

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO**

In the Matter of)	Case No. 04-O-12774-PEM
JUDITH ANNE FINCH,)	DECISION
Member No. 114851,)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this disciplinary matter, Mark Hartman appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Judith Anne Finch 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 until she complies with standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct;¹ that said suspension be stayed; and that she be actually suspended for one year and until she complies with rule 205, Rules Proc. of State Bar.²

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on December 29, 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 section³ 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of mailing.

¹Future references to standard or std. are to this source.

²Future references to the Rules of Procedure are to this source.

³Future references to section are to the Business and Professions Code.

(*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The return receipt was executed by “E. Finch” on December 30, 2005.

On January 6, 2006, respondent was properly served at her official address with a notice advising her, among other things, that a status conference would be held on February 27, 2006.

Respondent did not file a responsive pleading to the NDC. On January 27, 2006, a motion for entry of default was filed and properly served⁴ on respondent at her official address by certified mail, return receipt requested. The motion advised her that minimum discipline of two years’ stayed suspension with actual suspension for one year and until she complied with Rule of Procedure 205 would be sought if she was found culpable. Respondent did not respond to the motion.

On February 23, 2006, the court entered respondent’s default and enrolled her inactive effective three days after service of the order. The order was filed and properly served on her at her official address on that same date by certified mail, return receipt requested.

The State Bar’s efforts to contact respondent were fruitless.

The matter was submitted for decision without hearing after the State Bar filed a brief on March 7, 2006.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court’s findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (§6088; Rules Proc. of State Bar, rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

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

⁴The proof of service on the motion did not properly identify the document being served on respondent as a default motion. Instead, it noted that the document being served was a motion to file a first amended NDC. On February 7, 2006, the default motion was re-served with the proof of service correctly indicating the document being served.

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 3, 1984, and has been a member of the State Bar at all times since.

B. Facts

On January 1, 2004, respondent was placed on inactive status which continued until February 18, 2004.

On March 22, 2004, the California Supreme Court filed order no. S121784 (State Bar Court case no. 02-O-10906) (Supreme Court order) actually suspending respondent from the practice of law for 60 days. On that same date, the Clerk of the Supreme Court served the order on respondent at her official address. She received it.

The Supreme Court order became effective on April 22, 2004. On that same date, respondent filed a motion seeking to stay her suspension. On May 5, 2004, the Review Department issued an order temporarily staying the suspension until June 5, 2004. Respondent received this order.

Respondent was actually suspended from on June 6, 2004, until September 13, 2004.

Between January and June 2004, respondent appeared or filed documents in court while she was on inactive status or actually suspended, including:

(a) On January 26, 2004, respondent filed a substitution of counsel in *Estate of John Morris*, Contra Costa County case no. P-02-00034 (Morris case). The form included her name, followed by the term “ESQ.,” “Law Offices of Judith A. Finch” and her State Bar number;

(b) On February 2, 2004, respondent filed an application for waiver of court fees and costs and an amended petition for letters of administration in the Morris case. The forms included her name, followed by the term “ESQ.,” “Law Offices of Judith A. Finch” and her State Bar number;

(c) On February 6, 2004, respondent filed a notice of hearing in the Morris case. The form included her name, followed by the term “ESQ.,” “Law Offices of Judith A. Finch” and her State Bar number; and

(d) On June 14, 2004, respondent appeared in court on the Morris case although she

knew that she had been suspended from the practice of law effective June 6, 2004.

On September 1, 2004, respondent used her law office letterhead in corresponding with the State Bar.

On August 20, 2004, a State Bar investigator wrote to respondent regarding its investigation of allegations that respondent had engaged in the unauthorized practice of law.

On September 17, 2004, respondent wrote to the investigator and stated that she had not worked on any case during her suspension. However, when she made this representation, respondent was fully aware that she had filed documents and appeared in court while she was on inactive status or actually suspended.

C. Conclusions of Law

1. Count One - Section 6068(a) (Engaging in the Unauthorized Practice of Law)

Section 6068, subdivision (a) requires an attorney to support the Constitution as well as state and federal laws.

Section 6125 requires an individual to be a member of the State Bar in order to practice law in California.

In relevant part, section 6126, subdivision (b) makes a person who has been suspended from membership in the State Bar and practices or attempts to practice, to advertise or to hold him- or herself out as practicing or entitled to practice law guilty of a crime punishable by imprisonment in the state prison or county jail.

By filing the aforementioned documents and making a court appearance in the Morris case and by using her law office letterhead in corresponding with the State Bar, respondent held herself out as entitled to practice law and actually practiced law when she was not so entitled. In so doing, she violated sections 6125 and 6126, subdivision (b) and failed to support the laws of this State in wilful violation of section 6068, subdivision (a).

2. Count Two - Section 6103 (Violation of Court Order)

In relevant part, section 6103 makes it a cause for disbarment or suspension for an attorney to wilfully disobey or violate a court order requiring him or her to do or to forbear an act connected with or in the course of his or her profession, which he or she ought in good faith to do

or forbear.

Although respondent's conduct in continuing to represent a client in the Morris case after she was suspended from the practice of law constitutes wilful disobedience of a court order in violation of section 6103, the factual basis for this violation is the same as that in Count One. It is generally inappropriate to find redundant charged allegations. The appropriate level of discipline for an act of misconduct does not depend on how many rules of professional conduct or statutes proscribe the misconduct. "There is 'little, if any, purpose served by duplicative allegations of misconduct.'" (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) Accordingly, this charge is dismissed with prejudice.

3. Count Three - Section 6068(d) (Employing Means Inconsistent with the Truth)

Section 6068(d) requires an attorney from employing, for the purpose of maintaining the causes confided to him or her, those means only as are consistent with the truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

As stated with regard to Count Two, this charge is duplicative of Count One and is dismissed with prejudice.

