

PUBLIC MATTER

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JUN 27 2005

STATE BAR COURT CLERK'S OFFICE

STATE BAR COURT OF CALIFORNIA SAN FRANCISCO

HEARING DEPARTMENT - SAN FRANCISCO

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In the Matter of)	Case No. 04-O-10088-JMR
CAROL DEBRA MARMOREK,)	DECISION
Member No. 213399,)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this disciplinary matter, Manuel Jimenez appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Carol Debra Marmorek 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 one year and that the suspension be stayed on conditions including 30 days actual suspension and until she complies with rule 205 of the Rules of Procedure of the State Bar of California.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on January 4, 2005, and was properly served on respondent on that same date at her official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section¹ 6002.1(c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v.*

¹Unless otherwise specified, all future references to "section(s)" are to the Business and Professions Code.



1 *State Bar* (1988) 45 Cal.3d 1181, 1186.) The return receipt was returned to the State Bar bearing
2 an illegible signature and dated January 5, 2005. However, the correspondence also was returned
3 to the State Bar with a handwritten notation stating:

4 "Return to sender. No longer employed at this address since 2/3/03. Staff member
5 should have returned the envelope to postmaster before signing return receipt. She said
she did not look at front of envelope before signing. 1/5/05. Office Manager."

6 On January 11, 2005, respondent was properly served at her official address with a notice
7 advising her, among other things, that a status conference would be held on February 7, 2005.

8 Respondent did not appear at the February 7 status conference. On that same date, she
9 was properly served with a status conference order at her official address by first-class mail,
10 postage prepaid. The order also advised her, among other things, that a default motion would be
11 filed within two weeks. The court judicially notices its records pursuant to Evidence Code
12 section 452(d)(1), which indicate that this correspondence was returned with a handwritten
13 notation stating that respondent was not at that address.

14 Respondent did not file a responsive pleading to the NDC. On February 25, 2005, a
15 motion for entry of default was filed and properly served on respondent at her official address by
16 certified mail, return receipt requested. The motion advised her that minimum discipline of two
17 years stayed suspension, two years probation, 60 days actual suspension and "appropriate
18 restitution" would be sought if she was found culpable. She did not respond to the motion.

19 On March 14, 2005, the court entered respondent's default and enrolled her inactive
20 effective three days after service of the order. The order was properly served on her at her
21 official address on that same date by certified mail, return receipt requested. This
22 correspondence was also returned as undeliverable.

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

24 The matter was submitted for decision without hearing on April 4, 2005.

25 **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

26 The court's findings are based on the allegations contained in the NDC as they are
27 deemed admitted and no further proof is required to establish the truth of those allegations.

28 (Section 6088; Rules Proc. of State Bar, rule 200(d)(1)(A).) The findings also are based on any

1 evidence admitted. It is the prosecution's burden to establish culpability of the charges by clear
2 and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct.
3 Rptr. 163, 171.)

4 **A. Jurisdiction**

5 Respondent was admitted to the practice of law in California on May 31, 2001, and has
6 been a member of the State Bar at all times since.

7 **B. Facts**

8 On September 8, 2002, Stuart Pang was involved in an automobile accident with Ryan
9 Goetz. The next day, respondent agreed to represent Pang regarding the injuries he suffered in
10 the accident for a contingency fee of 25 percent.

11 Between September 9, 2002, and September 30, 2003, respondent and Pang spoke many
12 times about the status of Pang's case.

13 On September 8, 2003, respondent filed a complaint on Pang's behalf, entitled *Pang v.*
14 *Goetz*, Santa Clara County Superior Court, case no. 1-03-CV-000056.

15 Pang terminated respondent's services on September 30, 2003, because he did not feel
16 that respondent was adequately pursuing his case. On September 30, 2003, Pang requested in a
17 telephone conversation that respondent provide him with his client file. Respondent refused to
18 return the file.

19 On October 1, 2003, Pang went to respondent's home to obtain his file. Respondent
20 again refused to return Pang's file.

21 On October 5, 2003, respondent sent a letter to Goetz's insurance carrier, Prudential
22 Financial (Prudential), stating that respondent represented Pang in this lawsuit.

