

FILED SEPTEMBER 17, 2010

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)	Nos. 05-O-03263 ; 08-O-10419
)	
HENRY JAMES KOEHLER, IV)	OPINION ON REVIEW AND
)	ORDER
A Member of the State Bar.)	
_____)	

I. STATEMENT OF THE CASE

In his fourth disciplinary proceeding, Henry James Koehler IV seeks review of a hearing judge’s recommendation that he be disbarred. The hearing judge found Koehler culpable of engaging in the unauthorized practice of law (UPL), an act of moral turpitude. Koehler did not present any mitigation evidence and the hearing judge found several aggravating factors, including three prior records of discipline, multiple acts of wrongdoing and uncharged misconduct. In recommending disbarment, the hearing judge applied standard 2.3,¹ which calls for disbarment or suspension for an act of moral turpitude and standard 1.7(b), which calls for disbarment for two or more prior records of discipline, absent compelling mitigation.

II. ISSUES

Koehler contends that: (1) the charges were not sufficiently proved, (2) the hearing judge erred in denying his posttrial motion to set aside the judgment and reopen the record to permit

¹ 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.

mitigation evidence, and (3) case law supports a one-month suspension rather than disbarment. The State Bar did not seek review but advocates that we adopt the hearing judge's recommendation. The issues before us are:

1. Did the State Bar clearly and convincingly prove that Koehler engaged in UPL?
2. If so, did the UPL constitute an act of moral turpitude?
3. Did the hearing judge err when he denied Koehler's motion to set aside the judgment and reopen the case for mitigation evidence?
4. Should Koehler be disbarred under standard 1.7(b) (two or more prior disciplines)?

III. SUMMARY OF THE CASE

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we find Koehler culpable of engaging in UPL and committing an act of moral turpitude. He should be disbarred under standard 1.7(b) because this is his fourth discipline and he failed to present compelling mitigation.

IV. FINDINGS OF FACT

Clear and convincing evidence establishes the following facts.² In July 1999, Stephen Kite, Norma LaLonde (Kite's mother) and Larry LaLonde (Norma's husband) retained Koehler to represent them in a custody dispute involving Kite's son. Koehler generally represented fathers in custody matters. Four months after Kite and the LaLondes retained him, the California Supreme Court imposed Koehler's third discipline, suspending him from the practice of law for 60 days beginning November 4, 1999, and ending January 4, 2000.

Koehler persuaded Kite to retain family law attorney Steven Wingfield to handle the child custody matter during his suspension. On November 2, 1999, Kite, but not the LaLondes,

² Evidence by a clear and convincing standard requires that the 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.)

signed a retainer agreement with Wingfield that stated: “I am a client of Henry James Koehler, Attorney at Law. It is my understanding that he will be suspended from the practice of law . . . for 60 days.” Under the agreement, Koehler would continue to work on the custody case as a paralegal, and Wingfield would manage all legal strategy, advice and client representation.³

Despite the retainer agreement, Koehler persisted in providing legal advice to the clients during his suspension and without authorization from Wingfield. In fact, Wingfield believed Koehler was performing only the paralegal duties outlined in the retainer agreement, such as assembling data, performing research, and assisting in drafting briefs. And while Wingfield was aware that Koehler communicated with the clients, he testified that “obviously he [Koehler] couldn’t give legal advice to the clients.” Wingfield welcomed Koehler’s input on the case but made it clear that “Mr. Koehler didn’t tell me how to practice law . . . I make the decisions on my cases . . .” The State Bar alleged that during his suspension, Koehler wrote nine letters to Wingfield, Kite, the LaLondes and/or a paralegal, and each letter constituted UPL. Of those letters, we conclude that the ones written to the clients on December 7 and 9, 1999, establish Koehler’s UPL.

