PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

FILED December 5, 2013

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case Nos. 07-O-12306; 10-C-11055
	)	
DONALD CHARLES SCHWARTZ,	)	OPINION
	)	
A Member of the State Bar, No. 122476	)	
	)	

This case illustrates Donald Charles Schwartz's failure to heed the lessons of his past discipline. He appeals a hearing judge's recommendation of a six-month suspension and three years' probation in his second disciplinary case. In one client matter, the judge found him culpable of incompetence and failing to promptly return his client's file. The judge also found he committed misconduct warranting discipline due to his 2011 misdemeanor conviction for carrying a weapon concealed in his vehicle. Schwartz contends he did nothing wrong in the client matter, the conviction does not involve other misconduct warranting discipline, and if discipline is imposed, the facts warrant no more than a 30-day suspension. He also challenges several of the judge's procedural rulings. The Office of the Chief Trial Counsel for the State Bar (State Bar) supports the hearing judge's decision.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we find no merit to Schwartz's procedural challenges, and agree with the hearing judge's culpability findings and recommended discipline. Schwartz lacks insight into his wrongdoing, presented minimal mitigation, and committed misconduct that echoes his 1997 discipline case. Although we find slightly less aggravation than the hearing judge found, a six-month suspension is proper progressive discipline. We affirm the decision below.

I. NO MERIT TO SCHWARTZ'S PROCEDURAL CHALLENGES

We review Schwartz's challenges to the hearing judge's procedural rulings under an abuse of discretion standard. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695 [abuse of discretion standard applies to procedural rulings]; see *H. D. Arnaiz v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368 ["appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered"].) All four of Schwartz's challenges lack merit.

A. The Hearing Judge Provided Adequate Time to Prepare for Trial

Schwartz contends that he did not have enough time to prepare for trial because the hearing judge "abated the case for a one-year period of time and then suddenly set the matter for trial two-three months out." We reject this claim.

The State Bar filed two Notices of Disciplinary Charges (NDC): the original proceeding (07-O-12306, filed March 2010) and the conviction proceeding (10-C-11055, filed May 2011). The hearing judge abated the original proceeding at Schwartz's request based on an ongoing civil dispute with his client. In July 2011, the judge unabated the original proceeding and consolidated it with the conviction matter. In September 2011, the judge again abated the case due to a pending appeal in the criminal matter. At a May 7, 2012 pretrial conference, the judge unabated the case and set it for trial in late August 2012.

We find that the hearing judge set the trial within a reasonable time following the abatements. Since an abatement merely stays the proceedings and tolls the time limitations (Rules Proc. of State Bar, rule 5.50(A)), nothing prevents a litigant from preparing for trial while the case is abated. Schwartz had more than a year to prepare for trial during the abatement periods and after the judge set the trial.

B. The Hearing Judge Properly Denied Schwartz's Request for Trial Continuance

The hearing judge denied Schwartz's request to continue the trial on the grounds that his attorney was unavailable on the scheduled court dates. Schwartz asserts this deprived him of his right to counsel. He is incorrect. First, attorneys who face disciplinary proceedings have no constitutional right to the assistance of counsel. (*Walker v. State Bar* (1989) 49 Cal.3d 1107, 1115–1116.) Second, Schwartz associated his attorney into the case not as primary counsel but as *co-counsel*, who appeared on two of the four trial days. Under these circumstances, the hearing judge did not abuse her discretion by denying Schwartz's request to continue the trial.

C. The Hearing Judge Did Not Discourage Schwartz from Presenting Evidence

Schwartz argues that the hearing judge discouraged him in the conviction matter from "putting on any evidence about his wife's bipolar mental condition and manipulations, e.g., framing [him] for the gun in the car in preparation for a custody battle." He contends that the judge told him: "It's just a gun in a car." Schwartz concedes this comment is not in the trial transcript, but claims it is in the audio recording, which he did not produce. Our review of the transcript reveals that when Schwartz began to testify about his wife's mental condition, the judge merely advised him to "wait until she takes the stand. . . . At this point it's not relevant." Nothing in the record suggests the judge discouraged Schwartz from presenting evidence he considered relevant.

