PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed May 16, 2018

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of KEITH GOFFNEY, A Member of the State Bar, No. 175821	)))))))	Case Nos. 16-O-10016; 16-O-15832 (Consolidated) OPINION AND ORDER

Respondent Keith Goffney was not entitled to practice law when he filed two ex parte requests to continue his client's case, and appeared in court on those requests. A hearing judge found him culpable of two counts of engaging in the unauthorized practice of law (UPL). The judge also found that Goffney's misconduct was mitigated by 28 years of discipline-free practice, his lack of bad faith, and no client harm; it was aggravated by his lack of insight. The judge ordered a public reproval and that Goffney attend State Bar Ethics School (Ethics School).

Goffney appeals. He argues that the charges should be dismissed on procedural grounds and because he did not engage in UPL. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal and supports the hearing judge's decision. Upon independent review of the record (Cal. Rules of Court, rule 9.12), we reject Goffney's arguments, and affirm the hearing judge's culpability findings and discipline order.

I. PROCEDURAL HISTORY

On August 4, 2016, OCTC filed a four-count Notice of Disciplinary Charges (NDC) in Case No. 16-O-10016. Counts one and three charged that Goffney violated Business and

Professions Code section 6068, subdivision (a),[1] by holding himself out as entitled to practice law and actually practicing law when he was not an active member of the State Bar, in violation of sections 6125 and 6126.[2] Counts two and four charged that Goffney committed acts of moral turpitude, in violation of section 6106,[3] by engaging in the UPL described above when he knew, or was grossly negligent in not knowing, that he was not an active member of the State Bar.

The trial was set for January 18, 2017. On December 20, 2016, the State Bar filed an additional two-count NDC in Case No. 16-O-15832. Count one charged that Goffney violated section 6068, subdivision (a) (UPL), by maintaining an outgoing voicemail message on his law office telephone implying that an active attorney was associated with the office. Count two charged that Goffney violated section 6106 (moral turpitude) because he intended to mislead the public by leaving the outgoing message. The hearing judge consolidated the two NDCs on January 9, 2017, held the trial on April 18 and 19, and issued her decision on June 22, 2017.

The judge found Goffney culpable of counts one and three (UPL) in the first NDC, and dismissed counts two and four (moral turpitude). The judge also dismissed both counts in the second NDC. OCTC does not challenge these dismissals, which the record supports.

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[1] This section provides that an attorney must "support the Constitution and laws of the United States and of this state." All further references to sections are to the Business and Professions Code.

[2] Section 6125 provides: "No person shall practice law in California unless the person is an active member of the State Bar." Section 6126 prohibits an individual who is not an active member of the State Bar from holding himself or herself out as entitled to practice law. (*In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 506 [violations of §§ 6125 and 6126 constitute violation of § 6068, subd. (a)].)

[3] Section 6106 states: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."

II. GOFFNEY'S REQUEST TO DISMISS IS DENIED

Goffney seeks to dismiss Case No. 16-O-10016 (the first NDC) on procedural grounds. He argues that the hearing judge erred by denying his oral trial motion to dismiss the charges because they were not brought to trial within 125 days of when the first NDC was served, pursuant to rule 5.102(C) of the State Bar Rules of Procedure.[4] That rule provides: "Unless the hearing judge finds, in writing, that good cause exists for a continuance, the trial will begin no later than 125 days after the [NDC] is served . . . ." Citing *Serna v. Superior Court* (1985) 40 Cal.3d 239, Goffney argues that rule 5.120(C) should be interpreted consistently with the constitutional "speedy trial" right of criminal defendants. His argument lacks merit.

