

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 11-O-17979
)	
DANIEL JOSEPH SWEENEY,)	OPINION AND ORDER
)	
A Member of the State Bar, No. 78362.)	
_____)	

In this fourth disciplinary proceeding for Daniel Joseph Sweeney, a hearing judge found him culpable of disobeying a court order and engaging in the unauthorized practice of law (UPL). After assessing four factors in aggravation (prior record, multiple acts, significant harm, and lack of remorse) and one factor in mitigation (cooperation), the judge recommended a one-year actual suspension. The Office of the Chief Trial Counsel (OCTC) appeals, seeking his disbarment. Sweeney did not file any response.

Based on our independent review (Cal. Rules of Court, rule 9.12), we affirm the hearing judge’s culpability findings, give greater weight to the evidence in aggravation, and find no mitigating factors. Considering Sweeney’s disciplinary record, the risk is high that he will commit future misconduct if permitted to continue practicing law. Therefore, the presumptive discipline of disbarment under the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.8(b)¹ for attorneys with two or more prior disciplines is appropriate and necessary.

¹ On January 1, 2014, the standards were revised and renumbered. Since this case was submitted for ruling in 2014, we apply the new standards. All further references to standards are to the new standards, and references to the earlier version will be designated former standards.

I. PROCEDURAL HISTORY

This matter commenced on December 6, 2012, when OCTC filed a three-count Notice of Disciplinary Charges (NDC) alleging that Sweeney disobeyed a superior court order, engaged in UPL, and committed an act of moral turpitude in his communications with the State Bar. Prior to trial, Sweeney neither filed a pretrial statement nor attended the pretrial conference, both of which were ordered by the hearing judge. At the one-day trial, Sweeney offered only his own testimony, presenting no other witnesses or documentary evidence in his defense.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The record clearly and convincingly supports the culpability findings by the hearing judge,² which we affirm and summarize below.

A. **Count One: Violation of Court Order (Bus. & Prof. Code, § 6103)**³

Beginning in May 2007, Sweeney was the attorney of record for Nishit Shaw in dissolution proceedings in the Superior Court of Los Angeles County. On April 25, 2011, the superior court issued an order imposing discovery sanctions in the sum of \$15,000 (Sanctions Order) jointly against Sweeney and Mr. Shaw “for failure to meet and confer and failure to approximate even reasonable reliance and compliance with the law governing discovery and to compensate [Meeta Shaw] for losses resulting from [Nishit Shaw’s] past and present non-compliance.” Neither Sweeney nor Mr. Shaw paid the \$15,000 by the May 20, 2011 court-ordered deadline.

After the deadline passed, Sweeney filed a Notice of Appeal of the Sanctions Order on behalf of his client but *not* on his own behalf. He provided no undertaking pursuant to Code of

² 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.)

³ All further references to sections are to this source unless otherwise noted.

Civil Procedure section 917.1,⁴ and did not obtain an order staying enforcement of the Sanctions Order. He testified at trial that the appeal was ultimately dismissed. On October 29, 2012, Mr. Shaw belatedly complied with the Sanctions Order and paid the \$15,000.

The hearing judge found that Sweeney willfully disobeyed the Sanctions Order in violation of section 6103.⁵ We agree. As a preliminary matter, we find that Sweeney had a duty to comply with the Sanctions Order because he did not stay its enforcement. (See *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 615 [prejudgment orders for monetary sanctions have force and effect of money judgment, and are immediately enforceable through execution, except trial court may order stay of sanction].) Furthermore, we find that Sweeney knew about the Sanctions Order and its deadline, and knowingly chose to disobey it. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787 [culpability under § 6103 requires finding that attorney knowingly chose not to comply with final, binding order].)

Sweeney contends that his noncompliance is excused by his belief that the Sanctions Order was beyond the jurisdiction of the superior court and is therefore void *ab initio*. His claim is unavailing. The Code of Civil Procedure expressly provides for the imposition of monetary sanctions based on discovery abuses. When asked at trial, Sweeney could point to no legal authority to support his position and offered no basis, other than his personal belief, to justify his failure to comply with the Sanctions Order. Both this court and the Supreme Court have rejected this rationale as a basis for disobeying a court order. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 952 (“There can be no plausible belief in the right to ignore final, unchallengeable orders

⁴ Code of Civil Procedure section 917.1, subdivision (a), provides in relevant part that “[u]nless an undertaking is given, the perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court . . .”

⁵ Section 6103 provides that an attorney’s “wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.”

one personally considers invalid”]; *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr 41, 47; *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 404.) Sweeney testified at the trial that his financial circumstances also played a role in his decision not to comply with the Sanctions Order. Since he did not inform the superior court of his circumstances or seek a stay of the order on that or any other ground, it does not excuse his non-payment. Accordingly, we find Sweeney culpable of willfully disobeying the Sanctions Order in violation of section 6103.

