PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

FILED December 22, 2015

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 13-N-17388
	)	
MICHAEL B. STONE,	)	OPINION AND ORDER ON
	)	SUMMARY REVIEW
A Member of the State Bar, No. 160177.	)	
	)	

THE COURT.*

A hearing judge found Michael B. Stone culpable of failing to timely comply with California Rules of Court, rule 9.20, as ordered by the California Supreme Court in his prior discipline case.[1] The judge recommended discipline that included a two-year actual suspension continuing until Stone proves his rehabilitation and fitness to practice law.

Stone seeks summary review. He does not challenge culpability. Instead, he argues that the recommended discipline is excessive and requests an admonishment or minimal discipline. In response, the Office of the Chief Trial Counsel of the State Bar (OCTC) concedes that the Hearing Department's discipline recommendation in this matter is supported by meaningful evidence and case law. Nevertheless, it renews its trial request for disbarment because this is Stone's fourth discipline case.

*Before Purcell, P. J., Epstein, J., and Stovitz, J., Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

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

On summary review, our record is limited to the hearing judge's factual findings, which are binding. Thus, the issues before us are whether those factual findings support culpability; and, if so, the appropriate level of discipline.

We affirm the hearing judge's uncontested culpability finding as well as the discipline recommendation. We agree that disbarment is unnecessary given Stone's mitigation and the hearing judge's finding that Stone made repeated attempts to file an accurate and honest declaration. The recommended discipline is a significant sanction that properly addresses Stone's misconduct considering his prior discipline cases.

I. SUMMARY REVIEW

On November 26, 2014, we granted Stone's unopposed request for summary review under rule 5.157 of the Rules of Procedure of the State Bar. In summary review proceedings, the hearing judge's decision is final as to all material findings of fact and the parties are bound by them. As such, the issues are limited to: (1) contentions that the facts support conclusions of law different from those reached by the hearing judge; (2) disagreement about the appropriate disposition or degree of discipline; or (3) other questions of law. If the parties do not raise an issue or contention, it is waived.

II. STONE HAS THREE PRIOR RECORDS OF DISCIPLINE

Stone has been a member of the State Bar since 1992. The hearing judge found that Stone has three prior records of discipline, based upon three separate stipulations. However, for discipline purposes, we treat Stone's first two discipline cases as one since they could have been brought as a single case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.) Thus, we consider the present proceeding as Stone's third discipline case.

A. First Discipline – Private Reproval

In April 2011, Stone stipulated to committing misconduct in three client matters. He improperly withdrew from employment and failed to return unearned fees, return costs, pay court-ordered sanctions, competently perform legal services, and respond to reasonable client inquiries. Multiple acts were found in aggravation, and mitigation credit was given for Stone's lack of a prior discipline record. Stone agreed to a private reproval with conditions for one year, including restitution of $2,751.50 to Carney Garcia and $900 to the County of Orange. The Hearing Department approved of and imposed the stipulated discipline. (Rules Proc. of State Bar, rule 5.127(A) [State Bar Court's order approving stipulation for reproval takes effect when order is final].)

B. Second Discipline – Public Reproval

In November 2011, Stone stipulated that he committed misconduct in two additional client matters. He improperly withdrew from employment and failed to deposit advance costs in trust, provide an accounting, and return an unearned fee. His prior record of discipline was aggravating while his candor and cooperation were mitigating. He agreed to a public reproval with conditions for two years, including mandatory fee arbitration with both clients. The Hearing Department approved of and imposed the stipulated discipline. (Rules Proc. of State Bar, rule 5.127(A).)

C. Third Discipline – Actual Suspension (90 days)

In August 2013, Stone stipulated that he failed to comply with the reproval conditions in his 2011 discipline cases. He failed to submit or filed late quarterly reports to the Office of Probation (Probation) and failed to provide Proof to Probation that he: (1) attended Client Trust accounting School and Ethics School and passed the test given at the end of each class; (2) paid restitution or complied with fee arbitration conditions; and (3) passed the Multistate Professional

Responsibility Examination. Stone's misconduct was aggravated by his two prior disciplines, multiple acts of misconduct, and significant client harm. Mitigation credit was given because he entered into a full pretrial stipulation and suffered financial hardship that was unforeseeable and beyond his control.

Stone agreed to a two-year stayed suspension and two years' probation with conditions, including that he serve a 90-day suspension, continuing until he made restitution to Garcia and the County of Orange, and that he comply with rule 9.20. The Hearing Department recommended the stipulated discipline to the Supreme Court. Effective September 21, 2013, the Supreme Court ordered Stone to comply with rule 9.20, to refund all unearned fees, and to file a declaration indicating he had done so.[2] (*In re Michael B. Stone on Discipline* (S211464).)

Stone's declaration was due on October 31, 2013. He filed it on October 30, 2013, but it was defective. Thereafter, he filed several more deficient declarations that Probation rejected. OCTC then filed a Notice of Disciplinary Charges (NDC) in February 2014.

