

**PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION**

Filed September 5, 2006

**REVIEW DEPARTMENT OF THE STATE BAR COURT**

In the Matter of	)	<b>01-N-04495; 02-O-10010;</b>
	)	<b>02-O-11996</b>
<b>JACK RAYMOND COONEY, JR.,</b>	)	<b>(Consolidated)</b>
	)	
A Member of the State Bar.	)	<b>OPINION ON REVIEW</b>
_____	)	

BY THE COURT<sup>1</sup>

In this consolidated disciplinary proceeding, a State Bar Court hearing judge has recommended that respondent, Jack Raymond Cooney, be disbarred from the practice of law. Respondent seeks our review, arguing that disbarment is excessive in view of his asserted financial hardship and the alleged prejudice he contends is due to the State Bar's delay in bringing this proceeding.

As we shall discuss, respondent's arguments are without merit. He has been actually suspended for two years and until he establishes his fitness to practice, and is culpable of a serious and willful violation of rule 955 of the California Rules of Court.<sup>2</sup> Based on that culpability alone, and to protect the public and support the prophylactic purposes of rule 955, case law calls on us to follow the hearing judge's recommendation. However, respondent's conduct was even more serious, involving deceit during his earlier disciplinary proceeding, failure to refund unearned fees and failure to timely comply with probation conditions. Under all of the circumstances and independently reviewing the record (*In re Morse* (1995))

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<sup>1</sup> Before Stovitz, P.J., Watai, J., and Epstein, J.

<sup>2</sup> Unless noted otherwise, references to rule 955 are to the California Rules of Court.

11 Cal.4th 184, 207, Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a)), disbarment is the only recommendation we can make.

**Findings.**

On our independent review, we adopt the hearing judge's findings of fact and conclusions. As some of the facts were stipulated to by respondent and others are not essentially disputed, we summarize briefly the judge's key findings.

Respondent was admitted to practice law in 1975. In 2001, based on his stipulation that in 1999 he misappropriated about \$15,000 of client trust funds, he was suspended for five years with that suspension stayed on conditions of a four-year probation and two years of actual suspension, with the actual suspension continuing until respondent proved his rehabilitation, fitness to practice and learning under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. As pertinent here, respondent was also required to comply with rule 955 and to file quarterly reports attesting to his compliance with prescribed probation conditions. Respondent's prior discipline considered no evidence of aggravation. In mitigation, respondent then had no prior discipline, was candid and remorseful and experienced marital difficulties, serious illness and resulting financial difficulties leading to the loss of respondent's home and cars.

In the present consolidated proceeding we review, the hearing judge found respondent culpable of willfully failing to comply with rule 955, misrepresenting a fact in stipulating to misconduct in his prior disciplinary case, failing to file timely five required probation reports and failing to refund promptly unearned fees owed to three of his former clients.

As to respondent's willful failure to comply with rule 955, the hearing judge found that respondent's declaration of October 2, 2001, required to prove compliance with rule

955, was qualified. That is, respondent stated that he had refunded all unearned attorney fees “or made arrangements to refund such fees.” However, respondent did not refund over \$3,000 of unearned fees and by nearly three years later, had still not refunded over \$1,000 owed two clients. Respondent qualified his October 2001 declaration in another way by stating that he had filed a copy of his suspension notice with all courts in pending litigation “or will immediately file” this notice. Despite receiving notices from the State Bar that his October 2001 declaration did not report full compliance with rule 955, and giving him an opportunity to file a corrected declaration, respondent did not do so. In November 2001, respondent sent the State Bar a letter in which he said he could not cure his previous rule 955 declaration because he could not refund unearned fees to three clients. He never sought judicial relief until after he sought review before us.

As to respondent’s lack of timely compliance with probation conditions, the hearing judge found that respondent filed tardy five consecutive probation compliance reports. His first required report was filed over four months late.

As to respondent’s misrepresentation in his prior disciplinary proceeding, the hearing judge found that in his March 30, 2001, stipulation of facts, conclusions and proposed discipline, respondent stated that he had deposited \$1,584.33 in his trust account to cover disputed lien claims of his client’s former attorney, despite knowing that he had not deposited these funds in his trust account. The hearing judge concluded that respondent’s misconduct constituted moral turpitude in violation of section 6106.

Finally, as to respondent’s refund of unearned fees, he had not refunded over \$1,000 due two clients and refunded a compromise amount of \$1,500 to another client only after pursuing fee arbitration, admitting therein that he owed the client unearned fees but then pursuing a small claims action to seek to win a trial de novo after the arbitration award.