23 On October 6, 2003, respondent filed a Civil Case Cover Sheet (cover sheet) in Pang's
24 case. The cover sheet and the complaint listed respondent's address as P.O. Box 1534, Santa
25 Cruz, California 95060. Respondent performed no services for Pang after October 6, 2003.

26 On October 8, 2003, Gail Abilovitz, a casualty analyst with Prudential, sent respondent a
27 letter indicating that the statute of limitations had expired on Pang's claim and requesting proof
28 that a complaint had been filed to preserve it. The letter was sent to respondent at Pang's home

1 address.

2 On October 10, 2003, respondent repeatedly telephoned Pang asking him to revoke her
3 termination. Pang refused to do so.

4 Pang filed a complaint with the State Bar on October 30, 2003.

5 Although respondent's services had been terminated, she never filed a substitution of
6 attorney form in Pang's case. She continued to be listed as his attorney of record in that matter.
7 She also never arranged for service of the complaint, and she never told Pang that he needed to
8 serve the complaint and file a proof of its service with the court.

9 Prior to January 12, 2004, the court set a case management conference on January 13,
10 2004, and notified respondent of it. Respondent never told Pang about this conference. No one
11 appeared at the conference and the court set the matter for an Order to Show Cause (OSC)
12 regarding the failure to appear.

13 On January 27, 2004, the court sent respondent a notice that a hearing was set on the OSC
14 for March 11, 2004. Respondent did not advise Pang about the OSC hearing. Since no one
15 appeared at the hearing, the court dismissed Pang's case.

16 On March 16, 2004, the court served respondent with a notice of dismissal of Pang's case
17 due to the failure to appear and/or show cause in writing why dismissal should not be entered.
18 On March 16, 2004, a copy of this notice was served on respondent at the P.O. Box address
19 respondent had listed on the Civil Case Cover Sheet with the court. Respondent never told Pang
20 that the case had been dismissed.

21 On November 4, 2003, the State Bar opened an investigation pursuant to a complaint
22 filed by Pang regarding allegations of misconduct by respondent in this matter. On December
23 17, 2003, a State Bar investigator sent respondent a letter requesting that she answer in writing
24 specific allegations of misconduct regarding the Pang complaint. The letter was addressed to
25 respondent's official membership records address and sent by first-class mail, postage prepaid.

26 On December 23, 2003, the office manager for Bay Area Legal Aid telephoned the
27 investigator indicating that respondent had gone out on disability on October 23, 2003, and could
28 no longer be contacted at that address. The office manager stated that she would forward the

1 State Bar's correspondence to respondent but would not provide her address due to
2 confidentiality concerns.

3 On January 20, 2004, respondent telephoned the State Bar and left a message containing
4 the telephone number where she could be reached. On April 15, 2004, the State Bar investigator
5 called respondent at that telephone number but it was disconnected.

6 On April 16, 2004, the investigator obtained two other addresses for respondent: P.O.
7 Box 1534, Santa Cruz, California 95060, and P.O. Box 320832, Los Gatos, California 95032.
8 The investigator sent a letter to respondent regarding the Pang complaint to each address. The
9 letters were properly mailed by first-class mail, postage prepaid, in sealed envelopes and
10 deposited for collection by the United States Postal Service in the ordinary course of business.

11 On April 24, 2004, the Santa Cruz letter was returned as undeliverable, marked "Box
12 closed; Unable to Forward; Return to Sender."

13 The Los Gatos letter was not returned as undeliverable.

14 Respondent did not provide the State Bar with a current membership records address
15 where she was able to receive mail.

16 **C. Conclusions of Law**

17 **Count One - Rule of Professional Conduct, rule 3-110(A)² (Failing to Perform**
18 **Competently)**

19 Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to
20 perform legal services competently.

21 There is not clear and convincing evidence that respondent intentionally, recklessly or
22 repeatedly performed incompetently in wilful violation of rule 3-110(A) prior to her services
23 being terminated by Pang. In fact, respondent had been discharged and should not have been
24 performing services on Pang's behalf except as necessary to properly withdraw from
25
26

27 ²Unless otherwise noted, all further references to "rule(s)" are to the Rules of Professional
28 Conduct.