D. The Hearing Judge Correctly Admitted a 2007 Letter

Schwartz contends the hearing judge erred by admitting an April 10, 2007 letter because the State Bar produced it for the first time at trial. The letter was from his client's subsequent counsel, who was requesting the client's file. The State Bar asserted it provided the letter to Schwartz in pretrial discovery. We cannot discern from the record when the letter was first produced. However, even if Schwartz received it at trial, he failed to establish that he suffered

prejudice since he had received several similar letters from the same attorney. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [absent actual prejudice, party not entitled to relief from evidentiary ruling].) The hearing judge did not abuse her discretion by admitting the 2007 letter.

II. THE WASNEY MATTER – CASE NO. 07-O-12306

A. Factual Statement[1]

Schwartz was admitted to the bar in 1986, and has his own civil law practice. In 1998, David Wasney hired Schwartz to represent him as a plaintiff in a civil case in superior court. Neither party secured a court reporter for the trial. In 2005, the superior court judge granted the defense motion for nonsuit. Wasney asked Schwartz to appeal the judge's ruling. Schwartz declined, telling Wasney that he lacked appellate experience, an appeal would be difficult without trial transcripts, and their fee agreement did not include appellate work.

1. Schwartz Represented Wasney on Appeal

Despite their conversation, Schwartz represented Wasney on appeal. Beginning in 2006, he prepared and filed a notice of appeal, designation of clerk's transcript, and amended designation, signing each document as follows:

"Donald Charles Schwartz
Attorney for Plaintiff/Appellant
David A. Wasney, Sr."

In April 2006, he identified himself as Wasney's counsel on the civil case information sheet that Schwartz filed with the Third Appellate District Court of Appeal.

Schwartz failed to perfect Wasney's appeal and, as a result, it was dismissed. The problems leading to the dismissal started in June 2006, when he filed a notice designating the

[1] Our factual statement is based on the hearing judge's findings and the trial evidence. (Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight on review].)

clerk's transcript, but did not properly identify the titles and filing dates of the documents, as required by former rule 5(a)(4) of the California Rules of Court. The superior court judge instructed Schwartz in open court that "the specific items of documents need to be more precise rather than just a generalized statement," and directed him "to talk to the clerk about what needs to be in there." On August 3, 2006, Schwartz filed an amended designation, but it was nearly identical to the first, and again failed to include the dates and titles of most documents. Consequently, on August 4, 2006, the superior court struck it, sua sponte, "for failure to comply with the requirements of [former] California Rules of Court 5(a)(1)."[2] On the same day, a notice of default was issued for failure to designate the clerk's transcript. Schwartz did not timely cure the default, and the Court of Appeal dismissed Wasney's appeal on August 23, 2006.

2. Schwartz Delayed Returning Wasney's File for Over a Year

By September 2006, Wasney learned that his appeal had been dismissed. As a result, the attorney-client relationship began to break down. The following month, Wasney requested all post-trial and appellate documents, which Schwartz timely provided. Around the same time, in October 2006, Schwartz filed a motion in superior court to be relieved as counsel. It was not until a year later, in October 2007, that the court granted the motion, ruling that Schwartz "satisfactorily completed all work agreed to be accomplished in this action." Upon Schwartz's request, the superior court made the order retroactive to August 15, 2006, a week before the appeal had been dismissed.

Meanwhile, in November 2006, Wasney emailed Schwartz and requested his "entire file." Schwartz did not return the file even though Wasney offered to meet at the courthouse to

[2] Schwartz wrote to Wasney blaming him and the court for the adverse ruling: "I think you have really pissed-off [the judge] with the hearing aid issue (as he stated on the record) and he is disinclined to give you any favorable rulings at this point. In fact, he is now looking for ways to throw you out of his court, as is evident by his sua sponte order on the Clerk's record. I have never in 20 years of practicing law seen firsthand the injustice that is taking place against you in the Butte County Superior Court."

pick it up or, alternatively, to pay the cost of shipping it. When Wasney did not receive his file by the spring of 2007, he retained new counsel, Klaus Kolb.

