

FILED DECEMBER 3, 2010

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)	08-O-13791; 08-N-14225 (Cons.)
)	
STEPHINE M. WELLS,)	OPINION AND ORDER
)	
Member No. 113148)	
)	
A Member of the State Bar.)	
_____)	

I. STATEMENT OF THE CASE

In this consolidated proceeding, Stephine M. Wells faces her fourth disciplinary case. A hearing judge found Wells culpable of misconduct in two matters: (1) violating probation conditions imposed in her second discipline case; and (2) failing to timely file a rule 9.20 affidavit¹ in her third discipline case. However, the hearing judge found that a medical condition prevented Wells from meeting her obligations in those cases. Consequently, the hearing judge did not recommend disbarment, although it is the presumptive discipline under standard 1.7(b)² (where two or more prior records exist without compelling mitigation), or where a rule 9.20 violation has occurred. Instead, the hearing judge recommended five years’ probation with

¹ California Rule of Court, rule 9.20, requires that a suspended member must, within the time prescribed by the California Supreme Court, file an affidavit showing full compliance with the requirements of the rule. These requirements include providing notice of the suspension to clients, co-counsel, opposing counsel, adverse parties and the court where current litigation is pending, delivering legal papers to clients and co-counsel and refunding any unearned fees to clients.

² Standard 1.7(b) calls for disbarment for two or more prior records of discipline, absent the most compelling mitigation that predominates over aggravation. Unless otherwise noted, all references to “standard(s)” are to the rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

conditions, including a three-year actual suspension, and until Wells establishes her rehabilitation, fitness and ability to practice law according to standard 1.4(c)(ii). The State Bar seeks review requesting that Wells be disbarred.

II. ISSUES

The State Bar contends that Wells should be disbarred under standard 1.7(b) and the decisional law for rule 9.20. In response, Wells contends that the State Bar failed to prove any charges against her and, even if found culpable, no more than a private reproof should be imposed.

The issues before us are:

1. Did the State Bar prove that Wells is culpable of violating probation in her second discipline case and failing to timely file a rule 9.20 declaration in her third discipline case?
2. If culpable, did Wells present compelling mitigation to avoid disbarment under standard 1.7(b)?
3. If culpable, did Wells present sufficient mitigating circumstances to avoid disbarment for filing her rule 9.20 affidavit nine months late?

III. SUMMARY OF DECISION

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we find that Wells willfully violated probation by filing late quarterly reports and not attending Ethics School in one case. We also find that she filed her rule 9.20 affidavit late and without reasonable justification in a separate case. Wells should be disbarred under both standard 1.7(b) and rule 9.20 decisional law since the aggravating circumstances greatly outweigh those in mitigation.

IV. CASE NUMBER 08-O-13791
(Violating Probation Conditions of Second Prior Discipline Case)

A. FINDINGS OF FACT³

In Wells’s second prior record of discipline, the California Supreme Court imposed an actual suspension from the practice of law for six months and placed her on probation for two years, commencing July 14, 2006. Wells was required to file quarterly reports and to complete Ethics School no later than July 14, 2007. By late October 2008, she had not completed Ethics School, had submitted three late quarterly reports and had failed to submit her July 10, 2008 quarterly report and her final report, due on July 14, 2008. As a result, on October 29, 2008, the State Bar filed an NDC alleging these probation violations. The next day, Wells filed her two final reports that were due in July. The five late filings are detailed below:

<u>Report</u>	<u>Due Date</u>	<u>Date Filed</u>	<u>No. Days Late</u>
Fourth Report	July 10, 2007	July 11, 2007	(1 day late)
Fifth Report	October 10, 2007	October 12, 2007	(2 days late)
Sixth Report	April 10, 2008	April 25, 2008	(15 days late)
Eighth Report	July 10, 2008	October 30, 2008	(112 days late)
Final Report	July 14, 2008	October 30, 2008	(107 days late)

Wells testified that she did not comply with these requirements due to illness and personal stress during her probation period, from 2006 to 2008. Specifically, after undergoing successful breast cancer surgery in December 2004, she began a regimen of anti-hormone therapy to reduce the risk of recurrence. By 2006, Wells was suffering side-effects from the therapy, including hot flashes, joint aches, musculoskeletal pain, forgetfulness, inability to focus

³ The findings of fact were established by clear and convincing evidence, which requires that proof be “so clear as to leave no substantial doubt,” and must be “sufficiently strong to command the unhesitating assent of every reasonable mind.” (*Sheehan v. Sullivan* (1899) 126 Cal. 189, 193.)

and insomnia. She endured these side-effects until June 2009, when her doctor prescribed a different drug. Wells also experienced anxiety and depression in 2007 and 2008, after four relatives and a friend passed away in succession.