In the December 7, 1999, letter to the LaLondes, Koehler discussed a court hearing scheduled for the following day. He offered his legal opinion that an expert need not testify at the hearing and informed them that opposing counsel was technically correct about that expert’s role. Koehler also explained his legal analysis about Kite’s wife’s best defense. He sent the letter “straight up to Norma and Larry” without authorization from Wingfield. Wingfield did not

³ The evidence conflicts on whether Koehler told the clients about his suspension. Kite and the LaLondes deny that he informed them. They testified that Wingfield was temporarily filling in for Koehler for medical reasons. The hearing judge found that Kite and the LaLondes lacked credibility and we give great weight to that finding.

recall authorizing the document, particularly since the LaLondes were not his clients under the retainer agreement.

In the December 9, 1999, written communication, Koehler provided tactical legal advice to Kite and the LaLondes. He advised them to appeal a recent trial court ruling in the custody case. He also informed them that he would subpoena records, and recommended they send in “someone undercover” to gather evidence that Kite’s wife was back at work. Koehler claimed that his communication was not legal advice but rather “tea and sympathy” comments since he was simply “trying to cool the whole thing.”

While the remaining letters Koehler sent do not constitute UPL, they corroborate it and reveal the controlling nature of his relationship with Kite and the LaLondes. For example, in the December 18, 1999, letter, Koehler informed Kite that he had a new phone number and Kite was to contact Koehler directly instead of communicating with Wingfield’s office. He instructed Kite: “Do not use any of the phone lines for reaching me that you ever used before. All are on automatic call-forwarding and go 200 miles south to La Mesa, Steve Wingfield’s office. Many times I never, ever, get them. So, ignore those lines entirely if you want action.”

In his December 23, 1999, letter to Kite, Koehler demanded that Kite clear all future actions with him. In this letter, Koehler expressed frustration about not knowing all the details of the case when he advised Kite about a Christmas visitation exchange stating: “. . . I shot off my mouth giving you advice. I’ll never, ever, do that again. The tragedy is that if you call a lawyer for advice, he’ll give it . . . even when he shouldn’t because he doesn’t know all the tiny details of what’s going on. And that was my mistake.” Koehler then directed Kite to “clear everything” with him beginning December 30, 1999, a week before his suspension ended, stating: “Pls [sic] don’t buy a plane ticket, utter a peep, write a letter, or go the bathroom without checking with me, first.”

In November 2003, Kite and the LaLondes dismissed Koehler as their attorney and eventually filed a State Bar complaint against him. After an investigation, the State Bar declined to take any action. In 2005, Koehler sued Kite and the LaLondes for damages, alleging breach of their fee contract in the custody case, and libel and slander for making an unwarranted disciplinary complaint. He also sought attorney fees for defending against the State Bar complaint. Kite and the LaLondes retained counsel, who repeatedly demanded that Koehler dismiss the libel and slander cause of action since the clients' complaint to the State Bar was privileged and Koehler's lawsuit appeared to be a strategic lawsuit against public participation (SLAPP). Koehler finally dismissed this count, and the remainder of the lawsuit went to arbitration.

V. CULPABILITY – PRINCIPLES OF LAW AND ANALYSIS

COUNT 1: SECTION 6068, SUBDIVISION (A) – UPL

The State Bar alleged in Count One of the second amended Notice of Disciplinary Charges (NDC)⁴ that Koehler engaged in UPL, violating Business and Professions Code sections 6125, 6126, and 6068, subdivision (a).⁵ Section 6125 prohibits the practice of law in California without active State Bar membership, section 6126 prohibits an attorney from advertising or holding himself out as entitled to practice law without active membership, and section 6068, subdivision (a) requires an attorney to support state laws. (See *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 506 [appropriate method of charging violations of §§ 6125 and 6126 is by charging violation of § 6068, subd. (a)].) Specifically, the State Bar

⁴ All further references to the NDC are to the second amended filing.

