FILED June 15, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **HAROLD T. ROSS,** **Member No. 58168,** A Member of the State Bar.	)	Case No.: **05-O-02574-RAH** **DECISION**

I. INTRODUCTION

In this original disciplinary proceeding, 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 (hereafter State Bar). Respondent Harold T. Ross did not appear in person or by counsel.

In the notice of disciplinary charges (hereafter NDC), the State Bar charges respondent with a total of four counts of misconduct. The first three counts charge respondent with misconduct in a single client matter, and the fourth count charges respondent with failing to cooperate in the State Bar's disciplinary investigation of that client matter. The State Bar seeks "two years of stayed suspension with a period of probation to be specified, conditioned on 60

days of actual suspension and until a motion to terminate Respondent's actual suspension is granted."[1]

For the reasons set forth below, the court concludes that the appropriate level of discipline is one year's stayed suspension and thirty days' actual suspension with the actual suspension continuing until respondent makes and the State Bar Court grants a motion to terminate his suspension under Rules of Procedure of the State Bar, rule 205.

II. PROCEDURAL HISTORY

A. Case Number 04-O-12130-RAP

The State Bar filed the NDC in this case on November 10, 2005. Thereafter, on November 16, 2005, the State Bar properly served a copy of the NDC on respondent at his latest address shown on the official membership records of the State Bar (hereafter official address) by certified mail, return receipt requested in accordance with Business and Professions Code section 6002.1, subdivision (c).[2] That service was deemed complete when mailed even if respondent did not receive it. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108.) On November 16, 2005, the State Bar exceeded its minimum statutory duty to mail a copy of the NDC to respondent at his official address (§ 6002.1, subd. (c)) by mailing another copy of the NDC to respondent at an address on Sepulveda Boulevard in Los Angeles (hereafter the

[1]After the March 15, 1999, effective date of rule 205 of the Rules of Procedure of the State Bar, State Bar Court disciplinary recommendations in default proceedings are not to include both a period of actual suspension and a period of probation. (Cf. *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 110 [Under rule 205, "the appropriate time to consider imposing probation and its attendant conditions is when the attorney seeks relief from the actual suspension that may be imposed following his or her default in a disciplinary proceeding."].) In other words, under rule 205, the disciplinary recommendation in a default proceeding may properly include only (1) a period of stayed suspension with a period of actual suspension or (2) a period of stayed suspension with a period of probation. Accordingly, the court rejects the State Bar's assertion that the discipline recommendation in this proceeding should include a "period of probation to be specified, conditioned on [some specified period] of actual suspension."

[2]Unless otherwise indicated, all further statutory references are to this code.

Sepulveda Boulevard address), which is an alternative address that it had for respondent in its file. The State Bar received, from the United States Postal Service (hereafter Postal Service), a return receipt (i.e., green card) for the copy of the NDC that was served on respondent at his official address. That receipt establishes that the copy of the NDC was actually delivered to respondent's official address on November 29, 2005, and accepted and signed for by "H. Ross."

Respondent's response to the NDC was due no later than December 12, 2005. (Rules Proc. of State Bar, rule 103(a).) Respondent, however, failed to timely file a response. Nevertheless, respondent appeared in court in this case on January 11, 2006, for an in-person status conference and made an oral motion for an extension of time to file a response, which the State Bar did not oppose. The court granted respondent's motion and directed respondent to file a response to the NDC no later than January 30, 2006. At that status conference, respondent also advised the court that only his official address should be used for correspondence in this proceeding. Also, at the conference, the State Bar made an oral motion to extend the discovery cut-off date to April 21, 2006, which the court granted.

Respondent failed to file a response to the NDC by the extended deadline of January 30, 2006. What is more, he failed to appear at the second status conference on February 21, 2006.

On March 3, 2006, the State Bar filed a motion for entry of respondent's default and properly served a copy of it on respondent at his official address by certified mail, return receipt requested. Respondent failed to respond to the State Bar motion or to file a response to the NDC. Because all of the statutory and rule prerequisites were met, the court filed an order on March 21, 2006, entering respondent's default and, as mandated in section 6007, subdivision (e)(1), placing him on involuntary inactive enrollment.

On April 10, 2006, the State Bar filed a brief on culpability and discipline. Thereafter, on April 13, 2006, the court took the case under submission for decision without a hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on: (1) the well-pleaded factual allegations (not the legal contentions) contained in the NDC, which allegations are deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)); and (2) the facts in this court's official file in this matter.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 20, 1973, and has been a member of the State Bar since that time.

B. Misconduct

On March 20, 2004, Tom and Nancy Vaughn retained respondent to represent them in a personal injury matter. Between October 2004 and January 2005, the Vaughns telephoned respondent about 10 times. On each occasion, the Vaughns left a voicemail message for respondent inquiring as to the status of their case and leaving a telephone number at which they could be reached. Even though respondent received each of those messages, he did not respond to any of them. Nor did respondent ever perform any legal services for the Vaughns. Accordingly, on March 3, 2005, the Vaughns retained Attorney G. Nicholas Vaters, Jr. to represent them in their personal injury matter.