In aggravation, the hearing judge considered respondent's prior discipline, that multiple acts of misconduct were involved, that respondent's misconduct harmed clients and that he demonstrated indifference to rectifying his misconduct. In mitigation, the hearing judge gave slight or limited weight to favorable character evidence and evidence of cooperation with the State Bar in agreeing to key facts. Also, respondent's illness was given some weight.

After the hearing judge filed her decision and disbarment recommendation, respondent followed his request for review before us with a motion for additional time to comply with rule 955. We denied the motion. Respondent also moved to augment the record or that we judicially notice certain documents. Exhibit W, respondent's timeline of events, was received into evidence below and it is unnecessary that we judicially notice it. Rather, we give it the weight we deem its minimal relevancy requires. We deny respondent's request that we accept the grant deed to former client Adams-Irving. This exhibit was neither offered nor admitted in evidence below, as it could have been. We also deny respondent's request to consider an uncertified copy of a dissolution of marriage decree pertaining to Adams-Irving as we consider it irrelevant to the issues before us.

**Discussion.**

Before us, respondent urges the same claim of prejudicial delay which the hearing judge rejected and we reject it as well. Respondent contends that the State Bar delayed excessively in filing this consolidated proceeding and that this in turn impaired his conduct of a proceeding under standard 1.4(c)(ii) to terminate his two-year actual suspension. However, respondent's argument is unavailing as it was his admitted misconduct between 2001 and 2004 that would have defeated his attempt to terminate his actual suspension and any delay which occurred in filing the current proceeding did not prejudice him.

Respondent also asserts his financial inability to have refunded unearned fees due his former clients. Here, too, we cannot agree that respondent has established his point. At no time did respondent seek relief from his payment obligations. Indeed, we agree with the hearing judge that respondent provided little evidence of his inability to pay and he did not even attempt to make modest periodic payments to two of his clients. Although he ultimately settled with Adams-Irving, he did so only after fee arbitration and extended trial de novo and appellate proceedings, all of which were decided in the client's favor.

Discussing first respondent's violation of rule 955, it was unquestionably a serious and willful breach of the letter and purpose of the rule. Not only was respondent's declaration qualified, it was perjurious in that respondent had never made the arrangements to repay his clients which he claimed. Rule 955 is a Supreme Court rule performing a "critical prophylactic function" designed to ensure that clients, courts and opposing counsel know not only of an attorney's suspension or disbarment from practice but of the attorney's whereabouts. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187; *In the Matter of Snyder* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 593, 599, disapproved on other grounds in *In the Matter of Lais* (Review Dept. 1998), 3 Cal. State Bar Ct. Rptr. 907, 916, fn. 6.) It is also designed to aid in the effective administration of justice by returning a client's papers and property, including unearned fees, allowing the client to seek other counsel. (See rule 955(a)(2).) Respondent plainly violated these principles and failed to utilize available alternatives to comply with rule 955 or to timely seek court relief from the compliance deadline.

We also agree fully with the hearing judge's observation that "the gravamen of [this] case is respondent's noncompliance with rule 955 and his misrepresentation in resolving his prior disciplinary case and in his declaration of compliance." Indeed, we would uphold the

hearing judge's recommendation if we only had before us respondent's willful violation of rule 955, for case law makes clear that such violations generally result in disbarment, particularly when, as is the case here, aggravating circumstances outweigh mitigating ones. (E.g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *Lydon v. State Bar*, *supra*, 45 Cal.3d at pp. 1186-1188; *Powers v. State Bar* (1988) 44 Cal.3d 337, 341-342; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 296.)

Respondent's added misconduct, especially his dishonest attempt to obtain an advantage in his prior disciplinary stipulation, merely builds incontrovertible support for the hearing judge's current recommendation. Upon all the evidence, the public deserves the protection of a successful and formal reinstatement proceeding before respondent is again allowed to practice law.

**Recommendation.**

For the reasons stated, we uphold the findings and conclusions of the hearing judge and recommend that respondent, Jack Raymond Cooney, Jr., be disbarred from the practice of law and that his name be stricken from the roll of attorneys in this state. Pursuant to the provisions of Business and Professions Code section 6007, subdivision (c)(4) and Rules of Procedure of the State Bar, rule 220(c), respondent is ordered enrolled inactive upon personal service of this opinion or three days after service by mail, whichever is earlier.

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in section 6140.7 of that Code and as a money judgment.