III. FACTS SUPPORT UNCONTESTED CULPABILITY FINDING

The NDC alleged that Stone "failed to file a declaration of compliance with California Rules of Court, rule 9.20 in conformity with the requirements of Rule 9.20(c) with the clerk of the State Bar Court by October 31, 2013, as required by [the] Supreme Court." The hearing judge found Stone culpable as charged. Stone confirmed at oral argument that he did not challenge this culpability finding, and we adopt it as fully supported by the record, as summarized below.

[2] Rule 9.20, subdivision (a)(3), provides, in relevant part, that an attorney must: "[r]efund any part of fees paid that have not been earned." Subdivision (c) provides, in relevant part, 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."

As noted above, Stone filed his first rule 9.20 declaration on October 30, 2013, one day before it was due. He did not declare unequivocal compliance with rule 9.20, including whether he had refunded all unearned fees or reimbursed the Client Security Fund (CSF) for payment made to former clients as required by a Supreme Court order. Therefore, Probation rejected his declaration.

Stone filed a second declaration about a week later on November 7, 2013. This time, he admitted in an attachment that he had not refunded all unearned fees by the October 31, 2013 due date. Probation rejected this declaration indicating to Stone: "[A]s you admit in your attachment to Form 9.20, you failed to refund unearned fees."

Before Stone filed his third declaration on February 20, 2014, he paid his outstanding restitution and CSF obligations. However, he altered the rule 9.20 form to reflect that he had returned the unearned fees by February 20, 2014. This statement conflicted with other language on the form indicating he had complied "[w]ithin 30 days of the [October 31, 2013] effective date," the time period in which he was ordered to refund the unearned fees. Probation also rejected this declaration. OCTC filed the NDC the following day, on February 21, 2014 (amended March 20, 2014).

Stone filed his fourth rule 9.20 declaration on July 14, 2014, shortly before his disciplinary trial. To our knowledge, it has not been rejected.[3]

The hearing judge considered Stone's failed attempts to file his rule 9.20 compliance declaration as evidence that he "did not shirk his ethical responsibility in this regard." The judge found that Stone "attempted repeatedly, although unsuccessfully, to file a correct and honest rule 9.20 declaration." However, the judge rejected any claim that Stone did not understand his rule 9.20 obligations and found he failed to file a motion with the State Bar to extend the time to

[3] Although the hearing judge stated he was "unaware of the status" of this filed declaration, no evidence established it was rejected.

refund fees. Finally, the judge found that Stone knew or should have known Probation would reject his declarations based on non-compliance with his probation terms.

The hearing judge also made material findings about Stone's personal situation. In particular, the judge found that Stone had been unemployed for some time, owed "five figures" in past-due child support plus $3,000 to $4,000 in State Bar payments, had not practiced law since 2012, had unsuccessfully sought employment outside the legal field, and was dependent on government assistance to care for his wife and mother-in-law, both of whom suffer from debilitating illnesses. The judge concluded that Stone could not afford to return unearned fees or pay restitution until 2014, and then did so with money his mother-in-law received from a Social Security settlement.

IV. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[4] requires OCTC to establish aggravating circumstances by clear and convincing evidence.[5] Standard 1.6 requires Stone to meet the same burden to prove mitigation. We agree with the hearing judge's aggravation and mitigation findings, and find one additional mitigating circumstance.

In aggravation, the judge found one factor—Stone's three prior discipline records which resulted in a private reproval, a public reproval, and a 90-day actual suspension. (Std. 1.5(a).)

In mitigation, the judge found two factors. First, Stone was remorseful for his failure to comply with rule 9.20. (Std. 1.6(g).) Second, Stone experienced "severe, compelling financial difficulties that were not reasonably foreseeable and that were beyond his control." The judge

[4] All references to standards are to this source. Effective July 1, 2015, the standards were revised and renumbered. As this case was submitted for ruling after the July 1, 2015 effective date, we apply the revised version of the standards.

[5] 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.)

found that these financial problems led to Stone filing the incorrect rule 9.20 declarations. (*In re Naney* (1990) 51 Cal.3d 186, 196 [financial difficulties may be considered in mitigation].) As an additional factor in mitigation, we assign modest weight to Stone's pretrial stipulation (std. 1.6(e)), which contained easily proven facts that did not establish his culpability. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation accorded those who admit culpability as well as facts.) Overall, the aggravation tends to slightly outweigh the mitigation given Stone's disciplinary history.

V. A TWO-YEAR ACTUAL SUSPENSION IS APPROPRIATE 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. 1.1.) Stone contends his misconduct warrants, at most, minimal discipline. In response, OCTC requests that we raise the recommended level of discipline to disbarment in view of Stone's prior disciplinary record. (Rules Proc. State Bar, rule 5.157(G)(3) [on summary review, opposing party may state additional issue for review, including how disposition should be modified].) We find that the hearing judge's recommendation is appropriate based on the standards and the relevant law.

