

**PUBLIC MATTER
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**THE STATE BAR COURT
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 03-O-03112-JMR
HENDLEY CLAY HUTCHINSON,)	DECISION
Member No. 191891,)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this disciplinary matter, Lee Ann Kern appeared for the Office of the Chief Trial Counsel of the State Bar of California ("State Bar"). Respondent Hendley Clay Hutchinson ("respondent") did not appear in person or by counsel.

After considering the evidence and the law, the court recommends, among other things, that respondent be suspended for two years and that the suspension be stayed on conditions including 60 days actual suspension and until he makes specified restitution and until he complies with rule 205 of the Rules of Procedure of the State Bar of California ("Rules of Procedure").

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges ("NDC") was filed on April 20, 2004, and was properly served on respondent on that same date at his official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section¹

¹All future references to "section(s)" are to the Business and Professions Code unless otherwise specified.

1 6002.1(c) ("official address"). Service was deemed complete as of the time of mailing. (*Lydon*
2 *v. State Bar* (1988) 45 Cal.3d 1181, 1186.) This correspondence was returned by the United
3 States Postal Service ("USPS") as undeliverable with the notation "moved - left no address."

4 On April 29, 2004, respondent was properly served at his official address with a notice
5 advising him, among other things, that a status conference would be held on June 1, 2004. This
6 correspondence was returned by the USPS as undeliverable with the notation "moved - left no
7 address."

8 Respondent did not appear at the June 1, 2004, status conference. On June 2, 2004, he
9 was properly served at his official address with an order advising him, among other things, that a
10 motion for entry of default would be filed. This correspondence was returned by the USPS with
11 the notation "attempted - not known."²

12 Respondent did not file a responsive pleading to the NDC. On June 21, 2004, a motion
13 for entry of default was properly served on respondent at his official address by certified mail,
14 return receipt requested. It was filed on June 22, 2004. The motion advised him that minimum
15 discipline of 30 days actual suspension and until he made restitution would be sought if he was
16 found culpable. He did not respond to the motion.

17 On July 7, 2004, the court entered respondent's default and enrolled him inactive
18 effective three days after service of the order. The order was properly served on him at his
19 official address on that same date by certified mail, return receipt requested. This
20 correspondence was returned by the USPS as undeliverable, bearing the notation "not deliverable
21 as addressed - unable to forward."

22 The State Bar's efforts to locate and contact respondent were fruitless.

23 The matter was submitted for decision without hearing on July 27, 2004.

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27 ²The declaration of service attached to the order indicated that the name of the document
28 served on June 2, 2004, was the notice of assignment and notice of initial status conference. The
court considers this an insignificant error since the declaration indicates that the correspondence
was correctly addressed to respondent at his official address.

1 By mid-November 2002, respondent had moved out of his law office without leaving
2 Cepeda a forwarding address. She never heard from him again.

3 Respondent never returned any of the \$500 Cepeda had paid him.

4 On August 21, 2003, the State Bar opened an investigation in case no. 03-O-03112
5 pursuant to a complaint filed by Cepeda regarding allegations of misconduct by respondent. On
6 that same date, a State Bar investigator sent respondent a letter requesting that Respondent
7 answer in writing specific allegations of misconduct regarding the Cepeda complaint. The letter
8 was addressed to respondent's official address and sent by first-class mail, postage prepaid. On
9 August 29, 2003, it was returned to the State Bar, marked "undeliverable as addressed." The
10 address on the envelope was the same as respondent's official address.

11 On September 2, 2003, the investigator sent respondent another letter asking him to
12 respond to allegations of misconduct in the Cepeda matter. The letter was addressed to
13 respondent at the address at which Cepeda had met with him³ and sent by first-class mail,
14 postage prepaid. It was not returned as undeliverable or for any other reason. Respondent
15 received the letter.