⁵ Unless otherwise noted, all further references to “section(s)” are to the Business and Professions Code.

claims that Koehler engaged in UPL by writing nine letters to Kite, the LaLondes, Wingfield and a paralegal.

The practice of law is not limited to litigation. It embraces a wide range of activities, including preparation of documents, providing legal advice and taking all actions necessary in matters connected with the law. (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128; see *Morgan v. State Bar* (1990) 51 Cal.3d 598, 603 [if application of legal knowledge and technique is required, activity constitutes practice of law]; *Mickel v. Murphy* (1957) 147 Cal.App.2d 718, 720-721 [giving advice in matters not pending before court constitutes UPL].) Throughout his suspension, Koehler continued to exercise control over the custody case, providing legal advice, strategy and recommendations to Kite and the LaLondes. We find that his December 7 and 9, 1999, letters constitute more than “tea and sympathy,” and instead embody legal advice.

Koehler contends that he did not commit UPL since he merely suggested a legal strategy rather than securing legal rights for his clients, citing *People v. Merchants’ Protective Corp.* (1922) 189 Cal. 531, 535 (practice of law includes legal advice/counsel and preparation of legal instruments/contracts by which legal rights are secured whether or not such matters are pending in court). However, under *Merchants*, the requirement that legal rights be secured relates to preparing legal instruments or contracts, and not to providing legal advice. Koehler also contends his letters are authorized under section 6450, which outlines a paralegal’s proper tasks. But section 6450, subdivision (b)(1), clearly provides that a paralegal cannot give legal advice. And finally, he did not present sufficient evidence that Wingfield authorized or approved Koehler’s client letters. We conclude that Koehler engaged in UPL in violation of sections 6125 and 6126, thereby establishing a violation of section 6068, subdivision (a).

**COUNT 2: SECTION 6106 – MORAL TURPITUDE, CORRUPTION
OR DISHONESTY**

Koehler committed an act of moral turpitude by engaging in UPL because he directly violated a Supreme Court order that suspended him from the practice of law. (See *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 384 [intentional violation of court order involves moral turpitude].)⁶ Koehler’s conduct violates section 6106.

VI. KOEHLER’S MOTION AND REQUESTS FOR JUDICIAL NOTICE

At his discipline trial, Koehler did not present any evidence supporting mitigation. On the last day of trial, his counsel stated that all mitigation evidence had already been presented. The hearing judge filed his decision recommending Koehler’s disbarment on August 10, 2009, finding that “[n]o mitigating factor was submitted into evidence.”

On September 4, 2009, Koehler made a motion to set the judgment aside and requested that the court reopen the record to admit his mitigation evidence. He argued that the hearing judge erred because he did not consider the records in the court’s file regarding Koehler’s mental health problems and his participation in the Lawyer Assistance Program (LAP) and the Alternative Discipline Program (ADP). The hearing judge denied the motion. Koehler requests that we review the hearing judge’s decision to deny his posttrial motion to set aside the judgment and reopen the case. He also asks us to judicially notice three matters, and augment the record with the judicially noticed documents. As discussed below, we affirm the hearing judge’s decision to deny Koehler’s posttrial motion, and further deny Koehler’s requests for judicial notice and to reopen and augment the record.

⁶The hearing judge dismissed the remaining charges with prejudice (Counts Three, Four and Five). Count Three alleged that Koehler maliciously filed a lawsuit against the LaLondes and Counts Four and Five alleged that Koehler charged an illegal fee and by doing so, committed moral turpitude. Neither party contests the hearing judge’s dismissals and we adopt them.