B. Count Two: UPL (§ 6068, subd. (a))

Effective July 1 through July 22, 2011, Sweeney was not eligible to practice law in California because he failed to comply with the minimum continuing legal education (MCLE) requirements by the June 30, 2011 deadline. While not eligible to do so, Sweeney engaged in the practice of law on two dates. On July 7, 2011, Sweeney signed, served, and filed a Civil Case Information Sheet, identifying himself as Nishit Shaw’s attorney in the appeal of the Sanctions Order in the dissolution action. On July 12, 2011, Sweeney signed, served, and filed a Designation of Record on Appeal and a Mandatory Docketing Statement, also in the Shaw dissolution action. As a result, we adopt the hearing judge’s finding that Sweeney improperly held himself out as entitled to practice law, and, in fact, practiced law while not entitled to do so on both dates, in violation of section 6068, subdivision (a).⁶ (*In the Matter of Taylor* (Review

⁶ Section 6068, subdivision (a) requires an attorney “[t]o support the Constitution and laws of the United States and of this state.” Sweeney failed to do so by practicing law, and holding himself out as entitled to practice law, without active State Bar membership, in violation of sections 6125 (prohibiting practice of law while inactive) and 6126 (prohibiting holding oneself out as entitled to practice). (See *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 505-506 [appropriate method of charging violations of §§ 6125 and 6126 is by charging violation of § 6068, subd. (a)].)

Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 572-573 [suspended attorney is not entitled to practice; mere holding out as entitled to practice constitutes UPL].)⁷

III. AGGRAVATION AND MITIGATION

The appropriate discipline is determined in light of the relevant circumstances, including aggravating and mitigating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) OCTC must establish aggravation by clear and convincing evidence (std. 1.5), while Sweeney has the same burden to prove mitigating circumstances (std. 1.6). We modify the hearing judge's findings in aggravation, as discussed below, and find no mitigation.

A. Aggravation

1. Three Prior Records (Std. 1.5(a))

Sweeney was admitted to practice law in California in 1977, and he was disciplined in 1992, 1993, and 2011. The hearing judge found Sweeney's three prior disciplines were an aggravating factor under standard 1.5(a). But the judge discounted the significance of the prior misconduct due to its remoteness and the fact that Sweeney's third discipline was imposed after he committed the misconduct in this matter. We disagree, and instead ascribe substantial aggravation to Sweeney's three prior disciplines because they involved serious misconduct, which we summarize as follows:

a. *In the Matter of Daniel Joseph Sweeney, Cal. State Bar Ct. No. 90-O-12361 (Sweeney I)*

On October 1, 1992, Sweeney was publicly reprovved, with conditions, after he stipulated to failing to keep his client informed, to competently perform, and to return his client's papers

⁷ OCTC also charged Sweeney with committing an act of moral turpitude by intentionally and falsely representing to the State Bar investigator that he had no knowledge of his July 1, 2011 suspension. The hearing judge dismissed the count with prejudice, finding OCTC failed to prove by clear and convincing evidence that Sweeney knew of his ineligible status at the time he committed UPL. OCTC does not challenge the dismissal of Count Three, and upon our review of the record, we affirm it.

and property. Sweeney's misconduct occurred from 1983 through 1989 when his incompetence resulted in a default judgment against his client and the subsequent dismissal of the appeal from that judgment. Sweeney also never returned the client's files despite numerous requests, even after the client retained new counsel. In mitigation, Sweeney had no prior record of discipline and cooperated; there were no aggravating circumstances.

b. *In the Matter of Daniel Joseph Sweeney, Cal. State Bar Ct. No. 93-H-12614 (Sweeney II)*

On October 5, 1993, the conditions attached to the public reproof in *Sweeney I* were extended for a period of six months after Sweeney stipulated to failing to comply with them. Sweeney stipulated that he did not timely file the first two reports and that his prior discipline record was an aggravating circumstance. In mitigation, the parties stipulated that Probation had incorrectly addressed its only letter to Sweeney reminding him of his probation terms and that this error contributed to Sweeney's failure to promptly file his first two quarterly reports. Also in mitigation, Sweeney cooperated with the investigation and otherwise complied with the reproof conditions.

c. *In the Matter of Daniel Joseph Sweeney, Sup. Ct. Case No. S195788, Cal. State Bar Ct. No. 10-O-05855 (Sweeney III)*

On October 25, 2011, the Supreme Court ordered Sweeney suspended from the practice of law for one year, stayed, and placed him on probation for two years subject to conditions, including a 30-day actual suspension. Sweeney stipulated to misconduct in a single client matter.⁸ In the summer of 2009, Khachik Sarkissian retained Sweeney to handle Sarkissian's "child support arrearage problem" and paid \$1,500 in advance fees. During his three-month representation, Sweeney provided no legal services of value and performed incompetently by not clarifying the legal issue once it became clear that Sarkissian mistakenly thought a decrease in