To begin, rule 9.20 provides that a violation is cause for either disbarment or suspension.[6] Generally, a rule 9.20 violation is deemed a serious ethical breach for which disbarment is appropriate discipline. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) But each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059.) And lesser discipline has been imposed on occasion where the late filing of a compliance declaration was the only issue *and* the attorney

[6] Rule 9.20, subdivision (d), provides: "A suspended member's willful failure to comply with the provisions of this rule is a cause for disbarment or suspension and for revocation of any pending probation."

demonstrated good faith, unsuccessful attempts to file the declaration, significant mitigation, little aggravation, or other extenuating circumstances.[7] The hearing judge's findings reflect that some of these factors are present in this case.

First, the judge found that the seriousness of Stone's misconduct was diminished by his attempts to file an honest rule 9.20 declaration. The judge reasoned that Stone's compelling financial difficulties prevented him from refunding all unearned fees and, in turn, timely reporting his compliance with rule 9.20. Moreover, the judge found that Stone eventually paid full restitution, successfully filed his compliance declaration, and did not shirk his ethical responsibility. In light of these findings, we agree with OCTC's frank concession on appeal that "despite Respondent's record of prior discipline, he may still be willing and able to comport himself to ethical standards in the future."

We also agree with the hearing judge's finding that Stone did not disregard his ethical responsibilities nor was he indifferent to the disciplinary system. Accordingly, he should not be disbarred under rule 9.20. (Cf. *Dahlman v. State Bar* (1990) 50 Cal.3d 1088, 1096 [disbarment ordered where attorney ignored efforts of both State Bar and Supreme Court to obtain his compliance with rule 9.20 and "evidenced an indifference to the disciplinary system"]; *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, 388 [disbarment recommended for attorney with two prior disciplines who demonstrated "ostrich-like behavior" and failed to timely file rule 9.20 compliance affidavit].)

Beyond our rule 9.20 analysis, we look to the standards to guide us to the proper discipline. (*In re Silverton* (2005) 36 Cal.4th 81, 92 [standards entitled to great weight].) Specifically, we focus on standard 1.8(b), which provides that disbarment is appropriate for a

[7] See *Shapiro v. State Bar* (1990) 51 Cal.3d 251; *Durbin v. State Bar* (1979) 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.

member with two or more prior records of discipline if an 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. Standard 1.8(b) also provides for a departure from a disbarment recommendation if the most compelling mitigating circumstances clearly predominate or if the misconduct underlying the prior discipline occurred during the same period as the current misconduct. The hearing judge correctly observed that disbarment is not mandatory in every case of two or more prior disciplines, 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)].)

In a thoroughly considered decision, the hearing judge did not recommend disbarment under standard 1.8(b) because Stone's misconduct was mitigated by his financial difficulties, his attempts to file an honest declaration, and his genuine remorse. We also do not discern reasons strong enough to recommend disbarment. We are mindful that our record on summary review is limited and the hearing judge who evaluated the evidence was in an appreciably better position than we are to attribute intent or motive to Stone's conduct. (Rules Proc. of State Bar, rule 5.155(A); *Resner v. State Bar* (1967) 67 Cal.2d 799, 807; *Connor v. State Bar*, *supra,* 50 Cal.3d at p. 1055.) We conclude that Stone has demonstrated "the existence of extraordinary circumstances justifying a lesser sanction [than provided for in standard 1.8(b)]." (*In re Silverton*, *supra*, 36 Cal.4th at p. 92; see also *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [clear reasons must be articulated to depart from standards]; *Alberton v. State Bar* (1984) 37 Cal.3d 1, 11 [all reasonable doubts resolved in favor of attorney].)

Finally, we reject Stone's position that an admonishment or minimal discipline is proper. The Supreme Court has directed that a 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

hearing judge's recommendation is in accord with the principle of progressive discipline embodied in standard 1.8(a).[8] A two-year suspension, with the requirement that Stone present proof at a formal hearing of his rehabilitation and present fitness to practice law, is significantly progressive to accomplish the goals of attorney discipline without being punitive.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Michael B. Stone be suspended for three years, that execution of that suspension be stayed, and that he be placed on probation for three years subject to 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

[8] Standard 1.8(a) provides: "If a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was to remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust."

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. It is not recommended that he attend Ethics School, as he was ordered to do so in connection with S211464 (State Bar Court case nos. 12-H-16290 and 13-H-10477 (Cons.)).

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.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We do not recommend that Stone be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners as he already did so in connection with Supreme Court Case number S211464 (State Bar Court Case nos. 12-H-16290 and 13-H-10477 (Cons.)).

VIII. RULE 9.20

We further recommend that Stone 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.