A. THE HEARING JUDGE PROPERLY DENIED KOEHLER’S MOTION TO SET ASIDE THE JUDGMENT AND TO REOPEN THE RECORD

Koehler challenges the hearing judge’s decision to deny his motion to set aside the judgment and to reopen the record to allow Koehler to present evidence in mitigation. In order to set aside the judgment, Koehler must prove mistake, inadvertence, surprise or excusable neglect. (Code Civ. Proc., § 473, subd. (b).) To reopen the proceedings, Koehler must show that “the evidence is newly discovered and could not with reasonable diligence have been discovered and produced earlier” (Rules Proc. of State Bar, rule 222(b)(1).) We review the hearing judge’s decision by the abuse of discretion standard. (*In the Matter of Navarro* (1990) 1 Cal. State Bar Ct. Rptr. 192, 198 [Supreme Court applies abuse of discretion standard in reviewing procedural motions in State Bar proceedings].)

The hearing judge properly denied Koehler’s motion to set aside the judgment. The original moving papers reveal that Koehler and his trial attorney affirmatively decided *not* to admit the mitigation evidence because they felt the State Bar had failed to prove its case, and they wanted to avoid giving the hearing judge “the option of finding culpability on any count and mitigating that culpability at the imposition of discipline.” Only after the hearing judge recommended disbarment did Koehler file the motion to set aside the judgment. We find that Koehler’s deliberate decision not to introduce mitigation evidence does not qualify for relief under section 473, subdivision (b) of the Code of Civil Procedure.

The hearing judge also properly denied Koehler’s request to reopen the proceedings. Koehler sought to admit mitigation evidence in three categories: (1) participation in LAP and ADP programs based on his bipolar condition, (2) achievements in family law, and (3) good character attested to by client declarations. He asserts that the hearing judge should have automatically considered all information in his LAP and ADP files. However, it is Koehler’s burden, not the court’s, to prove mitigation. Further, the LAP and ADP records are confidential

and Koehler did not waive his privilege of confidentiality by presenting or even referencing them as mitigation evidence at trial. Because the information was available at trial, the hearing judge did not abuse his discretion in denying Koehler's posttrial request to reopen the record and his subsequent request for reconsideration.

B. WE DENY THE REQUEST TO TAKE JUDICIAL NOTICE OF INFORMATION IN LAP/ADP FILES

Koehler requests that we judicially notice evidence in the State Bar Court's file to prove mitigation. Specifically, he asks us to notice three points: (1) his participation in the LAP/ADP program for his mental health condition, referenced in the LAP/ADP program files; (2) his noteworthy contributions to family law, referenced in his LAP/ADP program files; and (3) his reputation for good character, referenced in client declarations in support of his posttrial motion to set aside the judgment. As discussed above, Koehler's request lacks good cause since he intentionally withheld this evidence at trial, and his request is denied.

C. WE DENY THE REQUEST TO TAKE JUDICIAL NOTICE OF APPELLATE DECISION

Koehler also requests that we judicially notice *In Re Henry James Koehler, on Habeas Corpus* (2010) 181 Cal.App.4th 1153, which was filed on February 5, 2010, and became final on April 8, 2010, after Koehler's trial ended. The court in that case found that Koehler did not receive due process during contempt proceedings in superior court. Koehler contends that the decision should trigger dismissal of a separate disciplinary case (06-0-15387), which has been abated pending these proceedings. Koehler maintains that *if* the abated case is dismissed, he could argue in mitigation that he had been discipline-free for the past seven years. We find Koehler's contention to be too attenuated to establish that the Court of Appeal opinion is relevant to the case before us, and deny his request.

D. WE DENY THE REQUEST TO TAKE JUDICIAL NOTICE OF MOTION TO DISMISS IN ABATED CASE

In his reply brief on review, Koehler contends that the State Bar selectively prosecuted him, and requests judicial notice of his motion to dismiss in his abated case (06-O-15387). We deny this request because Koehler has not articulated any relevant reason for us to judicially notice this motion.

VII. AGGRAVATION AND MITIGATION

We determine the appropriate discipline in light of all relevant circumstances, including aggravation and mitigation. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Koehler must establish mitigation by clear and convincing evidence (std. 1.2(e)), while the State Bar has the same burden to prove aggravating circumstances. (Std. 1.2(b).)

