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PUBLIC MATTER

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STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO

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In the Matter of
James Leonard Moriarty,
Member No. 72012,
A Member of the State Bar.

Case No. 02-O-15420-JMR
Decision

I. INTRODUCTION

In this disciplinary matter, which proceeded by default, Deputy Trial Counsel Eric H. Hsu appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent James Leonard Moriarty¹ did not appear in person or by counsel.

In the first amended notice of disciplinary charges (first amended NDC), the State Bar charges respondent with violating rule 3-110(A) of the Rules of Professional Conduct of the State Bar² (failure to competently perform legal services), rule 3-700(A)(2) (improper withdraw from representation), Business and Professions Code section 6068, subdivision (m)³ (failure to adequately communicate with client), and rule 3-700(D)(2) (failure to refund unearned fees), and section 6068, subdivision (i) (failure to update State Bar membership records).

The State Bar argues that the appropriate level of discipline is two years' stayed

¹Respondent was admitted to the practice of law in California on December 22, 1976, and has been a member of the State Bar since that time. He does not have a prior record of discipline.

²Unless noted otherwise, all further references to rules are to these rules.

³Unless otherwise noted, all further statutory references are to this code.

1 suspension and ninety days' actual suspension continuing until respondent makes restitution of
2 \$2,812.50 in unearned fees and until he files and the State Bar Court grants a motion, under rule
3 205 of the Rules of Procedure of the State Bar, to terminate his actual suspension. For the
4 reasons stated *post*, the court concludes that the appropriate discipline is one year's stayed
5 suspension and 30 days' actual suspension continuing until respondent makes \$2,812.50 in
6 restitution and until he makes and the State Bar Court grants a motion to terminate the actual
7 suspension.

8 II. RELEVANT PROCEDURAL HISTORY

9 On October 20, 2004, the State Bar filed the original notice of disciplinary charges
10 (original NDC) and, in accordance with section 6002.1, subdivision (c), properly served a copy
11 of it on respondent by certified mail, return receipt requested, at his latest address shown on the
12 official membership records of the State Bar (official address). That service was deemed
13 complete when mailed. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-
14 108.) On October 20, 2004, as a courtesy to respondent, the State Bar served an additional copy
15 of the original NDC on respondent by certified mail, return receipt requested, at 1870 Jefferson
16 Street, Suite 202, San Francisco, California 95123 (Jefferson Street address). The United States
17 Postal Service (Postal Service) returned both of these copies to the State Bar as undeliverable.

18 On October 26, 2004, the State Bar filed a first amended NDC (first amended NDC) and,
19 in accordance with section 6002.1, subdivision (c), properly served a copy of it on respondent by
20 certified mail, return receipt requested, at his official address. That service was also deemed
21 complete when mailed. (§ 6002.1, subd. (c); *Bowles v. State Bar, supra*, 48 Cal.3d at pp. 107-
22 108.) On October 26, 2004, as a courtesy to respondent, the State Bar served an additional copy
23 of the amended NDC on respondent at the Jefferson Street address by certified mail, return
24 receipt requested. The Postal Service returned both of these copies to the State Bar as
25 undeliverable.

26 In addition to mailing courtesy copies of the original NDC and the amended NDC to
27 respondent at the Jefferson Street address, the State Bar took other steps in an attempted to
28 provide respondent with actual notice of this proceeding. Those additional steps are more fully

1 set forth in a declaration of a State Bar deputy trial counsel that is attached to the State Bar's
2 December 22, 2004, motion for entry of default.

3 Respondent was required to file a response to the first amended NDC no later than
4 November 22, 2004, but he did not do so. Therefore, on December 22, 2004, the State Bar filed
5 a motion for the entry of respondent's default. The State Bar properly served a copy of its
6 motion for entry of default on respondent by certified mail, return receipt requested, at his official
7 address on December 22, 2004.⁴

8 Respondent did not respond to the motion for entry of default. Because all of the
9 statutory and rule prerequisites were met, this court filed an order on January 12, 2005, entering
10 respondent's default and, as mandated in section 6007(e)(1), placing him on involuntary inactive
11 enrollment. The clerk properly served a copy of that order on respondent by certified mail, return
12 receipt requested, at his official address. In addition, the clerk mailed a courtesy copy of the
13 court's order to respondent at the Jefferson Street address by first class mail. The copy of the
14 order mailed to respondent at his official address was returned undelivered to the clerk and
15 marked forwarding order expired by Postal Service. The courtesy copy mailed to respondent at
16 the Jefferson street address was not returned to the clerk by the Postal Service.

