

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

In the Matter of)	Case No. 05-O-03054-RAH
)	
DAVID T. HARNEY,)	DECISION
)	
Member No. 142760,)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this default disciplinary matter, respondent **David T. Harney** is found culpable, by clear and convincing evidence, of three counts of professional misconduct as charged. His misconduct involved failure to perform services competently, failure to obey court orders, and failure to cooperate with the State Bar.

The court recommends, among other things, that respondent be suspended from the practice of law for one year, that execution of the suspension be stayed, and that respondent be actually suspended from the practice of law for six months and until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules Proc. of State Bar, rule 205.)

II. Pertinent Procedural History

On April 13, 2006, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a three-count Notice of Disciplinary Charges (NDC) at his official membership records address under Business and Professions Code section 6002.1.¹ The NDC was returned as unclaimed.

Respondent did not file a response to the NDC. (Rules Proc of State Bar, rule 103.)

¹References to section are to the California Business and Professions Code, unless otherwise noted.

On May 17, 2006, the State Bar telephoned respondent at his official membership records telephone number. However, a recording on the answering machine at that number stated that the message box was full. On that same date, the State Bar called directory assistance for the area which includes respondent's official address and asked for all telephone listings for respondent. Directory assistance had no listing for respondent. The State Bar also checked Parker's Directory; but, it did not list any address of which the State Bar was not already aware.

On the State Bar's motion, respondent's default was entered on June 5, 2006, and respondent was enrolled as an inactive member on June 8, 2006, under section 6007, subdivision (e). An order of entry of default was sent to respondent's official address by certified mail.

Respondent did not participate in the disciplinary proceedings. This matter was submitted for decision on June 9, 2006, following the filing of the State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 11, 1989, and has since been a member of the State Bar of California.

B. The LaGrua Matter

On March 21, 2001, Christine LaGrua (LaGrua) contacted the Harney Law Offices to obtain representation in a medical malpractice action against Cedars-Sinai Medical Center. She spoke with attorney John Streeter (Streeter), an employee at the Harney Law Offices. Streeter told LaGrua that the Harney Law Offices would take her case on a contingency fee basis and asked that she forward her medical records. In late March 2001, LaGrua received a contingency fee retainer agreement in the mail from respondent, signed it, and returned it to the Harney Law Offices along with her medical records.

On April 3, 2001, LaGrua telephoned the Harney Law Offices. She was told by one of

respondent's employees that her medical records had been received and had been given to respondent for his review. She was also told that a medical expert would be contacted to review her medical records.

By August 20, 2001, after having heard nothing in five months, LaGrua contacted Harney's office. She was told that her medical records were being reviewed by a medical expert and that a complaint was being drafted.

On November 28, 2001, LaGrua once more checked with the Harney Law Offices. She was again assured that a complaint was being drafted in her matter, and that it would be filed before January 18, 2002, when the statute of limitations regarding her medical malpractice case would toll. LaGrua thereafter telephoned Harney's office on January 3, January 10, and January 15, 2002, in an effort to make sure that a complaint would be ready for filing before January 18, 2002.

Despite the repeated assurances made to LaGrua, respondent did not file LaGrua's complaint by January 18, 2002. Nor did respondent have LaGrua's matter reviewed by a medical expert. Thus, the statute of limitations regarding LaGrua's medical malpractice claim tolled.

In January 2002, LaGrua retained the Law Offices of William H. Newkirk (Newkirk) to file a legal malpractice action against the Harney Law Offices. On May 28, 2002, Newkirk filed the legal malpractice action on LaGrua's behalf, in Los Angeles Superior Court, case No. BC274649 in a matter entitled, *Christine LaGrua and Jeff LaGrua v. Harney Law Offices* (LaGrua case). A judgment was entered against respondent on June 4, 2004, whereby he was ordered to pay \$429,000 to LaGrua with interest thereon at the rate of ten percent per annum from April 14, 2003, until paid, together with costs and disbursements.

In April 2005, LaGrua employed attorney Steven A. Schuman (Schuman) to collect the debt that was owed her as a result of the legal malpractice judgment entered against respondent. Although respondent was served on May 9, 2005, with an order to appear for a Judgment Debtor Examination on May 23, 2005, he failed to appear. The hearing was continued to June 20, 2005, and an Attachment for Defaulter (bench warrant) for respondent was issued and held by the court. Respondent was served with notice of the new hearing date by LaGrua's counsel.

When respondent failed to appear for the June 20, 2005 Judgment Debtor Examination, the

Attachment for Defaulter, previously held by the court on May 23, 2005, was ordered issued forthwith.

