PUBLIC MATTER — NOT DESIGNATED FOR PUBLICATION

Filed June 12, 2015

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 12-N-16663
	)	
ALBERT MYRICK GRAHAM JR.,	)	OPINION
	)	
A Member of the State Bar, No. 44490.	)	
	)	

This is the third disciplinary proceeding for Albert Myrick Graham Jr. He appeals from a hearing judge's decision finding him culpable of failing to comply with California Rules of Court, rule 9.20,[1] and recommending discipline including a two-year actual suspension to continue until he proves his rehabilitation and fitness to practice law. Graham contends that the Office of the Chief Trial Counsel (OCTC) failed to demonstrate he willfully violated rule 9.20 and, alternatively, that a "technical and insignificant instance of noncompliance" with the rule should not result in the imposition of discipline. OCTC requests that we affirm the hearing judge's recommendation.

The factual findings are largely undisputed. Instead, the issues before us are whether the facts support a culpability finding and, if so, the appropriate discipline. After independently reviewing the record under rule 9.12, we adopt and affirm the hearing judge's factual and culpability findings, as modified below, and affirm the judge's discipline recommendation.

[1] All further references to rules are to the California Rules of Court unless otherwise noted.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

Graham has been a member of the State Bar since 1969 and has two prior records of discipline. First, in 2002, he stipulated to improperly entering into a business transaction with a client. No aggravating factors were present and mitigation credit was given for no prior discipline, no harm, candor and cooperation, and good character. Graham received a private reproval. Second, in 2012, he was found culpable of moral turpitude based on a United States Tax Court finding that he fraudulently underpaid his taxes by $157,000. The misconduct was aggravated by his prior discipline, multiple acts of misconduct, lack of candor, and a lack of insight and remorse. Mitigation credit was given for good character and extensive community service. Graham received a two-year actual suspension to continue until he proves his rehabilitation and fitness to practice law.

In his second disciplinary matter, the California Supreme Court denied Graham's petition for review on June 13, 2012, and issued Order No. S201839 (9.20 Order). That order required that Graham comply with rule 9.20 by performing the acts specified in subdivisions (a)[3] and (c)[4] within 30 and 40 days, respectively, after the effective date of the order.

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[2] Rules of Procedure of State Bar, rule 5.155(A), provides that the "findings of fact of the hearing judge are entitled to great weight."

[3] In relevant part, subdivision (a) provides that an attorney must: "Notify all clients being represented in pending matters and any co-counsel of his or her [suspension] and his or her consequent disqualification to act as an attorney after the effective date of the [suspension], and in the absence of co-counsel, also notify the clients to seek legal advice elsewhere; [¶] Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties of the [suspension] and consequent disqualification to act as an attorney after the effective date of the [suspension], and file a copy of the notice with the court, agency, or tribunal before which the litigation is pending for inclusion in the respective file or files."

[4] In relevant part, subdivision (c) provides that "[w]ithin such time as the order may prescribe after the effective date of the member's [suspension], 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."

In this proceeding, Graham stipulated that the Supreme Court properly served him with a copy of the 9.20 Order on June 13, 2012, which he received. He also stipulated that he represented 29 clients as of that date.

On August 14, 2012, Graham filed a form Rule 9.20 Compliance Declaration. He did not, however, check the box certifying that he had "notified all clients and co-counsel, in matters that were pending on the date upon which the order to comply with Rule 9.20 was filed by certified or registered mail, return receipt requested, of my consequent disqualification to act as an attorney after the effective date of the order of suspension." Instead, Graham attached a supplemental declaration. In it, he stated that he had removed himself as counsel of record that day in 28 of 29 pending matters and that "[a]ll of those substitutions or withdrawals were signed or served on the clients, on opposing counsel and filed with the respective courts." He further declared that "because they are no longer pending, there would seem to be no reason warranting any further notifications to those [former 28] clients, opposing counsel and the courts, because they already have been notified and I am no longer representing them." As to the remaining client matter, he asserted, "I have sent the Rule 9.20(a) notifications required via certified mail and filed them with the applicable court."[5]

The Office of Probation of the State Bar rejected the compliance declaration for a variety of reasons, including that Graham was to have provided rule 9.20 notices in all matters pending as of June 13, 2012 (the date the 9.20 Order was filed). Graham's counsel responded by countering that August 13, 2012 — 30 days after the effective date of the 9.20 Order — was the operative date. He asserted that, therefore, as Graham had only one client on that date, he was in compliance with rule 9.20 by virtue of sending the required notices in that matter. Graham

[5] In addition to the other notice requirements, rule 9.20 specifies that they must be provided by registered or certified mail, return receipt requested, and must contain an address where communications to the suspended member may be directed.

thereafter filed two additional supplemental declarations regarding his compliance efforts, but did not declare he sent notices pursuant to rule 9.20 in all 29 matters. The Office of Probation rejected both declarations.