A disciplinary proceeding is not intended to punish an attorney, but to protect the public, the courts, and the legal profession. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.1;[5] *Best v. State Bar* (1962) 57 Cal.2d 633, 637.) For this reason, discipline proceedings are not governed by rules of procedure applicable to criminal litigation. (*Emslie v. State Bar* (1974) 11 Cal.3d 210, 224 [criminal procedure rules do not apply in disciplinary proceedings]; *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 912 [no right to jury trial in State Bar proceeding].) In 2010, the State Bar Board of Governors (now Board of Trustees) enacted rule 5.102(C) as one of several measures designed to streamline the disciplinary process; it did not and could not convey constitutional rights or remedies. (See Board of Governors' Agenda Item, September 121, dated September 7, 2010, admitted to augment the record.) Finally, any delay in a disciplinary proceeding will merit consideration only if the delay

[4] All further references to rules are to the State Bar Rules of Procedure unless otherwise noted.

[5] All further references to standards are to this source.

causes "specific, legally cognizable prejudice." (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.) Goffney has not demonstrated such prejudice.[6]

III. THE FIRST NDC (Case No. 16-O-10016)

A. Facts

The facts of this case are straightforward and largely undisputed.[7] In June 2015, in an unrelated fee arbitration matter, the Presiding Arbitrator of the State Bar's Mandatory Fee Arbitration Program (Presiding Arbitrator) filed a motion to enroll Goffney involuntarily inactive and ineligible to practice law because he failed to pay an award in favor of one of his clients. On July 20, 2015, the Hearing Department granted the motion. Goffney was involuntarily enrolled as an inactive member and placed on "Not Entitled" status, effective July 25, 2015. He made several failed challenges to this order in the Review Department, and has been ineligible to practice law since this date. Goffney had actual knowledge of his inactive status at all relevant times in these proceedings.

In 2015, Goffney represented Osborn LaRay Fowler in a family law case entitled *County of Los Angeles v. Osborn LaRay Fowler*, Los Angeles County Superior Court, Case No. BY650585. In late September 2015, Goffney remained on "Not Entitled" status and knew that he would not be able to represent Fowler at an upcoming evidentiary hearing on October 8. Fowler had not been able to hire alternate counsel. After speaking to a superior court clerk, Goffney concluded that, despite his inactive status, he could file an ex parte application to notify the superior court that he would not be able to appear at the October hearing.

[6] We note that the hearing judge consolidated the first and second NDCs without objection, and commenced trial within 125 days of the filing of the second NDC.

[7] The facts are based on the parties' Partial Stipulation as to Facts and Admission of Documents (Stipulation), trial testimony, documentary evidence produced at trial, and the hearing judge's factual findings, which are entitled to great weight. (Rule 5.155(A).)

1. Goffney's First Ex Parte Request for Continuance

On September 29, 2015, Goffney filed an ex parte request on behalf of Fowler to continue the October hearing (Request), and appeared in court that same day in support of the Request. Goffney entitled the pleading "Respondent's Ex Parte Request for Continuance of Hearing to Next Available Date." The Request did not contain the word "attorney" with Goffney's name or his State Bar number, but it was prepared on "Law Offices of Keith Goffney" stationery and indicated it was filed "for Respondent Osborn LaRay Fowler." Goffney disclosed in the Request that he was not entitled to practice law and sought a continuance of the October 8 hearing to allow him to resolve his matter with the Presiding Arbitrator. He stated in the Request that if he were not able to resolve his status with the State Bar, he expected that his client would retain other counsel for the December 8, 2015 hearing. The signature in Goffney's attached declaration shows "Keith Goffney" on one line, "for" on the next line, and "Respondent Osborn LaRay Fowler" on the third line.

On September 29, a superior court judge called the Request for hearing, and asked Goffney to make an appearance. Goffney declined, stating that he was not allowed to do so. The judge proceeded with the hearing and asked Goffney for his name. Goffney answered. The judge asked Goffney if he gave notice of the ex parte request to opposing counsel. Goffney replied: "I did, your honor, and there is a declaration of notice there." The judge inquired of the opposing side: "Counsel [Goffney] is asking for Tuesday, December 8th, does that date work for the County?" The date was agreed upon, and the judge granted the Request, continuing the October 8 hearing to December 8, 2015. The judge asked Goffney to give notice, and he agreed. The judge made no comment about Goffney's ineligibility to practice law described in his pleadings. Fowler was not present, yet the minute order states that he appeared "pro per."[8]

[8] No evidence explains this entry since Goffney filed the Request and appeared in court on Fowler's behalf. Nor does the record support the hearing judge's finding or Goffney's argument that the superior court considered his Request sua sponte.

