

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No. 05-O-02680-RAP
)	
BERNABE HERNANDEZ,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 110671,)	ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this contested disciplinary matter, respondent **Bernabe Hernandez** is charged with eight counts of professional misconduct in one client matter. The court finds, by clear and convincing evidence, that respondent is culpable of seven of those charges, involving (1) accepting compensation for representing a client from one other than the client without obtaining the client's written consent; (2) failing to perform legal services with competence; (3) moral turpitude; (4) failing to respond promptly to reasonable status inquiries; (5) failing to keep a client reasonably informed of significant developments; (6) failing to promptly release a client file; and (7) failing to render appropriate accounts to a client regarding client funds.

In view of respondent's serious misconduct and the evidence in aggravation, the court recommends that respondent be disbarred from the practice of law.

II. PROCEDURAL HISTORY

The Office of Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on May 31, 2006. On June 26, 2006, respondent filed a response to the NDC.

On January 16, 2007, this court issued an order precluding respondent from calling witnesses or submitting documents into evidence at trial for his failure to file a pretrial statement, in violation

of rule 211(f) of the Rules of Procedure of the State Bar.

Trial was held on January 24, 2007. The State Bar was represented by Deputy Trial Counsel Robin Brune. Respondent represented himself in this matter.

The court took this case under submission after briefing on April 9, 2007.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the evidence introduced and the stipulation as to facts and conclusions of law and admission of documents filed on the day of trial.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 12, 1983, and since that time has been a member of the State Bar of California.

B. The Kenneth Douglas Criminal Matter

The parties stipulated that the following facts are true:

In or about early July 2003, respondent was employed by Richard W. Leslie (Richard) and Stephen M. Leslie (Stephen) to represent Kenneth Douglas (Kenneth) in a criminal matter. Richard is Kenneth's grandfather, and Stephen is Kenneth's uncle.

At that time, respondent was paid \$6,000 in advanced attorney fees by Stephen for legal services for Kenneth. Respondent did not obtain Kenneth's informed written consent to respondent accepting fees from Stephen.

From the beginning of the representation, Kenneth instructed respondent that Richard was to be the family contact, and that respondent was to communicate with Richard on his behalf, because Kenneth was in custody and it would be difficult for him to contact respondent.

At the beginning of the case, for the first six to seven months of the representation (until December 2003 or January 2004), respondent was cooperative and responsive to requests for information from Richard and Kenneth. However, thereafter, respondent failed to respond to over 100 telephone calls, or numerous faxes and letters from Kenneth, Richard or other family members.

When Richard was unable to contact respondent, he went to the Sonoma County Courthouse to track him down, and followed him from courtroom to courtroom to talk to him. On those occasions, respondent would always promise to set a family meeting to explain the status of the case,

but he failed to do so.

On one occasion when Richard attempted to talk to respondent, respondent told him that he and Kenneth had decided that Kenneth's family members should no longer receive information. That representation was false, and known by respondent to be false, because he and Kenneth had no such discussion.

Kenneth provided respondent with a list of witnesses that should be contacted regarding the criminal case. However, respondent did not contact any of them, despite his repeated promises to Kenneth that he would do so. At trial, which began on or about March 30, 2004, the only witness called on Kenneth's behalf was Kenneth himself.

Before the case went to trial, Kenneth met with respondent on five occasions, and each time asked respondent to provide him with all the discovery in his case. Respondent did not do so. Kenneth was especially interested in the medical records in the case. Kenneth told respondent that the records were important because it would show that there were more than one stab wound and that the information was critical to his defense. Respondent failed to provide the medical records to Kenneth, or to investigate the information about them that Kenneth had provided. At trial, it was established that there were in fact different wounds, as Kenneth had said.

On or about April 19, 2004, Kenneth was convicted of a felony violation of Penal Code section 245(a)(1) [assault with a deadly weapon; a knife], and a felony violation of Penal Code section 664/192(a) [attempted voluntary manslaughter].

After Kenneth was convicted, respondent filed a motion for a new trial on his behalf, which was denied on September 24, 2004.

Respondent then told Kenneth that he would appeal the case. However, respondent failed to file the appeal, or to inform Kenneth or his family that he would not do so. Accordingly, Kenneth's conviction was never appealed.

Thereafter, in the next six months, Kenneth made numerous attempts to contact respondent, to request the status of the appeal, to ask for an accounting and to request the return of his client file. Respondent failed to respond or to provide an accounting.