From April 2007 to January 2008, Kolb made telephone calls and sent numerous faxes and letters to Schwartz requesting the file, and offering to pay the shipping cost in advance. The correspondence between Kolb and Schwartz included:

- On April 3, 2007, Kolb sent a letter to Schwartz identifying himself as Wasney's new counsel and requested the file.
- On April 9 , 2007, Kolb received a fax response from Schwartz. The next day, Kolb sent him a fax asking again that Schwartz ship Wasney's file to him.
- On April 12, 2007, Kolb received another fax response from Schwartz requesting that Wasney counter-sign Kolb's earlier demands for Wasney's file.
- On April 15, 2007, Kolb faxed and mailed Schwarz a third letter request for Wasney's file, this one counter-signed by Wasney.
- On May 4, 2007, after receiving no response to his April 15 letter, Kolb faxed and mailed another letter request offering to pay the shipping cost in advance and gave Schwartz until May 9, 2007 to send the file.
- On May 9, 2007, Kolb received a telephone message from Schwartz's office to contact the office to arrange overnight shipping of several boxes of Wasney's file. Kolb's last three letters stated that Wasney did not want to pay for overnight shipping and that two- or three-day delivery was acceptable.
- On May 17, 2007, Kolb telephoned Schwartz's office and heard a recorded message stating that Schwartz would return calls sometime after 4:30 p.m. that day. Kolb left a message reiterating his offer to pay the cost of two- or three-day shipping of Wasney's file and asked for contact information to provide to the shipping company.
- On November 29 and December 11, 2007, Kolb again requested Wasney's file.

Finally, in January 2008, Schwartz left the file in five bankers boxes at the United Parcel Service (UPS) store with instructions: "Please contact the following person [Kolb] for shipping and billing instructions of these boxes." Kolb testified that when he finally obtained the file in mid-January, more than a year after Wasney's November 2006 request, it was a "complete jumble," and consisted mostly of copies of motions.

B. Culpability[3]

Count One – Failure to Perform Competently (Rules Prof. Conduct, rule 3-110(A))[4]

The hearing judge found that Schwartz performed incompetently, in violation of rule 3-110(A), by not properly designating the clerk's transcript on appeal and by failing to set aside or cure the default. We agree.

Rule 3–110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. Schwartz chose to represent Wasney on appeal despite his admitted lack of appellate experience. In doing so, he caused the appeal to be dismissed because he failed to correctly designate the clerk's transcript even after the superior court judge pointed out his non-compliance with court rules. Such representation reflects "reckless and repeated incompetence." (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 554–555 [incompetence where attorney filed personal injury complaint but made feeble attempts to locate defendant and failed to serve by publication causing dismissal of case]; see *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 399 [incompetence where attorney agreed to prosecute case but failed to do so].)

Schwartz contends he is not culpable because he was never *retained* to pursue Wasney's appeal. This contention is incorrect. Schwartz appeared as Wasney's appellate counsel and, as such, had an ethical obligation to perform competently, even without a written retainer agreement, "unless and until a substitution of counsel is filed or the court grants leave to withdraw." (*In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 115

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[3] The hearing judge dismissed Count Two [failure to communicate] and Count Three [moral turpitude] for lack of clear and convincing evidence. The record supports those dismissals, and we adopt them.

[4] All further references to rules are to the Rules of Professional Conduct.

[attorney had duty to act competently even if discharged where no substitution of counsel had been executed and filed].)

Schwartz also argues that he is not culpable because the superior court found that he had satisfactorily completed the work in Wasney's civil action, effective August 15, 2006. Although the superior court made its order retroactive to August 15th, Schwartz was not relieved of his ethical duties to Wasney during that interim time. Until the superior court ruled on the motion to withdraw in October 2007, Schwartz was obligated to protect his client's interests while representing him on appeal. (*In the Matter of Riley*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 115.) Furthermore, Schwartz committed much of his misconduct *before* August 15th, including failing to address deficiencies in the designation of the clerk's transcript, beginning in June 2006 and continuing until the August 4th default.

