

FILED AUGUST 12, 2010

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	No. 08-C-12029
	)	
HAROLD VINCENT SULLIVAN II,	)	OPINION ON REVIEW AND
	)	ORDER
A Member of the State Bar.	)	
_____	)	

I. SUMMARY

In his fourth disciplinary proceeding, respondent Harold Vincent Sullivan II requests review of a hearing judge's recommendation that he be disbarred. In 1999, Sullivan entered a plea to conspiracy to obstruct justice, a misdemeanor involving moral turpitude per se. He never reported the criminal charges or conviction to the State Bar. After Sullivan's conviction was transmitted to us, we referred it to the hearing department to recommend the appropriate discipline. The hearing judge found that Sullivan's misconduct was significantly aggravated because he has three prior records of discipline and he failed to report the charges and conviction to the State Bar. In recommending disbarment, the hearing judge applied two standards that call for disbarment absent compelling mitigation: standard 3.2 for criminal convictions involving moral turpitude and standard 1.7(b) for two or more records of discipline.¹ The State Bar Office

¹Unless otherwise noted, all further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

of the Chief Trial Counsel (State Bar) did not seek review and supports the hearing judge's decision.

Sullivan contends that disbarment is too harsh and standard 1.7(b) should not apply because there is no common thread or repeated misconduct in each of his disciplines. Sullivan urges us to assign more mitigation credit to his pro bono work, apply less weight to his records of discipline and recommend an actual suspension equal to the time he has been on interim suspension. The primary issue before us is whether standard 1.7(b) requires a common thread or repetitive pattern of misconduct in Sullivan's four discipline records. We conclude it does not, and recommend that Sullivan be disbarred under standards 3.2 and 1.7(b), given his moral turpitude criminal conviction, his extensive disciplinary record and his failure to prove compelling mitigation.

II. PROCEDURAL HISTORY

Sullivan was admitted to practice law in California in 1967. He was disciplined three times for violating the Rules of Professional Conduct² and the State Bar Act³ for misconduct that began in 1988. Sullivan was first disciplined in 1997. While on probation in that case, and with a second disciplinary matter pending, Sullivan pled no contest in 1999 to conspiracy to obstruct justice, the misdemeanor conviction matter before us. He did not report the charges or conviction to the State Bar. In 2000, Sullivan received his second discipline. Then in 2002, while on probation in that matter, he was disciplined a third time. Sullivan has been on interim suspension since July 7, 2008, as a result of his conviction. (§ 6102, subd. (a).)

²Unless otherwise noted, all further references to "rule(s)" are to the Rules of Professional Conduct of the State Bar.

³Business and Professions Code, section 6000 et seq. Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

III. SULLIVAN'S CRIMINAL CONVICTION

A. FACTS AND CIRCUMSTANCES SURROUNDING THE CONVICTION

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we find that the following facts were proved by clear and convincing evidence.

In 1995, Sullivan entered into a business relationship with Faina Bash, the owner/operator of MGB Legal Service (MGB). Sullivan paid MGB \$5,000 per month to market his practice to the Russian community in Los Angeles and to provide him with a secretary and a translator.

Sullivan represented Jose Hermasillo, whose child was killed in a hit-and-run accident. After the case settled, Sullivan issued a check for \$10,000 to MGB from the Hermasillo client trust account (CTA). He testified that he owed MGB that amount for two months of services, and denied that MGB had referred the Hermasillo case to him.

In August 1998, the Los Angeles District Attorney's Office filed a criminal complaint against Sullivan and Bash as co-defendants in a "capping" conspiracy, alleging that Sullivan paid Bash for referring clients to him. The District Attorney claimed that the \$10,000 payment from the Hermasillo settlement was the overt act needed for the conspiracy charge.

Sullivan and Bash were each charged with three felony counts: (1) conspiracy to commit a crime (Pen. Code § 182, subd. (a)(1)); (2) capping (Ins. Code § 750, subd. (a)); and (3) conspiracy to commit an act injurious to the public or to obstruct justice. (Pen. Code § 182, subd. (a)(5).) On April 12, 1999, Sullivan pled no contest to count three as a misdemeanor and Bash pled no contest to count two as a misdemeanor.⁴ Sullivan claims that he entered his plea only to save money, not because he believed his dealings with Bash were illegal. But the

⁴Both Sullivan and Bash entered their pleas pursuant to *People v. West* (1970) 3 Cal.3d 595 (where no contest plea is not admission of guilt but agreement to be punished as if guilty).

superior court judge plainly told Sullivan and Bash that their pleas related to the fee that Sullivan paid Bash for referring the Hermasillo matter.

