

Filed July 7, 2015

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	Case No. 11-O-15818
	)	
JOSEPH GIOVANAZZI,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 42827.	)	
_____	)	

Joseph Giovanazzi was admitted to practice in 1969, disbarred in 1990 after two prior disciplines, reinstated in 2003, and charged in 2012 with the unauthorized practice of law (UPL) and intentional deceit to a superior court that he was entitled to practice law when he knew that he was not. A State Bar Court hearing judge found Giovanazzi culpable of the charges and recommended disbarment, concluding that his prior discipline was an extremely aggravating circumstance not overcome by the minimal weight of mitigating circumstances. Giovanazzi seeks review, claiming that the hearing judge’s findings are incorrect, and that we should dismiss this matter. The Office of the Chief Trial Counsel of the State Bar (OCTC) supports the hearing judge’s findings and urges disbarment. Upon our independent record review (Cal. Rules of Ct., rule 9.12), we affirm the hearing judge’s findings and uphold his recommendation.

**I. FACTS AND FINDINGS RE. CULPABILITY**

Most of the background facts are undisputed, having been established by Giovanazzi’s stipulation, his admissions at trial, or evidence which he does not dispute.

In 2011, Giovanazzi represented a defendant, James Deck, in a multi-count felony jury trial in Riverside County Superior Court. The most serious charge against Deck — attempted

murder of a peace officer — resulted in a mistrial and was set for a new trial setting on August 5, 2011. A hearing was also set for August 5, 2011 for Deck’s sentencing on the remaining counts of which the jury had found him guilty.

Between July 1 and August 10, 2011, Giovanazzi was suspended from the practice of law in California for failing to pay his State Bar member fees. (Bus. & Prof. Code, § 6143.)<sup>1</sup> Prior to the superior court’s new trial in this matter, he received the State Bar’s periodic notices that, absent timely payment, he would be, and eventually was, suspended effective July 1, 2011.<sup>2</sup>

On August 5, 2011, while knowingly suspended, Giovanazzi appeared in superior court to protect Deck’s rights. Giovanazzi came to court with a motion seeking to vacate the date of the retrial due to the continuing effects of a recent illness he suffered. The motion listed Giovanazzi as Deck’s counsel and did not disclose that he (Giovanazzi) was currently suspended. Although it is undisputed that this motion was not filed, there was clear evidence that, upon entry into the courtroom, Giovanazzi gave a copy of it to Deputy District Attorney Marcus Garrett, the prosecutor in the Deck case, and the motion was lodged with the courtroom deputy clerk. It was also considered that morning by Hon. Timothy Freer, the superior court judge to whom the Deck case was assigned.<sup>3</sup>

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<sup>1</sup> All further references to sections are to this source.

<sup>2</sup> At trial, Giovanazzi testified, contrary to the stipulation, that he did not learn of his suspension until July 27, 2011.

<sup>3</sup> Judge Freer did not testify below but Garrett did testify as to all relevant aspects of Giovanazzi’s court appearance on August 5. Although no transcript of a sidebar conference between Judge Freer, Garrett, and Giovanazzi was offered in evidence, the record includes a summary by Judge Freer prepared that morning of what had transpired at the sidebar. The statements in the judge’s summary were consistent with Garrett’s testimony.

Shortly after Giovanazzi entered the courtroom on August 5 and gave a copy of his motion to Garrett, Judge Freer took the bench and called Garrett and Giovanazzi to sidebar<sup>4</sup> to inquire into Giovanazzi's practice status and to determine what steps to take to protect Deck's rights of representation. According to Garrett, upon being advised by the judge that he was suspended and not entitled to practice, Giovanazzi appeared shocked and told Judge Freer that Giovanazzi's secretary must have failed to pay his State Bar fees. In relieving Giovanazzi as Deck's counsel because of his suspension, and appointing the public defender to represent Deck, Judge Freer had concluded that on August 5, Giovanazzi had sought to file a motion on behalf of Deck and have it heard and that Giovanazzi indicated to the court that he was not aware of his suspension. Judge Freer determined that Giovanazzi's position was unreasonable since his suspension had been in effect for over a month. Almost as soon as Judge Freer appointed the public defender to represent Deck, Giovanazzi left the sidebar conference. Shortly after that, he left the courtroom.

