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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE ATTORNEY LYNN HUBBARD
III,

Respondent.

Case No. 12-cv-1975-L(WMc)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

On August 8, 2012, the Standing Committee on Discipline for the Southern District of California (“Standing Committee”) commenced this disciplinary action against Attorney Lynn Hubbard III for alleged professional misconduct. The alleged professional misconduct occurred in the underlying Americans with Disabilities Act (“ADA”) action, *Hubbard v. Plaza Bonita, LP, et al.*, 09-cv-1581-JLS(WVG). The Standing Committee seeks to suspend Mr. Hubbard for a period of one year from the practice of law in this district.

On December 10, 2012, Mr. Hubbard filed an opening trial brief, and on December 17, 2012, the Standing Committee filed a responsive trial brief. On December 18, 2012, a one-day bench trial was held. Based on the trial, stipulations, and the admitted evidence, the Court issues the following findings of fact and conclusions of law.

1 **I. FINDINGS OF FACT¹**

2 1. Donna Gin, counsel for Hot Topic, Inc.,² believed that Barbara Hubbard had in
3 fact signed the settlement agreement that Mr. Hubbard's office transmitted on December 8,
4 2009. (*See* Pet'r's Ex. 5 ¶ 6.)

5 2. Ms. Gin had her client sign the settlement agreement transmitted on December 8,
6 2009, unaware that Barbara Hubbard³ had died on November 13, 2009 and thus could not have
7 signed the settlement agreement. (*See* Pet'r's Ex. 5 ¶¶ 6, 8–9.)

8 3. Had Ms. Gin known about Barbara Hubbard's death—as a named plaintiff in the
9 underlying action, an obviously material fact—at any time during the negotiation of the
10 settlement, she would have immediately halted settlement discussions and notified her client of
11 the development. (*See* Pet'r's Ex. 5 ¶¶ 8–9.)

12 4. By transmitting the settlement agreement to Ms. Gin on December 8, 2009, which
13 was purportedly signed by Barbara Hubbard, Mr. Hubbard attempted to mislead opposing
14 counsel into believing that Barbara Hubbard was alive. Foremost, during Mr. Hubbard's
15 testimony, when asked what his intention was in approving the settlement agreements, he was
16 non-responsive. That is, he neither confirmed nor denied that it was his intention to mislead
17 opposing counsel. Aside from his non-responsiveness, the Court finds that Mr. Hubbard's
18 testimony lacks credibility, primarily because of Mr. Hubbard's pattern of inconsistent
19 statements as well as his inability to adequately explain his failure to inform opposing counsel of
20 Barbara Hubbard's death in a reasonably timely manner.

21 For example, Mr. Hubbard testified that he did not inform United States Magistrate Judge
22 William V. Gallo that Barbara Hubbard was “gravely ill” during the February 25, 2010

23
24 ¹ The Standing Committee introduced fifteen exhibits, and called two witnesses to testify
25 during trial. Mr. Hubbard introduced no exhibits, and only called himself to testify during trial.
26 It is worth noting that Mr. Hubbard originally included Kaina Schukei—who, in retrospect, is an
important player in the alleged misconduct that occurred in the underlying action—on his
witness list, but Mr. Hubbard ultimately did not call her to testify during trial.

27 ² Hot Topic is one of numerous defendants in the underlying action.

28 ³ Barbara Hubbard is the plaintiff in the underlying action. She died on November 13,
2009. (Pet'r's Ex. 1.) Barbara Hubbard is also Mr. Hubbard's mother.

1 settlement conference, but in an objection to an order to show cause (“OSC Objection”)
2 submitted to United States District Judge Janis L. Sammartino, he stated that “Attorney Hubbard
3 told Magistrate Gallo on February 25, 2010, that he had heard that his mother [Barbara Hubbard]
4 was ‘gravely ill.’” (Pet’r’s Ex. 9 at 5:10–11.) Similarly, during his testimony, Mr. Hubbard
5 denied telling Judge Gallo that he had Barbara Hubbard sign numerous blank settlement
6 agreements before her death, but in the same aforementioned objection, he stated that “Attorney
7 Hubbard told Magistrate Gallo on February 25, 2010, that his mother, Barbara, had signed
8 numerous blanks [sic] settlement agreements, which the parties and court agree were never
9 used.” (*Id.* at 5:20–22.) These are not exclusive examples of Mr. Hubbard’s inconsistencies.