⁸ The NDC in *Sweeney III* issued on February 1, 2011. Sweeney signed the stipulation on June 7, 2011, which was then filed on June 28, 2011.

his arrearage was possible. In addition, Sweeney failed to provide an accounting and did not promptly refund any part of his fees when he was terminated. Finally, Sweeney failed to cooperate in the disciplinary investigation, which took place from May through July of 2010. Sweeney stipulated that his two prior discipline records were an aggravating circumstance and that no mitigating circumstances were involved.

2. Multiple Acts of Misconduct (Std. 1.5(b))

Standard 1.5(b) provides that aggravating circumstances “may include multiple acts of wrongdoing.” Sweeney committed three acts of wrongdoing arising from two matters. He disobeyed the Sanctions Order from May 2011 through October 2012, and he committed two acts of UPL in July 2011. We give this factor nominal weight in aggravation. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646 [two matters of misconduct may or may not be considered multiple acts of misconduct].)

3. Significant Harm (Std. 1.5(f))

Standard 1.5(f) provides for aggravation where an attorney’s misconduct causes “significant harm to the client, the public, or the administration of justice.” Sweeney did not pay the court-ordered sanctions of \$15,000. Ultimately, the sanctions were paid a year late and then by his client, not by Sweeney. We find that Meeta Shaw, a member of the public, was harmed by Sweeney’s misconduct because the sanctions were intended to compensate her for the losses she suffered due to Sweeney’s and Mr. Shaw’s discovery abuses. We assign some weight in aggravation to this factor. (See *Kelly v. State Bar* (1991) 53 Cal.3d 509, 519 [loss of \$2,000 for six weeks is monetary loss albeit not grievous and \$750 loss for two years is genuine monetary injury although not severe].)

4. Indifference Towards Rectification (Std. 1.5(g))

We find Sweeney's misconduct is significantly aggravated by his indifference towards the consequences of his misconduct and his lack of remorse. (Std. 1.5(g).) Sweeney's insistence at trial that he did not have a duty to comply with the Sanctions Order demonstrates both a lack of recognition of his obligation as an attorney to obey court orders and a lack of remorse. Given that the Sanctions Order relied on statutes expressly addressing discovery abuses and that Sweeney took no action on his own behalf to seek a stay of the order or appeal it, he had no plausible basis for disobeying the order.

Despite his duty to participate in these proceedings (§ 6068, subd. (i)), Sweeney's involvement was meager at best. He did not file a pretrial statement, did not attend the pretrial conference, and did not submit documentary evidence at trial or present witness testimony other than his own. Moreover, he failed to submit a responsive brief or any other document on appeal. We assign substantial weight to this factor. (*Weber v. State Bar* (1988) 47 Cal.3d 492, 506 [lack of remorse and failure to acknowledge misconduct are properly considered as aggravating factor].)

B. No Mitigation

1. Cooperation (Std. 1.6(e))

Sweeney did not enter into a stipulation of facts in this proceeding. The hearing judge nevertheless gave him mitigation credit for his cooperation with OCTC because he "admitted in his response to the NDC to most of the underlying facts [and] . . . stipulated to the admission of all [OCTC's] exhibits." We disagree. Sweeney's actions merely fulfilled his "legal and ethical duty" to cooperate with the State Bar's disciplinary investigation (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 2) and to participate in the disciplinary proceeding. (§ 6068, subd. (i).) We find he is not entitled to mitigation pursuant to standard 1.6(e).

2. Physical Difficulties (Std. 1.6(d))

The hearing judge considered Sweeney’s testimony that he suffers from a debilitating physical condition but did not assign this factor mitigation under standard 1.6(d). We agree. Sweeney failed to establish that his illness no longer poses a risk that he will commit further misconduct, as required by standard 1.6(d).

IV. 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.) We balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266; *Gary v. State Bar, supra*, 44 Cal.3d 820, 828.) Our analysis begins with the standards. The Supreme Court has instructed that we should follow them “whenever possible” (*In re Young, supra*, 49 Cal.3d at p. 267, fn. 11), and give them great weight to promote “the consistent and uniform application of disciplinary measures.” (*In re Silvertown* (2005) 36 Cal.4th 81, 91, internal quotations and citation omitted.) We focus on standard 1.8(b), which is the most severe and deals with an attorney who has been disciplined twice.⁹

In relevant part, standard 1.8(b) provides that *unless the most compelling mitigating circumstances clearly predominate*, disbarment is the presumptive discipline where: (1) actual suspension was ordered as a prior discipline; (2) the prior disciplines, coupled with the current matter, demonstrate a pattern of misconduct; or (3) the prior discipline together with the current