Giovanazzi testified below that he came to the August 5 hearing not to appear as Deck's attorney of record, but to be "personally satisfied with an abundance of caution" that Deck's rights were protected and that there would be a smooth transition to successor counsel. Giovanazzi claimed that he came to court with a motion in case the judge ordered Deck's retrial to proceed and a continuance motion were needed, but denied that he lodged it with the Clerk or gave a copy of it to Garrett. He also denied indicating to the Court that he was entitled to practice law and he assumed from the nature of the sidebar conference that Judge Freer knew that he was suspended. Giovanazzi sought to explain to Judge Freer the circumstances of the suspension but testified that the judge cut him off.

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<sup>4</sup> Garrett had alerted Judge Freer by motion to trail the Deck case, before Giovanazzi entered the courtroom on August 5, that it appeared that Giovanazzi was suspended.

Giovanazzi also testified that several illnesses he had suffered during and before 2011 and the prescribed medications for his conditions affected, episodically, his memory of events. These effects included mental decline and confusion. At the time of the 2013 State Bar Court hearings, he felt much better than in 2011.

The State Bar Court trial followed charges by OCTC that Giovanazzi violated his duties as an attorney when, while suspended, he held himself out as entitled to practice law and practiced law on behalf of Deck by appearing in court on August 5, 2011 (§§ 6068, subd. (a); 6125, 6126, subd. (a)); and that Giovanazzi did so intentionally or with gross negligence so as to commit an act of moral turpitude proscribed by section 6106. He was also charged with an act of moral turpitude by knowingly misrepresenting his practice status to Judge Freer on August 5.

The hearing judge found the facts as set forth *ante*, and concluded that Giovanazzi was culpable of violating his duties by holding himself out to practice law and practicing law, and that this conduct and his misrepresentation to the superior court of his entitlement to practice were acts of moral turpitude. In his culpability decision, the hearing judge described as credible the testimony of Garrett on the circumstances of Giovanazzi's service and lodging of his August 2011 motion, and also noted that the effect of Giovanazzi's bouts of illness at about this time affected his memory.

## **II. DISCUSSION OF CULPABILITY**

Giovanazzi's attack on the hearing judge's decision is limited to disputing several factual findings. For the following reasons, we adopt the hearing judge's findings. Our scope of review in this area is clear. While our review is independent, the hearing judge's findings are entitled to great weight, particularly, in this case, as the hearing judge was in a better position than are we to assess witness credibility. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 931; Rules Proc. of State Bar, rule 5.155 (A).)

Review of Giovanazzi's attack on the findings shows that it is narrow and without merit. Giovanazzi favors his view of the testimony, and has identified only a few findings to specifically attack. We discuss them in turn.

Giovanazzi disputes that he sought to file the motion which he admittedly had prepared or that he appeared in the case. We disagree. There was ample evidence from Garrett's testimony that Giovanazzi served him with a copy of it and that the courtroom clerk had the motion in her hand and directed it to Judge Freer who considered it. Giovanazzi concedes that he participated in the sidebar conference with Judge Freer and Garrett. Judge Freer's summary statement about the sidebar conference confirms these statements. Although Judge Freer's statement appears to be hearsay if considered for the truth of the matters stated in it, the rules governing this proceeding do allow hearsay to be used to supplement or explain other evidence, i.e., Garrett's testimony. (Rules Proc. of State Bar, rule 5.104(D).)

Giovanazzi also attacks the hearing judge's finding that he approached the clerk and presented her with a motion to file. As Garrett was present in the courtroom at all pertinent times and received from Giovanazzi a copy of the motion, Garrett's testimony, and the circumstances he observed of the clerk holding up the motion and directing it to Judge Freer, provide support for us to adopt this finding. We note also that even circumstantial evidence can support culpability. (E.g., *In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 237.)

