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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **HOWARD MICHAEL COHEN,** **Member No. 170490,** A Member of the State Bar.	)	Case No. **05-O-03369-DFM** (06-O-12712; 07-O-11810; 08-O-12212) **DECISION**

I. INTRODUCTION

In this default disciplinary matter, respondent **Howard Michael Cohen** is charged with multiple acts of professional misconduct in four client matters, including (1) repeatedly failing to perform competently; (2) repeatedly failing to communicate; (3) repeatedly failing to return unearned fees (totaling $13,350); (4) repeatedly failing to cooperate with the State Bar; (5) repeatedly failing to return client files; and (6) failing to update his membership records address.

The court finds, by clear and convincing evidence, that respondent is culpable of 16 counts of misconduct. In view of respondent's misconduct and the evidence in aggravation, the court recommends, among other things, that respondent be suspended from the practice of law for four years, that execution of suspension be stayed, and that he be actually suspended from the

practice of law for two years and until (a) he makes certain restitution; (b) he establishes his rehabilitation, fitness to practice, and knowledge of the general law; and (c) the State Bar Court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California.

II. PERTINENT PROCEDURAL HISTORY

On September 23, 2008, the State Bar filed and properly served on respondent a Notice of Disciplinary Charges (NDC) at his official membership records address. Respondent appeared telephonically at the November 3, 2008 initial status conference. At that time he was already well past the normal deadline for filing his response to the NDC. Although the court ordered him at this status conference to file a response, respondent did not thereafter do so.

On November 20, 2008, the State Bar filed a motion for entry of default. Respondent made no effort to oppose the motion. His default was then entered on December 10, 2008, and respondent was enrolled as an inactive member on December 13, 2008.

Respondent did not subsequently seek to participate in the disciplinary proceedings. On December 29, 2008, this matter was submitted for decision, 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).)

Jurisdiction

Respondent was admitted to the practice of law in California on June 6, 1994, and has since been a member of the State Bar of California.

Case No. 05-O-03369 (Giron)

Facts:

In or about November 2004, Olga Giron retained respondent by phone to represent her in a civil matter involving a credit and/or possible identity theft issue with Bank of America (the "civil matter"). Respondent advised Giron that he would charge her $3,000 for his services. During the phone conversation, they agreed that she would send him $1,000 as advanced fees, and upon receipt of the money, respondent would provide her with a written retainer agreement.

On or about November 18, 2004, Giron sent respondent a check in the amount of $1,000 as advanced fees. Respondent cashed the check on or about December 10, 2004. At no time did respondent provide Giron with a written retainer agreement as he had promised.

Thereafter, from approximately December 2004 until April 2005, respondent took no further action to proceed with the civil matter on behalf of Giron.

In or about January 2005, Giron called respondent at his office regarding her case. She left a message requesting that respondent call her back. Respondent failed to do so.

From and after in or about January 2005 to in or about April 2005, Giron called respondent at his office numerous times regarding the status of her case. Each time, she left a message requesting that respondent call her back. Respondent received Giron's telephone messages, but failed to respond to her status inquiries.

In or about April 2005, Giron spoke to respondent by phone and terminated his services. She advised him to deduct the first phone consultation from the $1,000 and to refund her the unearned fees. Respondent agreed that he would refund Giron $700 of the $1,000 that Giron paid to respondent as advanced fees.

On or about May 11, 2005, Giron sent a letter to respondent, requesting that he send her the unearned fees within 10 working days as they had discussed on the phone in April 2005. Respondent received the letter, but failed to respond to it.

Respondent provided no services of value to Giron. Respondent did not earn any of the advanced fees paid by Giron. To date, respondent has not refunded any portion of the $1,000 paid by Giron in advanced fees.

On or about July 21, 2005, the State Bar opened an investigation pursuant to a complaint filed by Giron.

On or about November 4, 2005, the State Bar sent respondent a letter advising him that it would be closing the Giron matter since respondent had agreed to refund Giron the unearned fees.

On or about September 12, 2006, the State Bar re-opened the investigation of the Giron matter.

On or about October 23, 2006, an investigator for the State Bar sent a letter to respondent regarding the Giron matter. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Giron matter. Respondent received the investigator's letter, but failed to provide a response to the letter or otherwise communicate with the investigator concerning the Giron matter.

On or about November 7, 2006, an investigator for the State Bar sent another letter to respondent regarding the Giron matter. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Giron matter. Respondent received the investigator's letter, but failed to provide a response to the letter or otherwise communicate with the investigator concerning the Giron matter.