In addition to Kenneth's repeated requests for the return of his client file, at one point in the

six months after the conviction, Kenneth's wife, Melissa Douglas (Melissa), also went to the Sonoma County Courthouse to talk to respondent about obtaining the file. Respondent told her that he would return the file right away; however, he failed to do so. In fact, respondent did not return the client file until after the intervention and repeated requests of the State Bar. Respondent ultimately provided the file to Melissa in or about March 2006. The file did not contain the witness statements or the medical records.

C. Conclusions of Law

The parties stipulated to the following conclusions of law:

Count 1: Avoiding the Representation of Adverse Interests and Accepting Compensation from a Non-Client (Rules Proc. of State Bar, rule 3-310(F))¹

To avoid any conflict of interest, rule 3-310(F) provides, in part, that a member must not accept compensation for representing a client from one other than the client unless the member obtains the client's informed written consent.

By willfully failing to obtain Kenneth's written consent that respondent could accept compensation for representing him from Stephen, respondent accepted compensation for representing a client from one other than the client without obtaining the client's written consent and thereby willfully violated rule 3-310(F).

Count 2: Failure to Perform with Competence (Rules Prof. Conduct, Rule 3-110(A))

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence.

Respondent intentionally, recklessly and repeatedly failed to perform legal services with competence, in wilful violation of rule 3-110(A), by willfully failing to contact witnesses as requested by Kenneth or to call any of those witnesses at trial, by failing to review the medical records or provide them to Kenneth as he had requested, and by failing to prepare and file an appeal.

¹References to rule are to the current Rules of Professional Conduct, unless otherwise noted.

Count 3: Moral Turpitude (Bus. & Prof. Code, § 6106)²

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

By misrepresenting to Richard that Kenneth had decided that Kenneth's family members should no longer receive information, when there had been no such discussion with Kenneth, respondent committed an act of dishonesty and moral turpitude in willful violation of section 6106.

Counts 4 and 5: Failure to Communicate (§ 6068, Subd. (m))

Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

By willfully failing to respond promptly to the numerous status inquiries of Kenneth and the multiple requests for status information from Richard and Melissa, respondent violated section 6068, subdivision (m), in count 4.

Respondent willfully violated section 6068, subdivision (m), in count 5 by failing to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in that respondent willfully failed to inform Kenneth or any member of his family that he would not file an appeal on Kenneth's behalf after he had said that he would file such an appeal.

Count 6: Failure to Return Client File (Rule 3-700(D)(1))

Rule 3-700(D)(1) requires an attorney whose employment has terminated to promptly release to a client, at the client's request, all the client's papers and property. Respondent willfully violated rule 3-700(D)(1) by failing to promptly return the client file to Kenneth upon Kenneth's repeated requests and waiting until March 2006, after intervention and repeated requests of the State Bar, before returning the file.

Count 7: Failure to Render Accounts of Client Funds (Rule 4-100(B)(3))

Rule 4-100(B)(3) provides that an attorney must maintain records of all funds of a client in

²References to section are to the provisions of the Business and Professions Code.

his possession and render appropriate accounts to the client.

By willfully failing to account to Kenneth for the advanced attorney fees that he had been paid to represent Kenneth on the criminal case, respondent failed to render appropriate accounts to a client regarding all of the client funds coming into respondent's possession, in willful violation of rule 4-100(B)(3).

Count 8: Failure to Cooperate with the State Bar (§ 6068, subd. (i))

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney.

The court hereby orders that count 8 be dismissed with prejudice in the interest of justice, as requested by the State Bar.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

No mitigating evidence was offered or received. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)³

Although given the opportunity to testify on his own behalf concerning any mitigating factors, respondent elected not to testify.

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent has a prior record of discipline. (Std. 1.2(b)(i).) The court takes judicial notice that the Supreme Court had recently ordered respondent's actual suspension after this matter was submitted.

On May 29, 2007, the Supreme Court issued order S151368 (State Bar Court case No. 01-O-02736 et al.), suspending respondent from the practice of law for three years, that execution of the suspension be stayed, and the he be placed on probation for five years on condition that he be actually suspended for two years. Respondent stipulated to and was found culpable of misconduct in nine matters, spanning the period from 1998 to 2003: seven counts of failure to communicate,

³All further references to standards are to this source.

four counts of failure to perform, two counts of failure to refund unearned fees, one count of failure to return a client file, one count of improper withdrawal from employment, and one of count of failure to promptly deliver properties to the client. In aggravation, respondent's misconduct harmed significantly a client, the public or the administration of justice and constituted multiple acts of misconduct. In mitigation, respondent was candid, cooperative, and remorseful.