Despite these difficulties, Wells participated in many activities of daily life while she was on probation. For example, she attended church events, cancer support group meetings, and weekly yoga classes. She also worked out at the gym four days per week and traveled to the East Coast to visit friends and family. During this time period, Wells provided pro bono and other significant community service. And in 2007, she represented herself before the State Bar Court and the California Supreme Court on a motion to modify a restitution requirement that she had not fulfilled in her second discipline case, so that she could return to the practice of law.

B. CULPABILITY

In the NDC, the State Bar charged Wells with failing to comply with probation in violation of Business and Professions Code section 6068, subdivision (k),⁴ because she did not timely file five quarterly reports or complete Ethics School. Wells stipulated only that she filed her last two quarterly reports late and did not attend Ethics School. The hearing judge found her culpable of these violations. We agree, but also find Wells culpable for failing to timely file her fourth, fifth and sixth probation reports.

Wells contends she did not *willfully* violate probation because physical and emotional difficulties made it impossible for her to comply. We reject this claim since Wells participated in other daily activities, particularly representing herself in State Bar disciplinary proceedings, which required substantially more effort than filing quarterly reports. At oral argument, Wells conceded that she avoided satisfying her State Bar probation requirements because doing so was

⁴ Unless otherwise noted, all further references to “section(s)” are to the Business and Professions Code. Section 6068, subdivision (k), requires an attorney “To comply with all conditions attached to any disciplinary probation”

too stressful, given her experiences in past discipline cases. Even so, Wells was obligated to comply with mandatory probation conditions. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 148 [willful non-compliance with probation condition merely requires knowledge of doing or not doing an act and intention to commit or refrain from committing an act].) We find clear and convincing evidence that Wells willfully violated probation.

V. CASE NUMBER 08-N-14225
(Failing to Comply with Rule 9.20 In Third Prior Discipline Case)

A. FINDINGS OF FACT

In Wells's third prior record of discipline, the California Supreme Court placed Wells on a three-year probation, and suspended her from the practice of law for three years, beginning September 12, 2008, and until she demonstrated her rehabilitation, fitness and legal learning in the law in a standard 1.4(c)(ii) hearing. Under the Supreme Court order, Wells was required to file a rule 9.20 affidavit no later than October 22, 2008. The State Bar Office of Probation (Probation) sent Wells a reminder letter on September 10, 2008. When Wells failed to timely submit the affidavit, the State Bar filed an NDC on December 10, 2008, charging her with misconduct. Finally, on July 10, 2009, ten days after trial on this charge commenced, Wells filed her rule 9.20 affidavit.⁵

⁵ Wells attempted to file her affidavit late on March 11, 2009, but it was rejected because it was illegible, had the wrong case number and was misdirected to Probation rather than the State Bar Court. Further, Wells used an outdated form even though Probation had provided her with a current one.

B. CULPABILITY

The State Bar charged Wells with violating section 6103⁶ because she disobeyed the Supreme Court's order to file her rule 9.20 affidavit by October 22, 2008. The hearing judge found Wells culpable and we agree.

Wells claims she honestly believed that she did not have to file a rule 9.20 affidavit because she had already filed a rule 955⁷ affidavit in her prior discipline, and she no longer had clients, files, or funds. But compliance is mandated even if an attorney is not practicing law and/or has no clients. (See *Bercovich v. State Bar* (1990) 50 Cal.3d at 116, 129-130 [claim that rule 955 affidavit unnecessary where attorney had no clients is "legally incorrect"].)

