

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 04-O-13040-JMR
DON ALAN RAIG,)	DECISION
Member No. 45791,)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this disciplinary matter, Joseph R. Carlucci appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Don Alan Raig 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 he complies with rule 205 of the Rules of Procedure of the State Bar of California.¹

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on January 3, 2005, 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 section² 6002.1, subdivision (c) (official address). (Rules Proc. of State Bar, rule 60(b).) Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.)

¹Future references to Rules of Procedure are to this source.

²Future references to section are to this source.

On June 7, 2005, the State Bar received a return receipt signed by “M. Moreno” on June 4, 2005. Moreno was an employee of the commercial maildrop at which respondent rented a box.³

On June 8, 2005, respondent was properly served at his official address with a notice advising him, among other things, that a status conference would be held on July 11, 2005. The court judicially notices its records pursuant to Evidence Code section 452, subdivision (d), that this correspondence was returned as undeliverable by the United States Postal Service (USPS).

A First Amended NDC was filed on June 14, 2005. It was served on respondent at his official address on June 10, 2005, by first-class mail, postage prepaid. It was not served by certified mail, return receipt requested, as required.

Respondent did not appear at the July 11, 2005, status conference. On that same date, he was properly served with an order memorializing the status conference. This correspondence was returned as undeliverable.

On July 12, 2005, a courtesy copy of the First Amended NDC was served on respondent at an alternate address in Baja, Mexico (Baja address). It was not returned as undeliverable.⁴

Respondent did not file a responsive pleading to the First Amended NDC. On July 26, 2005, a motion for entry of default was served on respondent at his official address by certified mail, return receipt requested. It was filed on July 28, 2005. The motion advised him that minimum discipline of 30 days’ actual suspension would be sought if he was found culpable. He did not respond to the motion.

On August 12, 2005, the court entered respondent’s default and enrolled him inactive effective three days after service of the order. The order was properly served on him at his official address on that same date by certified mail, return receipt requested. It was returned as undeliverable. A courtesy copy sent to the Baja address was not returned as undeliverable.

³According to the owner of the maildrop, no mail had been picked up for respondent since January 2005.

⁴The court judicially notices its records pursuant to Evidence Code section 452, subdivision (d), which indicate that none of the documents the court served on respondent at the Baja address, set forth below, were returned as undeliverable.

The order entering default and enrolling respondent inactive was vacated by order filed and properly served on November 8, 2005, at respondent's official and Baja addresses. The order also notified respondent that a status conference would be held on December 5, 2005. The order served at the official address was returned as undeliverable but the one sent to the Baja address was not.

The First Amended NDC was re-filed on November 14, 2005. It had been properly served on respondent at his official and Baja addresses and an alternate address in La Jolla (La Jolla address) on November 10, 2005, by certified mail, return receipt requested. The copy sent to the official address was returned as undeliverable. The others were not.

Respondent did not appear at the December 5, 2005, status conference. On the next day, he was properly served with a status conference order at his official address by first-class mail, postage prepaid. It was returned as undeliverable.

Respondent did not file a responsive pleading to the First Amended NDC. On December 14, 2005, a motion for entry of default was served on respondent at his official, Baja and Los Angeles Jolla addresses by certified mail, return receipt requested. It was filed on December 12, 2005. The motion advised him that minimum discipline of 30 days' actual suspension would be sought if he was found culpable. He did not respond to the motion.

On December 30, 2005, the court entered respondent's default and enrolled him inactive effective three days after service of the order. The order was properly served on him at his official and Baja addresses on that same date by certified mail, return receipt requested. The copy sent to the official address was returned as undeliverable. The other was not.

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

The matter was submitted for decision without hearing after the State bar filed a brief on January 12, 2006.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Jurisdiction

Respondent was admitted to the practice of law in California on January 15, 1970, and has been a member of the State Bar at all times since.