16 On February 9, 2004, a State Bar investigator conducted computerized research to
17 determine whether there were any other addresses for respondent. On that same date, the
18 investigator sent respondent another letter asking him to respond to allegations of misconduct in
19 the Cepeda matter. The letter was addressed to respondent at an alternate address found in the
20 computer database⁴ and sent by first-class mail, postage prepaid. On February 18, 2004, it was
21 returned stamped "forwarding order expired."

22 Respondent did not answer the investigator's September 2, 2003, letter nor did he
23 otherwise communicate with the investigators.

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26 _____
27 ³610 Paulin Avenue, Suite 104, Calexico, California.

28 ⁴711 S. "F" Street, Imperial, California.

1 **C. Conclusions of Law**

2 **Count One - Section 6068(a) (Noncompliance with Laws / Unauthorized Practice of Law)**

3 Section 6068(a) requires an attorney to support the Constitution as well as state and
4 federal laws. Section 6125 requires an individual to be a member of the State Bar in order to
5 practice law in California. Section 6126(a) makes it a misdemeanor for an individual to advertise
6 or to hold him- or herself out as practicing or entitled to practice law or otherwise practicing law
7 when he or she is not an active member of the State Bar of California.

8 By entering into an employment agreement with Cepeda while suspended, respondent
9 held himself out as entitled to practice law when he was not so entitled. In so doing, he violated
10 sections 6125 and 6126(a) and failed to support the laws of this State in wilful violation of
11 section 6068(a).

12 **Count Two - Section 6106 (Dishonesty or Moral Turpitude)**

13 Section 6106 makes it a cause for disbarment or suspension to commit any act involving
14 moral turpitude, dishonesty or corruption, whether the act is committed in the course of his or her
15 relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

16 There is clear and convincing evidence that respondent violated section 6106. He
17 misrepresented to Cepeda that he was entitled to practice law when, in fact, he was not.
18 Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation
19 of section 6106.

20 **Count Three - Section 6068(m) (Failure to Communicate)**

21 Section 6068(m) requires an attorney to respond promptly to reasonable status inquiries
22 of clients and to keep clients reasonably informed of significant developments in matters with
23 regard to which the attorney has agreed to provide legal services.

24 By not informing Cepeda that he was suspended from the practice of law, respondent did
25 not keep Cepeda reasonably informed of significant developments in wilful violation of section
26 6068(m).

27 **Count Four - Rule 3-700(D)(2) (Failure to Return Unearned Fees)**

28 Rule 3-700(D)(2) of the Rules of Professional Conduct requires an attorney whose

1 employment has terminated to promptly return any part of a fee paid in advance that has not been
2 earned. This rule does not apply to true retainer fees paid solely for the purpose of ensuring the
3 availability of an attorney to handle a matter.

4 By not returning to Cepeda any of the \$500 she paid him while he was suspended,
5 respondent did not return an advanced, unearned fee in wilful violation of rule 3-700(D)(2).

6 **Count Five - Section 6068(j) (Failure to Maintain Address)**

7 Section 6068(j) requires an attorney to comply with the requirements of section 6002.1,
8 which, among other things, requires him or her to maintain a current address and telephone
9 number with the State Bar and to notify the State Bar within 30 days of any change in same.

10 By not maintaining a current address with the State Bar, respondent wilfully violated
11 section 6068(j).

12 **Count Six - Section 6068(i) (Failure to Participate in a Disciplinary Investigation)**

13 Section 6068(i) requires an attorney to participate and cooperate in any disciplinary
14 investigation or other disciplinary or regulatory proceeding pending against himself.

15 By not responding to the State Bar investigators' letters, respondent did not participate in
16 the investigation of the allegations of misconduct regarding the Cepeda case in wilful violation of
17 6068(i).

18 **IV. LEVEL OF DISCIPLINE**

19 **A. Aggravating Circumstances**

20 Respondent's multiple acts of misconduct are an aggravating factor. (Standard 1.2(b)(ii),
21 Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct ("standards").)