At his disciplinary trial, Graham's testimony was consistent with his declarations. He stated that he sent rule 9.20 notices in one client matter but did not do so in 28 matters. As for these, Graham filed 22 attorney substitution forms between July 5 and August 10, 2012, serving copies on opposing counsel or unrepresented parties in each matter. The forms, however, did not explicitly inform them of Graham's suspension and his "consequent disqualification to practice." In the other six matters, Graham filed notice of withdrawal forms between July 10 and August 9, 2012, with the notices provided to each client, opposing counsel, and the court. Again, these forms did not provide explicit notice that he was suspended and precluded from practicing law.

We adopt the hearing judge's finding that Graham's rule 9.20 compliance efforts were based on the advice of his attorney and under the misapprehension that the required notices were not necessary for clients and matters in which he had formally removed himself prior to commencement of his suspension. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315 ["[D]eterminations of testimonial credibility must receive great weight because the hearing judge heard and saw the witnesses and observed their demeanor. [Citations.]"].) We also adopt the hearing judge's determination that Graham orally notified all of his clients of his suspension before it went into effect.

II. CULPABILITY

On February 15, 2013, OCTC filed a one-count Notice of Disciplinary Charges (NDC) seeking Graham's disbarment. The NDC alleged that Graham failed to comply with rule 9.20 and the 9.20 Order by failing "to serve notice of his suspension in the manner prescribed by rule 9.20(a) in 28 of the 29 client matters that were pending on June 13, 2102, and by failing to file a

declaration of compliance with rule 9.20 in conformity with the requirements of rule 9.20(c)." The hearing judge found Graham culpable as charged and recommended a two-year actual suspension to continue until he proves his rehabilitation and fitness to practice law.

On review, Graham argues he fully complied with the 9.20 Order through a combination of substitutions, withdrawals, and oral notifications. He also contends that, given his compliance efforts, he cannot be found to have willfully violated either the order or the rule. We disagree.

Graham's deadline for client identification under rule 9.20 was June 13, 2012. The operative date for identification of clients being represented in pending matters and others to be notified under rule 9.20 is the filing date of the Supreme Court order for compliance and not any later effective date. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) We find, therefore, that Graham was required to provide written notice in all 29 matters pending on June 13, 2012, via certified or registered mail to his clients and any co-counsel, of his suspension and his "consequent disqualification to act as an attorney" after the suspension's effective date. Further, in matters without co-counsel, he was required to advise those clients to seek legal advice elsewhere. (Rule 9.20(a)(1), (c).) He was obligated to provide the same notices to opposing counsel in pending litigation matters and to file them in the respective courts. (Rule 9.20(a)(4).)

That Graham formally removed himself as counsel in 28 matters *after* the operative date did not obviate his duty to comply with the 9.20 Order in all 29 cases. (*Athearn v. State Bar*, *supra*, 32 Cal.3d at p. 45 [rule provisions "clearly contemplate *advance* notice to *existing* clients of the attorney's prospective inability to represent their interests" (original italics)].) Accordingly, we find that OCTC established by clear and convincing evidence that Graham did not provide the requisite rule 9.20 notices in all pending matters.[6]

[6] 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.)

Further, Graham's contention that he did not commit a willful violation because he actually notified his clients of his upcoming suspension and because he caused no client harm is unavailing. Client notification of an impending suspension is one part of rule 9.20 compliance but does not constitute full compliance. In *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187, the Court stated: "Nothing on the face of [rule 9.20] or in [Supreme Court] practice distinguishes between 'substantial' and 'insubstantial' violations of [rule 9.20]. In every case, [rule 9.20] performs the critical prophylactic function of ensuring that all concerned parties — including clients, co-counsel, opposing counsel or adverse parties, and any tribunal in which litigation is pending — learn about an attorney's discipline (Citations.)"[7] (See also *Hippard v. State Bar* (1989) 49 Cal.3d 1084 [no client harm necessary to establish rule 9.20 violation].) Moreover, Graham acted willfully when, after receiving, reading, and, as he testified, understanding the 9.20 Order, he elected to comply in only one of 29 matters.[8] (See *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [willfulness under rule 9.20 does not require bad faith or intent to violate law or to injure another]; see also *Durbin v. State Bar* (1979) 23 Cal.3d 461, 467 [no intent to violate law, to injure another, or to acquire advantage required].) While Graham's efforts vis-à-vis his clients warrant consideration in mitigation, we find he is culpable for his noncompliance.

Regarding the allegation that Graham also failed to file a declaration of compliance in conformity with rule 9.20(c), we adopt and affirm the hearing judge's finding that Graham's failure to satisfy subdivision (c)'s requirements "does not reflect any additional misconduct or disregard by [Graham] of the Supreme Court order, [and] there is no reason to treat it as an additional basis for discipline."

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[7] References to former rule 955 in *Lydon v. State Bar, supra,* were replaced with current rule 9.20 for clarity.

[8] That Graham acted on the advice of counsel is not a defense of wrongdoing. (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 [opinion of "fellow attorney" no defense to misconduct].)

