

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

STEPHEN C. DOWNEY

A Member of the State Bar

[No. 05-O-04653]

Filed October 20, 2009; as modified October 21, 2009

SUMMARY

The State Bar and respondent each requested review of a hearing judge's decision to recommend a public reproof based on findings that respondent committed an act involving moral turpitude and failed to maintain a current address with the State Bar.

The review department upheld the hearing judge's culpability determination. However, it found fewer factors in mitigation and more in aggravation. Due to respondent's serious prior record of discipline, the review department applied standard 1.7(a) and recommended respondent be actually suspended for 150 days.

COUNSEL FOR PARTIES

For State Bar: Agustin Hernandez

For Respondent: Ellen A. Pansky

HEADNOTES

- [1] **148 Evidentiary Issues–Witnesses**
 159 Evidentiary Issues–Miscellaneous Evidentiary Issues
 164 Quantum of Proof Required in Disciplinary Matters–Proof of Intent
Great weight is given to a hearing judge's finding as to intent. Where hearing judge determined respondent was grossly negligent when verifying his clients' complaint and State Bar relied on same evidence already considered by the hearing judge to argue respondent was intentionally deceitful, there was no basis to conclude that respondent's decision to sign verification rose to an act of intentional dishonesty rather than mere gross neglect.
- [2 a, b] **221.12 Section 6106 (moral turpitude, corruption, dishonesty)–Gross Negligence**
Respondent was grossly negligent and culpable of moral turpitude when he jumped to the unreasonable conclusion without sufficient supporting evidence that his clients left the county. Additionally, respondent could have used a tailored affidavit explaining why his clients did not sign the verification rather than using a standard, pre-printed form provided by the Judicial Council.

- [3] **720.50 Lack of Harm to client/victim (1.2(e)(iii))–Declined to Find**
Although respondent’s filing of a false verification burdened opposing counsel and the court, there was no evidence that the burden rose to the level of cognizable harm in aggravation. Nevertheless, it clearly repudiates a finding of no harm in mitigation.
- [4 a, b] **511 Aggravation–Found**
Where respondent’s prior misconduct extended over several years and was very serious in nature, the record of prior discipline constituted a significant aggravating circumstance.
- [5] **541 Bad faith, dishonesty, concealment (1.2(b)(iii))–Found**
Where respondent failed to demonstrate recognition of his mistake in filing a false verification by promptly taking steps to rectify it and instead twice concealed it through legal semantics, respondent’s misconduct was followed by dishonesty and concealment.
- [6] **805 Current discipline should be greater than prior**
Although respondent’s misconduct was limited in nature, it was tempered only by limited character evidence and cooperation and aggravated by dishonesty and concealment and a record of serious prior misconduct. This totality of circumstances warranted progressive discipline as directed by standard 1.7(a).
- [7] **1015.03 Three months (incl. anything between 3 and 6 mos.)**
Where attorney committed an act involving moral turpitude by filing a false verification, and failed to maintain a current address with the State Bar, where the misconduct was aggravated by serious prior misconduct and subsequent dishonesty and concealment but mitigated by limited character evidence and cooperation, the appropriate discipline recommendation was 150 days actual suspension under standard 1.7(a).

ADDITIONAL ANALYSIS

Culpability

Found

214.01 Violations–Section 6068(j) (comply with section 6002.1 address)

Mitigation

Found but discounted or not relied on

735.30 Candor and cooperation with Bar (1.2(e)(v))

740.30 Good character references (1.2(e)(vi))

OPINION

REMKE, P.J.

Respondent Stephen C. Downey was admitted to practice law in 1976 and has one prior record of discipline that resulted in a four-month suspension for making misrepresentations in violation of Business and Professions Code section 6106.¹ In the present case, Downey is culpable of committing an act of moral turpitude by gross neglect in violation of section 6106 for filing a false verification, and failing to update his membership records address. The issue is whether the discipline imposed in this case should be greater than that imposed in the prior proceeding, as provided for under the standards.² In particular, standard 1.7(a) directs that the degree of discipline imposed on an attorney with a prior record of discipline “shall be greater than that imposed in the prior proceeding *unless* the prior discipline imposed was so remote in time to the current proceeding *and* the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.” (Italics added.) Downey’s prior misconduct was serious. Moreover, his misconduct here also was serious and was followed by dishonesty and concealment. Accordingly, we find that progressive discipline is warranted.

