

Filed June 25, 2015

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	Case No. 12-N-16765
	)	
VICTOR MARCEL COMSTOCK,	)	OPINION AND ORDER
	)	[As Modified on June 25, 2015]
A Member of the State Bar, No. 232078.	)	
_____	)	

This case illustrates the perils faced by an attorney who disregards the most basic of his discipline responsibilities. In this proceeding, Victor Marcel Comstock faces discipline for the third time for failing to file a compliance affidavit as required by California Rules of Court, rule 9.20(c).<sup>1</sup> For this violation, the hearing judge recommended Comstock receive a two-year actual suspension, conditioned upon satisfactory proof of his rehabilitation. The Office of the Chief Trial Counsel of the State Bar (OCTC) appeals and urges that disbarment is the appropriate discipline. Comstock does not appeal. He concedes culpability and supports the hearing judge’s recommended discipline.

Based on our independent review (rule 9.12), we adopt the hearing judge’s factual findings, as supplemented herein, and affirm the uncontested culpability determination. We also adopt the hearing judge’s finding of one aggravating factor for Comstock’s prior discipline, and we agree with the judge’s findings of three factors in mitigation — cooperation with the State Bar, extreme emotional difficulties, and remorse and recognition of wrongdoing. However, we

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<sup>1</sup> Rule 9.20(c) requires in relevant part that “[w]ithin such time as the order may prescribe . . . the member must file with the Clerk of the State Bar Court an affidavit showing that he or she has fully complied with those provisions of the order entered under this rule.” All further references to rules are to this source unless otherwise noted.

give less weight in mitigation for Comstock's recovery from his emotional difficulties and substance abuse, which span almost 30 years and were a significant factor in his misconduct. His four months of sobriety at the time of trial is an insufficient period to show the requisite rehabilitation.

In light of Comstock's two prior discipline records, standard 1.8(b) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct<sup>2</sup> applies, and provides that disbarment is appropriate, absent the most compelling mitigating circumstances. Ultimately, we conclude Comstock has not proven mitigating circumstances so compelling as to justify a departure from the presumptive discipline of disbarment under standard 1.8(b).

### **I. FACTS AND CULPABILITY**

Comstock was admitted to practice law on October 1, 2004. On March 2, 2011, he stipulated to culpability for failing to properly withdraw from a criminal matter (Rules of Prof. Conduct, rule 3-700(A)(2))<sup>3</sup> and failing to cooperate with the State Bar's investigation (Bus. & Prof. Code, § 6068, subd. (i)).<sup>4</sup> In his initial misconduct, Comstock ignored an order from the Court of Appeal directing him to file an opening brief or risk dismissal of his client's case. He did not file the brief, and took no action to reinstate the appeal after he received the notice of dismissal. He then ignored three letters from the California Appellate Project (CAP) requesting information on behalf of his client and urging him to withdraw or seek to reinstate the appeal.

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<sup>2</sup> All further references to standards are to this source.

<sup>3</sup> Rule 3-700(A)(2) provides: "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."

<sup>4</sup> All further references to sections are to this source. In pertinent part, section 6068 provides: "It is the duty of an attorney . . . (i) [t]o cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself."

In the resulting State Bar disciplinary investigation, Comstock failed to respond to two investigative letters, even after receiving a call from the investigator, during which Comstock pledged to respond within a week. Effective July 28, 2011, the Supreme Court suspended Comstock for one year, stayed, and placed him on probation for one year, subject to conditions (*Comstock I*). The conditions required, inter alia, that he: (1) contact the Office of Probation (Probation) within 30 days after the Supreme Court's order became effective to schedule a meeting to discuss his probation terms; and (2) file quarterly reports certifying his compliance with the State Bar Act and Rules of Professional Conduct.