On June 29, 2005, respondent appeared before the court on the LaGrua case and the court's Attachment for Defaulter was ordered recalled. The Judgment Debtor Examination was continued until August 1, 2005, and respondent was personally ordered to appear before the court on that date. However, when respondent failed to appear before the court on August 1, 2005, as ordered, an Attachment for Defaulter was issued for his arrest and bail was set at \$25,000.

In June 2005, the State Bar opened case No. 05-0-03054, pursuant to a complaint filed by Steven Schuman on behalf of Christine LaGrua (the LaGrua complaint). On July 15 and August 1, 2005, a State Bar investigator wrote to respondent and requested a written reply. Although respondent received the July 15 and August 1, 2005 letters, he never responded to them or otherwise cooperated in or participated in the investigation regarding the LaGrua complaint.

Count 1: Failure to Perform Competently (Rules Prof. Conduct, Rule 3-110(A))²

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

Despite repeated reassurances made by the Harney Law Offices to LaGrua that a complaint was being drafted regarding her medical malpractice matter and despite LaGrua's numerous telephone calls to Harney's office, made in an effort to ensure that a complaint would be ready for filing before the statute of limitations tolled on January 18, 2002, respondent failed to have LaGrua's medical records reviewed by a medical expert and failed to file LaGrua's complaint before the statute of limitations tolled. Therefore, the court finds by clear and convincing evidence that respondent recklessly failed to competently perform the legal services for which he was employed in wilful violation of rule 3-110(A).

Count 2: Failure to Obey Court Order (Bus. & Prof. Code §6103)

Section 6103 requires attorneys to obey court orders and provides that the wilful disobedience

²References to rule are to the current Rules of Professional Conduct, unless otherwise noted.

or violation of such orders constitutes cause for disbarment or suspension.

By failing to comply with the court orders requiring him to appear for a Judgement Debtor Examination on May 23, June 22, and August 1, 2005, respondent wilfully disobeyed and violated court orders requiring him to do an act connected with or in the course of respondent's profession which he ought to have done in good faith, in wilful violation of section 6103.

Count 3: Failure to Cooperate with the State Bar (Bus. & Prof. Code §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. By failing to respond to the State Bar's July and August 2005 letters or otherwise participate in the investigation of the LaGrua matter, respondent failed to cooperate in a disciplinary investigation in wilful violation of section 6068, subdivision (i).

IV. Mitigating and Aggravating Circumstances

A. Mitigation

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

Respondent was admitted to the practice of law in December 1989, and has no prior record of discipline. Respondent's 11 years of discipline-free practice at the time of his misconduct in 2001 is an important mitigating factor. (See, *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 589.) (Standard 1.2(e)(i).)

B. Aggravation

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

Respondent committed multiple acts of wrongdoing, including failing to perform competently, failing to obey court orders, and failing to cooperate with the State Bar. (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed his client, LaGrua. Respondent failed to timely file a complaint on LaGruas's behalf in her medical malpractice case; and the statute of

³All further references to standards are to this source.

limitations regarding her claim tolled. Thus, LaGrua lost her legal right to pursue the matter. (Std.1.2(b)(iv).)

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) After having a judgment entered against him in the legal malpractice action, whereby he was ordered to pay \$429,000 to LaGrua, respondent failed to appear for the Judgment Debtor Examination, requiring the court to issue an Attachment for Defaulter (bench warrant) for his arrest.

Respondent's failure to participate in this disciplinary matter before the entry of his default is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

The purpose of 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.)

Respondent's misconduct involved one client matter. The standards for respondent's misconduct provide a broad range of sanctions ranging from reproof to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds. 1.6, 2.4, and 2.6.) While the standards are not binding, they are entitled to great weight. (*In re Silvertown* (2005) 36 Cal.4th 81, 92.)

Standard 2.4 provides that culpability of wilfully failing to perform services in an individual matter not demonstrating a pattern of misconduct must result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client. As discussed above, respondent was found culpable of failing to perform services, which significantly harmed his client.

Standard 2.6 provides that failure to obey a court order will result in suspension or disbarment, depending on the gravity of the offense or the harm to the client.

The State Bar urges a three-year stayed suspension, a four-year probation,⁴ and a two-year

⁴It is not appropriate to recommend probation in a default proceeding, if the attorney's discipline includes a period of actual suspension. In a default proceeding, "the appropriate time to consider imposing probation and its attendant conditions is when the attorney seeks relief from

actual suspension, citing *Harris v. State Bar* (1990) 51 Cal.3d 1082 and *In the Matter of Trillo* (Review Dept.1990) 1 Cal. State Bar Ct. Rptr. 59 in support of its recommendation.