We find that Wells reasonably should have known that the affidavit was due since several significant events placed her on actual notice. First, on August 13, 2008, the Supreme Court ordered her to file her rule 9.20 affidavit by October 22, 2008. Second, Probation sent a reminder letter on September 10, 2008. Then, on December 10, 2008, the State Bar filed its NDC alleging misconduct for failing to file the affidavit. And finally, on June 30, 2009, the trial on this issue commenced. Given these notices, we conclude that Wells willfully failed to file her rule 9.20 affidavit for nearly nine months and is therefore culpable of violating section 6103.

VI. AGGRAVATION AND MITIGATION

The offering party bears the burden of proof for aggravating and mitigating circumstances. The State Bar must establish aggravating circumstances by clear and convincing evidence while Wells has the same burden to prove mitigating circumstances. (Std. 1.2(b) and (e).)

⁶ Section 6103 makes it a cause for disbarment or suspension when an attorney willfully disobeys or violates an order of the court.

⁷ Effective January 2007, rule 955 was renumbered as rule 9.20.

A. AGGRAVATING CIRCUMSTANCES

We adopt the three aggravating circumstances the hearing judge found – a prior record of discipline, multiple acts of misconduct, and uncharged misconduct. We also find additional aggravation in that Wells failed to cooperate in these proceedings. Overall, the aggravation outweighs the mitigation.

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

Wells has an extensive record of prior discipline, to which we assign great aggravating weight.

First Discipline -- 1993 (State Bar Case No. 91-O-04351)

This discipline involved misconduct that occurred between 1989 and 1991 in two client matters. Wells stipulated that she commingled personal funds with client funds in her client trust account and failed to deposit disputed client funds in trust. No aggravation was found and in mitigation, she had no priors, cooperated, and provided pro bono services. The State Bar Court imposed a private reproof, effective April 14, 1993.

Second Discipline -- 2006 (Supreme Court Case No. S140918)

This discipline involved misconduct that occurred between 2000 and 2001 in two client matters. Wells practiced law in South Carolina without a license, charged illegal and unconscionable fees, failed to return unearned fees, did not maintain client funds in trust and repeatedly committed acts that involved moral turpitude. In aggravation, Wells had a prior record of discipline, committed multiple acts of misconduct, caused significant harm, and demonstrated indifference toward the consequences of her misconduct. In mitigation, she cooperated with the State Bar, displayed good character, and suffered from extreme emotional distress due to marital problems and racism she experienced in South Carolina. On June 14, 2006, the Supreme Court ordered that she be suspended for two years and until she complies

with standard 1.4(c)(ii), but stayed that suspension and ordered that she comply with rule 955, serve two years probation and be actually suspended for six months and until she made restitution.

Third Discipline -- 2008 (Supreme Court Case No. S163446)

While proceedings were still pending before the State Bar Court in her second disciplinary case, Wells committed additional misconduct between 2004 and 2005 in two client matters. She repeatedly drafted checks on her client trust account against insufficient funds, which were deemed acts of moral turpitude. In aggravation, Wells had a record of two prior impositions of discipline and committed multiple acts of misconduct. In mitigation, she did not cause client harm, displayed remorse and suffered physical and emotional difficulties due to her breast cancer and subsequent treatment. On August 13, 2008, the Supreme Court imposed a two-year actual suspension and until she proved her rehabilitation, fitness and ability to practice law according to standard 1.4(c)(ii), and ordered her to file a rule 9.20 affidavit and serve three years' probation.

2. Multiple Acts of Misconduct (Std. 1.2(b)(ii))

Wells committed multiple acts of misconduct by filing five probation reports late, failing to complete Ethics School and filing her rule 9.20 affidavit late. (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 529 [failure to timely file two probation reports or cooperate with probation monitor constituted multiple acts of misconduct].) We assign moderate weight to this aggravating circumstance.

3. Uncharged Misconduct (Std. 1.2(b)(iii))

In her third discipline case (Supreme Court Case No. S163446), Wells did not timely submit two quarterly reports that were due January 10, and April 10, 2009. This uncharged misconduct further aggravates the case before us. (*Edwards v. State Bar* (1990) 52 Cal.3d 28,

35-36 [evidence of uncharged misconduct may be considered in aggravation].)⁸ We note that Wells filed these quarterly reports late even though she was awaiting trial in this case for similar probation violations. Such blatant disregard of probation responsibilities demonstrates that Wells does not take them seriously, and is an aggravating factor.