Count Four – Failure to Promptly Return Client File (Rule 3-700(D)(1))[5]

The hearing judge found that Schwartz violated rule 3-700(D)(1) by failing to promptly return Wasney's file. We agree. Wasney requested his entire file in November 2006; Schwartz arranged for its return over a year later in January 2008. This delay violates rule 3-700(D). (See *Rose v. State Bar* (1989) 49 Cal.3d 646, 655 [six-month delay in surrendering client file unreasonable under former rule 2-111(A)(2)]; *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 958 [two-month delay in sending file to client's subsequent attorney after three requests violated rule 3-700(D)].)

Schwartz argues he is not culpable because he was required only to make Wasney's file "available" for pick-up in his office. He asserts that shipping the bankers boxes would cause problems with the file's "chain of custody." His claim lacks merit. Chain of custody is a concept that applies in criminal, not discipline, cases. Here, Schwartz had an affirmative and

[5] Rule 3–700(D)(1) requires that an attorney who has been terminated shall promptly release all papers and property to the client upon the client's request.

ethical duty under rule 3-700(D)(1) to promptly release Wasney's papers and property. (See *Friedman v. State Bar* (1990) 50 Cal.3d 235, 244 [attorney "obligated to turn the file over" to successor attorney].) Since Wasney and Kolb offered to advance mailing costs, Schwartz had only to arrange for the boxes to be shipped through a mail service such as UPS—which he finally did in January 2008. A client's written request for a file places the attorney on notice that "the file should be prepared for delivery." (*In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608, 612–613 [violation of rule 3-700(D)(1) for six-month delay in returning client file even where delay due to attorney's stored files in disarray].) Schwartz's unreasonable demand that Wasney or Kolb pick up the file at his office and his refusal to arrange for shipping for over a year violated rule 3-700(D)(1).[6]

III. SCHWARTZ'S CONVICTION MATTER – CASE NO. 10-C-11055

In March 2011, Schwartz pled nolo contendere to a misdemeanor violation of Penal Code section 12025, subdivision (a)(1), carrying a weapon concealed within a vehicle.[7] After the State Bar transmitted the conviction records to us, we referred the matter to the hearing department to determine whether the facts and circumstances of the crime involved moral turpitude or other misconduct warranting discipline and, if so, the proper level of discipline. (Bus. & Prof. Code, § 6102, subd. (e); see *In re Kelley* (1990) 52 Cal.3d 487, 494.) The hearing judge found that the facts and circumstances did not involve moral turpitude, a finding neither party disputes. However, the judge found that the facts and circumstances did involve other misconduct warranting discipline, a finding Schwartz disputes.

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[6] We take judicial notice that the distance between Schwartz's City of Aptos office and Kolb's Sacramento office is 152 miles. (Evid. Code, §§ 452, subds. (g) & (h), 459.)

[7] CALJIC No. 12.46.1 lists the elements of former Penal Code section 12025, subdivision (a) [Penal Code section 25400 as of January 1, 2012] as follows: (1) A person carried concealed within any vehicle under his control or direction a pistol, revolver, or firearm capable of being concealed upon the person; and (2) The person had knowledge of the presence of the firearm. The section does not include a requirement that the weapon be loaded.

A. Facts

On October 22, 2010, Schwartz and his wife, Elizabeth, got into an argument. The couple had been experiencing difficulties in their relationship. Later that day, they went to a utility company to pay a bill. As Elizabeth drove, the two began arguing again. After Schwartz left the car to pay the bill, Elizabeth went into a hair salon and called the police. She was crying and visibly shaking when the officers arrived. According to one officer who testified at the trial, Elizabeth informed him that Schwartz had brought a gun from the house and placed it in the couple's SUV.[8] She also stated that she was afraid of Schwartz and the gun. Upon searching the car, the officers recovered from under the passenger's seat a Smith and Wesson .357 magnum revolver loaded with six live rounds. Schwartz was arrested. He entered a nolo contendere plea, and was convicted of violating Penal Code section 12025, subdivision (a)(1).[9] The superior court imposed a suspended sentence for 36 months, placed him on probation, and ordered him to pay a fine, refrain from possessing firearms, and comply with the terms of a protective order.

