PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed July 15, 2015

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 10-C-07932
	)	
JEFFREY ALAN DICKSTEIN,	)	OPINION
	)	
A Member of the State Bar, No. 70638.	)	
	)	

The Office of the Chief Trial Counsel of the State Bar (OCTC) appeals a hearing judge's recommendation that Jeffrey Alan Dickstein be disciplined based on his 2010 misdemeanor contempt conviction in a federal district court. (18 U.S.C. § 401(3).) Dickstein was convicted for seeking to withdraw from representing two clients in a criminal case, in violation of a court order. The hearing judge recommended a 30-day suspension and that Dickstein pass the Multi-State Professional Responsibility Examination, but did not recommend a stayed suspension or probation period. No aggravating or mitigating circumstances were found.

OCTC appeals, arguing Dickson's misconduct is aggravated by his indifference and the harm he caused to his clients and to the administration of justice. It urges a six-month actual suspension, a one-year stayed suspension, and two years' probation. Dickstein did not seek review, but challenges this court's subject matter jurisdiction.

After independent review (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's culpability finding. We also find aggravation for lack of insight and harm to the administration of justice, and mitigation for Dickstein's more than 30-year discipline-free record. We affirm the 30-day actual suspension, but include a one-year stayed suspension and a two-year probation period.

I. FACTUAL BACKGROUND[1]

A. Dickstein Agrees to Represent the Hirmers

Dickstein was admitted to practice law in California in 1976, and is experienced in representing clients charged with tax avoidance schemes. In 2008, he began defending Claudia and Mark Hirmer on federal charges in Florida of conspiracy to defraud the Internal Revenue Service, conspiracy to commit money laundering, tax evasion, and wire fraud. If convicted, both clients faced 25 years in prison and $20 million dollars in restitution.

In August 2008, Dickstein initially told the federal district court that his future appearances on behalf of the Hirmers were contingent on making financial arrangements with them for his fees. But in early September 2009, he advised the court he would accept the Hirmers as clients. He acknowledged the complexity of the case, its anticipated duration, and that he might receive little (if any) compensation unless the Hirmers were acquitted of the conspiracy count due to forfeiture allegations. At a September 16, 2008 hearing, the district judge cautioned Dickstein that he was expected to continue representing the Hirmers throughout the entire case. Dickstein agreed. When the court warned that it would not entertain a motion to withdraw based on the Hirmers' failure to pay fees, Dickstein said he understood.

On September 23, 2008, the district court entered its Standing Order and Notice to Retained Criminal Defense Attorneys (Standing Order). The order required counsel to make sufficient financial arrangements to represent their clients and to notify the court within seven days if arrangements could not be made. The order stated that the court expected counsel to represent their clients "until the conclusion of the case" if no notification were provided.

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[1] At the disciplinary hearing, Dickstein appeared telephonically and OCTC did not call witnesses. The federal district court's 14-page Order and Judgment of Criminal Contempt was admitted. We rely on the facts provided therein and the hearing judge's findings of fact, which are entitled to great weight (Rules Proc. of State Bar, rule 5.155(A)), and which Dickstein does not challenge on review (Rules Proc. of State Bar, rule 5.152(C) [factual error not raised on review is waived by parties]).

Dickstein did not withdraw within the seven-day period, but instead filed a notice of his intent to continue representation. For the next 18 months, Dickstein represented the Hirmers, including during a month-long trial, where both clients were ultimately convicted on all counts. Sentencing was set for July 2010.

B. Dickstein Moves to Withdraw as Counsel

In April 2010, Dickstein filed a motion to withdraw as counsel on the grounds that the Hirmers failed to pay his fees. He made several claims in his motion. To begin, he revealed that the Hirmers had paid him approximately $146,000, but still owed $308,210.67. He asserted this nonpayment of fees placed him in "severe financial straits, rendering him unable to pay current expenses for rent, food, utilities and other bills." He stated he was living in Wisconsin, and did not have the funds to travel to Florida for the sentencing hearing, to pay fees for an appeal, or to order trial transcripts.[2] Finally, Dickstein asserted that the Hirmers had "rendered him a pauper," and he was "unwilling" to continue representing them.