At some point in late 2006, respondent relocated his office from his official State Bar membership records address of 4201 Wilshire Blvd., #510, Los Angeles, California, 90010 to an unknown address.

In or about April 2007, respondent relocated his office to 15901 Hawthorne Blvd., Suite 306, Lawndale, CA 90260. Sometime thereafter, respondent relocated his office to 15901 Hawthorne Blvd., Suite 332, Lawndale, CA 90260.

Despite these moves, respondent's membership records address has remained 4201 Wilshire Blvd., #510, Los Angeles, California 90010. As of late 2006, respondent did not receive mail there nor did he have a presence at that address.

Since 2006, respondent has failed to update or ensure that his State Bar membership records address reflects a current address for State Bar purposes.

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

Rule 3-110(A) of the Rules of Professional Conduct[1] provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence.

By not taking any action on behalf of Giron from approximately December 2004 until April 2005, when respondent was terminated by Giron in the civil matter, respondent intentionally and recklessly failed to perform legal services with competence, in wilful violation of rule 3-110(A).

Count 2: Failure to Communicate [Bus. & Prof. Code, § 6068(m)]

Section 6068, subdivision (m), of the Business and Professions Code[2] provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep

[1] References to rule(s) are to the Rules of Professional Conduct, unless otherwise indicated.

[2] References to section(s) are to the provisions of the Business and Professions Code.

clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

By failing to respond to Giron's numerous attempts to contact him by phone from about January 2005 until April 2005 and by failing to respond to Giron's May 11, 2005 letter, respondent failed to respond to reasonable status inquiries of a client in wilful violation of section 6068, subdivision (m).

Count 3: Failure to Return Unearned Fees [Rule 3-700(D)(2)]

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund unearned fees.

By not refunding any portion of the $1,000 in advanced fees paid by Giron, respondent wilfully failed to promptly refund fees paid in advance that had not been earned, in wilful violation of rule 3-700(D)(2).

Count 4: Failure to Cooperate With the State Bar [Section 6068(i)]

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

By not providing a written response to the allegations of misconduct in the Giron matter or otherwise cooperating in the investigation, respondent failed to cooperate and participate in a disciplinary investigation pending against respondent, in wilful violation of section 6068, subdivision (i).

Count 5: Failure to Update Membership Address [Section 6068(j)]

Section 6068, subdivision (j), states that a member must comply with the requirements of section 6002.1, which provides that respondent must maintain on the official membership records of the State Bar a current address and telephone number to be used for State Bar purposes.

By not updating his State Bar membership records address after 2006, respondent failed to maintain a current address and telephone number to be used for State Bar purposes, in wilful violation of section 6068, subdivision (j).

Case No. 06-O-12712 (Fleming)

Facts:

In or about May 2005, Jorge Tomas Fleming employed respondent in connection with a family law matter; in particular, respondent was to defend a claim against Fleming by his ex-wife for unpaid child support payments in connection with *Fleming v. Fleming*, Los Angeles County Superior Court, case No. LD008430. At this time, Fleming was living in Florida and could not afford to travel to California to handle the matter himself. Fleming was allegedly in arrears on his child support payments and his ex-wife was pursuing collection of the amount due. Fleming hired respondent to determine the amount due and obtain credit for payments that Fleming had made.

Prior to employing respondent, Fleming had been served with several orders to show cause requiring him to provide evidence through cancelled money orders and travelers checks of the child support payments he had made in order for the Child Support Services Department to grant Fleming credit toward the child support claimed to be due. After employing respondent, Fleming provided respondent with cancelled checks reflecting support payments he had made and other documentation so respondent could represent him in this matter.

Although respondent had initially agreed to perform the services on behalf of Fleming for a total fee of $2,000, Fleming paid respondent a total of $2,650 in advanced fees by way of three separate payments. The payments to respondent were as follows: On or about May 24, 2005, Fleming paid respondent the sum of $500. On or about August 19, 2005, Fleming paid respondent the sum of $1,500. Finally, on or about December 23, 2005, Fleming paid

respondent an additional sum of $650, pursuant to respondent's request, which payment was earmarked specifically for a court hearing that was to occur on February 6, 2006.

After employing respondent, Fleming was served with another order to show cause to appear on September 7, 2005 and to provide proof of his child support payments. The September 7, 2005 hearing was continued at the request of respondent.