The Supreme Court in *Harris v. State Bar* (1990) 51 Cal.3d 1082 imposed a 90-day actual suspension, with a three-year stayed suspension and three-year probation, on an attorney with no prior record of discipline, who had abandoned a client for four years, had shown a lack of candor to her client, and had demonstrated indifference toward the consequences of her misconduct. The attorney was also found to have violated her duties as an attorney within the meaning of section 6103. Her actions caused the client and his estate monetary loss and prejudiced their causes of action. Unlike the respondent in the instant matter, the attorney in *Harris* participated in her disciplinary proceeding.

In *In the Matter of Trillo, supra*, 1 Cal. State Bar Ct. Rptr. 59, 69, the attorney was actually suspended for one year with a three-year stayed suspension and a three-year probation for failure to communicate with two clients, failure to perform, failure to return unearned fees, failure to maintain funds received for his clients' benefit in a client trust account, and misrepresentations to his clients. In mitigation, the attorney had practiced for more than a 14-year period with no prior record of discipline. In aggravation, the court found that the attorney engaged in multiple acts of misconduct, that his failure to perform substantially harmed his clients, that he did not cooperate with his clients and acted in bad faith toward them, and that he failed to participate in the disciplinary proceedings. Like the attorney in *Trillo*, respondent defaulted and his failure to perform significantly harmed his client.⁵

The court also finds these cases to be instructive.

In *Lester v. State Bar* (1976) 17 Cal.3d 547, the Supreme Court actually suspended an attorney for six months for failing to perform services in four matters, failing to refund any portion of advanced fees, failing to communicate with clients, and making misrepresentations. Aggravation included his lack of

the actual suspension that may be imposed following his or her default in a disciplinary proceeding.” (*In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 110.)

⁵The State Bar erroneously contends on page five of its brief on culpability and discipline that no default was entered in the *Trillo* matter.

candor before the State Bar and general lack of insight into the wrongfulness of his actions.

In *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, the failure in one matter to perform services competently, causing the client harm, improper withdrawal from employment while the client was incarcerated, failure to render an accounting of unearned fees and failure to refund them resulted in a one-year stayed suspension and three-year probation, conditioned on a 45-day actual suspension. Aulakh had no prior record of discipline in 20 years of practice, but was found to be very uncooperative during the disciplinary process.

In *King v. State Bar* (1990) 52 Cal.3d 307, the Supreme Court imposed a 90-day actual suspension as part of a longer, stayed suspension. The attorney had no prior record of discipline, but wilfully failed to perform services in two matters, resulting in a large default judgment against one of his clients.

Finally, in *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831, the court found that the attorney's two serious instances of reckless failure to perform legal services which resulted in dismissal of his clients' lawsuits and his failure to cooperate with the State Bar's investigations warranted a discipline recommendation of 18-months stayed suspension, two years of probation and a 90-day actual suspension. The attorney had defaulted in the disciplinary proceedings.

In this matter, the gravamen of respondent's misconduct is his failure to perform services in one client matter and his failure to comply with three court orders. Respondent's misconduct is aggravated by the significant harm he caused his client, his indifference toward rectification, and his failure to participate in these proceedings. His misconduct reflects a blatant disregard of professional responsibilities.

In light of the foregoing case law, the State Bar's recommendation of two-years' actual suspension in a single client matter is excessive. In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) Although the State Bar's recommendation of two years' actual suspension is too harsh, respondent's misconduct, as well as the aggravating circumstances surrounding his misconduct weigh heavily in assessing the appropriate level of discipline. In addition, the court is particularly troubled by the fact that respondent permitted his default to be entered.

Failing to appear and participate in this hearing shows that respondent comprehends neither the

seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) His failure to participate in this proceeding leaves the court without information about the underlying cause of respondent's misconduct or any mitigating circumstances surrounding his misconduct.

Therefore, in view of respondent's misconduct, the case law, the standards, and the mitigating and aggravating factors, placing respondent on actual suspension for six months would be appropriate to protect the public and preserve public confidence in the profession.

VI. Recommended Discipline

Accordingly, the court hereby recommends that respondent **David T. Harney** be suspended from the practice of law for one year, that said suspension be stayed, and that respondent be actually suspended from the practice of law for six months and until he files and the State Bar Court grants a motion to terminate his actual suspension. (Rules Proc. of State Bar, rule 205).

It is also recommended that respondent be ordered to comply with any probation conditions hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

It is also recommended that if respondent is actually suspended for two years or more, he will remain actually suspended until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii).

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order or during the period of his actual suspension, whichever is longer. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn.8.)

It is also recommended that the Supreme Court order respondent to comply with rule 955, paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter. **Wilful failure to comply with the provisions of rule 955 may result in revocation of probation, suspension, disbarment, denial of**

reinstatement, conviction of contempt, or criminal conviction.⁶

VII. Costs

It is further 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: August __, 2006

RICHARD A. HONN
Judge of the State Bar Court

⁶Respondent 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.)