The district court denied Dickstein's motion to withdraw because it violated the Standing Order. However, considering the complexity of the case and Dickstein's familiarity with it, the court appointed him to continue his representation under the Criminal Justice Act (CJA).[3]

C. Dickstein Moves for Reconsideration

Dickstein filed a motion for reconsideration of the district court's order denying his motion to withdraw and appointing him as CJA counsel. He stated in his motion that he no longer had the best interests of the Hirmers at heart, and was spiritually, emotionally, and physically incapable of providing adequate representation. For the first time, he cited conflicts of interest and irreconcilable differences as bases for his motion.

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[2] When Dickstein began representing the Hirmers, he was a solo practitioner in Wisconsin. He relocated to Florida for the trial from about February through April 2010.

[3] The CJA provides federal funds to enable willing attorneys to represent indigent defendants.

The district court found Dickstein was unwilling to continue representing the Hirmers based on nonpayment of his fees, but concluded it had no choice but to grant the motion and appoint substitute counsel.[4] Consequently, the sentencing was delayed for several months.

D. The Criminal Contempt Trial

On August 18, 2010, the district court initiated sua sponte criminal contempt proceedings, charging Dickstein with violating the court's verbal and written orders "advising him he was required to represent the Hirmers even if they could not pay his fees." At trial, Dickstein claimed he did not think he was violating the orders when he sought to withdraw because he was unable to pay rent, buy food, or maintain a law office. He testified that his billable hours for the case far exceeded the $146,000 he had been paid.

In the district court's written November 2010 order on contempt, it found beyond a reasonable doubt that: (1) its September 16, 2008 verbal order and the September 23, 2008 Standing Order were lawful and reasonably specific; (2) Dickstein violated those orders by moving to withdraw "based explicitly on [the Hirmers'] nonpayment of his fees, which was the very act the court's orders were designed to prevent"; and (3) Dickstein's violation was willful. The court also found Dickstein's "subsequently offered reasons" for his withdrawal were "mere after thought" and "pretextual," and there was no evidence to support his claim of being a homeless pauper. Dickstein's actions, the district court concluded, "hindered the court's processes and disrupted the administration of justice by delaying the Hirmers' sentencing hearings three months and forcing the court to appoint two new attorneys 20 months into the case, following a lengthy trial in which they had not participated." Dickstein was sentenced to 90 days in custody, but was released on his own recognizance pending appeal.

[4] Claudia Hirmer appeared at the hearing. When the district court asked whether she wanted Dickstein to continue as her attorney, she replied "No. He said he doesn't have our best interest at heart anymore. How can we have an attorney that doesn't care about our position anymore?"

Dickstein unsuccessfully appealed his conviction to the United States Court of Appeals, Eleventh Circuit, which found that he "deliberately and intentionally" filed a motion to withdraw based on the Hirmers' failure to pay fees, in violation of the district court's order. The appellate court concluded that, "at a minimum, Dickstein's actions amounted to reckless disregard for the administration of justice, which is sufficient to support a criminal contempt conviction."

II. SUBJECT MATTER JURISDICTION[5]

Dickstein contends that this court and the California Supreme Court lack subject matter jurisdiction. He cites Business and Professions Code section 6102, subdivision (e),[6] which provides that an attorney may be disbarred or suspended if a crime or circumstances of its commission involve moral turpitude; otherwise, the proceeding shall be dismissed. He argues that this authority supports a dismissal because the hearing judge found no moral turpitude in the facts and circumstances surrounding his conviction. His argument is unpersuasive.

Section 6102, subdivision (e), does not limit the Supreme Court's inherent and primary authority to control the practice of law or to provide procedures for attorney discipline. (§ 6100 ["Nothing in this article limits the inherent power of the Supreme Court to discipline, including to summarily disbar, any attorney"]; *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889 [legislative standards for admission to practice are minimum as Supreme Court retains inherent power to require additional standards].) After 1973, the Supreme Court instructed that an attorney may be disciplined, *without a finding of moral turpitude*, if the facts and circumstances surrounding a conviction involve "other misconduct warranting discipline." (*In re Rohan* (1978) 21 Cal.3d 195, 202-203, italics omitted.)