Subsequently, a further order to show cause hearing was set for December 6, 2005. Because Fleming was having difficulty speaking with respondent, despite his numerous attempts to contact him by telephone, Fleming traveled to California and met with respondent in or about late November 2005. Respondent made some minimal efforts to determine the amount of money Fleming owed in child support payments and the amount of credit he should receive for payments he had made.

Commencing in May of 2005 and continuing through February of 2006, Fleming attempted to contact respondent by telephone on the following dates and times to discuss the status of his case, in addition to other dates and times: May 20, 2005, at 2:26 p.m.; May 21, 2005 at 12:50 p.m.; May 23, 2005, at 8:18 p.m.; June 1, 2005, at 1:01 p.m.; August 5, 2005, at 1:07 p.m., August 17, 2005, at 5:29 p.m., 8:20 p.m., 9:10 p.m., and 9:56 p.m.; August 19, 2005, at 1:10 p.m.; August 22, 2005, at 12:20 p.m. and 4:09 p.m.; September 19, 2005, at 11:05 a.m., October 18, 2005, at 9:09 p.m.; October 21, 2005, at 1:56 p.m.; and December 6, 2005, at 4:11 p.m. Fleming would either reach respondent's secretary, or on a few occasions he would reach respondent's answering machine. In either case, Fleming would leave a message for respondent that he had called and request that respondent contact him. Fleming would call respondent at (323) 702-4333. Although respondent received Fleming's telephone messages, he failed to respond to them.

On or about December 6, 2005, respondent appeared at the Order to Show Cause hearing on behalf of Fleming. The hearing was continued and a further Order to Show Cause hearing was set for February 6, 2006, to again allow Fleming to provide proof of the support payments he had made.

After appearing at the December 6, 2005 hearing, respondent provided no further services to Fleming and did not appear at the February 6, 2006 hearing on behalf of Fleming, despite receiving the $650 specifically for the appearance. After December 2005, Fleming had no further communications or contact with respondent and was unable to determine the status of his case, despite his attempts to contact respondent by telephone. Respondent effectively abandoned Fleming's cause following the December 6, 2005 hearing.

On or about March 1, 2006, Fleming sent a letter to respondent complaining about his inability to reach him and obtain information about the status of his case. In the letter, Fleming requested an immediate response from respondent. Respondent received Fleming's letter, but failed to respond to it.

Throughout the representation, respondent spoke with Fleming on few occasions: once in August of 2005 and once in December of 2005 when respondent called Fleming to request additional money for the services to be rendered; and once in November of 2005 when Fleming flew to California to see respondent in-person because he could not get information about the status of his case by telephone. This resulted in unnecessary expense and inconvenience to Fleming who hired respondent in significant part because he was not physically present in California to handle the matter himself.

Respondent performed such little and preliminary services for Fleming as to be of no value to him. In addition, respondent specifically requested and received $650 in connection

with the February 6, 2006 hearing that respondent did not attend. As such, respondent did not earn any of the legal fees he received from Fleming in connection with this matter.

In or about June 2006, Fleming hired new counsel, Maricela Alvarez, to assist him in the family law matter.

After several attempts at trying to obtain Fleming's file from respondent informally, on or about June 13, 2006, Alvarez subpoenaed the file in connection with the family law matter from respondent on behalf of Fleming. Respondent was served with the subpoena, but failed to comply with it.

To date, respondent has not provided Fleming or Alvarez with a copy of his complete file, including copies of some of the payments Fleming had made to his ex-wife, which Fleming needed to respond to the order to show cause.

On or about May 22, 2006, the State Bar opened an investigation pursuant to a complaint filed by Fleming.

On or about July 26, 2006, an investigator for the State Bar sent a letter to respondent regarding the Fleming matter. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Fleming matter. Respondent received the investigator's letter, but failed to provide a response to the letter or otherwise communicate with the investigator concerning the Fleming matter.

On or about October 25, 2006, an investigator for the State Bar sent another letter to respondent regarding the Fleming matter. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Fleming matter. Respondent received the investigator's letter, but failed to provide a response to the letter or otherwise communicate with the investigator concerning the Fleming matter.

On or about December 22, 2006, an investigator for the State Bar sent another letter to respondent regarding the Fleming matter. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Fleming matter. Respondent received the investigator's letter, but failed to provide a response to the letter or otherwise communicate with the investigator concerning the Fleming matter.