B. Schwartz's Misconduct Warrants Public Discipline

The issue before us is whether the facts and circumstances surrounding Schwartz's conviction constitute other misconduct warranting discipline. (*In re Gross* (1983) 33 Cal.3d 561, 566 [misconduct, not conviction, warrants discipline].) In the past, our Supreme Court has imposed discipline for non-moral turpitude offenses involving weapons where reckless driving, alcohol abuse, or domestic violence are also present. For example, in *In re Titus* (1989) 47 Cal.3d 1105, 1106, the attorney was publicly reproved for driving recklessly while carrying a

[8] Schwartz testified that his brother loaned him the gun after their home was recently burglarized, and he often kept it in the car away from the children in the house.

[9] We reject Schwartz's attempts to refute his conviction by asserting: Elizabeth put the loaded gun into the car; he was unaware the gun was in the car; and Elizabeth called the police and blamed him for the gun because she is mentally ill. For purposes of attorney discipline, Schwartz's conviction proves all requisite elements of his crime (Bus. & Prof. Code, § 6101, subd. (a)), and he may not collaterally attack it here (*In re Utz* (1989) 48 Cal.3d 468, 480).

concealed, loaded firearm in his vehicle. And in *In re Hickey* (1990) 50 Cal.3d 571, 581–582, the attorney was suspended for 30 days due to his conviction for carrying a concealed weapon during a domestic violence altercation with his wife resulting from his serious alcohol abuse.

As the hearing judge noted, certain facts surrounding the conviction are disputed while others are clear. The record establishes Schwartz concealed the handgun in his car, took it to a public place, and argued with his wife while in the vehicle. Most importantly, there is no dispute the weapon was loaded with six live rounds. Schwartz's access to the loaded gun during an ongoing domestic dispute created a volatile situation that caused his wife to flee the vehicle to a public place and call the police. As the high court noted in *Hickey*, "the State Bar need not wait until the attorney injures a client or neglects his legal duties before it may impose a discipline to ensure the protection of the public." (*In re Hickey*, *supra*, 50 Cal.3d at p. 579 [where attorney's alcoholism led to violent criminal conduct].) We find that Schwartz engaged in dangerous misconduct, and agree with the hearing judge that he demonstrated "a profound lack of respect for the law and for the safety of the public." Such wrongdoing calls for public discipline.

IV. AGGRAVATION AND MITIGATION

The State Bar must establish aggravating circumstances by clear and convincing evidence.[10] (Std. 1.2(b).)[11] Schwartz has the same burden to prove mitigating circumstances. (Std. 1.2(e).)

[10] 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.)

[11] All references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

A. Mitigation

In mitigation, the hearing judge found that Schwartz established his good character through testimony of character witnesses and by evidence of his pro bono and civic activities. The record supports these findings.

1. Good Character (Std. 1.2(e)(vi))

Schwartz presented eight character witnesses—two inactive members of the Bar including his father, three clients, his brother, a pastor, and a teacher. The witnesses described Schwartz as a hardworking, moral, and diligent attorney who is a compassionate and dedicated father to his children. All three clients expressed gratitude for and satisfaction with the legal services Schwartz provided. Although these witnesses represent a "wide range of references in the legal and general communities" (std. 1.2(e)(vi)), we discount the mitigating weight of this evidence because several witnesses were not fully aware of Schwartz's misconduct. (*In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446, 457 [weight of good character evidence decreased because witnesses unaware of full extent of attorney's misconduct].)

2. Pro Bono Work and Community Service

Pro bono work and community service are mitigating factors. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Schwartz has provided pro bono work and other services for the community, including a childhood development program, the Little League, and a foundation to promote citizenship in schools. He is currently developing a program to teach street law in public schools. Two clients substantiated his pro bono work. We assign significant mitigating weight to this commendable community service.

B. Aggravation

In aggravation, the hearing judge found three factors: a prior record of discipline, failure to recognize the wrongfulness of his misconduct, and uncharged misconduct. We find the State Bar proved the first two factors.