Both the State Bar’s Office of Chief Trial Counsel (State Bar) and Downey appeal from the decision of the hearing judge that imposed a public reproof based on the two counts of professional misconduct. The State Bar urges us to find that Downey’s act of moral turpitude was intentional and, based on his prior record of discipline, seeks an increase in discipline to include six months of actual suspension. Downey argues that any finding of moral turpitude is unwarranted. However, he contends that if any discipline is justified, the hearing judge’s recommendation of a reproof should be adopted. Upon independent review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207), we uphold the hearing judge’s culpability determination, finding Downey’s

gross neglect in filing a false verification under penalty of perjury clearly supports a finding of moral turpitude. However, we find fewer factors in mitigation and more in aggravation. In light of Downey’s serious prior record of discipline, we will follow standard 1.7(a) and recommend that Downey be suspended for 150 days.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Many of the key facts set forth in the hearing department decision were stipulated to by the parties and are supported by clear and convincing evidence. Thus, except as noted, we adopt most of the hearing judge’s findings and summarize the pertinent facts below.

Downey has significant experience representing landlords in unlawful detainer actions. At the relevant time in 2005, his office typically filed about 60 to 70 unlawful detainer actions monthly. Downey’s office was located in Mission Hills in Los Angeles County.

In May 2005, Charles and Fradelle Rosenberg hired Downey to evict Paula Sundstrom from a residence the Rosenbergs owned in Sherman Oaks, California. On May 23, 2005, Downey caused to be served on Sundstrom a notice to quit the premises within 60 days, ending her tenancy on July 25, 2005. The notice required Sundstrom to pay, on a pro rata basis, the July rent owed to the Rosenbergs. After Sundstrom failed to pay the July rent, on July 5, 2005, Downey served her with a three-day notice to pay rent or quit.

On July 11, 2005, the Rosenbergs telephoned Downey’s office and spoke with a staff person. They informed the staff person that Sundstrom still had not paid the July rent and requested that an unlawful detainer complaint be filed. During that same conversation, the Rosenbergs paid Downey’s remaining fees and costs by credit card. Downey prepared the complaint that day, which required his clients to sign

1. Unless noted otherwise, all later references to sections are to the provisions of the Business and Professions Code.

2. All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct

a verification. Downey's office manager called the Rosenbergs twice to ask them to come into the office to verify the complaint, but he was unable to reach them. Downey testified that he also telephoned the Rosenbergs once that day but was unsuccessful in reaching them. Downey did not take any additional steps to contact the Rosenbergs on July 11.

Later that day, Downey filed the verified complaint for unlawful detainer. He had signed the verification on behalf of the Rosenbergs as their attorney, alleging the truth of the matters in the complaint based on information and belief. An attorney may sign the verification on behalf of a client if the client is "absent from the county" where the attorney has his or her office. (Code Civ. Proc., § 446, subd. (a).) Downey signed the verification under penalty of perjury, attesting that the Rosenbergs were "absent" from Los Angeles County.³ According to Downey, he signed the verification because "the most plausible explanation" of why he was unable to reach the Rosenbergs is that "they were traveling somewhere and probably out of the county." However, the Rosenbergs lived in Los Angeles County and were in fact in the county on July 11, 2005.

On July 20, 2005, opposing counsel in the unlawful detainer action moved to strike the complaint on the ground that it was unverified by the clients, and that if they "resided" in Los Angeles County, Downey's verification was untrue. The Rosenbergs met with Downey on August 4, 2005, and told Downey that they had been in Los Angeles County on July 11. Downey obtained the Rosenbergs' signatures on new verifications and filed them with the court, along with his opposition to the motion to strike.

In the opposition to the motion to strike, rather than acknowledging that he signed the verification on behalf of his clients in error, Downey argued the motion must be denied because he never said that the

Rosenbergs resided in another county. In particular, he argued:

Nowhere in the verification does counsel for plaintiff state that plaintiffs reside out of the county, nor does [Code of Civil Procedure] Section 446 say 'unless the parties reside out of the county', only that they "are absent from the county". "Absent" is a condition that may be only temporary, as when the party is out of the county when the attorney verifies the complaint in his stead. For the purposes of a motion to strike the verification, the truth or falsity of the allegation that the parties were absent from the county does not appear from a reading of the pleading. Whether plaintiffs were out of the county at the time their counsel executed the verification on their behalf is a question of fact. Nevertheless, new verifications of the complaint, executed by plaintiffs themselves, are submitted herewith.