On March 7, 2005, Attorney Vaters mailed respondent a letter in which he informed respondent that the Vaughns had retained him to take over the prosecution of their personal injury matter and asked respondent to send the Vaughns' file to him. Even though respondent received that letter, respondent did not provide the file to Attorney Vaters. Nor did respondent otherwise provide the file directly to the Vaughns.

On March 24, 2005, Attorney Vaters mailed a second letter to respondent. In that letter, Vaters demanded that respondent send the Vaughns' client file to his office immediately. Even

though he received that letter, respondent failed to send the Vaughns' file to Vaters. Nor did he send the file to the Vaughns.

In April 2005, the State Bar opened a disciplinary investigation with respect to a complaint the Vaughns filed against respondent. On June 15, 2005, and again on July 13, 2005, a State Bar investigator mailed, to respondent at his official address, a letter asking respondent to respond, in writing, to specific allegations of misconduct involving the Vaughns. Even though he received both of those letters, respondent did not respond to either of them. Nor did respondent otherwise communicate with the investigator or participate in the investigation in any way.

Count 1: Failure to Competently Perform (Rules Prof. Conduct, rule 3-110(A))[3]

The State Bar charges that respondent violated rule 3-110(A) (which provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence) by failing to perform any legal services for the Vaughns. The facts that the Vaughns left respondent about 10 voicemail messages over a four-month period and that respondent received those messages establish that respondent's failure to perform any legal services for them for almost an entire year was more than just negligent, it was reckless and repeated, if not intentional. Accordingly, the record clearly establishes that respondent willfully violated rule 3-110(A) as charged.

Count 2: Failure to Communicate (§ 6068, subd. (m))

Section 6068, subdivision (m) requires that attorneys respond to reasonable status inquiries from their clients and to keep their clients reasonably informed of significant developments in their matters. The record clearly establishes that, as charged, respondent

[3] Unless otherwise indicated, all further references to rules are to these Rules of Professional Conduct.

willfully violated section 6068, subdivision (m) when he failed to respond to any of the Vaughns' 10 voicemail messages.

Count 3: Failure to Return Client File (Rule 3-700(D)(1))

Rule 3-700(D)(1) requires that, upon termination of employment, an attorney must, "Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. 'Client papers and property' includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not." The record clearly establishes that, as charged, respondent willfully violated rule 3-700(D)(1) when he failed to send the Vaughns' file to Attorney Vaters (or to the Vaughns directly) in accordance with Vaters's March 7, 2005, and March 24, 2005, letters.

Count 4: Failure to Cooperate with State Bar (§ 6068, subd. (i))

Section 6068, subdivision (i) requires an attorney "To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. . . ." The record clearly establishes that, as charged, respondent willfully violated section 6068, subdivision (i) when he failed to respond to the State Bar investigator's June 15, 2005, and July 13, 2005, letters or to otherwise participate with the State Bar.

IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravating Circumstances

1. Multiple Acts of Misconduct

The fact that respondent has been found culpable on four counts of misconduct is an aggravating circumstance. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(ii).)

2. Failure to Cooperate

Respondent's failure to participate in this disciplinary proceeding before the entry of his default is an aggravating factor. (Std. 1.2(b)(vi).) However, contrary to the State Bar's contention, it warrants little weight in aggravation because the conduct relied on for this aggravating factor closely equals the misconduct relied on to find respondent culpable of violating section 6068, subdivision (i) and to enter his default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

B. Mitigating Circumstances

The State Bar has not proffered any evidence indicating that respondent has a prior record of discipline, which would be an aggravating circumstance under standard 1.2(b)(i). As noted above, respondent was admitted to practice on December 20, 1973. Furthermore, the State Bar's official membership records show that respondent has continually been an active member of the State Bar since that time. In addition, the State Bar's official address records indicate that respondent practiced law at various law firms in Los Angeles area at least from March 1986 through May 1999 (more than 13 years), when he changed his official address to a post office box in Thousand Oaks. The misconduct found in this proceeding began sometime in October 2004 when respondent failed to respond the Vaughns' voicemail messages. Thus, the record establishes that respondent has practiced law discipline-free for many years, which is a very substantial mitigating circumstance (std. 1.2(e)(i)).

V. DISCUSSION ON DISCIPLINE

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Ba*r (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) However, as noted below, the standards provide little guidance in the present case. (See, e.g., *In re Brown* (1995) 12 Cal.4th 205, 220.)

Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylo*r (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In this case, the most severe sanction for respondent's misconduct is found in standard 2.6, which applies to respondent's violations of section 6068. Standard 2.6 provides, among other things, that a violation of section 6068 "shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3." Of course, according to standard 1.3, the primary purposes of imposing discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Accord, C*hadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In short, the generalized language of standard 2.6 provides little guidance. (*In re Morse* (1995) 11 Cal.4th 184, 206.) Likewise, the generalized language in standards 2.4(b) and 2.10, which are the standards covering respondent's violations of rules 3-110(A) and 3-700(D)(1) and which provide for lesser sanctions than standard 2.6, provide little guidance in this case.