Finally, Giovanazzi disputes the hearing judge's finding that he at no time advised the court of his suspended status. This finding is supported by several parts of the record. Giovanazzi's motion, on its face, held himself out as counsel for Deck and was devoid of any restriction of entitlement to practice. Giovanazzi admitted that he did not notify Garrett of his suspension prior to August 5, and Garrett testified that Giovanazzi was shocked when the judge

confronted him about his apparent suspended status. Giovanazzi placed the blame on his secretary.<sup>5</sup>

At times, Giovanazzi's testimony was unclear and he even ascribed it to the episodic effects of his illnesses and treatment. With respect to the length of knowledge he had of his suspension, the effect of his stipulation that he had received all of the State Bar's notices of his fee delinquency and his July 1 suspension appeared to conflict with his testimony that he did not learn until late July of his suspension. We view this case as exemplary of the reasons why the apt procedural rules give great weight to the hearing judge's assessment of witness credibility. (See *ante*.) We follow that precept and adopt the hearing judge's findings.

We hold that Giovanazzi breached his duties as an attorney and committed an act of moral turpitude by engaging intentionally in the unauthorized practice of law, both by holding himself out on August 5, 2011, as entitled to practice, and appearing for his client, Deck. Giovanazzi testified below that he was a mere spectator in the courtroom, there to distantly observe the hearing. But the evidence showed that he was actively engaged first with opposing counsel Garrett and then with Garrett and Judge Freer at the sidebar conference about his status as attorney for Deck, never revealing to them that he was suspended when he knew that he was.

These same facts support the charge that Giovanazzi committed an act of moral turpitude by misrepresenting his status to the superior court on August 5, 2011. It is immaterial that Giovanazzi's motion was not filed, since he gave it to Garrett and it was also lodged with the court so that it would be considered by Judge Freer. Even if Judge Freer had learned earlier that day of Giovanazzi's suspension, this did not erase the moral turpitude nature of his violation.

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<sup>5</sup> We view Garrett's testimony of Giovanazzi's shocked reaction as a competent observation of demeanor and of Giovanazzi's statement as an exception to the hearsay rule as a spontaneous declaration by him. (Evid. Code, § 1240; *People v. Lynch* (2010) 50 Cal.4th 693, 751-755.)

(*Davis v. State Bar* (1983) 33 Cal.3d 231, 239-240 [actual deception is unnecessary to prove wilful deceit of court].)

### III. DISCUSSION OF APPROPRIATE DISCIPLINE

#### A. Prior Discipline as Significantly Aggravating

The hearing judge found Giovanazzi's record of three prior disciplines, culminating in his 1990 disbarment, to be a very significant aggravating circumstance, not only for the number of priors, but for the dishonesty he found in this proceeding which was reflected in the priors. We agree, and briefly review Giovanazzi's prior discipline.

Twelve years after Giovanazzi's admission to practice law, the Supreme Court suspended him for three years, stayed that suspension, but imposed a 30-day actual suspension.

(*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465.) Giovanazzi's suspension was based on misconduct to two clients. In the first matter, Giovanazzi breached his fiduciary duty by entering into a loan agreement with his client without adequate disclosures. When the first client filed a civil suit against Giovanazzi, he misled the court by filing "dishonest and inaccurate" pleadings concerning the loan transaction. In the second matter, Giovanazzi unintentionally misappropriated most of \$2,452 that he held in trust to pay an investigator for services on the client's behalf. As it concluded that Giovanazzi had engaged in moral turpitude in the first matter and that his misappropriation in the second matter was serious, the Supreme Court ordered actual suspension, despite significant evidence in mitigation.<sup>6</sup>

In January 1990, Giovanazzi was suspended for five years, stayed, with actual suspension for the first two years of his probationary period and until he proved his rehabilitation, learning, and fitness to practice. Giovanazzi's four separate convictions of crime were surrounded by