17 On January 28, 2005, the State Bar filed a request for waiver of default hearing and brief
18 on culpability and discipline.⁵ And the court took the matter under submission for decision
19 without hearing on February 1, 2005.

20 **III. FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

21 **A. The Adams Matter (Counts 1 through 4)**

22 **1. Findings of Fact**

23 In April 1999, Brian Gainer filed a workers' compensation claim against
24 his employer, Superior Surfaces (Superior). Superior, which is a sole proprietorship owned by
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26 ⁴The record does not indicate whether this mailing was returned undelivered to the State
27 Bar.

28 ⁵Exhibit 1 to this pleading is admitted into evidence. (Rules Proc. of State Bar, rule
202(c).)

1 Ross Adams, is insured by the California State Compensation Insurance Fund (SCIF). In
2 February 2000, Gainer filed a separate action against Superior for employer's serious and wilful
3 misconduct (wilful misconduct action).

4 In March 2000, Adams retained respondent to represent him and Superior in the wilful
5 misconduct action. Adams paid respondent \$3,000 in accordance with respondent's fee
6 agreement, which required that Adams pay a "nonrefundable retainer of \$3,000 which will be
7 applied to work we do on your behalf. Our hourly rate is \$150 plus expenses (copies, postage,
8 milage, etc.)." On March 6, 2000, respondent sent Adams an invoice for \$187.50 in attorney
9 fees. Respondent never sent Adams any further invoices. Nor did respondent otherwise assert
10 that he had earned anymore than \$187.50 of Adams's \$3,000 payment or even provide Adams
11 with an accounting with respect to the remaining \$2,812.50 (\$3,000 less \$187.50).

12 Respondent told Adams that he would update Adams whenever there was a status change
13 in the wilful misconduct action. Respondent promptly filed an answer and notice of
14 representation for Adams and Superior in the wilful misconduct action. In addition, for Adams,
15 respondent filed a counterclaim against Gainer for serious and wilful misconduct of employee as
16 the applicant (counterclaim). Respondent never notified Adams that Gainer had filed an answer
17 to the counterclaim. In fact, respondent never communicated with Adams again. Nor did
18 respondent ever take any further action on behalf of Adams or Superior.

19 Respondent never told Adams that he was withdrawing from representation. Nor did
20 respondent ever file a substitution of attorney or a motion to withdraw. Moreover, when Gainer's
21 attorney, Eric Volkmann, attempted to contact respondent by telephone and letter, respondent
22 never responded. Nor did respondent respond when Attorney William Wessell attempted to
23 contact him on behalf of Adams sometime after April 2001 (probably sometime in late 2002).

24 In August 2001, the Supreme Court suspended Respondent from the practice of law,
25 effective September 1, 2001, for failing to pay his annual State Bar membership fees.⁶ And,

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27 ⁶Once respondent was actually suspended from the practice of law, his only duty was to
28 withdraw from employment and stop practicing law. (§§ 6125, 6126; *In the Matter of Taylor*
(Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 573-574.) Neither rule 3-110(A) regarding

1 since that time, respondent has remained on actual suspension under that order. Adams did not
2 learn of respondent's actual suspension until he was told of it in September 2002 by an attorney
3 at SCIF.

4 Then, a year later, in September 2002, Attorney Volkmann filed a declaration of readiness
5 to proceed in wilful misconduct action. That same month, Adams sent respondent faxes asking
6 respondent to contact him, but respondent did not do so. Therefore, Adams wrote to the judge in
7 the wilful misconduct action asking that the action not proceed and that he be given time to find a
8 new attorney. Attorney Volkmann wrote to the judge supporting Adams's requests.

9 In October 2003, the judge ordered that respondent be dismissed as the attorney of record
10 for Superior (and presumably Adams).

11 2. Conclusions of Law

12 In count 2 of the first amended NDC, the State Bar charges respondent with violating rule
13 3-700(A)(2) by improperly withdrawing from employment in the wilful misconduct action.

14 However, there is no direct evidence that respondent intended to withdraw his representation of
15 Adams and Superior. (See *Baker v. State Bar* (1989) 49 Cal.3d 804, 816-817, fn. 5.)

16 Nonetheless, depending on the circumstances, an attorney's cessation of services can amount to
17 an effective withdrawal. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr.
18 631, 641.) Moreover, "gross negligence in failing to communicate with clients may be construed
19 as abandonment. [Citations.]" (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar
20 Ct. Rptr. 657, 680.)