⁹ Standard 1.7(a) directs that when multiple acts of misconduct call for different sanctions, we apply the most severe sanction. Other applicable standards include 2.6(a), which provides for actual suspension to disbarment for UPL, and 2.14, which calls for disbarment or actual suspension for any violation of a provision of Article 6 of the Business and Professions Code not otherwise specified in these Standards, including violations of section 6103.

misconduct “demonstrate the member’s unwillingness or inability to conform to ethical responsibilities.” This standard guides us to recommend disbarment because Sweeney has demonstrated an unwillingness or inability to conform to his ethical responsibilities, and, most importantly, he has provided no evidence in mitigation. (See, e.g., *Barnum v. State Bar* (1990) 52 Cal.3d 104, 113 [disbarment under former std. 1.7(b) imposed where no compelling mitigation]; compare *Arm v. State Bar* (1990) 50 Cal.3d 763, 778-779, 781 [disbarment under former std. 1.7(b) not imposed where compelling mitigation included lack of harm and no bad faith].) For reasons detailed below, we find no cause to depart from disbarment as recommended by standard 1.8(b).

To begin, Sweeney willfully violated the Sanctions Order, and “[o]ther than outright deceit, it is difficult to imagine conduct in the course of legal representation more unbefitting an attorney.” (*Barnum v. State Bar, supra*, 52 Cal.3d at p. 112.) Further, Sweeney’s misconduct is significantly aggravated by his ongoing, baseless insistence that he was not obligated to comply with the Sanctions Order. Notably, the deadline for complying with the Sanctions Order was just three months after the NDC was issued in *Sweeney III*. Even though he was on notice about his third disciplinary proceeding, Sweeney promptly defied a court order, and his misconduct continued even after he stipulated to misconduct in *Sweeney III* through his ongoing refusal to comply with the Sanctions Order and through his UPL.

Finally, we look to Sweeney’s three prior disciplines, and take into account the serious nature of the misconduct in *Sweeney I* and *Sweeney III*. In both cases, Sweeney performed incompetently on more than one occasion, did not communicate effectively about issues of material importance, and failed either to return client files and property or to promptly refund fees. As OCTC correctly argues, we must examine not only the level of discipline imposed in Sweeney’s prior proceedings, but also the nature and extent of his previous misconduct. Even

when an attorney's prior disciplines resulted in no more than a 30-day actual suspension, disbarment may still be appropriate. (See, e.g., *In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 969-970 [disbarment recommended for attorney with four prior disciplines, ranging from one-year stayed suspension to 30-day actual suspension].) Considering Sweeney's past and present misconduct, it appears that he is either "unwilling or unable" to conform his behavior to the rules of professional conduct. (*Barnum v. State Bar*, *supra*, 52 Cal.3d at p. 111.) "We believe that the risk of [Sweeney] repeating this misconduct would be considerable if he were permitted to continue in practice. [Citation.]" (*McMorris v. State Bar* (1983) 35 Cal.3d 77, 85.) Guided by standard 1.8(b) and relevant supporting case law,¹⁰ we conclude disbarment is warranted and necessary to protect the public, the courts, and the legal profession.

V. RECOMMENDATION

We recommend that Daniel Joseph Sweeney, Member No. 78362, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys admitted to practice in this state.

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

¹⁰ *McMorris v. State Bar*, *supra*, 35 Cal.3d 77 (disbarment in fifth discipline proceeding for five counts of misconduct, including §§ 6103 and 6106 violations and habitual course of misconduct); *Morgan v. State Bar* (1990) 51 Cal.3d 598, 607-608 (disbarment in fifth discipline proceeding after applying former std. 1.7(b) where pattern of misconduct, indifference to disciplinary orders, and no compelling mitigation); *Barnum v. State Bar*, *supra*, 52 Cal.3d 104 (disbarment in fourth discipline for collecting unconscionable fee, disobeying court orders, and failing to cooperate with State Bar investigation with no mitigation); *In the Matter of Thomson*, *supra*, 4 Cal. State Bar Ct. Rptr. 966, 976-977 (disbarment in fifth discipline proceeding for violations of court orders, failure to report sanctions, and UPL with no mitigation but aggravation including indifference, multiple acts, and acts of bad faith, dishonesty, and concealment).

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

VI. ORDER

Sweeney has been suspended since January 14, 2013. Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1) of the Rules of Procedure of the State Bar, Sweeney is ordered enrolled inactive. The order of inactive enrollment is effective three days after service of this opinion. (Rules Proc. of State Bar, rule 5.111(D)(1).

EPSTEIN, J.

WE CONCUR:

REMKE, P. J.

PURCELL, J.