1. 1997 Prior Record of Discipline (Std. 1.2(b)(i))

Schwartz has one prior record of discipline. Effective January 6, 1997, our Supreme Court placed Schwartz on 30 days' stayed suspension and a one-year probation. (*In re Schwartz* (Dec. 6, 1996, S056281) Cal. State Bar Ct. No. 94-O-12237.) He was ordered to take a professional responsibility examination. Schwartz stipulated to committing misconduct in four client matters between 1990 and 1994.

In one client matter, he improperly withdrew from employment and failed to promptly return a client's file. Schwartz moved to Santa Cruz without notifying his client. The client had to drive from Contra Costa County to Santa Cruz to retrieve his file after finally locating him. Schwartz's misconduct violated rule 3-700(D).

In the three other matters, Schwartz improperly withdrew attorney fees from his client trust account (CTA), failed to provide his clients with an accounting, failed to perform legal services competently, appeared at a hearing without his client's consent, failed to communicate, failed to maintain disputed funds in his CTA, and failed to promptly pay funds owed his client. Schwartz's misconduct violated Business and Professions Code section 6068, subdivision (m) and rules 3-110(A), 4-100(A)(2), 4-100(B)(3) and 4-100(B)(4).

The sole aggravating factor was that Schwartz committed multiple acts of misconduct. He received mitigation credit for his lack of a prior record of discipline, lack of client harm, and for "extreme emotional difficulties namely stress, depression, and escalating conflict in his household." We assign significant aggravating weight to Schwartz's prior record. He failed to

promptly release Wasney's file despite previously being disciplined for the same misconduct, and the problem of escalating household conflict remains, as evidenced by the circumstances surrounding his conviction.

2. Lack of Insight (Std. 1.2(v))

The hearing judge correctly found that Schwartz "fails to appreciate the wrongfulness of his misconduct in the Wasney matter." He does not accept that his designations of the clerk's transcript in Wasney's appeal were defective, or that he should have taken appropriate steps to cure the deficiencies. He also fails to understand his ethical obligation under rule 3-700(D)(1) to *promptly return* Wasney's file, insisting he was required only to make it "available" to be picked up by Kolb or Wasney. As noted, this is particularly troubling since Schwartz was disciplined in 1997 for violating rule 3-700(D)(1), when his client had to drive from Contra Costa County to Santa Cruz to retrieve the file. We assign substantial weight to this factor because Schwartz's lack of insight makes him an ongoing danger to the public. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380 [lack of insight causes concern attorney will repeat misconduct].)[12]

V. LEVEL OF DISCIPLINE

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. 1.3.) Ultimately, we "balance all relevant factors on a case-by-case basis" to ensure that the discipline imposed is consistent with

[12] We do not adopt the hearing judge's aggravation finding of uncharged misconduct for Schwartz's failure to become skilled in appellate procedure in order to adequately represent Wasney. We have already considered these same facts to support our culpability finding in Count 1 (failing to perform competently). (See *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 402 [facts used to establish culpability not considered in aggravation].)

its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) To determine the proper discipline, the Supreme Court instructs us to follow the standards "whenever possible." (*Id.* at p. 267, fn. 11.)

Several standards apply here. Schwartz's violations of rule 3-110(A) and rule 3-700(D)(1) each call for reproval or suspension, depending on the seriousness of the misconduct and the extent of client harm.[13] Also, standard 3.4 provides that discipline for a criminal conviction involving "other misconduct warranting discipline" should appropriately reflect the nature and extent of the misconduct. Finally, standard 1.7(a) calls for progressively more severe discipline when, as here, the attorney has a prior record, unless the prior discipline is remote in time and the offense is minimal. We find that Schwartz's 1997 discipline is not remote to his misconduct in the Wasney case, which began in 2006. Nor was his past wrongdoing minimal because it involved four clients and multiple acts of misconduct. Accordingly, standard 1.7(a) calls for discipline greater than the 30-day stayed suspension Schwartz received in 1997.