21 As noted *ante*, respondent did not perform any services for Adams and Superior other
22 than filing an answer, a notice of representation, and the counterclaim in the wilful misconduct
23 action. Moreover, even though he completely stopped performing any work for them, respondent
24 did not take any steps to protect Adams's and Superior's interests. Moreover, after March 2000,
25 respondent repeatedly and recklessly, if not deliberately, failed to communicate with Adams and

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competent performance nor rule 3-700(A)(2) has any applicability to suspended attorneys. (*In
the Matter of Taylor, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 573-574.)

1 Superior. When respondent's complete cessation of work for Adams and Superior is viewed
2 together with his repeated and reckless failure to communicate with Adams and Superior, it is
3 clear that respondent effectively withdrew from representing Adams and Superior. Thus,
4 because respondent failed to take any steps to protect his clients' interests before he withdrew, it
5 is clear that respondent is culpable of wilfully violating rule 3-700(A)(2). (*In the Matter of*
6 *Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 535-536; *In the Matter of Bach,*
7 *supra*, 1 Cal. State Bar Ct. Rptr. at p. 641; *In the Matter of Hindin, supra*, 3 Cal. State Bar Ct.
8 Rptr. at p. 680.)

9 In addition, respondent wilfully violated rule 3-700(A)(2) when he effectively withdrew
10 from representing Adams and Superior without leave of court.

11 Notwithstanding the fact that respondent's fee agreement characterized Adams's \$3,000
12 payment as "nonrefundable retainer," the payment was not a true retainer, but a fee paid in
13 advance that falls within the purview of rule 3-700(D)(2). (*In the Matter of Lais* (Review Dept.
14 1998) 3 Cal. State Bar Ct. Rptr. 907, 923.) Accordingly, when respondent withdrew from
15 representing Adams and Superior, he was required under rule 3-700(A)(2) to comply with rule
16 3-700(D)(2) and promptly refund the \$2,812.50 unearned portion of the \$3,000 advance payment
17 to Adams and Superior. Respondent, however, did not do so. Accordingly, respondent again
18 wilfully violated rule 3-700(A)(2). The court declines to find that respondent is also culpable of
19 violating rule 3-700(D)(2) as charged in count 4 because it is encompassed in this found
20 violation of rule 3-700(A)(2) and because rule 3-700(A)(2) is more comprehensive than rule
21 3-700(D)(2). (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 280-
22 281.) Accordingly, count 4 is dismissed with prejudice.

23 The court declines to find that respondent is culpable of failing to competently perform
24 legal services in violation of rule 3-110(A) as charged in count 1. First, there is no evidence to
25 suggest that any of the work respondent actually performed for Adams and Superior was not
26 performed competently. Second, to the extent that respondent's complete cessation of work for
27 Adams and Superior after March 2000 may be considered as a failure to competently perform
28 legal services, the court relies on respondent's cessation of work to establish respondent's

1 culpability for improper withdraw in violation of rule 3-700(A)(2). To consider that cessation of
2 work as a basis for finding that respondent failed to competently perform in wilful violation of
3 rule 3-110(A) would be duplicative. (Cf. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal.
4 State Bar Ct. Rptr. 32, 43.) Accordingly, count 1 is dismissed with prejudice.

5 Similarly, because the court relies on respondent's repeated and reckless failure to
6 communicate with Adams and Superior to establish respondent's culpability for improper
7 withdraw in violation of rule 3-700(A)(2), the court declines to find that respondent violated his
8 duty, under section 6068, subdivision (m), to adequately communicate with Adams and Superior
9 as charged in count 3; to do so would be duplicative. (*In the Matter of Valinoti, supra*, 4 Cal.
10 State Bar Ct. Rptr. at p. 536.) Accordingly, count 3 is dismissed with prejudice.

11 **B. Respondent's Official Address (Count 5)**

12 **1. Findings of Fact**

13 From May 1995 to the present, respondent official address has been 221 Main St., No.
14 1300, San Francisco, CA 94105. In May 2001, the State Bar mailed a notice to respondent at his
15 official address notifying him that he had not paid his annual membership dues and that, if he
16 failed to promptly pay his dues, he would be suspended from the practice of law. That notice,
17 however, was returned undelivered to the State Bar and marked forwarding order expired by the
18 Postal Service. In August 2001, the State Bar mailed to respondent at his official address a copy
19 of the Supreme Court's order suspending him from the practice of law for not paying his dues.
20 The copy of that order was also returned undelivered to the State Bar and marked forwarding
21 order expired by the Postal Service.

