. of State Bar,

⁵As a defense, Dowd also asserts that his reliance on the amanuensis rule precludes a culpability finding. This rule “provides that where the signing of a grantor’s name is done with the grantor’s express authority, the person signing the grantor’s name is not deemed an agent but is instead regarded as a mere instrument or amanuensis of the grantor, and that signature is deemed to be that of the grantor. [Citations.][fn.]” (*Estate of Stephens* (2002) 28 Cal.4th 665, 670-671.) Dowd presented no authority to show that the amanuensis rule is appropriate under the present circumstances where the law explicitly requires the attorney of record or the process server to sign his or her own name. We reject his defense as unpersuasive in light of clear authority to the contrary.

tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)⁶), and Dowd has the same burden to prove mitigation. (Std. 1.2(e).)

A. AGGRAVATION

1. Prior Record of Discipline (Std. 1.2(b)(i))

In 1998, the Supreme Court ordered Dowd suspended for one year, execution stayed, and placed him on two-years' probation for failing to properly supervise an employee who misappropriated client funds. Dowd voluntarily provided restitution to injured clients and displayed good faith, candor, and cooperation.

2. Pattern of Misconduct (Std. 1.2(b)(ii))

We do not adopt the hearing judge's finding that Dowd's misconduct constituted a long-standing pattern based solely on Dowd's acknowledgement that he routinely allowed McDaniel to sign his name to documents over the years. Without greater specificity about the nature and extent of Dowd's practice, including the number of documents or cases in which the practice occurred, we find insufficient evidence of this aggravating factor. (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149-1150, fn. 14 [pattern of misconduct involves the most serious instances of repeated misconduct over prolonged period of time]; *Cannon v. State Bar* (1990) 51 Cal.3d 1103, 1115 [no pattern of misconduct found where only two client matters were involved].)

B. MITIGATION

We agree with the hearing judge that Dowd is entitled to slight mitigation because he cooperated with the State Bar by entering into a comprehensive stipulation of undisputed facts. (Std. 1.2(e)(v).) However, we reject the finding that there was no harm. (Std. 1.2(e)(iii).) Both opposing counsel and the court spent time addressing the validity of pleadings as a result of Dowd's misconduct. While this inconvenience may not rise to the level of "harm to the

⁶All further references to "standard(s)" are to this source.

administration of justice” for purposes of aggravation, it certainly precludes a finding of no harm.

C. DEGREE OF DISCIPLINE

In recommending the appropriate degree of discipline based on the facts unique to this case, we first review the applicable standards. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090.) The hearing judge considered only standard 1.7, which provides for progressively severe discipline when an attorney has a prior record. We find standards 2.3 and 2.6 also apply.⁷

Since Dowd’s violation of section 6068, subdivision (d), involves dishonesty, standard 2.3 is most pertinent to the disciplinary analysis. If a member is culpable of an act of moral turpitude, fraud, or intentional dishonesty, standard 2.3 provides for actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled, the magnitude of the misconduct and the degree to which it relates to the member’s practice of law.

In addition to the standards, case law guides our disciplinary analysis. Our review of similar cases involving misrepresentation or false statement to a court discloses a range of discipline as lenient as a public reproof and as severe as six months’ actual suspension. (*Grove v. State Bar* (1965) 63 Cal.2d 312 [public reproof where attorney who had previously been privately reproofed intentionally misled judge into believing opposing party had defaulted]; *Bach v. State Bar* (1987) 43 Cal.3d 848 [60-day actual suspension where attorney intentionally misled judge about whether he was ordered to produce his client in mediation hearing, and no mitigation but aggravation for failure to understand gravity of misconduct]; *In the Matter of Chesnut, supra*, 4 Cal. State Bar Ct. Rptr. 166 [six months’ actual suspension for attorney who falsely

⁷Standard 2.6(a) calls for suspension or disbarment for a violation of section 6068; however, the more severe sanction is found in standard 2.3.

represented to two judges in different states that he had personally served opposing party, and in aggravation attorney displayed lack of candor and had prior discipline record for similar misconduct].)

Dowd's misconduct involved procedures that are integral to the practice of law. Submitting declarations and proofs of service with simulated signatures undermines the courts' ability to rely on the accuracy of sworn declarations and diminishes the public's confidence in the integrity of the legal profession. Here, Dowd sought to mislead opposing counsel and the court. Based on our review of the record, applicable standards and relevant case law, we conclude that progressive discipline is warranted and that the hearing judge's recommended 90-day actual suspension will adequately serve the discipline goals of protecting the public, the courts and the profession.

III. RECOMMENDATION

We recommend that Robert Eaton Dowd be suspended from the practice of law for two years, that execution of that suspension be stayed, and that Dowd be placed on probation for two years on the following conditions:

1. Dowd must be suspended from the practice of law for the first 90 days of the period of his probation.
2. Dowd 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, Dowd must report such change in writing to the Membership Records Office or the State Bar Office of Probation.
4. Dowd 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.

5. Subject to the assertion of applicable privileges, Dowd 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.
6. Within one year after the effective date of the discipline herein, Dowd 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 will not receive MCLE credit for attending Ethics School.
7. 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 Dowd has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

IV. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Robert Eaton Dowd 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 a suspension. (Cal. Rules of Court, rule 9.10(b).)

V. RULE 9.20

We further recommend that Robert Eaton Dowd 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.

VI. COSTS

We further 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 and as a money judgment.

REMKE, P. J.

I CONCUR:⁸

EPSTEIN, J.

⁸Judge Purcell did not participate in this opinion.