On the same day as he filed the opposition, and after he had learned that the Rosenbergs were not out of the county, Downey also sent a letter to opposing counsel, stating:

I have also read your motion to strike, and I wonder whether you even read the verification before you decided to threaten me with the a [sic] complaint to the State Bar. The verification only states that my clients were absent from the county, not that they reside out of the county. The two words do not mean the same thing... I have to wonder just what information you have that the Rosenbergs were absent from the county when I verified the complaint.

The superior court ultimately determined that opposing counsel's motion to strike was moot since Downey had filed new verifications signed by his clients.

3. The preprinted verification form states: "I am one of the attorneys for _____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that

party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. [¶] I declare under the laws of the State of California that the foregoing is true and correct."

A. Count One – Moral Turpitude in Violation of Section 6106

The hearing judge found Downey culpable of moral turpitude in violation of section 6106 based on his gross neglect in executing and filing the verification, which falsely attested under penalty of perjury that the Rosenbergs were out of the county. The hearing judge found that Downey concluded unreasonably that his clients were absent based on insufficient facts and analysis. Other than being unable to reach the Rosenbergs by telephone, Downey had no information indicating that they were absent from the county. We adopt the hearing judge's conclusion that Downey willfully violated section 6106 by filing a false verification with the superior court.

[1] Although directing its appeal primarily to the degree of discipline, the State Bar argues that we should find Downey's deceit in verifying his clients' complaint was intentional rather than mere gross neglect. However, we see no evidence relied on by the State Bar for this characterization beyond that already considered by the hearing judge. Having seen and heard the testimony, the hearing judge found no intent to defraud. In this situation, we give great weight to a hearing judge's finding as to intent. (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 283; Rules Proc. of State Bar, rule 305(a).) Thus, on this limited record, we are unwilling to conclude that Downey's decision to sign the verification rose to an act of intentional dishonesty.

[2a] Conversely, Downey argues that he did not engage in moral turpitude in violation of section 6106. Conceding that his acts could be characterized as "hasty" or "negligent," he contends that he exercised more care than is required for a gross neglect finding. We reject Downey's attempt to minimize his transgression. Downey jumped to the unreasonable conclusion that the Rosenbergs had left the county

with insufficient supporting evidence. Indeed, the Rosenbergs had telephoned Downey's office earlier that day to request filing of the unlawful detainer action and provide payment of legal fees. There is no evidence that they told Downey or his staff that they were leaving the county, and under the circumstances, it was unreasonable for Downey to make such an assumption.

[2b] Downey also suggests that he was unduly constrained by using a standard, pre-printed form verification provided by the Judicial Council. However, as an experienced attorney, Downey undoubtedly knew that standard forms are merely expedient tools for the situations they cover and not talismanic choices. The circumstances under which an attorney may verify a pleading on behalf of his client is not limited to when a client is "absent" from the county, but includes when the client is "from some cause unable to verify it." (Code Civ. Proc., § 446, subd. (a).) After Downey failed to reach the Rosenbergs by telephone, he could have used a tailored affidavit explaining why his clients did not sign the verification. His decision to use the pre-printed form verification under the circumstances supports a finding of gross neglect. Thus, we agree that Downey was grossly negligent and culpable of moral turpitude in violation of section 6106 by signing the verification on behalf of his clients and misrepresenting that they were absent from the county.

B. Count Four – Failure to Update Address in Violation of Section 6068, subdivision (j)⁴

Downey admittedly moved his office in February 2005 and did not notify the State Bar's membership records office until 28 months later. He thus violated section 6068, subdivision (j), by failing to perfect notice of the change within 30 days. (See § 6002.1, subd. (a).) On review, Downey does not contest this culpability conclusion, and we adopt it.

4. Count Three (improper withdrawal from representation, rule 3-700(A)(2) of the Rules of Professional Conduct (Rules)) was dismissed by the court prior to trial pursuant to a motion by the State Bar. Count Two (failure to perform legal services

competently, rule 3-110(A)) was dismissed during trial for insufficiency of the evidence. On appeal, these dismissals are not in dispute and we adopt them.

II. DISCIPLINE

We determine the appropriate level of discipline in light of all relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Downey must establish mitigation by clear and convincing evidence, while the State Bar has the same burden of proof for aggravating circumstances. (Stds. 1.2(e) and 1.2(b).)