10 5. At the February 25, 2010 settlement conference, Mr. Hubbard told Judge Gallo
11 that he had heard Barbara Hubbard was ill. (*See* Pet’r’s Ex. 9 at 5:10–11.) Mr. Hubbard also
12 failed to disclose that he had personally observed Barbara Hubbard’s deteriorating condition just
13 before her death. (*See* Pet’r’s Ex. 6 ¶¶ 3–10.)

14 6. By transmitting the settlement agreement to David Peters, counsel for Flava
15 Enterprises, Inc. (“Flava”)⁴ on December 9, 2009, which was purportedly signed by Barbara
16 Hubbard, Mr. Hubbard attempted to mislead opposing counsel into believing that Barbara
17 Hubbard was alive. The Court makes this finding for the same reasons that it found above that
18 Mr. Hubbard attempted to mislead counsel for Hot Topic.

19 7. At the February 25, 2010 settlement conference, Mr. Hubbard informed Judge
20 Gallo that he was considering Chris Kohler, one of Mr. Hubbard’s other clients, to substitute in
21 as the plaintiff in place of Barbara Hubbard in the underlying action. (*See* Pet’r’s Ex. 8 at
22 10:3–17; *see also* Pet’r’s Ex. 6 ¶¶ 13–20.) Mr. Peters’ testimony also supports this factual
23 finding.⁵

24 8. At the February 25, 2010 settlement conference, Mr. Hubbard intended to mislead
25

26 ⁴ Flava is another defendant in the underlying action.

27 ⁵ Mr. Hubbard brought up concerns about Mr. Peters’ potential bias during trial. The
28 Court recognizes these concerns. However, the Court finds that Mr. Peters’ testimony regarding
the pertinent issues in this case is credible.

1 the court that he had not observed firsthand Barbara Hubbard's deteriorating condition in the
2 days before her death. On this factual issue, Mr. Hubbard once again took contradictory
3 positions. In the OSC Objection, Mr. Hubbard unequivocally admits that "Attorney Hubbard
4 told Magistrate Gallo on February 25, 2010 that *he had heard* his mother was 'gravely ill.'" (Pet'r's Ex. 9 at 5:10–11 (emphasis added).) However, Mr. Hubbard testified that that never
5 happened. Stating that Mr. Hubbard merely "had heard" Barbara Hubbard was gravely ill
6 strongly suggests that he did not personally observe her physical condition, but rather heard
7 about her physical condition through a third person. (*See id.*)

9 9. Before the February 25, 2010 settlement conference, the decision had been made
10 that Mr. Hubbard's father, and not some other client of Mr. Hubbard's, would assume the role of
11 plaintiff in the underlying action at the time of Barbara Hubbard's death. In a declaration, Mr.
12 Hubbard stated that after being informed of Barbara Hubbard's death, he called his father.
13 (Pet'r's Ex. 6 ¶¶ 12–13.) At that time, Mr. Hubbard concluded that his father inherited Barbara
14 Hubbard's causes of action, and based on that conclusion, Mr. Hubbard asked his father "what
15 he wanted to do." (*Id.* ¶¶ 15–17.) He informed his father that previous settlements needed to be
16 finalized, and received instruction from his father to "go ahead and 'finish up' the lawsuit." (*Id.*
17 ¶¶ 18–19.) Mr. Hubbard stated in the declaration that he and his father "agreed" that Mr.
18 Hubbard would represent his father's interest in the underlying action, and thereafter, Mr.
19 Hubbard's father went on to ratify and consent to Mr. Hubbard's office signing settlement
20 agreements. (*Id.* ¶¶ 20–23.) The declaration does not mention Chris Kohler. (*See id.* ¶¶ 12–23.)
21 This leads the Court to find that Mr. Hubbard decided that his father would assume the role of
22 plaintiff in the underlying action months before the February 25, 2010 settlement conference.