Sullivan contends that he was not required to report either the felony charges or the misdemeanor conviction to the State Bar. He testified: "I didn't think I had to. It was a misdemeanor and a nolo contendere plea and I didn't think I did anything wrong . . . [The District Attorney] said just plead to the general conspiracy type thing which obstruction of justice really doesn't mean anything." Sullivan claims that he did not consider his misdemeanor conviction as a criminal record and merely followed his attorney's advice to report only felony convictions to the State Bar.

B. THE CONVICTION INVOLVED MORAL TURPITUDE PER SE

Sullivan was convicted of violating Penal Code section 182, subdivision (a)(5), a conspiracy "[t]o commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws." Conspiracy to obstruct justice is a serious crime involving moral turpitude per se. (*In re Craig* (1938) 12 Cal.2d 93, 97 ["no doubt that the offense of conspiring to corruptly influence, obstruct, impede, hinder and embarrass the due administration of justice . . . falls easily within the definition of 'moral turpitude.' "].) Sullivan's conviction is conclusive evidence of his guilt. (*In re Utz* (1989) 48 Cal.3d 468, 480 [record of conviction is conclusive evidence of guilt that attorney cannot collaterally attack in discipline proceedings].) He was sentenced to 36 months' probation, one day in jail, \$100 restitution and a \$4,000 fine and penalty assessment. Other than failing to report the charges and conviction to the State Bar, Sullivan successfully completed his criminal probation.

IV. AGGRAVATION AND MITIGATION

The offering party bears the burden of proving aggravating and mitigating circumstances. Sullivan must establish mitigation by clear and convincing evidence (std. 1.2(e)), and the State Bar must prove aggravation by the same standard. (Std. 1.2(b).)

A. ONE FACTOR IN MITIGATION

We agree with the hearing judge that Sullivan proved one factor in mitigation for performing pro bono work. For a few hours a week during much of his career, he advised and represented clients who could not afford legal services in immigration, business and small claims cases. However, Sullivan offered only his own testimony to establish these efforts. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [pro bono and community service as mitigating factor].) We therefore assign only modest weight to this mitigation evidence. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [limited mitigation weight for community service established only by respondent's testimony].) We reject Sullivan's request for mitigation credit for severing ties with Bash after the criminal charges were filed and for downsizing his office and caseload before his first discipline. He is not entitled to mitigation merely for lawfully operating his practice, and he already received credit in prior disciplinary actions for improving his office management.

B. THREE FACTORS IN AGGRAVATION

The hearing judge found two factors in aggravation – Sullivan's record of prior discipline (std. 1.2(b)(1)) and uncharged misconduct for failing to report the criminal charges and conviction. (Std. 1.2(b)(iii); *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) We agree, but also find a third aggravating factor in that Sullivan lacks insight into his misconduct. (Std. 1.2(b)(v).)

1. Sullivan Has Three Prior Discipline Cases

Sullivan has an extensive record of discipline. For more than a decade, he operated a lax office management system that caused case dismissals, settlement disbursement delays, client communication failures and trust account violations. Sullivan harmed at least nine clients from 1988 to 2000. We assign great aggravating weight to his prior record.

The First Discipline – 1997 (Supreme Court Case number S060193)

This discipline covers misconduct from 1988 through 1993 in five client matters. (*In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608.) During this time, Sullivan did not properly supervise a secretary who threw away or hid documents in several cases, and he failed to periodically review his files to discover the missing items. He was found culpable of failing to: (1) perform competently, (2) apprise clients of case status, and (3) return a file. In aggravation, Sullivan caused harm to clients whose cases were dismissed because he failed to appear in court. In mitigation, he was credited for practicing law for 21 years without discipline, correcting flaws in his case management system, acknowledging responsibility for his wrongdoing and downsizing his practice before the State Bar contacted him. Sullivan received a 60-day actual suspension subject to a one-year stayed suspension and three years of probation.