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[5] At oral argument, OCTC objected to Dickstein's jurisdictional challenge since he did not appeal. The objection was noted. We consider Dickstein's argument here because it involves subject matter jurisdiction, a fundamental issue we must address under independent review.

[6] All further references to sections are to the Business and Professions Code.

More recently, in *In re Kelley* (1990) 52 Cal.3d 487, 494-495, the Supreme Court confirmed the validity of the "other misconduct warranting discipline" standard for criminal conduct. The *Kelley* Court explained that this standard appropriately "permits discipline of attorneys for misconduct not amounting to moral turpitude as an exercise of our inherent power to control the practice of law and to protect the profession and the public." (*Kelley*, *supra*, 52 Cal.3d at p. 494; *Emslie v. State Bar* (1974) 11 Cal.3d 210, 224-225 [Supreme Court's inherent power over admission, disbarment, and suspension is long-standing and predates the State Bar Act].) As the Supreme Court has delegated its power to the State Bar Court to act on its behalf in disciplinary matters subject to its review (§ 6087), we have subject matter jurisdiction to recommend discipline in this non-moral turpitude conviction proceeding. (See *Obrien v. Jones* (2000) 23 Cal.4th 40, 49-50; *In re Rose* (2000) 22 Cal.4th 430, 442; Cal. Rules of Court, rule 9.10; §§ 6040, 6043, 6048, 6078, 6079.1, 6081.)

III. DICKSTEIN'S MISCONDUCT WARRANTS DISCIPLINE

Dickstein's conviction is conclusive proof, for the purpose of attorney discipline, of the elements of the crime. (See § 6101, subds. (a) & (e); *In re Kirschke* (1976) 16 Cal.3d 902, 904.) Thus, his criminal contempt conviction establishes that: (1) the district court entered a lawful order of reasonable specificity; (2) Dickstein violated that order; and (3) the violation was willful. (See *United States v. Robinson* (11th Cir. 1991) 922 F.2d 1531, 1534.)

The hearing judge found that the facts and circumstances surrounding Dickstein's misdemeanor criminal contempt conviction do not involve moral turpitude, and OCTC does not challenge that finding. We agree.[7]

[7] The hearing judge found the facts and circumstances surrounding Dickstein's conviction also violated section 6103 (failure to obey court order) and rule 3-700(A)(2) of the Rules of Professional Conduct (withdrawing without taking reasonable steps to avoid foreseeable prejudice). We disregard these culpability findings because they were not charged in the Notice

As noted, we may still recommend discipline if "other misconduct warranting discipline" surrounds the conviction, although we examine the facts and circumstances and do not merely rely on the conviction. (See *In re Gross* (1983) 33 Cal.3d 561, 566 [misconduct, not conviction, warrants discipline]; *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 589, fn. 6 [whether acts underlying conviction amount to professional misconduct "is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction"].)

The totality of facts and circumstances surrounding Dickstein's conviction amounts to "other misconduct warranting discipline." In no uncertain terms, the district court's Standing Order and the judge's verbal warnings explicitly prohibited Dickstein from filing a motion to withdraw due to the Hirmers' nonpayment of fees. Yet he did so in direct violation of the orders. This delayed the sentencing proceeding and disrupted the orderly administration of justice. We find that Dickstein's contemptuous disregard of the district court's order was directly related to his practice of law, and is serious misconduct. "Other than outright deceit, it is difficult to imagine conduct in the course of legal representation more unbefitting an attorney [than willful violation of court order]." (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.)

IV. AGGRAVATION AND MITIGATION

The appropriate discipline is determined in light of the relevant circumstances, including aggravating and mitigating factors.[8] (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) OCTC must

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of Disciplinary Charges, and are not relevant to determine the appropriate discipline in a conviction referral matter.

[8] Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. On July 1, 2015, the standards were revised and renumbered. Because this appeal was submitted for ruling before that date, we apply the prior version of the standards, which was effective January 1, 2014 through June 30, 2015. All further references to standards are to the prior version of this source.

establish aggravation by clear and convincing evidence (std. 1.5), while Dickstein has the same burden to prove mitigating circumstances.[9] (Std. 1.6.)