B. Facts

On May 20, 2004, John A. Raef sent respondent a letter asking for a complete accounting of the Anna L. Cardwell Trust dated July 20, 1989 (1989 trust) from its inception upon the trustor's death on August 19, 1989, to May 20, 2004. He asked that the accounting be provided within 30 days. Raef was Anna Cardwell's grandson and the nephew of her son, John Cardwell (Cardwell). Both Raef and Cardwell were beneficiaries of the trust.

Cardwell was appointed co-trustee with respondent of the Anna L. Cardwell Charitable Lead Unitrust (charitable trust). Respondent was named trustee of the Anna L. Cardwell Family Trust (family trust). The charitable and family trusts were created by the 1989 trust. The charitable trust was funded with \$1.8 million. The family trust was funded with \$133,000.

The charitable trust was to be liquidated and divided among Anna Cardwell's heirs, including Raef and Cardwell, 15 years after its creation. The family trust was to be used for the support of Anna Cardwell's heirs and was to be liquidated 15 years after its creation.

Initially, both respondent and Cardwell participated in the investment and periodic distribution of funds from the charitable trust. The funds were deposited in numerous bank accounts and invested in various certificates of deposit.

After 1992, Cardwell did not participate in the management or distribution of the charitable trust funds. After 1992, respondent did not inform either Raef or Cardwell of the charitable trust's status or of the identity of its assets. Respondent also did not inform Raef about the status of the family trust.

Raef and Cardwell have been able to identify only the following assets of the 1989 trust:

- (1) Anna L. Cardwell Trust: Comerica Bank account, approximate balance: \$29,400
- (2) Charitable Trust: H&R Block Financial Advisors, approximate balance: \$31,400
- (3) Family Trust: TD Waterhouse, approximate balance: \$1,500.

On June 25, 2004, in response to Cardwell's status inquiry, respondent sent Cardwell an email stating that he had been away but would be in touch.

On June 26 and July 7, 2004, Cardwell sent respondent email asking about the status of the trust and, specifically, how much he would be getting from the trust, when and in what manner (i.e., check, wire, etc.)

On July 9, 2004, respondent sent Cardwell email stating that he had the questions about the trust and that he would be in touch during the following week.

On July 17, 2004, respondent sent Cardwell email stating that he was waiting for a "couple of numbers" and a "specific date" so he could answer the questions.

On July 17 and 22 and August 4, 2004, Cardwell sent respondent email asking for responses and for a tentative list of the trust assets and liabilities and an estimate of the current net fair market value of the trust assets.

On August 13, 2004, Cardwell sent respondent an email reminding him that the charitable trust should be liquidated and the funds disbursed, after 15 years, by August 18, 2004. On that same date, he also sent respondent email questioning respondent's failure to answer the request for a general summary of the trust assets.

On August 16, 2004, respondent sent Cardwell email stating that he would get the summary of the trust assets to Cardwell on Wednesday, August 18, 2004.

On August 19, 2004, respondent sent Cardwell email stating that the summary of trust assets would go out to Cardwell that night or the next day.

On August 20, 2004, Cardwell sent respondent email asking for information about the list of trust assets and stating that respondent had not telephoned him or given him a telephone number or address.

On that same date, respondent sent Cardwell email with a "preliminary summary of the trust assets" stating that the trust held cash or equivalents, money market funds, mutual fund

shares, anticipated proceeds of municipal bond redemptions, an interest in a real estate investment partnership and other miscellaneous assets. The summary, however, did not give a dollar value for the assets. Respondent denied that he had stolen or “expropriated” any money from the trust.

On August 20, 2004, Cardwell sent respondent email stating that respondent had been stringing him along for two months and that respondent had not telephoned him or informed him of his current address or telephone number. Cardwell reminded respondent that the liquidation date was past due and that there was no legal reason for the delay.

On October 12, 2004, respondent electronically deposited \$200,000 from the charitable trust’s account with H&R Block Financial Advisors into his client trust account (CTA) at Scripps Bank.