The Second Discipline – 2000 (Supreme Court Case number S089249)

This discipline covers misconduct from 1990 to 1991 in one matter involving three clients. Sullivan stipulated to culpability for performing incompetently when a case was dismissed because he missed several court appearances. He also failed to respond to client status inquiries. In aggravation, Sullivan had a prior record of discipline and caused harm to his clients. In mitigation, the secretary who mishandled documents in the first disciplinary matter also worked on this case, Sullivan was distracted by his own divorce proceedings, and he was

again credited for downsizing his office. Sullivan received a one-year stayed suspension and two years of probation.

The Third Discipline – 2002 (Supreme Court Case number S108822)

This discipline covers misconduct from 1996 to 2000 involving three clients. Sullivan stipulated to culpability for performing incompetently and committing trust account violations by: (1) failing to supervise an attorney employee who issued three insufficiently funded checks from his CTAs, (2) failing to properly deposit or disburse settlement funds, (3) failing to promptly pay a medical provider, and (4) failing to supervise office staff regarding settlement paperwork. In aggravation, Sullivan had a prior record of discipline. No mitigating factors were present. Sullivan received a 75-day actual suspension subject to an 18-month stayed suspension and two years of probation.

2. Sullivan Did Not Report the Criminal Charges or Conviction

The State Bar Act mandates that criminal charges and convictions be reported to the State Bar within 30 days. (§ 6068, subd. (o)(4) and (5) [State Bar Act]; *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 65, fn. 3 [preexisting duty under State Bar Act to report misdemeanor conviction within 30 days after no contest plea].) And Sullivan's disciplinary probation conditions specifically required that he comply with the State Bar Act. Yet he failed to report his criminal charges and conviction, which is serious uncharged misconduct. (Std. 1.2(b)(iii).) Since the directives to report were clear, we reject Sullivan's explanation that he did not know he had to do so. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 937 ["serious act of misconduct" of failing to notify State Bar not excused by ignorance of rule requiring notification].)

By failing to report, Sullivan impeded the disciplinary process. The State Bar Court was not informed of his 1999 conviction when it made recommendations to the Supreme Court for

Sullivan's second and third discipline cases in 2000 and 2002, respectively. Similarly, the Supreme Court was unaware of the conviction when it imposed discipline in those cases. Under these circumstances, we assign heavy aggravating weight to this uncharged misconduct.

3. Sullivan Lacks Insight into Misconduct

Sullivan lacks "a full understanding of the seriousness of his misconduct," which is an additional and troubling aggravating factor. (*In the Matter of Duxbury, supra*, 4 Cal. State Bar Ct. Rptr. at p. 68.) He downplayed his misconduct when he testified that the conviction "really doesn't mean anything." Clearly, he does not recognize his professional and ethical duties to comply with the law.

Overall, the evidence in aggravation substantially outweighs the limited mitigation evidence of pro bono work.

V. LEVEL OF DISCIPLINE –DISBARMENT UNDER STANDARDS 3.2 AND 1.7(b)

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 standards for attorneys and to preserve public confidence in the profession. (Std. 1.3.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that discipline is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.)

We begin our analysis by looking to the standards. The Supreme Court has instructed us to give the standards great weight and follow them "whenever possible," even though they are not mandatory. (*In re Young, supra*, 49 Cal.3d at p. 267, fn. 11.; see *In re Silverton* (2005) 36 Cal.4th 81, 91 [stds. promote "consistent and uniform application of disciplinary measures"].)

Standards 3.2 and 1.7(b) apply here and the presumptive discipline for each is disbarment. Standard 3.2 instructs that an attorney who is convicted of a crime of moral

turpitude shall be disbarred unless the most compelling mitigating circumstances clearly predominate, in which case at least a two-year actual suspension shall be imposed. Likewise, standard 1.7(b) provides for disbarment where an attorney is culpable of professional misconduct and has a record of two prior disciplines, unless the most compelling mitigating circumstances clearly predominate. Both standards call for Sullivan's disbarment.

A. SULLIVAN'S CRIMINAL CONVICTION UNDER STANDARD 3.2

Disbarment is appropriate under standard 3.2 because Sullivan's conviction for conspiracy to obstruct justice is a serious offense of moral turpitude, and he did not prove compelling mitigation. (See *In re Craig, supra*, 12 Cal.2d at p. 97; see also *In re Crooks* (1990) 51 Cal.3d 1090, 1101 [disbarment is rule rather than exception following conviction of serious crime of moral turpitude].) Further, Sullivan's actions after his conviction cause great concern about his attitude toward his professional obligations, including his responsibilities to the State Bar. Sullivan's conviction and failure to report justify applying standard 3.2 which, standing alone, merits his disbarment.