Given the broad range of possible discipline in the standards, we also look to case law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.) The hearing judge relied on *In re Hickey, supra,* 50 Cal.3d 571, to recommend a six-month suspension. In *Hickey*, an attorney with no record of discipline received a 30-day suspension primarily due to the facts and circumstances surrounding his misdemeanor conviction for violating Penal Code section 12025, subdivision (b) (carrying a concealed weapon). (*Hickey,* at pp. 574, 581–582.) Hickey possessed the weapon during a domestic violence incident with his wife and improperly withdrew from employment in a client matter. (*Id.* at pp. 574–577.)

[13] Standard 2.4(b) provides that the failure to perform services not demonstrating a pattern of misconduct or the failure to communicate with a client "shall result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client." Standard 2.10, which applies to rule 3-700(D)(1) violations, similarly provides for "reproval or suspension according to the gravity of the offense or the harm, if any, to the victim . . . ."

While *Hickey* is instructive on the conviction matter, we believe Schwartz's discipline should be greater because he committed extensive misconduct in the Wasney case, has a prior record of discipline involving similar misconduct, and lacks insight into his wrongdoing (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317 [increased discipline warranted by lack of insight]). Therefore, a six-month suspension is proper progressive discipline for Schwartz's overall misconduct, and is supported by case law comparable to his wrongdoing in Wasney's matter. (E.g., *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 153, 157 [180-day suspension for second discipline for moral turpitude by gross neglect in filing false verification and not notifying State Bar of new membership address; prior case resulted in four-month suspension]; *In the Matter of Layton, supra,* 2 Cal. State Bar Ct. Rptr. 366, 379, 381 [six-month suspension for second discipline for failing to perform competently in probate matter where attorney lacked insight; prior case for similar misconduct resulted in 30-day suspension]; *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 495 [six-month suspension in second discipline for moral turpitude for misrepresentation to judge, misleading judge, and failing to cooperate; prior case resulted in 90-day suspension].)

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Donald Charles Schwartz be suspended from the practice of law for two 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 six months of the period of his 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 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.

7. 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.

8. 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.)

9. 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 two-year period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Donald Charles Schwartz be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order 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).)

VIII. RULE 9.20

We further recommend that Donald Charles Schwartz 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.

IX. 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.

PURCELL, J.

I CONCUR:

EPSTEIN, J.

REMKE, P. J.

I concur in the majority's recommendation of a six-month suspension based on Donald Charles Schwartz's misconduct in the Wasney matter; but I dissent from the finding that Schwartz's misdemeanor conviction under Penal Code section 12025, subdivision (a)(1), involved other misconduct warranting discipline.

The facts surrounding the conviction proven at trial are extremely limited and provide little more than the elements of the crime. As summarized by the majority, the record establishes that Schwartz concealed a loaded handgun under the car seat, he was a passenger in the car while his wife drove, he and his wife were arguing, and when he got out of the car to pay a utility bill, she got out to call the police. The majority concludes that public discipline is warranted because "Schwartz engaged in dangerous misconduct" that "demonstrated 'a profound lack of respect for the law and for the safety of the public.' " In my opinion, this justification "is far too vague and amorphous a standard on which to rest a decision which may suspend or bar a person from the practice of his profession." (*In re Rohan* (1978) 21 Cal.3d 195, 205 (conc. opn. of Tobriner, Acting C. J.).)

"The discipline imposed in attorney discipline proceedings following criminal conviction is not 'punishment' " and "discipline is imposed only if the criminal conduct reflects directly and adversely on the attorney's fitness to practice law." (*In re Brown* (1995) 12 Cal.4th 205, 216–217.) Since the conduct surrounding Schwartz's conviction did not involve moral turpitude, relate to his practice of law, impair the performance of his professional duties, or otherwise affect his fitness as a member of the bar, "we should leave the matter to the sanction of the criminal law or public opprobrium." (*In re Kelley* (1990) 52 Cal.3d 487, 500 (conc. opn. of Mosk, J.).) I would therefore dismiss the conviction matter and transmit the discipline recommendation to the Supreme Court based solely on the misconduct in the Wasney matter.