The hearing judge found no aggravating or mitigating factors. However, our independent review reveals two factors in aggravation and one in mitigation.

As to aggravation, OCTC proved that Dickstein lacked remorse and insight into his wrongdoing. (Std. 1.5(g); *Bach v. State Bar* (1991) 52 Cal.3d 1201, 1208 [aggravation based on persistent lack of insight into deficiencies of attorney's professional behavior].) He flatly denied his wrongdoing, and blamed others for his misconduct, proclaiming that "I never violated a court order," and "[t]his isn't the first time I've been attacked by federal judges." While the law does not require false penitence, Dickstein must "accept responsibility for his acts and come to grips with his culpability." (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) He has not done this.

We also find that Dickstein significantly harmed the administration of justice (std. 1.5(f)) by impeding the district court's orderly process and delaying the Hirmers' sentencing. However, our finding does not aggravate this case because we relied on that harm in determining that his misconduct surrounding the conviction warrants discipline. (See *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [where facts considered for culpability, improper to use for aggravation].)

In mitigation, we find that Dickstein had no prior discipline, at the time of his misconduct, in three decades of practice. (Std. 1.6(a).) But, as OCTC correctly notes, this factor merits only minimal credit because federal courts in other jurisdictions have twice sanctioned

[9] 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.)

him. In 1987, Dickstein was formally censured for contemptuous conduct during a trial,[10] and in 1996, his *pro hac vice* admission was revoked due to misrepresentations and omissions in his application.[11]

V. DICKSTEIN'S DISCIPLINE SHOULD INCLUDE A PERIOD OF STAYED SUSPENSION AND PROBATION

We begin our analysis with the standards. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Standard 2.8(a) applies here as it provides that "[d]isbarment or actual suspension is appropriate for disobedience or violation of a court order related to the member's practice of law." In particular, we are guided by this standard's requirement for, at a minimum, an *actual* suspension. We agree with the hearing judge that a 30-day actual suspension is appropriate.

OCTC, however, requests a six-month suspension, arguing that Dickstein's misconduct falls between cases that involve violations of a court order with a failure to perform (*Layton v. State Bar* (1990) 50 Cal.3d 889 [30-day suspension]; *Harris v. State Bar* (1990) 51 Cal.3d 1082 [90-day suspension]) and violations of a court order with client abandonment (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1 [18-month suspension for improperly withdrawing and abandoning over 300 clients in violation of court order].) OCTC urges that *Wolff* controls because Dickstein's misconduct was similarly harmful to the clients and the court system. We do not find *Wolff* applicable; the attorney in that case abandoned 300 clients while Dickstein violated a court order related to two clients.

In determining the proper discipline in this conviction proceeding, we are mindful that it is not our role to punish Dickstein for his criminal conduct; the federal district court has done that. Instead, we emphasize our purpose in imposing discipline — to protect the public and the courts and to maintain high professional standards. (Std. 1.1.) Since Dickstein's misconduct

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[10] *United States v. Summet* (9th Cir. 1988) 862 F.2d 784.

[11] *United States v. Howell* (D. Kan. 1996) 936 F.Supp. 767.

involved two clients in a single matter and considering that his mitigation balances the aggravation, a 30-day suspension properly falls at the low end of the discipline range suggested by standard 2.8(a). (See Std. 1.2(c)(1) ["Actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, or three years"].)

OCTC requests that, even if we affirm the 30-day suspension, we include a one-year stayed suspension and two years of probation in our recommendation. This point has merit. Given Dickstein's lack of insight, probation is particularly important to serve the critical purpose of protecting the public. (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 652.) Moreover, it "permits the State Bar to monitor [Dickstein's] compliance with professional standards" and ensures his rehabilitation is well established. (*Ritter v. State Bar* (1985) 40 Cal.3d 595, 605; see also *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 319.) Dickstein's overall misconduct resulting in his criminal contempt conviction calls for a stayed suspension and a probation period, in addition to the 30-day actual suspension recommended by the hearing judge.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Jeffrey Alan Dickstein be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for the first 30 days 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.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if Dickstein 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 further recommend that Dickstein 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. 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, P. J.

WE CONCUR:

EPSTEIN, J.

STOVITZ, J.*

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* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.