

Filed June 12, 2015

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 13-J-13500
)	
JAMES ANDRE BOLES,)	OPINION
)	
Member of the State Bar, No. 141639.)	
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The Supreme Court of Nevada suspended James Andre Boles for one year after the Northern Nevada Disciplinary Board of the State Bar of Nevada (Disciplinary Board) found that he failed to act with reasonable diligence and failed to communicate with two clients. In this reciprocal disciplinary matter, a hearing judge found Boles failed to show by clear and convincing evidence that the conduct for which he was disciplined in Nevada does not warrant the imposition of discipline in California or that his Nevada proceedings lacked fundamental constitutional protections. The judge recommended discipline, including a 90-day period of actual suspension.

Boles appeals, seeking dismissal or a lesser discipline recommendation. The Office of the Chief Trial Counsel of the State Bar (OCTC) asks that we uphold the hearing judge’s disciplinary sanction.

After independently reviewing the record under California Rules of Court, rule 9.12, we affirm the hearing judge’s finding that the Nevada misconduct warrants reciprocal discipline in California. We differ from the hearing judge, however, by finding that Boles did not cause his clients substantial harm. Relying on the applicable discipline standard and comparable case law, we recommend a 30-day period of actual suspension as fair and appropriate discipline.

I. FACTUAL AND PROCEDURAL HISTORY

Boles became licensed to practice law in Nevada in 1988 and in California in 1989. Prior to 2013, he had no disciplinary record in either state.

A. Boles's Misconduct in Nevada

In late January 2011, Boles was hospitalized for a day for an unspecified condition, and then followed his doctor's advice to take an immediate medical leave. He traveled to Santa Barbara, California, where he maintains a residence. Because he was a solo practitioner, he placed most of his caseload with other attorneys, retaining approximately eight matters he either was unable to refer to other counsel or he felt some obligation to complete. Boles remained on active status with the Nevada State Bar. His misconduct stems from two matters he retained.

1. The Miller Matter

Beginning in 2008, Boles represented Lorie Miller in a lawsuit against her former employer in Nevada.¹ After the federal district court granted summary judgment for the defendant, Boles filed a Notice of Appeal in the United States Court of Appeals for the Ninth Circuit in September 2010. Sometime around July 2010, Boles began to respond to Miller's communications sporadically. He did not inform her about his move or his decision to curtail his practice. Miller did not discover until late February 2011 that Boles had moved and taken medical leave when she received a response to her successive emails asking about her case. The response, apparently from Boles's legal assistant, stated that Boles was on indefinite medical leave, and referred Miller to Boles's brother.

In response to Miller's status inquiries, Boles's brother emailed Miller on March 2nd that her case was on hold until Boles's health improved and that "[t]his continuance has no bearing on the ultimate outcome of your case." In fact, as Boles admitted in his Nevada disciplinary

¹ Boles accepted the representation on a contingency fee basis with a \$2,000 retainer.

proceeding, he failed to timely file the opening brief for Miller's appeal before he took his medical leave. Frustrated in her attempts to reach Boles, Miller filed a grievance with Nevada's Office of Bar Counsel in July 2011. Ultimately, on August 11, 2011, Boles sought to withdraw as Miller's attorney and was officially removed by the Ninth Circuit on August 25, 2011.

2. The Petro Matter

In the second client matter, Boles was engaged by Patricia Petro's labor union to represent her in an administrative hearing regarding the termination of her employment as a registered nurse. Boles was successful in securing her reinstatement. In 2009, Petro hired him to handle her professional licensing discipline case, which arose from the same allegations of patient abuse that were the basis of her termination. As in the Miller matter, Boles's communication with Petro became infrequent. She too learned of his medical leave from his office staff and was unable to ascertain when Boles would return to work. When Petro learned a disciplinary hearing was set for May 2011, Boles's staff informed her that they did not know whether Boles would be able to attend. Petro asked that her fees be returned so she could hire another lawyer.² Boles refused, and also refused to commit to appearing on her behalf.

The day before the hearing, Boles informed Petro he would attend. Petro testified Boles was not prepared at the hearing and was unable to provide documentation requested by the Disciplinary Board. Petro filed a complaint, and the State Bar of Nevada opened a grievance file against Boles on August 24, 2011.