2. Goffney's Second Ex Parte Request for Continuance

Since Goffney remained on "Not Entitled" status in early December 2015, he knew he would not be able to appear at the December 8 hearing. On December 3, he filed a second ex parte request for continuance and appeared at the hearing that day. Goffney entitled this pleading "Respondent's Further Ex Parte Request for Continuance of Evidentiary Hearing" (Further Request). The Further Request was nearly identical to the first Request, but it sought a continuance to March 2016, and included argument about the purpose of the evidentiary hearing Goffney was trying to continue.

Another superior court judge called the case and reacted differently than the first judge did. This judge began by asking for Goffney's appearance in open court. Goffney provided his name but stated: "I am not making an appearance." The judge immediately swore him in as a witness and advised him of his Fifth Amendment rights. When Goffney told the judge he was "trying very hard not to make a court appearance," the judge sternly told Goffney that he *was* making an appearance. The judge further advised: "What you needed to do was to hire a lawyer who is eligible to practice law to come in and make this application. That's what you needed to do." The judge denied the Further Request without prejudice, and ordered that Goffney be reported to the State Bar. A week later, on December 8, the superior court granted Fowler's request to continue the hearing to January 12, 2016, so he could hire counsel.

B. Culpability

The hearing judge found Goffney culpable of UPL, as charged in counts one and three of the first NDC. The judge found that Goffney actually engaged in UPL by filing the two requests for continuance for Fowler and by appearing in court on those requests on September 29 and December 3, 2015. The judge did not find that Goffney held himself out as entitled to practice law because he made earnest efforts to inform the superior court of his status. We agree with the

judge's reasoning and find Goffney culpable of UPL. (See *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542 ["In a pragmatic sense, the practice of law encompasses all of the activities engaged in by attorneys in a representative capacity"].)

The hearing judge dismissed counts two and four of the NDC (moral turpitude), finding that Goffney's UPL did not involve moral turpitude, dishonesty, or deception. Instead, the judge found that Goffney made good faith attempts to alert the court to his status, though his actions constituted the practice of law. We affirm these dismissals as supported by the record and relevant case authority. (Compare *In the Matter of Tishgart* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 338, 343–344 [UPL involved moral turpitude because attorney concealed his suspension and left false impression he was entitled to practice law] with *In the Matter of Hazelkorn* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 602, 606 [UPL did not involve moral turpitude where attorney honestly believed entitled to practice].)

C. Goffney's Arguments on Review

Goffney maintains that his actions did not constitute UPL. His arguments lack merit. First, he contends that his Request and Further Request were filed "only as a means to communicate his predicament to the court, as directed by that court's clerk. No other means to communicate was available." But his requests were not merely intended to disclose that he was not entitled to practice law—each plainly requested a continuance of his client's upcoming evidentiary hearing. Goffney could have notified the court *only* of his inactive status without seeking affirmative judicial action. Or, as the superior court judge instructed at the December 3, 2015 hearing, Goffney could have hired a licensed attorney to make the appearance.

Second, Goffney claims he is not culpable of UPL because he made efforts to ensure that he did not practice law. He cites the fact that he filed the pleadings before the hearing date as ex parte requests to inform the court he was "Not Entitled" to practice law. He also points out that

he did not refer to himself as "attorney" in his pleadings, he attempted to reveal at the outset of the hearings that he could not appear, and he attended the hearings without his client. While we acknowledge that Goffney endeavored to avoid practicing law, his efforts were unsuccessful. The fact remains that he filed two formal pleadings on behalf of his client, appeared in court in support of them, and even secured the continuance he sought in his first Request. (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128 [practice of law is doing and performing services in court]; *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 318–319 [appearing twice in court for one client constitutes UPL].) Goffney's actions constituted UPL.