On or about November 5, 2006, Fleming sent a letter to respondent, requesting a refund of the advanced fees that Fleming had paid to respondent and informing him that he had to hire new counsel. Respondent received the letter, but failed to respond to it.

On or about December 26, 2006, Fleming sent another letter to respondent, requesting a refund of the money Fleming had paid to respondent for the services respondent was to have performed. However, this letter was returned to Fleming in January 2007 because no one was at respondent's office during the two attempts the United States Post Office made to deliver the letter to respondent. Respondent had moved from the address that Fleming had for him without any notice to Fleming.

Thereafter, on or about February 22, 2007, Fleming sent a third letter to respondent again requesting a refund of the advanced fees that Fleming had paid to respondent. This letter was sent to a new address that Fleming had obtained for respondent. Respondent received the letter, but failed to respond to it.

To date, respondent has not refunded any portion of the $2,650 paid by Fleming in advanced fees.

Count 6: Failure to Perform Competently [Rule 3-110(A)]

By not determining the amount of the alleged arrears on Fleming's child support payments, by not submitting to the court proof of payments made by Fleming, and by not

appearing at the February 6, 2006 hearing, respondent intentionally, recklessly and repeatedly failed to perform legal services with competence, in wilful violation of rule 3-110(A).

Count 7: Failure to Communicate [Section 6068(m)]

By not responding to Fleming's calls in May, June, August, September, October and December 2005 about the status of his case, and by failing to respond to Fleming's March 1, 2006 letter, respondent failed to respond to the reasonable status inquiries of his client, in wilful violation of section 6068, subdivision (m).

Count 8: Failure to Return Unearned Fees [Rule 3-700(D)(2)]

On or about February 6, 2006, when respondent failed to attend the hearing on behalf of Fleming, and thereafter had no further contact with him, respondent effectively withdrew from employment. At this time, respondent should have refunded all unearned fees paid to him in advance by Fleming in the amount of $2,650.

By not refunding any portion of the $2,650 in advanced fees paid by Fleming, respondent failed to promptly refund any part of a fee paid in advance that had not been earned, in wilful violation of rule 3-700(D)(2).

Count 9: 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.

By not turning over Fleming's file to Fleming's new counsel, Alvarez, despite her requests and a subpoena directed to respondent for the file, respondent wilfully failed to promptly release, upon termination of his employment, to his client, at the request of his client, all of the client's papers and property, in wilful violation of rule 3-700(D)(1).

Count 10: Failure to Cooperate With the State Bar [Section 6068(i)]

By not providing a written response to the allegations of misconduct in the Fleming matter or otherwise cooperating in the investigation, respondent failed to cooperate and participate in a disciplinary investigation pending against respondent, in wilful violation of section 6068, subdivision (i).

Case No. 07-O-11810 (Lorentzen)

Facts:

On or about October 4, 2006, Martha Lorentzen employed respondent to represent her father, Esequiel Quesada-Garcia, in connection with a criminal appeal. Quesada-Garcia was in custody at the time and during all times relevant to the facts alleged in this Notice of Disciplinary Charges. At all times herein mentioned, Lorentzen had the authority to act on behalf of Quesada-Garcia with regard to the legal services to be rendered in this matter, and to hire respondent and communicate with respondent on behalf of Quesada-Garcia, and respondent knew she was so authorized. At or about this time, respondent was provided with trial transcripts and legal files in the underlying criminal case, and with the government's investigative report in the matter.

Lorentzen paid respondent a total of $9,700 by way of four separate payments to represent Quesada-Garcia. The payments to respondent were as follows: On or about October 4, 2006, Lorentzen paid respondent the sum of $2,000. On or about November 1, 2006, Lorentzen paid respondent the sum of $2,000. On or about January 3, 2007, Lorentzen paid respondent the sum of $2,850. On or about January 4, 2007, Lorentzen paid respondent the sum of $2,850. Because respondent requested that the funds be provided to him in cash using Western Union, the total cost to Lorentzen for the representation of Quesada-Garcia came to $10,219.96, including the Western Union fees.

Thereafter, respondent failed to perform any work or services in connection with the criminal appeal. Respondent never contacted Quesada-Garcia or visited him in custody as he told Lorentzen he would do. After January 2007, Lorentzen had no further communications or contact with respondent. Respondent effectively abandoned Quesada-Garcia's matter.