A. NO FACTORS IN MITIGATION

We agree with the hearing judge that Koehler did not present any factors in mitigation. Although the hearing judge directly offered to receive mitigation evidence, Koehler's counsel responded: "In the course of our case, I believe all our evidence in mitigation ...[h]as been offered." The hearing judge probed further: "Okay. You don't wish to put on any other evidence?" Koehler's counsel replied "No, your Honor."

B. FACTORS IN AGGRAVATION

The hearing judge found three factors in aggravation: (1) prior records of discipline; (2) multiple acts of misconduct; and (3) uncharged misconduct. We adopt the first factor and reject the second and third for lack of clear and convincing evidence.

1. Koehler has Three Prior Discipline Records (Std. 1.2(b)(i))⁷

⁷At trial, the State Bar provided only the record of Koehler's third discipline. While that record establishes Koehler's two other discipline cases, we take judicial notice of the court

Koehler was admitted to practice law in California in 1972 and has an extensive record of discipline. During a 25-year period, he failed to perform competently or adequately meet his clients' professional legal needs. We assign great aggravating weight to this prior discipline record. (*In the Matter of Bouyer* (1998) 3 Cal. State Bar Ct. Rptr. 888, 892-893 [record of three prior disciplines was serious aggravating factor].)

The First Discipline – 1977

This discipline covers misconduct from 1974 to 1975 in four client matters. Koehler failed to competently perform, to communicate, and to refund unearned fees. In mitigation, he had been emotionally and psychologically disabled due to a marital dissolution, paid full restitution and partially performed services required of him. No aggravation was present. Koehler received a private reproof for each of the four violations.

The Second Discipline – 1992

This discipline covers misconduct from 1984 to 1985 in two client matters. Koehler failed to competently perform. He also failed to properly manage his client trust account, using it to pay his secretary and commingling funds. In mitigation, he presented evidence of good faith, candor and cooperation, community service, pro bono work and favorable character testimony. In aggravation, he concealed funds from the Franchise Tax Board and had a prior record of discipline. Koehler received an actual six-month suspension subject to a three-year stayed suspension and five years' probation.

The Third Discipline – 1999

This discipline covers misconduct in 1994 in one client matter while Koehler was still on probation in his second disciplinary case. He improperly withdrew from representation in a

record in those cases in order to fully evaluate the facts of his prior misconduct. (Evid. Code, § 459, subd. (a).)

family law case. In mitigation, he presented favorable character testimony and a history of pro bono work. In aggravation, he had two prior disciplines and had caused significant client harm. Koehler received an actual 60-day suspension, subject to a two-year stayed suspension and two years' probation.

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

Koehler's two letters that comprise UPL do not constitute multiple acts of misconduct for aggravation. [*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646 [two acts of misconduct not necessarily multiple acts of misconduct under standard 1.2(b)(ii).]

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

We disagree with the hearing judge that Koehler committed uncharged misconduct. The hearing judge found that Koehler wrote Kite a November 12, 1999, letter which constituted UPL, but was not charged in the NDC. This letter advised Kite that a motion should be filed in the family court. Koehler testified that Wingfield directed him to write the letter on letterhead, simulate his signature, and send it to Kite. Wingfield agreed that he may have authorized Koehler to do so. On this record, we find that the State Bar did not clearly and convincingly prove Koehler engaged in UPL when he wrote this letter.

VIII. DISCIPLINE – PRINCIPLES OF LAW AND ANALYSIS

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 standards for attorneys. (Std. 1.3.) No fixed formula exists for determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Ultimately, 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.)