Third, Goffney relies on *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, to support his argument that he did not practice law. His reliance is misplaced. *Hunter* involved an attorney who did not appear in court because he was ineligible to practice law even though he had been ordered to appear. We found that the attorney's ineligibility to practice law did not relieve him of his obligation to appear in court, *as ordered*. (*Id*. at p. 77, fn. 9.) We also found that the attorney "was obligated to do everything in his power to obey the court's order *short of practicing law*, and at a minimum should have been physically present in court . . . . This would not have constituted the practice of law." (*Ibid.*, italics added.) Goffney's conduct was fundamentally different and went beyond what the *Hunter* court prescribed. On the dates Goffney appeared in court, he initiated the hearings, and no court order required him to appear. His mistake was in using formal pleadings to request affirmative judicial relief for his client, and then appearing at the related hearings when he was not entitled to practice law.

Finally, Goffney asserts that we must find that he attempted to deceive clients or the court about his "Not Entitled" status in order to find him culpable of UPL. He is incorrect. Deception

is not a required element of either section 6125 or 6126. (See *In the Matter of Burke* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 448, 455 [discussing mens rea for §§ 6125 and 6126 violations].) Nor is lack of deception a defense to a UPL charge. (*Morgan v. State Bar* (1990) 51 Cal.3d 598, 604.)

IV. THE SECOND NDC (Case No. 16-O-15832)

The hearing judge dismissed both counts in the second NDC, finding that Goffney did not engage in UPL or commit an act of moral turpitude by leaving the outgoing telephone message. We affirm these unchallenged dismissals because the evidence does not support the UPL or moral turpitude charges, as analyzed below.

Goffney closed his law office after he was placed on inactive status. He kept his office telephone number, which was listed with the State Bar, until December 2016. Between September 1 and November 23, 2016, the voicemail message stated: "You've reached our Los Angeles law offices. We are currently on the phone, in court, or out of the office. Please leave a message with your name and phone information and we will contact you promptly." During August 2016, Goffney spoke to attorney Dorian Jackson on the telephone. Jackson asked him to appear as a witness in a case he was handling for Goffney's friend. Jackson testified that he asked Goffney if he was an attorney, and Goffney replied that he was. Goffney denies this.

The hearing judge reasoned that dismissal of both charges in the second NDC was appropriate because the record failed to establish culpability. Specifically, the voicemail message did not mention Goffney's name or otherwise suggest that the telephone number belonged to him. The judge also found she could not rely on Jackson's testimony to prove that Goffney committed UPL by stating he was an attorney because, even if true, the NDC did not charge Goffney with holding himself out *to Jackson* as entitled to practice law, and OCTC did not amend the NDC to conform to proof.

V. AGGRAVATION AND MITIGATION

Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [clear and convincing evidence leaves no substantial doubt and commands the unhesitating assent of every reasonable mind].) Goffney has the same burden to prove mitigation. (Std. 1.6.)

A. Aggravation

The hearing judge considered but did not assign aggravation for multiple acts of wrongdoing under standard 1.5(b) because Goffney was only culpable for two instances of misconduct. OCTC does not challenge this finding, and we affirm. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 839.)

However, the judge did assign aggravation for Goffney's lack of insight because he continued to assert at trial that his conduct did not constitute UPL. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317 [attorney's lack of insight into wrongfulness of actions may be aggravating factor].) On review, he maintains the same position. He refuses to acknowledge that he filed his ex parte requests in a representative capacity, and he contends that they were merely notices to the superior court of his ineligibility to practice law. This is simply incorrect. His ex parte requests clearly sought continuances of his client's scheduled court hearings, in addition to informing the court he was an inactive attorney. We reject Goffney's argument that titling his pleadings "requests" rather than "motions" insulates him from the charge of practicing law.