Turning to case law, the court notes that, in past decisions of the Supreme Court and State Bar Court involving abandonment of a single client's case where the attorney has no prior record of discipline, the discipline has generally ranged from a low of six months' stayed suspension and one year's probation with no actual suspension (V*an Sloten v. State Bar* (1989) 48 Cal.3d 921, 933-934) to a high of three years' stayed suspension, three years' probation, and ninety days' actual suspension (*Harris v. State Bar* (1990) 51 Cal.3d 1082, 1089).

The State Bar contends that the pre-rule 205 the default case of *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585 supports its contention that respondent should be placed on two years' stayed suspension and sixty days' actual suspension. The court disagrees.

The discipline recommended and imposed in *Johnston* was one year's stayed suspension, two years' probation, and sixty days' actual suspension. In that case, the attorney was found culpable in a single client matter of (1) failing to perform competently (rule 3-110(A)); (2) failing to adequately communicate with the client (section 6068, subdivision (m)); (3) engaging in acts involving moral turpitude, if not dishonesty (§ 6106); and (4) failing to cooperate with the State Bar's investigation of the client's complaints (section 6068, subdivision (i)). (*In the Matter of Johnston, supra*, 3 Cal. State Bar Ct. Rptr. at p. 589.) The misconduct in *Johnston* was significantly more egregious than that in the present case. In *Johnston*, the attorney improperly held himself out, to his client, as being entitled to practice law while he was on actual suspension for failing to pay his State Bar dues. (*Id*. at pp. 588-589.) What is more, the attorney in that case mislead his client into believing that he was still working on the client's case when he knew that the client's claim was barred because he (i.e., the attorney) did not serve the complaint within three years or bring the case to trial within five years as required by the Code of Civil Procedure. (*Ibid*.)

Furthermore, in *Johnston* the attorney's misconduct was aggravated because there was significant client harm – there the client lost her cause of action. (*In the Matter of Johnston, supra*, 3 Cal. State Bar Ct. Rptr. at p. 589.) Even though respondent failed to perform any legal services for the Vaughns for almost a year, there is no such evidence of any harm in the present case. At least under the facts of this case, the one-year delay does not rise to the level of

significant client harm. (Cf. *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 283.)

Finally, the discipline in *Johnston* was recommended, albeit implicitly, under standard 2.3.[4] Standard 2.3, which is applicable in cases involving moral turpitude, fraud, or dishonesty, provides for substantially greater discipline than does standard 2.6 -- the applicable standard in the present case. In short, respondent's misconduct does not warrant a 60-day actual suspension under *Johnston*.

Further, respondent's misconduct does not even warrant a 45-day actual suspension under *Wren v. State Bar* (1983) 34 Cal.3d 81. In *Wren*, the Supreme Court placed the attorney, who did not have a prior record of discipline, on two years' stayed suspension, two years' probation, and 45 days' actual suspension. In that case, the attorney was found culpable of failing to communicate with the client, misrepresenting the status of a case to the client, failing and refusing to perform, and giving false and misleading testimony in the State Bar Court.

In sum, while respondent's misconduct does not warrant either 60 days' or 45 days' actual suspension, it does warrant 30 days' actual suspension (Rules Proc. of State Bar, rule 205) and a one-year period of stayed suspension.

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent Harold T. Ross be suspended from the practice of law in the State of California for one year, that execution of the one-year suspension be stayed, and that Ross be actually suspended from the practice of law for thirty days and until he makes

[4]Standard 2.3 provides as follows: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon 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 member's acts within the practice of law."

and the State Bar Court grants a motion, under rule 205 of the Rules of Procedure of the State Bar, to terminate his actual suspension.

The court also recommends that, if Ross's actual suspension in this matter continues for two or more years, he remain actually suspended from the practice of law until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

The court also recommends, in accordance with rule 205(g) of the Rules of Procedure of the State Bar, that Ross 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.

VII. PROFESSIONAL RESPONSIBILITY EXAM, RULE 955 & COSTS

The court also recommends that Ross be ordered (1) to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners (MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, telephone number (319) 337-1287) within the greater of one year after the effective date of the Supreme Court order in this matter or the period of his actual suspension and (2) to provide satisfactory proof of his passage to the State Bar's Office of Probation in Los Angeles within that same time period. Failure to pass the MPRE within the specified time results, without a hearing, in actual suspension by the review department until passage. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; but see also Cal. Rules of Court, rule 951(b); Rules Proc. of State Bar, rules 320, 321(a)(1)& (3).)

Further, the court recommends that, if the period of his actual suspension in this proceeding extends for 90 or more days, Ross be required to comply with California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within

120 and 130 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[5]

Finally, the court recommends 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: June 14, 2006.

RICHARD A. HONN
Judge of the State Bar Court

[5]Ross 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.) Moreover, an attorney's failure to comply with rule 955 almost always results in disbarment in the absence of compelling mitigating circumstances. (See, e. g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 296.)