1 representation.³

2 **Count Two - Section 6068(m) (Failure to Communicate)**

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

6 At the time respondent's services were terminated, respondent did not tell Pang that he
7 needed to serve the complaint and file a proof of its service with the court. Accordingly,
8 respondent did not keep Pang reasonably informed of significant developments in wilful
9 violation of section 6068(m).

10 **Count Three - Rule 3-700(D)(1) (Failure to Return Client Papers or Property)**

11 Rule 3-700(D)(1) requires an attorney whose employment has been terminated to
12 promptly release to the client, at the client's request, all client papers and property, subject to any
13 protective order or non-disclosure agreement. This includes correspondence, pleadings,
14 deposition transcripts, exhibits, physical evidence, expert's reports and other items reasonably
15 necessary to the client's representation, whether the client has paid for them or not.

16 By not returning Pang's file when he asked for it after she was terminated, respondent
17 wilfully violated rule 3-700(D)(1).

18 **Count Four - Section 6068(j) (Failure to Maintain Address)**

19 Section 6068(j) requires an attorney to comply with the requirements of section 6002.1,
20 which, among other things, requires him or her to maintain a current address and telephone
21 number with the State Bar and to notify the State Bar within 30 days of any changes.

22 By not maintaining a current address and telephone number with the State Bar,
23 respondent wilfully violated section 6068(j).

24 ///

25 _____
26 ³The NDC does not charge respondent with alleged violations of rule 3-700(A)(2) or section
27 6104, which may have been more appropriate given the nature and extent of respondent's
28 conduct post-termination of her services. Further, since this is a default matter, it is not
appropriate to use evidence of uncharged misconduct as an aggravating factor. (*In the Matter of
Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 217 - 218.)

1 **IV. LEVEL OF DISCIPLINE**

2 **A. Aggravating Circumstances**

3 Respondent's multiple acts of misconduct are an aggravating factor. (Rules Proc. of State
4 Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b)(ii) (all further
5 references to standards are to this source).)

6 Respondent's misconduct significantly harmed Pang. (Standard 1.2(b)(iv).) As a result of
7 her conduct, Pang's personal injury case was dismissed.

8 **B. Mitigating Circumstances**

9 Since respondent did not participate in these proceedings and she bears the burden of
10 establishing mitigation by clear and convincing evidence, the court has been provided no basis
11 for finding mitigating factors.⁴

12 **C. Discussion**

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

17 Standard 1.6 provides that the appropriate sanction for the misconduct found must be
18 balanced with any mitigating or aggravating circumstances, with due regard for the purposes of
19 imposing discipline. If two or more acts of professional misconduct are found in a single
20 disciplinary proceeding, the sanction imposed shall be the most severe of the applicable
21 sanctions. (Standard 1.6(a).) The level of discipline is progressive. (Standard 1.7(b).) The
22 standards, however, are guidelines from which the court may deviate in fashioning the most
23 appropriate discipline considering all the proven facts and circumstances of a given matter. (*In*
24 *re Young* (1989) 49 Cal.3d 257, 267 (fn. 11); *Howard v. State Bar* (1990) 51 Cal.3d 215.) They

25
26 ⁴While there was evidence that respondent may have left her employment as a result of a
27 disability, there is no evidence as to the nature of the disability, the connection to the misconduct,
28 if any, or respondent's current condition. (Standard 1.2(e)(iv).) Accordingly, no mitigation is
provided.

1 are "not mandatory 'sentences' imposed in a blind or mechanical manner." (*Gary v. State Bar*
2 (1988) 44 Cal.3d 820, 828.)

3 Standards 2.6(a) and 2.10 apply in this matter. The most severe sanction is found at
4 standard 2.6(a), which recommends suspension or disbarment for violations of sections 6067 and
5 6068, depending on the gravity of the offense or harm, if any to the victim, with due regard to the
6 purposes of imposing discipline.

7 Respondent has been found culpable of violations of section 6068(j) and (m) and rule 3-
8 700(D)(1). No mitigating factors were presented. Aggravating factors include multiple acts of
9 misconduct and client harm.

10 In its motion for entry of default, the State Bar recommended 60 days actual suspension.
11 However, no authorities were submitted to support this recommendation and the State Bar failed
12 to submit a trial brief in this matter.