Given Goffney's continuing claim he did not practice UPL, OCTC asks us to affirm the lack of insight finding. It argues his failure to acknowledge his wrongdoing demonstrates he is "unwilling or unable to acknowledge or appreciate the true nature of his conduct or its impropriety." We agree as the evidence is clear that Goffney practiced law by filing pleadings that made affirmative requests on behalf of his client and appearing in court on those requests.

While the law does not require Goffney to be falsely penitent, it "does require that [he] accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz, supra*, 1 Cal. State Bar Ct. Rptr. at p. 511.) He has not done so, which raises concerns about possible future misconduct. (See *Blair v. State Bar* (1989) 49 Cal.3d 762, 781–782.) We assign moderate aggravating weight to Goffney's lack of insight.

B. Mitigation

We reduce the hearing judge's findings of "very significant" mitigation for Goffney's 28 years without discipline to "significant" mitigation, given his lack of insight into his wrongdoing. (Std. 1.6(a) [absence of discipline over many years coupled with present misconduct not likely to recur is mitigating]; *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [more than 10 years of misconduct-free practice entitled to significant weight].) We affirm the judge's findings of significant mitigation for no client harm. (Std. 1.6(c).) But we do not agree that mitigation credit should be assigned for the absence of bad faith under *Arm v. State Bar* (1990) 50 Cal.3d 763, 779–780, where the attorney "mistakenly believed" he was serving his client's interests by engaging in UPL. Though the hearing judge found that Goffney made misguided attempts to help his client, this does not amount to a mistaken belief or lack of bad faith as he should have known he was wrongfully practicing law by filing pleadings that requested continuances and appearing in court. Finally, the hearing judge did not assign mitigation credit for cooperation. We afford moderate weight to this factor, however, because Goffney entered into a detailed, partial Stipulation, which assisted OCTC with its prosecution. (Std. 1.6(e) [mitigation for cooperation with State Bar].)

VI. A PUBLIC REPROVAL 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.) Our disciplinary analysis begins with the standards, which, although not binding, are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.) The Supreme Court has instructed us to follow them whenever possible. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.)

Standard 2.10(b) provides that suspension or reproval is the presumed sanction for UPL, depending on whether the attorney knowingly engaged in the UPL. Goffney contends that even a public reproval is unfair and burdensome because he was merely trying to help his client, which "might benefit the administration of justice and all parties." It appears that the hearing judge considered Goffney's motives, finding he made "misguided attempts to help his client who was unable to find another attorney." Yet, the judge properly found Goffney culpable of UPL and determined that he lacked insight into his misconduct. Given Goffney's three factors in mitigation (no prior discipline, no client harm, and cooperation) and one factor in aggravation (lack of insight), discipline at the low end of the standard's range is appropriate.

We also look to comparable case law. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.) Like the hearing judge, we find guidance in *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229. The attorney in *Trousil* received a 30-day actual suspension for engaging in limited UPL with three prior records of discipline that were offset by substantial mitigation. (*Id*. at pp. 241–242.) Here, Goffney engaged in limited UPL, proved three factors in mitigation, and has no prior discipline record—which supports less than an actual suspension. We affirm the hearing judge's order for a public reproval and Ethics School. OCTC does not challenge this discipline, it is consistent with the applicable disciplinary standards and decisional law, and we find it adequate to protect the public, the courts, and the legal profession.

VII. ORDER

Keith Goffney is ordered publicly reproved, to be effective 15 days after service of this opinion and order. (Rule 5.127(A).) He must comply with the specified condition attached to the public reproval. (Rule 5.128; Cal. Rules of Court, rule 9.19.) Failure to comply with this condition may constitute cause for a separate proceeding for willful breach of rule 1-110 of the Rules of Professional Conduct.

Goffney is ordered to comply with the following condition: Within one year of the effective date of this public reproval, he must submit to the Office of Probation satisfactory evidence of completion of 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. (Rule 3201.)

VIII. 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.

PURCELL, P. J.

WE CONCUR:

HONN, J.

McGILL, J.