III. MITIGATION OUTWEIGHS AGGRAVATION[9]

The hearing judge correctly found two factors in aggravation. First, Graham's two prior records of discipline constitute serious aggravation. (Std. 1.5(a).) Second, he persists in maintaining that he satisfied rule 9.20 despite the Office of Probation's contention and the hearing department's decision, unequivocally supported by Supreme Court authority, that he has not done so. This ongoing lack of insight into his misconduct warrants some weight in aggravation because it suggests his conduct may recur. (See std. 1.5(g); *Weber v. State Bar* (1988) 47 Cal.3d 492, 506 [failure to acknowledge wrongdoing is aggravating factor].)

In mitigation, we agree with the hearing judge that Graham's efforts to comply with rule 9.20 prevented harm to his clients, the public, or the courts. Before his suspension began, he notified all his clients, returned their funds and files, and otherwise made necessary arrangements in all matters. In short, as the hearing judge found: "Had Respondent taken these steps only a few weeks earlier, there would have been no need" for rule 9.20 compliance in those matters. Graham's efforts are entitled to significant mitigation. (Std. 1.6 (c) [mitigation for lack of harm to clients].)

Graham is also entitled to mitigation credit for stipulating to certain facts and to admission of all exhibits. (Std. 1.6(e); *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [stipulation to relevant facts assists prosecution and is mitigating].) Like the hearing judge, we take judicial notice of the fact that we previously provided Graham with mitigation credit for his community service.

[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. Standard 1.6 requires Graham to meet the same burden to prove mitigation. All further references to standards are to this source.

IV. A LENGTHY SUSPENSION IS APPROPRIATE DISCIPLINE[10]

Our disciplinary analysis begins with rule 9.20 itself. It provides that a willful violation "is cause for disbarment or suspension and for revocation of pending probation. (See *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131 [Supreme Court has established that rule 9.20 violation is serious ethical breach for which disbarment is generally considered appropriate discipline].)[11]

Next, we look to the standards. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Specifically, we focus on standard 1.8(b), which provides that disbarment is appropriate for a member with two or more prior records of discipline if actual suspension was ordered in any of the previous disciplinary matters or if the prior discipline coupled with the current record demonstrate the member's unwillingness or inability to conform to ethical responsibilities. It further provides for a departure from the presumptive recommendation of disbarment if the most compelling mitigating circumstances clearly predominate.

In a thoroughly considered decision, the hearing judge analyzed rule 9.20 violation cases and acknowledged the applicability of standard 1.8(b), but stopped short of recommending disbarment. OCTC takes the position that "after balancing all relevant factors, including [the] misconduct, the standards, case law, and [significant aggravation] tempered by the finding of compelling mitigation, the Hearing Department's recommendation that [Graham] be actually suspended for two years and until he demonstrates rehabilitation and fitness to practice law, is the minimum discipline . . . . The Hearing Department's recommendation should be affirmed."

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[10] 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.)

[11] Discipline less than disbarment has been imposed in rule 9.20 violation cases where the attorney has demonstrated good faith, significant mitigation, and little or no aggravation. (See *Shapiro v. State Bar* (1990) 51 Cal.3d 251; *Durbin v. State Bar, supra,* 23 Cal.3d 461; *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192; *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527.)

Though disbarment should be considered under standard 1.8(b), we do not discern reasons strong enough to recommend it since the hearing judge and OCTC agree that a lesser discipline is appropriate under the circumstances.[12] We do not find that compelling mitigating circumstances clearly predominate, but we agree that strong mitigating circumstances are present. Graham has not caused any injury to a client or the public in any of his three discipline cases. Further, he took substantial steps to comply with the 9.20 Order and satisfied one of its primary goals — namely, to give clients advance notice of his impending suspension. He did not seek to avoid compliance; instead, he relied on the advice of his attorney and acted in good faith. Of critical importance is that Graham did not engage in any deception and honestly reported his compliance efforts to the State Bar. Finally, he responded to the Office of Probation and has fully participated in this disciplinary proceeding.

However, Graham's position that no discipline is warranted is wholly without support. Both the Supreme Court directive that willful violation of rule 9.20 is, "by definition, deserving of strong disciplinary measures" (*Hippard v. State Bar*, *supra*, 49 Cal.3d at p. 1096) and the principle of progressive discipline embodied in the standards recommend a lengthy period of suspension. Moreover, Graham has yet to acknowledge his deficiencies in complying with rule 9.20. After considering all relevant factors and the range of discipline suggested by the rule and the standard, we affirm the hearing judge's decision. Accordingly, we recommend a two-year actual suspension, to run concurrently with any remaining portion of Graham's existing suspension, with the requirement that Graham present proof at a formal hearing of his rehabilitation and present fitness to practice law pursuant to standard 1.2(c)(1).

[12] Clear reasons for departure from the standards must be shown. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

V. RECOMMENDATION

For the foregoing reasons, we recommend that Albert Myrick Graham Jr. be suspended for three years, that execution of that suspension be stayed, and that he be placed on probation for three years with the following conditions:

1. He must be suspended from the practice of law for a minimum of the first two years of the period of his probation, and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

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 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.

4. 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.

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 he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VI. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Albert Myrick Graham Jr. be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension 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. RULE 9.20

We further recommend that Albert Myrick Graham Jr. be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

VIII. COSTS

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

HONN, J.

WE CONCUR:

PURCELL, P. J.

EPSTEIN, J.