A. Two Limited Mitigating Factors

Downey offered six character witnesses, including four attorneys, who were aware of Downey's prior and current misconduct, and had a very high opinion of his moral character and integrity. However, we give this evidence only limited weight in mitigation since it is not "an extraordinary demonstration" of good character from a "wide range of references." (Std. 1.2(e)(vi); *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387 [testimony of three clients and three attorneys entitled to limited weight].)

We agree with the hearing judge that Downey is entitled to mitigation for cooperating with the State Bar by entering into a fairly comprehensive pretrial stipulation of facts. Although the stipulated facts were not difficult to prove, and Downey did not admit culpability, the stipulation was relevant and assisted the State Bar's prosecution of the case. (Cf. *In the Matter of Silver* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 902, 906 [attorney afforded substantial mitigation for his cooperation by stipulating to facts not easily provable].) Under these circumstances, we accord Downey limited mitigation under standard 1.2(e)(v).

[3] We reject, however, the hearing judge's finding in mitigation that neither Sundstrom nor the superior court was harmed by Downey's conduct. His actions did burden Sundstrom's counsel, the court, and his own clients in resolving the motion attacking Downey's verification. Although there is no evidence that the burden rose to the level of cognizable harm in aggravation (std. 1.2(b)(iv)), it clearly repudiates a finding of no harm in mitigation.

B. Two Serious Aggravating Factors

[4a] Downey's prior record of discipline is a significant aggravating circumstance. (Std. 1.2(b)(i).) Effective July 2, 1993, Downey received a one-year stayed suspension, three years of probation with conditions, including a four-month period of actual suspension. Beginning before 1983 and continuing to 1987, Downey failed to perform required legal services in over 22 separate collection matters, resulting in numerous matters being dismissed for failure to prosecute. During this time, he also repeatedly misrepresented to his law firm the amount of work he had performed for clients, causing the firm to incorrectly bill the clients for about \$86,000 in legal fees. Substantial mitigating circumstances were considered, including no prior record of discipline, Downey's psychological condition at the time, his candor and cooperation with his employer and the State Bar, remorse and evidence of rehabilitation. There were no aggravating circumstances.

[5] We also find in aggravation that Downey's present misconduct was followed by dishonesty and concealment. (Std. 1.2(b)(iii).) By August 4, 2005, Downey knew that the verification he executed and filed with the court was in error. However, rather than promptly demonstrating recognition of his mistake and taking steps to rectify it, he twice concealed it through legal semantics. In his opposition to the motion to strike filed with the court, Downey clearly implied he was entitled to sign the verification based on the absence of his clients from the county. Likewise, Downey's letter to opposing counsel challenged counsel to prove that the Rosenbergs were not absent from the county when Downey signed the verification. Although Downey may have felt pressure to quickly file the unlawful detainer complaint when he signed the verification, these subsequent misleading statements were made after Downey had time to reflect on his earlier gross carelessness. The Supreme Court has held that such concealment of a material fact "misleads the judge as effectively as a false statement . . . No distinction can therefore be drawn among concealment, half-truth, and false statement of fact." (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315, citing *Green v. State Bar* (1931) 213 Cal. 403, 405.) We are troubled by the similarity between

Downey's attempts to conceal his wrongdoing in the present case and his analogous behavior in his prior record of discipline. Thus, we assign great weight to this factor in aggravation.

C. Degree of Discipline

In determining the appropriate level of discipline, we first consider the standards applicable to this case. While we are "not compelled to strictly follow [the standards] in every case," we look to them for guidance (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and they should generally be given great weight in order to assure consistency in attorney disciplinary cases. (*In re Brown* (1995) 12 Cal.4th 205, 220.) On this record, several standards call for suspension. In light of Downey's prior record of discipline, we find that standard 1.7(a) is the most pertinent to the disciplinary analysis in this case.⁵

[4b] As set forth above, standard 1.7(a) provides that if an attorney has one prior imposition of discipline "the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding *unless* the prior discipline imposed was so remote in time to the current proceeding *and* the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust." (Italics added; *In re Silvertan* (2005) 36 Cal. 4th 81, 90-91 [exception to standard 1.7(a) is in the conjunctive].) Although it was imposed 12 years before his commission of the current offenses, we do not regard Downey's prior record as so remote to devalue it to the extent that the hearing judge did. More importantly, the hearing judge "made no finding that [Downey's] prior misconduct was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust, nor would such a finding be supported by a review of the prior disciplinary proceeding." (*In re Silvertan, supra*, 36 Cal. 4th at p. 91.) In fact, Downey's prior misconduct extended over several years and was very serious in

nature. Thus, the two-prong exception to "standard 1.7(a)'s requirement of greater discipline for recidivist attorneys" is not applicable in the present case and we find no other compelling justification to deviate from the standard. (*Id.* at pp. 90-91.)