B. The Nevada Disciplinary Proceedings

Following his clients' complaints, Boles's disciplinary matter was heard by a designated Formal Hearing Panel of the Disciplinary Board on May 8 and 11, 2012. Boles and both clients testified. The Disciplinary Board issued its Findings of Fact, Conclusions of Law, and Decision

² Boles received a flat fee of \$3,500 from Petro for the representation.

on July 11, 2012, finding by clear and convincing evidence that he “essentially abandoned Miller during the pendency of her Ninth Circuit appeal, despite having assured her through an intermediary that his medical leave and the continuance requested would not jeopardize her case. The assurance was misleading and even if it did not actually prejudice the representation,” Boles caused Miller “needless anxiety” and “undermined her confidence” in her attorney’s trustworthiness. The Board also found no justification for his concurrent refusals to refund fees and to guarantee his appearance at Petro’s hearing. The Board did not find prejudice to either Miller or Petro, but concluded that Boles violated Nevada Rules of Professional Conduct, rule 1.3.³

The Disciplinary Board also found by clear and convincing evidence that Boles “failed to discharge his affirmative duty to keep Miller and Petro informed of the status of their matters. [Boles’s] wholesale delegation of the communication duty, even if permissible, was not accompanied by sufficient oversight and direction” and, therefore, he was in violation of the Nevada Rules of Professional Conduct, rule 1.4.⁴ It decreed that Boles’s health was no excuse for his noncompliance and that he should have availed himself of “simple and reasonable options” to keep his clients informed.⁵

The Disciplinary Board identified four aggravating circumstances: (1) actions for a selfish motive; (2) multiple violations and pattern of conduct; (3) failure to acknowledge and accept responsibility for his misconduct; and (4) failure to comprehend his duties despite his

³ Rule 1.3 of the Nevada Rules of Professional Conduct provides that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”

⁴ Rule 1.4 of the Nevada Rules of Professional Conduct provides in relevant part that an attorney must “[r]easonably consult with the client about the means by which the client’s objectives are to be accomplished” and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

⁵ The Board dismissed allegations that Boles charged an unreasonable fee and that his conduct was prejudicial to the administration of justice.

substantial experience. In mitigation, the Board considered Boles's lack of prior discipline and his health problems. It recommended discipline, including a two-year actual suspension.

On June 7, 2013, in its automatic de novo review of the Disciplinary Board's decision, the Nevada Supreme Court concluded that clear and convincing evidence supported the Disciplinary Board's culpability findings. However, it reduced the recommended two-year suspension to one year.

Based on the Disciplinary Board's decision and the Nevada Supreme Court's final order of suspension, OCTC filed a Notice of Disciplinary Charges (NDC) in July 2013. The NDC charged Boles with professional misconduct in a foreign jurisdiction under section 6049.1 of the California Business and Professions Code.⁶ OCTC alleged that Boles's misconduct constituted violations of section 6068, subdivision (m)⁷, and California Rules of Professional Conduct, rule 3-110(A).⁸ It requested a 90-day period of actual suspension. After a one-day trial with Boles as the sole witness, and based on the sparse factual record submitted by the parties, the hearing judge found that Boles's violations in Nevada constituted violations of his ethical duties under the laws and rules in California. The judge recommended a 90-day actual suspension.

Boles filed a petition for review with this Court. On April 21, 2014, he filed a motion to augment the record with his medical records. On May 29, 2014, finding no good cause, we denied the motion. Following oral argument in this matter, Boles submitted a further motion to augment the record and to supplement his argument. Finding no good cause, we denied that motion on May 18, 2015.

⁶ Subsequent references to sections are to the California Business and Professions Code.

⁷ Section 6068, subdivision (m), requires attorneys "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

⁸ Rule 3-110(A) provides that a "member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Subsequent references to rules are to the California Rules of Professional Conduct unless otherwise indicated.

II. RECIPROCAL DISCIPLINE IS WARRANTED

The Nevada Supreme Court's final order is conclusive evidence that Boles is culpable of professional misconduct in California. (§ 6049.1, subd. (a).) To show that discipline is unwarranted, Boles must establish that either: (1) as a matter of law, his professional misconduct in Nevada does not warrant discipline in California; or (2) the Nevada proceedings failed to provide him with fundamental constitutional protections. (§ 6049.1, subd. (b)(2), and (3).) He has failed to prove either.