4. Lack of Cooperation (Std. 1.2(b)(vi))

We find that Wells failed to cooperate in this proceeding, as detailed below, which is a significant aggravating circumstance. First, she allowed her default to be entered after the State Bar filed its NDC in the probation matter. Second, she failed to attend two scheduled settlement conferences. Third, she did not timely file a pretrial statement or provide exhibits to the State Bar before the pretrial conference. And finally, Wells repeatedly failed to comply with the hearing judge's orders to disclose mitigation witnesses. (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81, 87 [attorney's failure to comply with pretrial procedures and provide witness list considered aggravating circumstance].)

B. MITIGATING CIRCUMSTANCES

We do not concur with all of the hearing judge's findings in mitigation. We agree that Wells experienced physical and emotional difficulties and expressed remorse for her misconduct, but assign only nominal weight to each. We also agree that Wells proved that she participated in significant community services, but did not prove mitigating good character. We disagree, however, that Wells proved lack of harm and good faith.

1. Extreme Emotional Difficulties or Physical Disabilities (Std. 1.2(e)(iv))

Wells suffered physical and emotional difficulties from the side-effects of her cancer therapy and the loss of people close to her. But unlike the hearing judge, we do not find that

⁸ The State Bar failed to amend the NDC to include these probation violations either before, during or after trial. Therefore, they may be considered only as aggravation and not for separate discipline. (See Rules Proc. of State Bar, rule 104; *Edwards v. State Bar, supra*, 52 Cal.3d at p. 35 [attorney may be disciplined only for misconduct alleged in notice].)

these “stressors in her life in 2008 caused [Wells] to . . . only make ‘partial’ efforts to comply with her probation conditions and with the Supreme Court order . . . directing her to comply with rule 9.20” Instead, we assign this mitigation only nominal weight because Wells continued to capably function in other aspects of her life. She did not prove by clear and convincing evidence that physical and emotional difficulties actually prevented her from complying with simple probation terms such as filing quarterly reports, or from timely complying with rule 9.20.⁹

2. Remorse (Std. 1.2(e)(vii))

The hearing judge found that Wells credibly expressed remorse at trial. Wells testified she regretted her non-compliance with disciplinary orders, stating: “I wish it had never happened.” And during oral argument, she asked for the court’s mercy and emphasized her *current* remorse. However, absent “objective steps . . . promptly taken demonstrating remorse,” we do not assign significant weight to this mitigating circumstance. (Std. 1.2(e)(vii); *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 519 [expressing remorse for misconduct, standing alone, deserves no special consideration in determining appropriate discipline].)

3. Community Service

Like the hearing judge, we assign mitigating credit for Wells’s extensive community service. (*Schneider v. State Bar* (1987) 43 Cal.3d 784, 799 [service to community is mitigating factor].) She established that she volunteers about three hours each week with her church, works with a nonprofit group to write grants, provides transportation and assistance to cancer patients, volunteers at a school reading program, assists others with resume preparation, teaches piano lessons and helps a mentally challenged girl with homework and social activities.

⁹ Wells’s third prior discipline case in 2008 was mitigated because of her breast cancer and subsequent treatment. We also assign mitigation credit in this case since Wells continued to experience side-effects from her medications when she committed the charged misconduct.

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

We agree with the hearing judge that Wells did not establish good character through the testimony from only two individuals – a pastor and an attorney. These witnesses credibly testified about Wells’ church and pro bono activities, as well as her reputation for honesty in the community. But they do not comprise “a wide range of references in the legal and general communities,” as called for in the standard. (Std. 1.2(e)(vi); see *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171 [testimony from only three character witnesses not entitled to significant weight in mitigation].)

5. Lack of Harm (Std. 1.2(e)(iii))

The hearing judge found that Wells proved lack of harm in mitigation, but we disagree. Even if she harmed no clients, Wells repeatedly failed to timely comply with probation, which harmed the fair administration of justice. (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 76 [harm to administration of justice inherent in probation violation.]

6. Good Faith (Std. 1.2(e)(ii))

We do not assign any mitigation to Wells’s claim that she believed in good faith that she did not have to file a rule 9.20 affidavit since a 955 affidavit was on file in a prior discipline case. Even if Wells initially believed in good faith that the affidavit from her second discipline case fulfilled her obligation in the third case, this belief was entirely unreasonable – Probation and the State Bar’s NDC notified her that it was due. (See *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50-51 [good faith mitigation requires attorney to prove his belief was both honestly held *and* reasonable].)