22 Respondent's failure to participate in these proceedings prior to the entry of default is also
23 an aggravating factor. (Standard 1.2(b)(vi).) He has demonstrated his contemptuous attitude
24 toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the
25 court to participate therein, a serious aggravating factor. (Standard 1.2(b)(vi); Cf. *In the Matter*
26 *of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 104, 109.)

27 **B. Mitigating Circumstances**

28 Since respondent did not participate in these proceedings and he bears the burden of

1 establishing mitigation by clear and convincing evidence, the court has been provided no basis
2 for finding mitigating factors. Although respondent has no prior instances of discipline, he had
3 been admitted to the practice of law in California for only about five years at the time the
4 misconduct commenced. Five years is not enough time to practice law without incident to be
5 considered a mitigating circumstance. (*Amante v. State Bar* (1990) 50 Cal.3d 247 (five years);
6 *Smith v. State Bar* (1985) 38 Cal.3d 525 (six years).)

7 **C. Discussion**

8 The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to
9 protect the public, to preserve public confidence in the profession, and to maintain the highest
10 possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111;
11 *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.)

12 Standard 1.6 provides that the appropriate sanction for the misconduct found must be
13 balanced with any mitigating or aggravating circumstances, with due regard for the purposes of
14 imposing discipline. If two or more acts of professional misconduct are found in a single
15 disciplinary proceeding, the sanction imposed shall be the most severe of the applicable
16 sanctions. (Standard 1.6(a).) The level of discipline is progressive. (Standard 1.7(b).) The
17 standards, however, are guidelines from which the court may deviate in fashioning the most
18 appropriate discipline considering all the proven facts and circumstances of a given matter. (*In*
19 *re Young* (1989) 49 Cal.3d 257, 267 (fn. 11); *Howard v. State Bar* (1990) 51 Cal.3d 215.) They
20 are "not mandatory 'sentences' imposed in a blind or mechanical manner." (*Gary v. State Bar*
21 (1988) 44 Cal.3d 820, 828.)

22 Standards 2.3, 2.6 and 2.10 apply in this matter. The most severe sanction is suggested
23 by standard which recommends actual suspension or disbarment for culpability of an act of moral
24 turpitude, fraud, intentional dishonesty or of concealment of a material fact from a court, client or
25 other person, depending on the extent to which the victim of the misconduct is harmed or misled
26 and depending upon the magnitude of the act of misconduct and the degree to which it relates to
27 the attorney's acts within the practice of law.

28 Respondent has been found culpable of violations of section 6068(a), (i), (j) and (m) and

1 rule 3-700(D)(2) with regard to one client matter. Respondent presented no mitigating factors.
2 Aggravating factors are multiple acts of misconduct and failure to participate in the proceedings
3 prior to the entry of default.

4 The State Bar, in its motion for entry of default, recommended a minimum of 30 days
5 actual suspension, among other things. Then, in its closing brief, it recommends 60 days actual
6 suspension without citing authority for the change in recommendation.

7 The court found *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr.
8 585, and *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, instructive.

9 In *Trousil*, the attorney was found culpable, in one client matter, of engaging in the
10 unauthorized practice of law while he was suspended for nonpayment of dues, and later for
11 disciplinary purposes. The client pressured Trousil into remaining on the bankruptcy case. In
12 mitigation, the Review Department found the most compelling circumstance in Trousil's manic
13 depression for which he underwent treatment and which was now controlled. There was no harm
14 to others involved in the bankruptcy case. Trousil practiced without further incident for six years
15 since the misconduct. In aggravation, Trousil had three prior instances of discipline, all of which
16 transpired during his psychological illness and prior to diagnosis. Discipline consisted of two
17 years stayed suspension, two years probation and 30 days actual suspension. *Trousil* presents
18 somewhat comparable misconduct but greater aggravating and mitigating circumstances than the
19 instant case.