A. Failure to Perform and Communicate In Two Matters

We agree with the hearing judge that Boles failed to prove that his professional misconduct in Nevada does not warrant discipline in California as a matter of law. To the contrary, we find that he failed to communicate and to perform in both the Miller and Petro matters. From January through August 2011, Boles willfully failed to communicate in the Miller client matter by relocating to California without informing Miller and failing to ensure her inquiries were promptly addressed. During the same period, he failed to attend to Miller's Ninth Circuit appeal, including not timely filing the opening brief. Similarly, in the Petro matter, Boles failed to communicate with Petro about his medical leave and relocation and then failed to respond to her inquiries. He also failed to promptly confirm he would appear at her May 2011 hearing. In both cases, his clients were denied the opportunity to fully participate in their matters and were caused needless anxiety. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 931 [“An attorney must use his best efforts to accomplish with reasonable speed the purpose for which he was employed. Failure to communicate with and inattention to the needs of a client are grounds for discipline”].)

B. No Showing that Nevada Proceedings Were Fundamentally Unconstitutional

Boles has also failed to demonstrate the Nevada proceedings were constitutionally inadequate. His primary argument is that the Nevada Disciplinary Board violated his rights under the Americans with Disabilities Act (ADA) by disciplining him for his disability. His argument is vague, but we glean from his testimony that the Board offered him the choice of either voluntarily placing himself on disability inactive status for six months or facing trial. Boles maintains that he should have been given the option to reduce his caseload so that he could continue to work “while bearing the burden of his neurological condition” *and* avoid a disciplinary trial.

Guided by our decision in *In the Matter of Wolfgram* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 355, we find Boles’s argument lacks merit. In *Wolfgram*, we concluded the State Bar may require an attorney who qualifies for ADA protection to enroll as inactive if he or she is unable to meet professional obligations. (*Id.* at p. 362 [“[N]o provision of the ADA . . . would require the State Bar to make accommodations to allow respondent to practice law despite the substantial threat of harm to clients and the public as a result”].) Simply put, inactive status is not punishment for a disability; rather, it is a mechanism to protect the public and does not violate the ADA. By extension, we find that the ADA did not preclude the Nevada State Bar from requiring Boles to either enroll as inactive because he was unable to meet his professional obligations due to his illness or face discipline for his failures to perform and communicate in the Miller and Petro matters. The choice did not amount to punishing Boles for his disability.

We also find that Boles’s generalized claims that the Nevada proceedings were biased do not establish that they lacked fundamental constitutional protection. (*In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 228 [“broadly diffuse strokes of unfairness charges” and generalized claims insufficient to show lack of fairness].)

III. MITIGATION OUTWEIGHS AGGRAVATION⁹

The hearing judge found Boles's misconduct was mitigated by his lengthy career without prior discipline, and, to a lesser extent, by his physical difficulties. We agree that his career as an attorney for more than 20 years without a prior record of discipline is entitled to significant mitigation. (Std. 1.6(a) [mitigation for no prior record of discipline over many years coupled with present misconduct that is not serious].) We do not view Boles's misconduct as serious since it spanned only a few months in two cases, and did not involve a client security fund matter, moral turpitude, or other serious offense.¹⁰ (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant weight in mitigation for over 10 years of practice before misconduct]; see *In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608, 613 [21 years of discipline-free practice before failing to perform in four client matters entitled to significant mitigation].)

We disagree that Boles's physical difficulties are entitled to mitigating weight because he did not submit sufficient evidence to corroborate his testimony that neurological problems caused his misconduct. He also failed to establish "by clear and convincing evidence that [his neurological problems] no longer pose a risk that [he] will commit misconduct." (Std. 1.6(d).)

However, Boles fundamentally modified his practice to compensate for his physical difficulties and outlined the precautions he has taken "to make sure that my client[s] are well taken care of." He acknowledged that he had been "foolishly" busy before his illness. He has since found new counsel for most of his clients, and had only one remaining client at the time of trial, which he said he "could easily handle." We find that his recognition of his limitations and

⁹ Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct requires OCTC to establish aggravating circumstances by clear and convincing evidence. Subsequent references to standards are to this source. Standard 1.6 requires Boles to meet the same burden to prove mitigation.

¹⁰ Rule 5.126(B) of the Rules of Procedure of the State Bar provides that a serious offense means conduct involving dishonesty, moral turpitude, or corruption.

ameliorative actions warrant modest weight in mitigation. (See *Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 2 [favorable consideration given for “taking steps to repair the damage done and to prevent its recurrence”].)

In aggravation, we agree with the hearing judge that Boles committed multiple acts of misconduct by repeatedly failing to perform and communicate in two client matters. (Std. 1.5(b).)