13 The court found instructive those cases dealing with the abandonment of a single client
14 matter. In *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 206, the
15 review department noted that in cases revolving around an attorney's abandonment of a single
16 client in situations where the attorney had no prior record of discipline, the discipline ranges
17 from no actual suspension to 90 days actual suspension.

18 For example, in *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, an attorney with five years
19 of practice and no prior record of discipline represented a client in a marital dissolution case.
20 The attorney began work on the matter and then failed to communicate with his client, take
21 action on the matter or withdraw. The Supreme Court concluded that a single act of failing to
22 perform requested services without serious harm to the client, aggravated by the attorney's lack
23 of appreciation for the discipline process and the charges against him, warranted a six-month
24 suspension, stayed, one year of probation on conditions and no actual suspension.

25 In *Layton v. State Bar* (1990) 50 Cal.3d 889, involving an attorney with 30 years of
26 practice without prior discipline, the Supreme Court imposed 30 days actual suspension. The
27 attorney, acting as attorney for a trust and an estate for which he was also the executor, failed
28 through neglect and inattention to fulfill important and material requirements of his office as

1 executor for over five years, which ultimately resulted in his removal from office by the probate
2 court.

3 In *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, a default
4 proceeding involving a single client matter, the attorney abandoned the client, failed to cooperate
5 with the State Bar's investigation, and failed to submit a change of address to the State Bar. He
6 had no prior discipline in nine years of practice at the time of the misconduct. The attorney was
7 suspended for one year, execution of the suspension was stayed, and he was placed on probation
8 for one year, with 30 days of actual suspension.

9 In *Harris v. State Bar* (1990) 51 Cal.3d 1082, the Supreme Court imposed a 90-day actual
10 suspension for protracted inattention to a client's case, resulting in a large financial loss to the
11 client's estate. Aggravating factors included lack of candor to her client and lack of remorse and
12 insight. In mitigation, she had approximately 10 years of practice with no prior discipline. Also,
13 her illness with typhoid fever after the misconduct commenced was considered. The attorney
14 participated in the proceedings.

15 The court believes that the instant case is more comparable to *Van Sloten, Layton* and
16 *Lilley* than to *Harris*, which includes the serious aggravating element of lack of candor.

17 Respondent's misconduct and lack of participation in this matter raises concerns about
18 her ability or willingness to comply with her ethical responsibilities to the public and to the State
19 Bar. No explanation has been offered that might persuade the court otherwise. Having
20 considered the evidence and the law, the court believes that a 30-day actual suspension period to
21 remain in effect until respondent explains to this court the reasons for not participating herein
22 and declares her willingness to comply fully with probation conditions that may hereafter
23 imposed, among other things, is adequate to protect the public and proportionate to the
24 misconduct found and the court so recommends.

25 **V. DISCIPLINE RECOMMENDATION**

26 Accordingly, it is hereby recommended that respondent be suspended from the practice of
27 law for one year, that said suspension be stayed, and that she be actually suspended from the
28 practice of law for 30 days and until the State Bar Court grants a motion to terminate

1 respondent's actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar at
2 its conclusion or upon such later date ordered by the court.

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

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

10 If respondent remains actually suspended for 90 days or more, it is also recommended
11 that she be ordered to comply with the requirements of rule 955 of the California Rules of Court
12 within 120 calendar days of the effective date of the Supreme Court order in this matter, and file
13 the affidavit provided for in paragraph (c) of rule 955 within 140 days of the effective date of the
14 Supreme Court order showing her compliance.⁵

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

20 VI. COSTS

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

23
24 Dated: June 27, 2005


25 JOANN M. REMKE
26 Judge of the State Bar Court

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 affidavit pursuant to paragraph (c)
of the rule even if she 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 of California. 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 June 27, 2005, I deposited a true copy of the following document(s):

DECISION, filed June 27, 2005

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

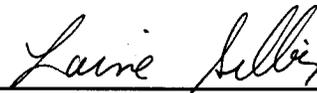
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

**CAROL D. MARMOREK
BAY AREA LEGAL AID
2 W SANTA CLARA ST
SAN JOSE CA 95113**

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

MANUEL JIMENEZ, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **June 27, 2005**.



Laine Silber
Case Administrator
State Bar Court