23 10. At the February 25, 2010 settlement conference, Mr. Hubbard intended to mislead
24 the court that no decision had been made as to who would assume control of the underlying
25 action following Barbara Hubbard's death. Mr. Peters testified that Mr. Hubbard represented
26 that either Chris Kohler or Mr. Hubbard's father would replace Barbara Hubbard in the
27 underlying action during the settlement conference. Mr. Hubbard also testified that when Judge
28 Gallo asked what his intentions were regarding substituting the plaintiff in the underlying action,

1 he answered that he might substitute Chris Kohler. However, in light of the factual findings
2 above, Mr. Hubbard's representations during the settlement conference were misleading. Taking
3 into account the discussion and agreement between Mr. Hubbard and his father following
4 Barbara Hubbard's death, there was no other evident purpose to mention Chris Kohler during the
5 settlement conference other than to mislead the court and the other participants.

6 11. At the February 25, 2010 settlement conference, Mr. Hubbard represented that
7 Barbara Hubbard had signed numerous blank settlement agreements before her death, but failed
8 to disclose that the "signed" settlement agreements sent to opposing counsel did not bear
9 Barbara Hubbard's actual signature, but rather someone else's. Mr. Hubbard testified that he did
10 not tell Judge Gallo that Barbara Hubbard had signed numerous settlement agreements before
11 her death. Rather, he explained that he told Judge Gallo that Barbara Hubbard had signed three
12 documents before her death, two of which involved other cases and the other involved a banking
13 matter. However, in the OSC Objection, Mr. Hubbard unequivocally took the position that he
14 "told Magistrate Gallo on February 25, 2010, that his mother, Barbara, had signed numerous
15 blanks [sic] settlement agreements, which the parties and court agree were never used." (Pet'r's
16 Ex. 9 at 5:20–21.) Furthermore, Mr. Peters and Ms. Gin both testified that they had no reason to
17 suspect that the signatures on the settlement agreements were not actually Barbara Hubbard's,
18 and that they believed that the signatures on the settlement agreements were actually Barbara
19 Hubbard's.

20 In sum, the Court finds that Mr. Hubbard represented that Barbara Hubbard had signed
21 numerous blank settlement agreements before her death. Additionally, the Court finds that Mr.
22 Hubbard failed to disclose to the court, Mr. Peters, and Ms. Gin the material fact that the
23 signature in the settlement agreements did not bear Barbara Hubbard's actual signature prior to
24 or at the February 25, 2010 settlement conference.

25 12. Mr. Hubbard intended to mislead the court about who had signed the December 9,
26 2009 settlement agreement faxed to Mr. Peters. Mr. Hubbard testified that the fee agreement
27 with Barbara Hubbard authorized him and possibly his firm to simulate Barbara Hubbard's
28 signature. A declaration of Mr. Hubbard's also states that he received authorization from his

1 father shortly after Barbara Hubbard's death to sign settlement agreements on Barbara
2 Hubbard's behalf. (Pet'r's Ex. 6 ¶ 23.) However, as discussed above, Mr. Hubbard nonetheless
3 represented to the court that Barbara Hubbard actually signed numerous blank settlement
4 agreements before her death. The totality of the evidence compels the Court to find that Mr.
5 Hubbard intended to mislead the court as well as the other parties involved in the underlying
6 action as to who actually signed the settlement agreements, including the one faxed to Mr. Peters
7 on December 9, 2009.

8 9 **II. CONCLUSIONS OF LAW**

10 1. Civil Local Rule 83.4(a) lays out the Code of Conduct for this district:

11 The United States District Court for the Southern District of California
12 is committed to the highest standards of professionalism and expects
13 those standards to be observed by lawyers who practice before it.
14 Compliance with high standards of professionalism depends primarily
15 upon understanding the value of clients, the legal system, the public,
16 and lawyers of adhering to the voluntary standards. Secondly,
17 compliance depends upon reinforcement by peer pressure and public
18 opinion, and finally, when necessary, by enforcement by the courts
19 through their powers and rules already in existence. This code of
20 conduct is not intended to be a set of rules that lawyers can use to incite
21 ancillary litigation on the question whether the standards have been
22 observed by an adversary, but the court may take any appropriate
23 measure to address violations of the rules.