When Comstock did not timely contact Probation or file his first quarterly report, OCTC moved to revoke his probation. The hearing judge granted the motion and recommended that Comstock's stay of suspension be lifted and that he be actually suspended from the practice of law for one year (*Comstock II*). The Supreme Court adopted the disciplinary recommendation and ordered Comstock to comply with rule 9.20(a) by notifying all clients, opposing counsel, and pertinent courts of his suspension and by returning all client files and unearned fees as of June 13, 2012. The Court further ordered him to file a compliance affidavit in accordance with rule 9.20(c) on or before July 23, 2012. Comstock received the Supreme Court's order, but did not timely file an affidavit of compliance. At the time, he was experiencing severe depression and had fallen into the abyss of addiction.

This matter commenced on October 30, 2012, when OCTC filed a one-count Notice of Disciplinary Charges (NDC), charging that Comstock failed to timely file a compliance affidavit in violation of rule 9.20(c) (*Comstock III*).<sup>5</sup> He did not respond to the NDC. Consequently, the hearing judge entered his default in January of 2013. OCTC petitioned for Comstock's

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<sup>5</sup> Comstock has not been charged with violating rule 9.20(a).

disbarment after default, and on August 12, 2013, the hearing judge issued its Order Submitting Default Matter for Decision.

Shortly thereafter, on September 3, 2013, Comstock filed his rule 9.20(c) affidavit of compliance, and moved to set aside the default the same day. In support of his motion, Comstock submitted a declaration attesting to his downward spiral of financial distress, depression, and substance abuse, all of which contributed to his probation and rule 9.20 violations. He explained that his clients stopped paying his fees in the spring of 2011, and he had “no discretionary income with which to pay for probation or the mandatory classes.” Comstock further detailed: “At or around this time, I began to explore avenues of escapism, of which alcohol became my primary substance of choice. . . . [¶] . . . [¶] I was drinking alcohol more frequently and more heavily to escape the depression under which I was suffering and for which I was self-medicating.” He described how OCTC’s petition for disbarment shocked him into action; he retained counsel and he enrolled in the State Bar’s Lawyer Assistance Program (LAP), seeking treatment to assist him in recovery. On October 2, 2013, the hearing judge found “good cause” to grant Comstock’s motion, lifted the default, and ordered that his verified answer be filed.

Since then, Comstock participated fully in these proceedings and has been wholly cooperative. Weeks before trial, he entered into a Stipulation as to Facts and Admission of Documents (Stipulation). OCTC tendered the Stipulation as its only evidence at the hearing below, and the hearing judge immediately made a culpability finding. This allowed the trial to proceed directly to the discipline phase, which consisted solely of Comstock’s testimony in mitigation.

On March 4, 2014, the hearing judge filed his decision, finding Comstock willfully failed to file a compliance declaration and thereby violated rule 9.20(c). The record — and principally Comstock’s stipulation to culpability — support this finding, and we affirm it.

## II. AGGRAVATION AND MITIGATION<sup>6</sup>

The hearing judge found one aggravating factor and three in mitigation. We agree with these findings but decrease the weight of mitigation afforded for Comstock’s emotional difficulties and recovery from substance abuse.

### A. Aggravation for Prior Discipline (Std. 1.5(a))

At trial, OCTC offered Comstock’s two prior discipline records as the only aggravating evidence. The hearing judge found aggravation based on those records, but did not specify the assigned weight. OCTC argues Comstock’s “prior disciplines, and failure to participate in the current proceedings for an extended period of time, represent a disturbing repetitive theme” and constitute “strong evidence in aggravation.”

We agree. Comstock’s prior misconduct demonstrates a recurring disregard of his duties to his client, his court-ordered probation obligations, and State Bar communications. We acknowledge that he eventually resurfaced and stipulated to culpability in *Comstock I*, despite his failure to participate in the discipline investigation. Unfortunately, this involvement was short-lived, as he promptly violated his probation conditions resulting from his stipulated discipline. We note, also, that his initial failure to cooperate in the instant proceedings resulted in his default. We thus assign significant aggravation under standard 1.5(a) as the earlier misconduct echoes the current misconduct.