Our discipline analysis begins with the standards. While we recognize that they are not binding on us in every case, the Supreme Court has instructed us to follow them “whenever possible.” (*In re Young, supra*, 49 Cal.3d at p. 267, fn. 11.) In fact, the standards should be given great weight to promote “the consistent and uniform application of disciplinary measures.” (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

Several standards apply here. Standard 2.6 calls for suspension or disbarment for willful violation of sections 6125 or 6126 (UPL). Standard 2.3 provides for actual suspension or disbarment for acts of moral turpitude, fraud, or intentional dishonesty. But standard 1.7(b) is most pertinent to our analysis because it provides for disbarment when an attorney has a record of two prior disciplines “unless the most compelling mitigating circumstances clearly predominate.” (Std. 1.6(a) [most severe of applicable sanctions shall be imposed].)

Koehler should be disbarred under standard 1.7(b). He engaged in UPL in violation of a Supreme Court order, has three prior discipline records and failed to establish any mitigation. According to standard 1.7(b), disbarment is the presumptive discipline absent compelling mitigation. Even so, to avoid rigidly applying standard 1.7(b), we consider all the facts and circumstances, including those related to prior disciplines. (*Arm v. State Bar* (1990) 50 Cal.3d 763, 778-779, 781 [facts underlying prior record of discipline weighed against mitigation]; *In the Matter of Sullivan* (Review Dept. 2010) ____ Cal. State Bar Ct. Rptr. ____ [all factors in case relevant to determine if std. 1.7(b) should apply].)

Viewing the unique factors of this case, we find that Koehler has engaged in increasingly serious misconduct over 25 years. This misconduct escalated from failing to competently perform or communicate with clients, to committing trust account violations, to abandoning a

client, and culminated in committing UPL, an act of moral turpitude, in violation of a Supreme Court order. Koehler had several chances to reform his behavior to the ethical demands of the profession. Yet, his ongoing misconduct “sadly indicates either his unwillingness or inability to do so.” (*Arden v. State Bar* (1987) 43 Cal.3d 713, 728 [disbarment appropriate for attorney with three prior disciplines]; *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646 [disbarment appropriate where prior discipline coupled with probation has not rehabilitated attorney].) Having already served two actual suspensions, we conclude that probation and/or suspension are inadequate to prevent Koehler from committing future misconduct that would endanger the public and legal profession.

Finally, we reject Koehler’s contention that case law supports a short actual suspension rather than disbarment, citing *In the Matter of Trousil* (Review Dept 1990) 1 Cal. State Bar Ct. Rptr. 229. In *Trousil*, the respondent engaged in UPL with three prior records of discipline, and received a 30-day actual suspension. But that respondent presented evidence of compelling mitigation and the court concluded the case was “one of those exceptional ones recognized in standard 1.7(b) in which the most ‘compelling mitigating circumstances clearly predominate.’” (*Id.* at 241.) *Trousil* is not applicable here since Koehler failed to present any evidence in mitigation.

IX. CONCLUSIONS OF LAW

1. The State Bar clearly and convincingly proved that Koehler engaged in UPL.
2. The UPL constituted an act of moral turpitude.
3. The hearing judge properly denied Koehler’s motion to set aside the judgment and reopen the case to present mitigation evidence.
4. Koehler should be disbarred under standard 1.7(b) because he has a prior record of three disciplines and did not present compelling mitigation.

X. RECOMMENDATION

We recommend that Henry James Koehler, IV be disbarred and that his name be stricken from the roll of attorneys.

We further recommend that Koehler be ordered to comply with the requirements of 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 days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, we recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable both as provided in section 6140.7 of that code and as a money judgment.

XI. ORDER OF INACTIVE ENROLLMENT

Because the hearing judge recommended disbarment, he properly ordered that Koehler be involuntarily enrolled as an inactive member of the State Bar as required by section 6007, subdivision (c)(4), and Rules of Procedure of the State Bar, rule 220(c). The hearing judge's order of involuntary inactive enrollment became effective on August 13, 2009, and Koehler has remained on involuntary inactive enrollment since that time and will remain on involuntary inactive enrollment pending the final disposition of this proceeding.

PURCELL, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.