20 In *Johnston*, the attorney, who had no prior record of discipline in 12 years of practice,
21 was actually suspended for 60 days for misconduct in a single client matter. The attorney failed
22 to communicate with his client and failed to perform competently which caused his client to lose
23 her case. He also improperly held himself out as entitled to practice law by misleading his client
24 into believing he was still working on her case while he was on suspension for not paying his
25 dues. He defaulted in the disciplinary proceedings as well. The court finds this case to be more
26 comparable to the case at hand.

27 Respondent's misconduct and lack of participation in this matter raises concerns about
28 his ability or willingness to comply with his ethical responsibilities to the public and to the State

1 Bar. No explanation has been offered that might persuade the court otherwise and the court can
2 glean none. Having considered the evidence and the law, the court believes that a 60-day actual
3 suspension to remain in effect until he makes restitution and explains to this court the reasons for
4 not participating herein and proclaims his willingness to comply fully with probation conditions
5 that may hereafter imposed, among other things, is adequate to protect the public and
6 proportionate to the misconduct found.

7 **V. DISCIPLINE RECOMMENDATION**

8 Accordingly, it is hereby recommended that respondent HENDLEY CLAY
9 HUTCHINSON be suspended from the practice of law for two years and until he complies with
10 standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, that said
11 suspension be stayed; and that he be actually suspended from the practice of law for 60 days and
12 until he makes restitution to Daria Cepeda (or the Client Security Fund, if appropriate) in the
13 amount of \$500 plus 10% interest per annum from October 15, 2002, and furnishes satisfactory
14 proof thereof to the State Bar Office of Probation, and until the State Bar Court grants a motion
15 to terminate respondent's actual suspension at its conclusion or upon such later date ordered by
16 the court. (Rules Proc. of State Bar, Rule 205(a), (c).)

17 It is further recommended that respondent be ordered to take and pass the Multistate
18 Professional Responsibility Examination given by the National Conference of Bar Examiners
19 within one year from the effective date of the Supreme Court's order or during the period of his
20 actual suspension, whichever is longer, and furnish satisfactory proof of such to the State Bar
21 Office of Probation within said period.

22 It is also recommended that respondent be ordered to comply with the conditions of
23 probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his
24 actual suspension.

25 If the period of actual suspension reaches or exceeds two years, it is further recommended
26 that respondent remain actually suspended until he has shown proof satisfactory to the State Bar
27 Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to
28 Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

1 If respondent remains actually suspended for 90 days or more, it is also recommended
2 that he be ordered to comply with the requirements of rule 955 of the California Rules of Court
3 within 120 calendar days of the effective date of the Supreme Court order in this matter, and file
4 the affidavit provided for in paragraph (c) within 130 days of the effective date of the order
5 showing his compliance with said order.⁵

6 **VI. COSTS**

7 The court recommends that costs be awarded to the State Bar pursuant to section 6086.10,
8 and that those costs be payable in accordance with section 6140.7.

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12 Dated: October 1, 2004

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14 JOANN M. REMKE
15 Judge of the State Bar Court
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27 ⁵Failure to comply with rule 955 could result in disbarment. (*Bercovich v. State Bar* (1990)
28 50 Cal.3d 116, 131.) Respondent is required to file a rule 955(c) affidavit even if he has no
clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

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 October 1, 2004, I deposited a true copy of the following document(s):

DECISION

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

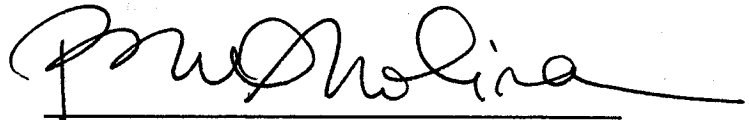
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

HENDLEY C. HUTCHINSON
2300 MARTIN LUTHER KING ST
CALEXICO CA 92243

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

KEVIN B. TAYLOR, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **October 1, 2004.**



Bernadette C. O. Molina
Case Administrator
State Bar Court