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<sup>6</sup> Although the Supreme Court divided four-to-three, the division was only on the method of considering evidence related to degree of discipline and the task of assessing the resulting discipline. (*Giovanazzi v. State Bar, supra*, 28 Cal.3d at pp. 475-479.)

moral turpitude: reckless driving in 1984;<sup>7</sup> intoxicated driving and assault committed in Giovanazzi's attempt to flee from police in 1986; intoxicated driving; driving with a suspended or revoked license and possessing a substance without a required prescription in 1987; and possessing a controlled substance in 1987. This latter conviction arose out of Giovanazzi's failure to complete diversion requirements he had agreed to in the second conviction.

Although mitigating evidence was considered, the findings in this consolidated matter show, collectively, that Giovanazzi lied to a police officer as to his car's ownership, allowed another person to misidentify him, failed to make timely restitution to the victim of his damage caused while driving, sought to evade police repeatedly while driving recklessly, and failed to complete requirements of both his criminal probation and diversion program.

In November 1990, the Supreme Court disbarred Giovanazzi. This action was based on his misconduct in four separate client matters, and, as to a fifth count of failing to cooperate and participate in the State Bar's disciplinary investigation. (§ 6068, subd. (i).)

The four client matters occurred in 1987 and 1988, and included writing two checks on a closed trust account to a superior court for filing fees in one client's matter and writing another check on a closed trust account to a municipal court to pay for court costs in another client's matter. In both matters, Giovanazzi wrote the checks at least two months after the trust account had been closed. These acts constituted moral turpitude.

In a third client's matter, a significant plaintiff personal injury and product liability matter, Giovanazzi failed to perform the services for which he was hired, including his failure to communicate with his client and to return her file despite her repeated demands and despite Giovanazzi's repeated promises to do so. He only did so after his client appeared in superior

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<sup>7</sup> Years shown in this discussion refer to those in which Giovanazzi's convictions occurred.



court, related her difficulty in getting her papers returned, and the court ordered Giovanazzi to return them.

In a fourth matter, Giovanazzi accepted \$2,000 in fees to pursue a habeas corpus matter for a client. He decided to withdraw from employment and promised to return the advance fee and the client's papers. However, he did not return the papers or the fee, despite a later conversation in which he told the client's legal representative that he would continue to work on the case. Yet he did not do so.

As noted, Giovanazzi was reinstated in 2003, and in 2011, committed the misconduct we have found in this proceeding.

## **B. Mitigating Evidence**

The hearing judge was correct in identifying only two mitigating factors to consider and in the weight he gave to those factors.

As to extreme emotional difficulties or physical difficulties (std. 1.6(d)),<sup>8</sup> the hearing judge gave no weight because of Giovanazzi's concession that he was aware of his suspension before he drafted his motion and appeared in superior court in the Deck matter on August 5, 2011. We agree with the hearing judge but also hold that the record lacks the evidence needed to support a claim of mitigation under this standard, because Giovanazzi failed to offer expert or other evidence demonstrating that his difficulties or disabilities were directly responsible for the misconduct and that the difficulties no longer pose a risk of continued misconduct. (E.g., *In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 572-573.) Concerning the factor of spontaneous candor and cooperation displayed to the State Bar (std. 1.6(e)), we

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<sup>8</sup> Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct. All further references to standards are to this source. Effective July 1, 2015, the standards were revised and renumbered. Because this appeal was submitted for ruling before the July 1, 2015 effective date, we apply the prior version of the standards, which was effective January 1, 2015 through June 30, 2015.

agree with the minimal weight accorded by the hearing judge to Giovanazzi's stipulation. The facts he stipulated to were few and easily proven. (See, e.g., *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 938; *In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888, 891.)