18 Rule 83.4(b) lays out the Standards of Professional Conduct for this district:

19 Every member of the bar of this court and any attorney permitted to
20 practice in this court must be familiar with and comply with the
21 standards of professional conduct required of members of the State Bar
22 of California, and decisions of any court applicable professional
23 conduct which are now adopted as standards of professional conduct of
24 this court. This specification will not be interpreted to be exhaustive of
25 the standards of professional conduct. In that connection, the Code of
26 Professional Responsibility of the American Bar Association should be
27 noted. No attorney permitted to practice before this court will engage
28 in any conduct which degrades or impugns the integrity of the court or
in any manner interferes with the administration of justice within the
Court.

Following the guidance of Rule 83.4(b), the Court will consider the standards of
professional conduct set forth in American Bar Association Model Rules of Professional
Conduct ("ABA Model Rules"), the California Rules of Professional Conduct, and the State Bar
Act.

1 ABA Model Rule 3.3 imposes a duty of candor on attorneys towards the tribunal. The
2 pertinent part of the rule states that a lawyer shall not knowingly “make a false statement of fact
3 or law to a tribunal or fail to correct a false statement of material fact or law previously made to
4 the tribunal by the lawyer.” ABA Model Rule 4.1(a) states that in the course of representing a
5 client, a lawyer shall not knowingly “make a false statement of material fact or law to a third
6 person.” ABA Model Rule 7.1 states that “[a] lawyer shall not make a false or misleading
7 communication about the lawyer or the lawyer’s services.” That rule adds that “[a]
8 communication is false or misleading if it contains a material misrepresentation of fact or law, or
9 omits a fact necessary to make the statement considered as a whole not materially misleading.”
10 Lastly, ABA Model Rule 8.4 states, in pertinent part, that “[i]t is professional misconduct for a
11 lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or]
12 engage in conduct that is prejudicial to the administration of justice.”

13 Moving on to the California Rules of Professional Conduct, Rule 5-200 states that in
14 presenting a matter to a tribunal, a member of the California State Bar “[s]hall employ, for the
15 purpose of maintaining the cases confided to the member[,] such means only as are consistent
16 with truth.” Rule 5-220 states that “[a] member shall not suppress any evidence that the member
17 or the member’s client has a legal obligation to reveal or to produce.”

18 Finally, § 6101 of the State Bar Act states that “[t]he commission of any act involving
19 moral turpitude, dishonesty or corruption, whether the act is committed in the course of his
20 relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not,
21 constitutes a cause for disbarment or suspension.” Section 6068 states that it is the duty of an
22 attorney to “[t]o maintain the respect due to the courts of justice and judicial officers,” and “[t]o
23 employ, for the purpose of maintaining the cases confided to him or her those means only as are
24 consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice
25 or false statement of fact or law.”

26 Relying on the aforementioned professional rules of conduct, the Court finds that Mr.
27 Hubbard’s intentionally deceptive and misleading conduct in the underlying action constitutes
28 unprofessional conduct that violates ABA Model Rules 3.3, 4.1(a), 7.1 and 8.4; California Rules

1 of Professional Conduct 5-200 and 5-220; and State Bar Act §§ 6101, 6068(b), and 6068(d).
2 Through these violations, Mr. Hubbard's conduct also constitutes unprofessional conduct in
3 violation of this district's Civil Local Rule 83.4.

4 2. "[M]onetary sanctions may take the form of an award for attorney's fees to
5 opposing counsel." *ADO Fin., AG v. McDonnell Douglas Corp.*, 938 F. Supp. 590, 595 (C.D.
6 Cal. 1996). "The purpose of an attorney's fee award is to deter undesirable conduct." *Id.*
7 Specifically, the purpose of discipline brought under 28 U.S.C. § 1927 "may be to deter attorney
8 misconduct, or to compensate the victims of an attorney's malfeasance, or to compensate and
9 deter." *Haynes v. City & Cnty. of San Francisco*, 688 F.3d 984, 987 (9th Cir. 2012). In contrast
10 to the court's sanctioning power, in a disciplinary proceeding for unprofessional conduct, "the
11 question before the court is whether an attorney may continue to practice a profession imbued
12 with the public interest and trust." *Standing Comm. on Discipline v. Ross*, 735 F.2d 1168, 1170
13 (9th Cir. 1984). "The court must consider both the fitness of one of its officers and the need to
14 protect the public from an unqualified or unscrupulous practitioner." *Id.* (citing *Ex parte Wall*,
15 107 U.S. 265 (1883)). Additionally, "[i]n the federal system there is no uniform procedure for
16 disciplinary proceedings. The individual judicial districts are free to define the rules to be
17 followed and the grounds for punishment." *Id.*