22 Moreover, in December 2002 and May 2003, the State Bar sent to respondent at his
23 official address a total of two letters. Both of those letters were returned undelivered to the State
24 Bar by the Postal Service. One was marked forwarding order expired the other was marked
25 attempted not known.

26 In June 2004 and September 2004, the State Bar sent two more letters to respondent at an
27 address other than is his official address. Neither one of those letters was returned undelivered.
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1 very uncooperative during the disciplinary proceeding. There the attorney had 20 years of
2 misconduct free practice. And the discipline imposed was one year's stayed suspension and three
3 years' probation on conditions including 45 days' actual suspension and restitution of \$3,000 to
4 be paid as a condition of probation and not an "and until condition" attached to the 45-day actual
5 suspension.

6 The court concludes that the appropriate discipline in the present proceeding is one year's
7 stayed suspension and thirty days' actual suspension continuing until respondent makes
8 restitution of the \$2,812.50 in unearned fees to Adams.

9 V. DISCIPLINE RECOMMENDATION

10 The court recommends that respondent James Leonard Moriarty be suspended from the
11 practice of law in the State of California for a period of one year, that execution of the one-year
12 suspension be stayed, and that he be actually suspended from the practice of law for thirty days
13 and until:

- 14 (1) he makes restitution to Ross Adams, or to the Client Security Fund if it has
15 paid, in the sum of \$2,812.50 plus interest thereon at the rate of 10 percent
16 per annum from May 30, 2000, until paid, and he provides satisfactory
17 proof of that restitution to the State Bar's Office of Probation in Los
18 Angeles;
- 19 (2) he files and the State Bar Court grants a motion, under rule 205 of the Rules of
20 Procedure of the State Bar, to terminate his actual suspension; and
- 21 (3) if he remains actually suspended for two or more years, he shows
22 proof satisfactory to the State Bar Court of his rehabilitation,
23 present fitness to practice, and present learning and ability in the
24 general law in accordance with standard 1.4(c)(ii) of the Standards
25 for Attorney Sanctions for Professional Misconduct.

26 Furthermore, in accordance with rule 205 of the Rules of Procedure of the State Bar, the
27 court recommends that, if the State Bar Court grants a motion to terminate respondent's actual
28 suspension, it be authorized to place him on probation for a specified period of time and to

1 impose on him such probation conditions as it deems necessary or appropriate in light of the
2 misconduct found in this proceeding. The court recommends that respondent be ordered to
3 comply with any such probation conditions imposed on him by the State Bar Court.

4 **VI. PROFESSIONAL RESPONSIBILITY EXAM, RULE 955, AND COSTS**

5 The court further recommends that respondent be ordered to take and pass the Multistate
6 Professional Responsibility Examination administered by the National Conference of Bar
7 Examiners within the greater of one year after the effective date of the Supreme Court order in
8 this matter or the period of his actual suspension and to provide satisfactory proof of such
9 passage to the State Bar's Office of Probation in Los Angeles within that same time period.

10 The court further recommends that, if the period of respondent's actual suspension
11 extends for 90 or more days, respondent be ordered to comply with rule 955 of the California
12 Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within
13 120 and 130 calendar days, respectively, after the effective date of the Supreme Court order in
14 this matter.⁷

15 Finally, the court recommends that the costs incurred by the State Bar in this matter be
16 awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and
17 that such costs be payable in accordance with Business and Professions Code section 6140.7.

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21 Dated: May 2, 2005


22 JOANN M. REMKE
23 Judge of the State Bar Court
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25 _____
26 ⁷Respondent is required to file a rule 955(c) affidavit even if he has no clients to notify.
27 (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or a
28 contempt, Respondent's failure to comply with rule 955 is also a ground for disbarment or
suspension and for revocation of any pending probation. (Cal. Rules of Court, rule 955(d).)

CERTIFICATE OF SERVICE
[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on May 2, 2005, I deposited a true copy of the following document(s):

DECISION, filed May 2, 2005

in a sealed envelope for collection and mailing on that date as follows:

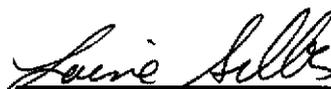
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

JAMES LEONARD MORIARTY
221 MAIN ST #1300
SAN FRANCISCO CA 94105

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

DONALD STEEDMAN, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **May 2, 2005**.



Laine Silber
Case Administrator
State Bar Court