Overall, Downey's misconduct was central to the practice of law and it was misleading to opposing counsel and the court. (Std. 2.3.) The filing of a false verification by an attorney not only undermines the ability of the courts to rely on the accuracy of sworn declarations, it also diminishes the public's confidence in the integrity of the legal profession. Further, we are troubled by Downey's subsequent misleading statements made to the court and opposing counsel in an attempt to conceal his wrongdoing. An attorney's false statements violate "the fundamental rules of ethics—that of common honesty—without which the profession is worse than valueless in the place it holds in the administration of justice." (*Alkow v. State Bar* (1952) 38 Cal.2d 257, 264, quoting *Tatlow v. State Bar* (1936) 5 Cal.2d 520, 524.) Had this been Downey's first offense, the limited nature of the misconduct ordinarily may have called for a short or even stayed period of actual suspension. However, Downey's current misconduct is aggravated by his serious prior record and his subsequent dishonesty and concealment, tempered only by the limited weight we give his character evidence and cooperation.

[6], [7] We find the totality of the circumstances warrants progressive discipline as directed by standard 1.7(a). (*In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 150 [reproval for minor violations increased to stayed suspension due to prior misconduct].) In light of Downey's four-month prior suspension for serious misconduct, we conclude that a 150-day period of actual suspension is appropriate here to protect the public, the courts and the legal profession, to maintain high professional standards by attorneys and to preserve public confidence in the legal profession. (Std. 1.3.) Our recommendation is supported by compa-

5. The other relevant standards are 2.3 and 2.6(a). Standard 2.3 provides for suspension or disbarment for acts of dishonesty or moral turpitude, depending on the extent to which the victim is harmed or misled and on the magnitude of the misconduct and the degree to which it relates to the practice of law. Likewise,

standard 2.6(a) provides for disbarment or suspension as a result of Downey's failure to comply with his reporting requirements, depending on the seriousness of the offense and harm, if any, to the victim, with appropriate regard to the purposes of imposing discipline.

rable case law as the appropriate sanction to ensure discipline proportionate to the misconduct. (*Conroy v. State Bar* (1991) 53 Cal.3d 495 [one-year suspension for failure to act competently and misrepresentations involving moral turpitude, even though no mitigation and two prior disciplines]; *Bach v. State Bar* (1987) 43 Cal.3d 848 [60-day suspension for misleading a judge, in aggravation a prior public reproof and behavior that threatens public and undermines confidence in profession, and no mitigation]; *Hallinan v. State Bar* (1948) 33 Cal.2d 246 [90-day suspension for simulating client's signature on settlement release with no priors].)

III. RECOMMENDATION

We recommend that Stephen Curtis Downey be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years subject to the following conditions:

1. Stephen Curtis Downey is to be suspended from the practice of law for the first 150 days of probation.
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct and all of the conditions of this 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 of the State Bar and the State Bar's Office of Probation.
4. 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, respondent must state whether respondent has complied

with the State Bar Act, the Rules of Professional Conduct, and all conditions of 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.

5. Subject to the assertion of any applicable privilege, he must fully, promptly and truthfully answer all inquiries of the State Bar's Office of Probation, and any probation monitor assigned under these conditions, that are directed to him, whether orally or in writing, relating to whether he is complying or has complied with the conditions of this probation.

6. Within one year of the effective date of the discipline herein, he must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School given periodically by the State Bar and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and he shall not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201).

7. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

We further recommend that Stephen Curtis Downey be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners, and provide proof of passage to the Office of Probation, within one year of the effective date of the discipline herein. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

We further recommend that Stephen Curtis Downey be ordered to comply with rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, from the effective date of the Supreme Court order. Failure to do so may result in disbarment or suspension.

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 Business and Professions Code section 6140.7 and as a money judgment.

We concur:

EPSTEIN, J.

PURCELL, J.