18 Mr. Hubbard argues that imposing discipline for the professional misconduct in the
19 underlying action for which he has already been monetarily sanctioned amounts to double
20 punishment for the same conduct that is fundamentally unfair. (Resp't's Trial Brief 3:11–6:7.)
21 The Standing Committee opposes primarily on three grounds: (1) the purpose of the monetary
22 sanctions differ from the purpose of the discipline sought here; (2) Mr. Hubbard fails to provide
23 adequate explanation or legal authority to support his argument; and (3) there are no laws or
24 other applicable rules that prevent the Court from imposing discipline in addition to monetary
25 sanctions. (Pet'r's Trial Brief 4:4–6:14.) The Court agrees with the Standing Committee.

26 On June 13, 2011, Judge Gallo imposed a monetary sanction on Mr. Hubbard in the
27 underlying action under § 1927 and the court's inherent authority. (June 13, 2011 OSC Order
28 22:17–19.) He concluded that any sanctions to be imposed on Mr. Hubbard would be to deter

1 him from repeating any misconduct. (*Id.* at 24:22–24.) Mr. Hubbard’s conduct was also
2 reported to the State Bar of California and referred to the Standing Committee. (*Id.* at 25:6–18.)
3 In a subsequent order, the monetary sanction amounted to \$55,224.05, “as sanctions for all of
4 Peters’ work done in connection with the Barbara Hubbard signature falsification issue.” (Nov.
5 27, 2012 Sanctions Order 14:24–15:2.)

6 Though deterrence was a substantial reason for imposing the monetary sanctions, so was
7 compensation—compensation for attorney’s fees incurred as a result of Mr. Hubbard’s
8 misconduct. Unlike the purpose for the monetary sanctions, the purpose of this disciplinary
9 proceeding is to consider Mr. Hubbard’s fitness to practice in this district and to protect the
10 public from an unqualified or unscrupulous practitioner. *See Ross*, 735 F.2d at 1170. Thus, the
11 Court finds that imposing discipline in this proceeding would not amount to “double
12 punishment” and it also would not be fundamentally unfair to Mr. Hubbard.

13 Additionally, Civil Local Rule 83.5 specifically contemplates the possibility of imposition
14 of discipline in addition to other sanctions: “In the event any attorney engages in conduct which
15 may warrant discipline or other sanctions, the court or any judge may, *in addition to* initiating
16 proceedings for contempt under Title 18 U.S.C. and Rule 42, Fed. R. Crim. P., or *imposing other*
17 *appropriate sanctions*, refer the matter to the disciplinary body of any court before which the
18 attorney has been admitted to practice.” Civ. L.R. 83.5 (emphasis added). Judge Gallo imposed
19 a monetary sanction that he deemed appropriate, and then acted in accordance with Rule 83.5 by
20 referring the matter to the Standing Committee. Thus, this disciplinary proceeding following the
21 monetary sanctions is actually aligned with the procedures and within the scope of Rule 83.5.

22 To summarize, the Court may impose a disciplinary punishment in this proceeding for
23 Mr. Hubbard’s professional misconduct even if he was previously monetarily sanctioned for that
24 same misconduct.

25 3. In light of the foregoing factual findings and legal conclusions, the Court finds that
26 a one-year suspension from the practice of law in the Southern District of California is
27 appropriate.

28 //

1 **III. CONCLUSION**

2 Based on the foregoing, the Court finds that Mr. Hubbard engaged in professional
3 misconduct in the underlying action, and imposes a one-year suspension on Mr. Hubbard from
4 the practice of law in the Southern District of California. The Clerk of the Court shall send a
5 copy of this order to the State Bar of California.

6 **IT IS SO ORDERED.**

7
8 DATED: February 4, 2013

9 
10 M. James Lorenz
11 United States District Court Judge

12 COPY TO:

13 HON. WILLIAM MCCURINE, JR.
14 UNITED STATES MAGISTRATE JUDGE

15 ALL PARTIES/COUNSEL
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