4. Count Four - Section 6106 (Moral Turpitude)

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

There is clear and convincing evidence that respondent violated section 6106 by making a misrepresentation to the State Bar investigator. Accordingly, she committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)

Respondent has two prior instances of discipline. (Std. 1.2(b)(i).) As previously noted,

in Supreme Court order no. S121784 (State Bar Court case no. 02-O-10906), filed March 22, 2004, respondent was suspended from the practice of law for two years, stayed, and placed on probation for two years on conditions including 60 days' actual suspension. She and the State Bar agreed that she was culpable of violating rules 3-300 and 3-100(A) of the Rules of Professional Conduct.⁵ The rule 3-110(A) violation was for not supervising her assistant who drafted and faxed three messages about litigation to opposing counsel without respondent's knowledge or consent while respondent was actually suspended from August 16 to October 4, 2000. The messages identified respondent as "Esq." Mitigating factors were no harm and candor and cooperation. In aggravation, the parties agreed that respondent had one prior instance of discipline and multiple acts of misconduct.

The court notes that respondent executed that stipulation on October 28, 2003, and that it was filed after court approval on November 25, 2003. The Supreme Court issued its disciplinary order on that matter on March 22, 2004. Respondent sought and obtained a temporary stay of the actual suspension which the Review Department granted by order filed May 5, 2004. Accordingly, respondent's misconduct in the instant case took place while this prior disciplinary matter was being resolved. Her sensitivity to the ethical rules should have been heightened as a result of her prior experience with the disciplinary process, but, clearly, it was not.

In her first disciplinary matter, respondent was suspended for two years and until she complied with standard 1.4(c)(ii) and until she provided satisfactory proof that a certain judgment had been satisfied. This suspension was stayed and she was placed on probation for two years on conditions including actual suspension for 30 days and until she provided proof of satisfaction of that judgment. (Supreme Court order no. S086594 (State Bar Court case no. 97-O-11894), filed May 12, 2000.) This matter was also resolved by stipulation. The misconduct, which occurred between 1988 and 1996, consisted of three counts of violations of former rule 5-101 and the present and former versions of rule 3-300 with regard to one client. In aggravation, the parties stipulated to multiple acts. The sole mitigating factor was no prior instances of

⁵Future references to rule are to this source.

discipline.

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors.

C. Discussion

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

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).) Discipline is progressive. (Std. 1.7.)

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

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Respondent has been found culpable of engaging in the unauthorized practice of law and

of making a misrepresentation to a State Bar investigator.

The State Bar recommends two years' stayed suspension and actual suspension for one year and until respondent complies with rule 205. The court believes that this is sufficient to protect the public in this instance.

The court found *Farnham v. State Bar* (1976) 17 Cal.3d 605 instructive. In *Farnham*, two years' stayed suspension and six months' actual suspension was imposed because the attorney abandoned two clients, misrepresented the status of the case to one of them and engaged in the unauthorized practice of law as to the other. During the time that Respondent Farnham was suspended from the practice of law, he met with a client, told him that he would accept his case and, on two occasions, told him that he would have a complaint ready to file by certain dates, both within the time of his suspension. The Supreme Court noted that the unauthorized practice of law "includes the mere holding out by a layman or a suspended attorney that he is practicing or is entitled to practice law. [Citation omitted.] ... While [respondent] did not sign any legal documents or make a court appearance on [his client's] behalf, in a larger sense, the practice of law includes legal advice and counsel and the mere preparation of legal instruments. [Citation omitted.]" *Id.* at p. 612. In aggravation, the court considered respondent's lack of insight into his misconduct and two prior instances of discipline.⁶ No mitigating factors were noted. *Farnham* is comparable to the present case. Both attorneys engaged in the unauthorized practice of law, had prior disciplinary records and presented no mitigating factors. However, the nature and extent of the unauthorized practice of law is greater in the instant case since she filed pleadings and appeared in court during a six-month period. She also made a misrepresentation to the State Bar. Respondent herein also has two records of discipline due to unethical behavior as opposed to Farnham's one prior record due to misconduct. These factors merit greater discipline than in *Farnham*.

Respondent's misconduct and lack of participation in this matter raises concerns about

⁶This court notes that one such prior "discipline" was for nonpayment of dues, not for unethical behavior. The other was for abandonment of four clients which resulted in a three-month actual suspension.

her ability or willingness to comply with her ethical responsibilities to the public and to the State Bar. No explanation has been offered that might persuade the court otherwise and the court can glean none. Having considered the evidence and the law, the court believes that a one-year actual suspension to remain in effect until she explains to this court the reasons for not participating herein and manifests her willingness to comply fully with probation conditions that may hereafter imposed, among other things, is adequate to protect the public and proportionate to the misconduct found and the court so recommends.

V. DISCIPLINE RECOMMENDATION

Accordingly, it is hereby recommended that respondent be suspended from the practice of law for two years and until she provides proof satisfactory to the State Bar Court of her rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct; that said suspension be stayed; and that she be actually suspended from the practice of law for one year and until the State Bar Court grants a motion to terminate respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Rule 205(a), (c), Rules of Proc. of State Bar.)

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

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until she has shown proof satisfactory to the State Bar Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also, rule 205(b).)

It is also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within 40

days of the effective date of the order showing his/her compliance with said order.⁷

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners during the period of her actual suspension and furnish satisfactory proof of such to the State Bar Office of Probation within said period.

VI. COSTS

It is recommended 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 Business and Professions Code section 6140.7 and as a money judgment.

Dated: May ___, 2006

PAT McELROY
Judge of the State Bar Court

⁷Failure to comply with rule 955 of the California Rules of Court could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a CRC 955(c) affidavit even if he/she has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)