We disagree, however, that Boles caused client harm. Standard 1.5(f) provides for aggravation in cases of “significant harm,” a level of harm not established by this record. The hearing judge erred in considering the harm inherent in the failure to perform and communicate as an independent basis for aggravation. (*In the Matter of Laden* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 678, 684 [considering harm inherent to misconduct would be duplicative and does not provide basis for aggravation].) Moreover, the Disciplinary Board did *not* find that Boles caused his clients prejudice or other cognizable harm, and the sparse factual record before us simply referencing the clients’ “needless anxiety” does not indicate client prejudice or other *significant* harm. (See *Calvert v. State Bar* (1991) 54 Cal.3d 765, 784-785 [no legally cognizable emotional harm absent evidence that client experienced unusual symptoms of stress]; see also *Young v. State Bar* (1990) 50 Cal.3d 1204, 1217 [no significant harm to client whose appeal was dismissed and later reinstated because “[a] delay of a few months in prosecuting an appeal, while it may be harmful to a client, is not unusual, and does not, standing alone, warrant the conclusion that the client was ‘significantly’ harmed thereby”].)

We reject OCTC’s arguments that we should find two additional factors in aggravation. First, while the Disciplinary Board found Boles lacked insight and remorse, we are not bound by their aggravation findings. Considering Boles’s testimony about the meaningful steps he has taken to ensure he will not fail to perform again, we disagree. Second, in contrast to Nevada, our

standards do not designate a lengthy career as an aggravating factor, and we see no reason to make such a finding in this case.

In sum, Boles's significant mitigation outweighs the aggravation present in this case.

IV. A 30-DAY SUSPENSION IS APPROPRIATE DISCIPLINE¹¹

We begin our discipline analysis with the standards that the Supreme Court instructs us to follow "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Although not binding, we give them great weight to promote "the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

Standard 2.5(b) establishes actual suspension as appropriate discipline for failures to perform or communicate that do not demonstrate a pattern of misconduct.¹² In view of the range of suggested discipline, we consider comparable case law for further guidance. (*In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160, 168 [decisional law appropriate as guidance when standards provide range of discipline].) Boles argues that a three-month actual suspension is excessive discipline.¹³ We agree.

At trial, OCTC argued that *King v. State Bar* (1990) 52 Cal.3d 307 supported a 90-day actual suspension. The hearing judge agreed. In *King*, the attorney, who practiced for 14 years with no discipline, failed to perform or return files in two client matters. His conduct was mitigated by his financial and emotional difficulties, but it was aggravated by lack of remorse and the fact that both clients suffered serious harm, with one client losing his cause of action and the other suffering long-term emotional distress.

¹¹ The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.)

¹² "Actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, or three years." (Std. 1.2(c)(1).)

¹³ In the alternative, Boles requests that we remand the case to the hearing department for consideration of medical evidence related to his physical disability. We deny this request.

On review, OCTC also relies on *Harris v. State Bar* (1990) 51 Cal.3d 1082. In *Harris*, an attorney with no discipline in 10 years of practice failed to perform in one matter over a four-year period, and then improperly withdrew. His misconduct caused monetary loss and prejudiced his client's causes of action. It was further aggravated by a lack of remorse and insight, and mitigated by illness.

We have also reviewed two cases recommending a six-month *stayed* suspension for attorneys with lengthy discipline-free careers who failed to perform in a single client matter and did not cause their clients substantial harm. (*Van Sloten v. State Bar, supra*, 48 Cal.3d 921; *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41.)

We find this matter is distinguishable from *Van Sloten* and *Riordan* because it involves misconduct in two client matters and is therefore more serious, calling for an actual suspension. On the other hand, *King* and *Harris* are also distinguishable as more serious than Boles's case because the attorneys lacked remorse, they caused substantial client harm, and the misconduct spanned a greater period of time. Comparing the relatively short duration of Boles's misconduct here, his more than 20 years of discipline-free practice, the steps taken to protect his clients, and the lack of significant harm, we find it unlikely that misconduct will recur. As such, we find the totality of the circumstances and relevant case law warrant reducing the hearing judge's recommendation. We recommend a 30-day actual suspension as appropriate and fair discipline.

V. RECOMMENDATION

For the foregoing reasons, we recommend that James Andre Boles 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 two years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first 30 days of 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 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.
4. 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.
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 Boles has complied with all conditions of probation, the stayed suspension will be satisfied and that suspension will be terminated.

VI. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Boles be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within

one year after the effective date of the Supreme Court order imposing discipline 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. 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.

HONN, J.

WE CONCUR:

PURCELL, P. J.

EPSTEIN, J.