We do not agree with Sullivan's contention that his criminal conduct was an isolated incident of capping that does not warrant disbarment. If his conviction marred an otherwise discipline-free record, we might not recommend disbarment. (*In the Matter of Duxbury, supra*, 4 Cal. State Bar Ct. Rptr. 61 [six-month actual suspension for misdemeanor capping conviction involving moral turpitude and no previous discipline].) But Sullivan's prior record reveals that his present misconduct is not a solitary incident and it triggers our analysis under standard 1.7(b).

B. SULLIVAN'S PRIOR DISCIPLINE RECORD UNDER STANDARD 1.7(B)

Sullivan should be disbarred under standard 1.7(b). He has three prior records of discipline, and his pro bono work, while commendable, does not establish mitigation compelling enough to preponderate over the strong aggravation evidence. Even if Sullivan's first two

discipline cases were consolidated because the misconduct occurred during the same time period, standard 1.7(b) still applies because the criminal conviction before us would then be his third discipline.

Sullivan contends that we should not apply standard 1.7(b) unless all of his discipline records demonstrate a “common thread” or “repeated finding of culpability of the same offense.” We reject this contention. Such patterns of misconduct are not *requirements* for disbarment under standard 1.7(b), but are simply possible issues to consider. In fact, the Supreme Court has considered several factors other than a pattern of misconduct in deciding whether to apply standard 1.7(b). (See, e.g., *Morgan v. State Bar* (1990) 51 Cal.3d 598, 607 [pattern of misconduct, indifference to disciplinary orders and no compelling mitigation considered in applying std. 1.7(b)]; *Morales v. State Bar* (1988) 44 Cal.3d 1037, 1048 [lack of remorse and no compelling mitigation considered in applying std. 1.7(b)].)

As the standard provides, the critical issue is whether compelling mitigating circumstances clearly predominate to warrant an exception to the severe penalty of disbarment. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 113 [disbarment under std. 1.7(b) imposed where no compelling mitigation]; compare *Arm v. State Bar* (1990) 50 Cal. 3d 763, 778-779, 781 [disbarment under std. 1.7(b) not imposed where compelling mitigation included lack of harm and no bad faith].) Yet even where compelling mitigation is absent, the Supreme Court has not always ordered disbarment. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-508 [one-year actual suspension even though no compelling mitigation in std. 1.7(b) case].) Instead, the Supreme Court considers all relevant facts and circumstances of a case to determine the discipline to impose. (See *In re Young, supra*, 49 Cal.3d at p. 267, fn 11 [stds. not required to be strictly followed in every case].) Guided by these considerations, we examine the nature and chronology of prior discipline records in standard 1.7(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.)

In view of the factors unique to this case, disbarment is warranted and necessary to protect the public, the courts and the legal profession. Sullivan did not present compelling mitigation and has failed to meet his professional obligations for over two decades in four disciplinary cases. In his first three cases, he performed incompetently and in the present case, although it occurred between his first and second discipline, he was convicted of a crime of moral turpitude that he never reported. Overall, Sullivan has demonstrated “pervasive carelessness” toward his practice and compliance with ethical rules since 1988. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 796). Consequently, it appears that he is either “unwilling or unable” to conform his behavior to the rules of professional conduct. (*Barnum v. State Bar, supra*, 52 Cal.3d at p. 111.) Under both standards 3.2 and 1.7(b), we recommend that Sullivan be disbarred.

VI. RECOMMENDATION

We recommend that Harold Vincent Sullivan II be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

We further recommend that he be required to comply with the provisions of rule 9.20 of the California Rules of Court and to perform the acts specified in subdivision (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court’s order in this case.

We further recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10, and such costs are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VII. ORDER

The hearing judge's order that Harold Vincent Sullivan be enrolled as an inactive member of the State Bar under Business and Professions Code section 6007, subdivision (c)(4), shall continue in effect, pending the Supreme Court's decision in this case.

PURCELL, J.

We concur:

REMKE, P. J.

EPSTEIN, J.