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<sup>6</sup> Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Comstock to meet the same burden to prove mitigation. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

**B. Mitigation for Cooperation with State Bar (Std. 1.6(e))**

The hearing judge credited Comstock with mitigation, based on his “full stipulation of culpability with the State Bar,” which allowed OCTC to rest its entire case on the Stipulation and resulted in a one-day trial. In fact, although Comstock initially defaulted, we afford some weight to his cooperation after the hearing judge set aside his default. We thus give limited mitigation for cooperation under standard 1.6(e).

**C. Mitigation for Emotional Difficulties (Std. 1.6(d))**

Under standard 1.6(d), extreme emotional difficulties may be mitigating if expert testimony establishes they caused the misconduct, and provided that such difficulties (1) “were not the product of any illegal conduct by the member, such as illegal drug or substance abuse,” and (2) no longer pose a risk. The hearing judge found Comstock’s “addiction issues and in particular, his response in recognizing and addressing his problems, represent important mitigation in this matter.” OCTC contends Comstock should not receive mitigation under standard 1.6(d) because his own testimony and his LAP progress report are the only evidence of his rehabilitation and sobriety. OCTC also asserts that Comstock neither established a direct nexus between his addiction and the misconduct nor proved the addiction no longer poses a risk.

Mitigation for emotional difficulties has been afforded absent expert testimony. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1364 [lay testimony of emotional problems considered as mitigation].) However, in order to consider recovery from substance abuse as a mitigating factor, the attorney must have undergone “a meaningful and sustained period of rehabilitation.” (*Harford v. State Bar* (1990) 52 Cal.3d 93, 101.) Comstock credibly testified that he had abused alcohol and drugs for about approximately 25 years before achieving sobriety in 2013. In early 2011, Comstock suffered acute financial problems, leading to severe depression, which was the proverbial straw that broke the camel’s back, converting his semi-

functional addiction into full-blown incapacitation. He thus reached what he described as “the lowest point of [his] life.”

But Comstock testified that the threat of disbarment was a wake-up call, resulting in “a complete 180[-degree] turnaround.” He began voluntarily participating in LAP in August 2013 and credibly testified that he has been sober since then. The hearing judge found that Comstock “now understands his behaviors and has a new sense of self-worth,” and that “the [LAP] program has given him a drive to succeed.” Furthermore, Comstock has restructured his life entirely. He is employed full-time and attends LAP or Alcoholics Anonymous (AA) meetings on a daily basis. He also has developed a support system of family members and acquaintances from LAP and AA. Comstock testified that this structured regimen and newly erected support network allows him to manage stress effectively and to work through his rehabilitation “one day at a time.”

We find the evidence clearly indicates Comstock’s depression and substance abuse issues contributed to his misconduct. (See Rules Proc. of State Bar, rule 5.155(A); *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055.) We agree also that, since August 2013, Comstock has shown a “serious commitment to his recovery and rehabilitation.” But, at the time of his December 2013 trial, Comstock’s sobriety was in its earliest stages, and no evidence shows that he has been successfully treated for depression, which he admits “has been the underlying motive” of his substance abuse. We commend Comstock for his affirmative steps on the path to recovery. Still, four months of sobriety prior to trial simply do not constitute a “sustained period of rehabilitation” as required to justify “significant mitigation.” (*Harford v. State Bar, supra*, 52 Cal.3d at 101.) Accordingly, we are unable to afford more than limited mitigation for his emotional difficulties and rehabilitation. (See, e.g., *In re Billings* (1990) 50 Cal.3d 358, 367 [eight months’ sobriety was not meaningful and sustained period of rehabilitation].)

**D. Mitigation for Remorse and Recognition of Wrongdoing (Std. 1.6(g))**

The hearing judge found Comstock “has credibly shown remorse and a recognition of wrongdoing [and] has attempted to correct improper behaviors by his active participation in LAP along with a serious period of self-reflection.” The evidence reflects that he regrets his actions and has restructured his life so that he might achieve his “biggest goal [of] earning back [his] law license.” The judge concluded that this remorse is an important mitigating factor, and we agree.