VII. DISCIPLINE ANALYSIS

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession, to maintain high standards for attorneys and to preserve

public confidence in the profession. (Std. 1.3.) No fixed formula exists to determine the appropriate discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Ultimately, we balance all relevant factors, including aggravating and mitigating circumstances, on a case-by-case basis to impose discipline consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) We begin our discipline analysis with the standards.

Two standards apply. Standard 2.6(a) provides that an attorney who violates section 6068 should be suspended or disbarred. But standard 1.7(b), which calls for disbarment for two or more prior disciplines absent compelling mitigation, is most apt to our analysis since Wells has three prior records of discipline.

A. STANDARD 1.7(b)

The critical issue presented by standard 1.7(b) is whether Wells has presented compelling mitigation that clearly predominates over the aggravating factors to warrant an exception to disbarment as the presumptive discipline. (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 113 [disbarment under std. 1.7(b) imposed where no compelling mitigation found].) But overall, the standards are not required to be strictly followed in every case. (*In re Young, supra*, 49 Cal.3d at p. 267, fn. 11.) Instead, the Supreme Court considers all relevant circumstances in each case to determine the appropriate attorney discipline. (*Id.* at p. 268.) Thus, we examine the facts unique to each case, as well as the nature and chronology of prior discipline records in standard 1.7(b) cases, recognizing that “[m]erely declaring that an attorney has [two prior] impositions of discipline, without more analysis, may not adequately justify disbarment in every case.” (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.)

In view of the unique facts presented here, we conclude that disbarment is warranted and necessary under standard 1.7(b) to protect the public, the courts and the legal profession. Wells’s

remorse, community service, nominal good character and physical and emotional difficulties do not establish compelling mitigation that preponderates over her extensive disciplinary record, multiple acts of wrongdoing, uncharged misconduct and lack of cooperation. Wells disregarded her probation obligations, which are designed to rehabilitate the attorney and to protect the public from similar future misconduct. (See *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044.) Given her unsuccessful performance on prior probations, further suspension with additional probation would neither prevent future misconduct nor adequately protect the public.

B. RULE 9.20 VIOLATION

A willful violation of rule 9.20 constitutes serious misconduct. “In every case, rule [9.20] performs [a] critical prophylactic function Thus, a wilful violation of this rule is, by definition, deserving of strong disciplinary measures. [Citations.]” (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187 [attorney disbarred after failing to file rule 9.20 affidavit even with no clients or counsel to notify]; accord, *Powers v. State Bar* (1988) 44 Cal.3d 337, 341 [attorney disbarred after failing to file rule 9.20 affidavit despite absence of law practice, clients or pending cases].) “[D]isbarment is generally the appropriate sanction for a willful violation of rule [9.20].” (*Bercovich v. State Bar, supra*, 50 Cal.3d at p. 131.) To avoid disbarment, the attorney must generally prove substantial mitigation, such as diligent but unsuccessful efforts to timely comply, physical impediments preventing timely compliance or misinformation from a probation officer or monitor. (See *Shapiro v. State Bar* (1990) 51 Cal.3d 251.)

Wells did not prove substantial mitigation. She knew about her obligation through the Supreme Court order, Probation’s reminder letter and the NDC charging her with failing to file the affidavit. Since she was no longer practicing law and had no clients, the requirement was nominal – Wells needed only to file a simple affidavit so stating these circumstances. Given all the other activities in which Wells participated, we conclude she could have timely filed the

affidavit. Under decisional law, Wells should be disbarred for violating rule 9.20 without adequate justification.

VIII. RECOMMENDATION

We recommend that Stephine M. Wells, bar number 113148, be disbarred from the practice of law in California and that her name be stricken from the roll of attorneys.

We also recommend that she be required to comply with the provisions of rule 9.20 of the California Rules of Court and to perform the acts specified in subdivision (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's order in this case.

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

IX. ORDER

Pursuant to Business and Professions Code section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the State Bar, Wells is ordered enrolled inactive. The order of inactive enrollment is effective three days after service of this opinion.

PURCELL, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.