### **C. Balance of Factors Bearing on Discipline**

We examine the standards in the initial process of recommending appropriate discipline. The standards guide that for Giovanazzi's unlawful practice and holding out as entitled to practice while suspended for nonpayment of State Bar fees, reproof or suspension is appropriate, with the degree of sanction dependent on knowing misconduct, which we found. (Std. 2.6(b).)

For Giovanazzi's dishonesty as to his status and moral turpitude in the unlawful practice, disbarment or actual suspension is guided. (Std. 2.7.) The degree of sanction depends on the magnitude of the misconduct, the extent of harm to or misleading of the victim, and the extent to which it is related to the practice of law. (*Ibid.*) Here, dishonesty surrounded Giovanazzi's courtroom appearance as to his verbal expression of shock when confronted by Judge Freer with information that he appeared to be suspended. Although Giovanazzi's acts may not have actually misled the court in the decision it had to make concerning Deck's representation, as we noted *ante*, it did not exonerate Giovanazzi from the exercise of his duty of honesty, and it occurred as part of Giovanazzi's representation of a criminal defendant charged with serious felonies.

The standards call on the more severe sanction to guide, as there are two or more bases of misconduct. (Std. 1.7(a).) Further, standard 1.8(b) has special guidance for attorneys disciplined on two or more previous occasions. In those cases, we are guided to recommend disbarment unless either the most compelling mitigation clearly predominates or the prior misconduct

happened during the same period as the current. We have found neither of the latter two exceptions.

Relevant case law is consistent with these standards, and we agree with the hearing judge's reliance on *In re Silverton* (2005) 36 Cal.4th 81 as the key guiding case. As with Giovanazzi, Silverton was disbarred, later reinstated, and thereafter committed further misconduct. Nineteen years had elapsed between Silverton's disbarment and the onset of further misconduct. The Supreme Court deemed that that period of time did not make the prior discipline too remote, noting that Silverton had not been entitled to practice for most of the period between disbarment and the commission of new misconduct. (*Id.* at p. 90.) In the present case, the period was 21 years.

After analyzing the record in *Silverton* and the guiding standards, the Supreme Court concluded that "when an attorney has previously been disbarred, disbarment is the appropriate sanction for subsequent professional misconduct" unless the exception to the standard re prior discipline is satisfied or the attorney establishes grave doubts that disbarment is proper. (*Id.* at p. 92.) Moreover, the court placed the burden on the attorney in this context to show that extraordinary circumstances justify a lesser standard. (*Ibid.*) Deeming that Silverton's misconduct was serious and accompanied by his apparent lack of insight into his wrongful conduct, the court found that Silverton had failed to meet his burden. (*Id.* at pp. 92-94.)

We conclude that for the same reasons, Giovanazzi failed to sustain his burden, noting that he disputed only certain findings and not the degree of discipline. Giovanazzi's misconduct could be seen as at least as serious as Silverton's since Giovanazzi's misconduct involved moral turpitude, but Silverton's did not. But even more serious was Giovanazzi's misrepresentation to the court and Garrett. Regrettably, it was reminiscent of the type of past misconduct involved in his earlier disciplines. As the Supreme Court observed succinctly in the recent admissions case

of *In re Glass* (2014) 58 Cal.4th 500, 524: “Honesty is absolutely fundamental in the practice of law.” Giovanazzi’s conduct fell well short of that standard.

Although Giovanazzi’s reinstatement order was a positive finding of his rehabilitation in 2003, it is clear from the record we now review that his reformation was either incomplete or not sustained. For all the reasons stated, we recommend that the Supreme Court no longer hold out Giovanazzi as one worthy of trust as an attorney at law in this State.

#### **IV. RECOMMENDATION**

We recommend that Joseph Giovanazzi be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that Giovanazzi must comply with rule 9.20 of the California Rules of Court and 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.

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

#### **V. ORDER**

The order that Joseph Giovanazzi be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective November 8, 2013, will continue, pending the consideration and decision of the Supreme Court on this recommendation.

STOVITZ, J.\*

WE CONCUR:

PURCELL, P. J.

EPSTEIN, 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.