Respondent wrote and delivered the following checks, all dated October 20, 2004, from his CTA to Anna Cardwell’s heirs:

Check no.	Payee	Amount
2437	John A. Raef	\$ 25,000
2438	John Cardwell	\$100,000
2439	Susan Raef	\$ 50,000
2440	Michael D. Raef, II	\$ 25,000

Respondent did not keep the trust beneficiaries reasonably informed of the trust status and administration. Further, after reasonable requests from trust beneficiaries Cardwell and Raef, respondent did not provide them with a report about the trust’s assets, liabilities, receipts and disbursements, respondent’s acts as trustee, and the particulars relating to the administration of the trust relevant to the beneficiaries’ interests, including the terms of the trust as required by Probate Code, sections 16060 through 16064.

On May 20, 2004, the State Bar opened an investigation on case no. 04-O-13040 pursuant to a complaint filed by Raef.

On August 4 and 23, 2004, a State Bar investigator wrote to respondent about the Cardwell Trust, its administration, the monthly payments Raef received from the trust and respondent’s failure to communicate.

On January 14, 2005, the investigator sent respondent a letter regarding the trust's Comerica Bank and TD Waterhouse accounts. The letter also asked respondent to explain why he used \$25,000 from his client trust account to pay Raef; questioning the origin of those funds and why the check was mailed to Raef.

Each of these letters was addressed to respondent's official membership records address and sent by first-class mail, postage prepaid, in sealed envelopes. None was returned to the State Bar as undeliverable or for any other reason. Respondent did not answer the letters or otherwise communicate with the investigator.

On April 20, 2005, one of the State Bar's deputy trial counsel sent respondent an email to an email address Raef provided. The email asked respondent to answer the investigator's letters and to update his telephone number with the State Bar. Respondent did not answer this email or otherwise communicate with the State Bar.

C. Conclusions of Law

1. Count One - Section 6068, subdivision (a) (Noncompliance with Laws)

Section 6068, subdivision (a), requires an attorney to support the Constitution and laws of the United States and of this State.

Probate Code sections 16060 - 16064 set forth certain duties of trustees. Probate Code section 16060 requires trustees to keep trust beneficiaries reasonably informed of the trust and its administration. With certain exceptions, Probate Code section 16061 requires trustees, upon reasonable request of a beneficiary, to provide the beneficiary with a report of information about the trust's assets, liabilities, receipts and disbursements, the acts of the trustee and the particulars relating to the administration of the trust relevant to the beneficiaries' interests, including the terms of the trust. In general and with certain exceptions, Probate Code section 16062 and 16063 set forth the trustee's duty to account to beneficiaries and the contents of the accountings.

Respondent did not comply with Probate Code, sections 16060 through 16064, because he did not keep the trust beneficiaries reasonably informed of the trust status and administration. After reasonable requests from trust beneficiaries Cardwell and Raef, respondent did not provide them with a report about the trust's assets, liabilities, receipts and disbursements, respondent's

acts as trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust. Accordingly, respondent did not support the Constitution or laws of the United States or California in wilful violation of section 6068, subdivision (a).

2. Count Two - Section 6068, subdivision (i) (Failure to Participate in a Disciplinary Investigation)

Section 6068, subdivision (i), requires an attorney to participate and cooperate in any disciplinary investigation or other disciplinary or regulatory proceeding pending against him- or herself.

By not responding to the January 14, 2004, letter, respondent did not participate in the investigation of the allegations of misconduct regarding the Raef complaint in wilful violation of section 6068, subdivision (i).

There is not clear and convincing evidence that, by not responding to the August 4 and 23, 2004, letters and the April 20, 2005, email, respondent wilfully violated section 6068, subdivision (i). There are no allegations that the August letters asked respondent to answer allegations of misconduct. There are no allegations that the address to which the email was sent belonged to respondent or that he received it.