Respondent committed multiple acts of misconduct by: accepting compensation for representing a client from one other than the client without obtaining the client's written consent; failing to perform legal services with competence; committing an act of moral turpitude; failing to respond promptly to reasonable status inquires of a client; failing to keep a client reasonably informed of a significant development; failing to promptly release a client file; and failing to render appropriate accounting to a client. (Std. 1.2(b)(ii).)

Respondent's misconduct harmed significantly a client, the public or the administration of justice. Respondent failed to perform with competence on behalf of an incarcerated client. (Std. 1.2(b)(iv).)

Respondent demonstrated indifference toward rectification or atonement for the consequences of his misconduct. Respondent has never shown remorse or apologized to his client, nor took any remedial action on behalf of his client. (Std. 1.2(b)(v).)

Although respondent stipulated to the facts and conclusions of law in this proceeding on the day of trial, he displayed a lack of candor and cooperation to the State Bar during disciplinary proceedings by not filing a pretrial statement and failing to appear at several status conferences. (Std. 1.2(b)(vi).)

V. 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 must be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.2(a), 2.3, 2.4, and 2.10 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.

Standard 1.7(a) also applies. It provides that, if an attorney has a prior record of discipline, the degree of discipline in the current proceeding must be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.

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 Silvertown* (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 serious misconduct, including failing to perform services competently and committing an act of dishonesty, while representing a vulnerable, incarcerated client.

The State Bar urges disbarment, citing *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459 in support of its recommended discipline. The court agrees.

In *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, the attorney failed to perform services for an incarcerated client, failed to return unearned fees, failed to communicate and failed to promptly return the client file. The Review Department found that

because an incarcerated client has a limited ability to assist an attorney or to stay apprised of the attorney's efforts, the abandonment of an incarcerated client is a serious matter warranting substantial discipline. (See *Borré v. State Bar* (1991) 52 Cal.3d 1047, 1053.) As a result, the attorney in *Nees* was actually suspended for six months.

Similarly, in *Borré v. State Bar*, the attorney who had practiced without discipline for 14 years represented an incarcerated client. He was found culpable of abandoning a criminal appeal and not disclosing this to the client until after the appeal had been dismissed. He had also fabricated a letter to deceive the State Bar during its investigation of the abandonment charge. The Supreme Court imposed an actual suspension of two years.

Like the attorneys in *Nees* and *Borré*, respondent's failure to perform services competently on behalf of Kenneth while the client was incarcerated was particularly egregious. Respondent failed to competently prepare for Kenneth's criminal trial, failed to file an appeal and failed to communicate with his client. Even though Kenneth had relatives outside of prison to act as intermediaries with respondent, it was difficult for him to stay apprised of respondent's work.

Moreover, respondent has a prior record of discipline and is actually suspended for two years, effective June 2007. There, he admitted to a total of 16 violations in seven client matters. Although he cited to depression and other psychological problems as major contributing factors to his misconduct in the prior record, respondent did not submit any mitigating evidence in this proceeding and the court found none.

Under standard 1.7(a), the degree of discipline in the current proceeding must be greater than that imposed in the prior proceeding. The serious nature of the misconduct as well as respondent's conduct before this court suggest that he is capable of future wrongdoing and raise concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. Moreover, the court finds that respondent is not a good candidate for suspension and/or probation because his misconduct and lack of cooperation in these proceedings, despite his stipulation, "reflect respondent's disdain and contempt for the orderly process and rule of law and clearly demonstrate that the risk of future misconduct is great." (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 581.) Placing respondent on an additional lengthy period of actual

suspension would very unlikely serve to rehabilitate respondent or to deter him from further misconduct. The court concludes that respondent cannot be trusted and is a liability to the legal profession and to the public. Having considered the evidence, the standards and other relevant law, the court determines that disbarment is the only adequate means of protecting the public from further wrongdoing by respondent. Accordingly, the court so recommends.

VI. RECOMMENDED DISCIPLINE

The court recommends that respondent **Bernabe Hernandez** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

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.

VII. ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of California effective three days after service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).

Dated: July 3, 2007

RICHARD A. PLATEL
Judge of the State Bar Court