**III. DISBARMENT IS APPROPRIATE**

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.) In assessing the appropriate level of discipline, we look to rule 9.20(d), which provides that a willful failure to comply with its own provisions is cause for disbarment or suspension. Additionally, we consider the standards (*In re Silvertown* (2005) 36 Cal.4th 81, 91), and, in particular, standard 1.8(b). That standard provides for disbarment as the presumptive discipline when a member has two or more prior records of discipline, and actual suspension was ordered in any one of the prior matters, “unless the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct.”

We are mindful that disbarment is not mandatory even where compelling mitigating circumstances do not clearly predominate. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [analysis under former std. 1.7(b)]; see also *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136 [to fulfill “purposes of lawyer discipline, we must examine the nature and chronology of respondent’s record of discipline”].) However, we are most concerned that Comstock’s prior misconduct, when considered with his current violation, evidences a continuing disregard for court orders and State Bar communications. (See *In the Matter of*



*Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [similarities between prior and current misconduct render previous discipline more serious, as they indicate prior discipline did not rehabilitate].) Indeed, from July of 2009 through July of 2013, Comstock consistently neglected his professional responsibilities, as follows:

- July - November 2009: disregarded all communications from the state Court of Appeal, resulting in dismissal of client's appeal, and failed to take any action upon receiving notice that appeal was dismissed;
- January - March 2010: failed to take action or respond to three letters from the CAP, seeking information regarding his client and urging Comstock to withdraw as counsel or move to reinstate client's appeal;
- April and May 2010: failed to respond to two investigative letters from the State Bar, despite receiving reminder phone call from a State Bar investigator, during which Comstock confirmed receipt of the first letter and agreed to respond within a week;
- August 2011: failed to timely contact assigned Probation deputy;
- October 2011: failed to file his initial quarterly report with Probation;
- January 2012: failed to respond to motion to revoke probation;
- July 2012: failed to timely comply with rule 9.20(c);
- November 2012: failed to file timely respond to the instant NDC or appear at a hearing department status conference;
- December 2012: continued failure to respond to NDC, despite OCTC's letter and email informing him that it would move for entry of default if he did not respond; and
- January - July 2013: failed to take any action to vacate his default.

Because Comstock's addiction was of long duration and central to his neglect of his professional obligations, and given the brief, four-month period of his recovery from addiction and the recent restructuring of his life, we find that he has not proven that the most compelling mitigating circumstances clearly predominate. (Compare with *In the Matter of Lawrence* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 239, 246-247 [most compelling mitigation for extreme physical difficulties where attorney underwent surgery to treat neuropathic disorder that contributed to misconduct, and had not experienced symptoms in 15 months following surgery]; *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 240-241 [most compelling mitigation for lack of harm, candor and cooperation, and extreme emotional

difficulties (bipolar mood disorder) that had been treated and brought under control, as demonstrated by no misconduct for six years thereafter].)

Where professional misconduct is attributed to chemical dependency, “a heavy burden remains on [the respondent] to demonstrate the kind of totally effective rehabilitation that would justify relief from or substantial reduction of discipline.” (*Howard v. State Bar* (1990) 51 Cal.3d 215, 222.) Here, we do not have adequate assurances that Comstock’s addiction no longer poses a risk to the public, the courts, and the profession. (*In re Billings, supra*, 50 Cal.3d 358, 369.) As such, we are unable to justify a departure from disbarment as provided by standard 1.8(b). (*Blair v. State Bar* (1989) 49 Cal.3d 762 [clear reasons for departure from standards should be shown].)

#### **IV. RECOMMENDATION**

We recommend that Victor Marcel Comstock, Member No. 232078, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys admitted to practice in this state.

We also recommend that Comstock be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

We further recommend that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable as provided in section 6140.7 and as a money judgment.

## V. ORDER

Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1) of the Rules of Procedure of the State Bar, Comstock is ordered enrolled inactive. The order of inactive enrollment is effective three days after service of this opinion. (Rules Proc. of State Bar, rule 5.111(D)(1).)

EPSTEIN, J.

WE CONCUR:

PURCELL, P. J.

STOVITZ, J. \*

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\* Retired Presiding Judge and Judge Pro Tem of the State Bar Court, appointed by the Supreme Court of California, sitting by designation of the Presiding Judge.