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

Respondent has one prior instance of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i).⁵) In Supreme Court order no. BM4218 (State Bar case no. LA3115; LA Prelim. no. 78-2163), effective April 7, 1980, discipline was imposed consisting of two years' stayed suspension and three years' probation with conditions, for failing to perform in four client matters and making misrepresentations to clients and others regarding the status of the matters in two of those client matters. Two of the cases were probate cases. The misconduct occurred at various times between 1973 and 1977. Mitigating factors

⁵Future references to standard or std. are to this source.

included no prior instances of discipline; severe emotional/psychological/personal problems for which he was obtaining help; insight and remorse; and taking steps to rectify the situation (stopped practicing as a solo practitioner in a small community and was working with an attorney to mitigate any damage done to clients).

Respondent's misconduct significantly harmed clients. (Std. 1.2(b)(iv).) Cardwell had to repeatedly contact respondent to obtain responses to his requests for status reports and for a report about the trust assets and liabilities. The beneficiaries had to wait almost two months after the trust should have been liquidated to receive their funds.

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

B. Mitigating Circumstances

Since respondent did not participate in these proceedings and he bears the burden of establishing mitigation by clear and convincing evidence, 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).) The level of discipline is progressive. (Std. 1.7(b).) The standards, however, are guidelines from which the court may deviate in fashioning the most appropriate

discipline considering all the proven facts and circumstances of a given matter. (*In re Young* (1989) 49 Cal.3d 257, 267 (fn. 11); *Howard v. State Bar* (1990) 51 Cal.3d 215.) They are "not mandatory 'sentences' imposed in a blind or mechanical manner." (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

Standard 2.6 applies in this matter. Standard 2.6(a) recommends suspension or disbarment for violations of sections 6067 and 6068, depending on the gravity of the offense or harm, if any to the victim, with due regard to the purposes of imposing discipline.

Respondent has been found culpable of violations of section 6068(a) and (i) in one client matter. Aggravating factors include one prior instance of discipline; client harm; and not participating in the proceedings prior to the entry of default. There are no mitigating factors.

The State Bar recommends 30 days' actual suspension, among other things. The court agrees.

The court found *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, instructive. In *Hultman*, a 60-day actual suspension was recommended for repeated self-dealing by a fiduciary. Respondent Hultman was found culpable of entering into a business transaction with clients in violation of rule 3-300 and of committing an act involving moral turpitude in violation of section 6106 by making a misrepresentation, through gross negligence, in an estate accounting to a court. In aggravation, he was found to have recklessly not performed legal services competently. This factor was afforded minimal weight since much of the same misconduct had been considered in finding him culpable of moral turpitude. The misconduct found was "serious and extensive" and, due to respondent's grossly negligent record-keeping, "an accurate accounting of the transactions in question may never be made." (*Id.* at p. 309.) Mitigating factors included 13 years of discipline-free conduct, remorse, good character and community service and restitution made.⁶ *Hultman* presents greater misconduct, but includes greater mitigation than appears in the present default case.

⁶Mitigating weight was afforded to respondent's repayment of a \$5,000 loan prior to the filing of disciplinary charges. Some mitigating weight was given to his restitution of a \$25,000 loan although it was made after the filing of such charges.

Respondent's misconduct and lack of participation in this matter raises concerns about his ability or willingness to comply with his 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 30-day actual suspension to remain in effect until he explains to this court the reasons for not participating herein and manifests his 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 one year; that said suspension be stayed; and that he be actually suspended from the practice of law for 30 days 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. (Rules Proc. of State Bar, rule 205(a), (c).)

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

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until he 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). (Rules Proc. of State Bar, rule 205(b).)

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

showing his 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 within one year from the effective date of the Supreme Court's order or during the period of his actual suspension, whichever is longer, 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: April 10, 2006

JOANN M. REMKE
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 rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)