Lorentzen attempted to contact respondent on numerous occasions concerning the status of Quesada-Garcia's matter as neither Lorentzen nor Quesada-Garcia had heard anything from respondent. Each time, Lorentzen would leave a message with respondent's office requesting respondent to call her back. Respondent received Lorentzen's messages, but failed to respond to her status inquiries.

On one occasion when Lorentzen called respondent, respondent answered, but asked if he could call Lorentzen back. Thereafter, respondent did not return Lorentzen's call.

On or about May 31, 2007, Lorentzen sent a letter to respondent, reminding him that she had been calling respondent and that he had not returned her telephone calls. In the letter, Lorentzen requested respondent to account for any work that he had done on the case and to return the unearned fees to Lorentzen. She also requested that respondent return the trial transcripts to her as soon as possible. Respondent received Lorentzen's letter, but failed to respond to it.

On or about July 26, 2007, Quesada-Garcia sent a letter to respondent, terminating his services and requesting that respondent refund the unearned fees to his family. Respondent received Quesada-Garcia's letter, but failed to respond to it.

Respondent did not earn any of the advanced fees paid by Lorentzen. To date, respondent has failed to refund any portion of the $9,700 paid by Lorentzen to Lorentzen or to Quesada-Garcia. Also, to date, respondent has not returned the trial transcripts and the legal files in the underlying criminal case to Lorentzen or to Quesada-Garcia.

On or about April 24, 2007, the State Bar opened an investigation, pursuant to a complaint filed by Lorentzen.

On or about May 30, 2007, an investigator for the State Bar sent a letter to respondent regarding the Lorentzen/Quesada-Garcia matter. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Lorentzen/Quesada-Garcia matter. Respondent received the investigator's letter, but failed to provide a response to the letter or otherwise communicate with the investigator concerning the Lorentzen/Quesada-Garcia matter.

On or about June 19, 2007, an investigator for the State Bar wrote another letter to respondent regarding the Lorentzen/Quesada-Garcia matter. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Lorentzen/Quesada-Garcia matter. Respondent received the investigator's letter, but failed to provide a response to the letter or otherwise communicate with the investigator concerning the Lorentzen/Quesada-Garcia matter.

Count 11: Failure to Perform Competently [Rules Prof. Conduct, Rule 3-110(A)]

By not taking any action on behalf of Quesada-Garcia in his criminal appeal from October 2006 to on or about July 26, 2007, when respondent was terminated by Quesada-Garcia, respondent intentionally and recklessly failed to perform legal services with competence, in wilful violation of rule 3-110(A).

Count 12: Failure to Communicate [Section 6068(m)]

By not responding to Lorentzen's numerous telephone calls, by not responding to Lorentzen's May 31, 2007 letter, and by not responding to Quesada-Garcia's July 26, 2007 letter, respondent failed to respond to reasonable status inquiries of his client, in wilful violation of section 6068, subdivision (m).

Count 13: Failure to Return Unearned Fees [Rule 3-700(D)(2)]

By not returning any portion of the $9,700 in advanced fees paid by Lorentzen in connection with Quesada-Garcia's criminal appeal after respondent effectively withdrew from employment, respondent wilfully failed to promptly refund any part of a fee paid in advance that had not been earned, in wilful violation of rule 3-700(D)(2)).

Count 14: Failure to Return Client File [Rule 3-700(D)(1)]

By not returning to Lorentzen or Quesada-Garcia at the termination of respondent's employment the trial transcripts and the legal files requested by Lorentzen, respondent wilfully failed to promptly release to his client, upon termination of his employment and at the request of his client, all of the client's papers and property, in wilful violation of rule 3-700(D)(1)).

Count 15: Failure to Cooperate With the State Bar [Section 6068(i)]

By not providing a written response to the allegations of misconduct in the Lorentzen/Quesada-Garcia matter or otherwise cooperating in the investigation, respondent failed to cooperate and participate in a disciplinary investigation pending against respondent in wilful violation of section 6068, subdivision (i).

Case No. 08-O-12212 (Curiel)

Facts:

On or about May 8, 2008, the State Bar opened an investigation, pursuant to a complaint filed by Jose and Yesenia Curiel (the "Curiel matter").

On or about June 13, 2008, an investigator for the State Bar sent a letter to respondent regarding the Curiel matter. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Curiel matter. Respondent received the investigator's letter, but failed to provide a response to the letter or otherwise communicate with the investigator concerning the Curiel matter.

Count 16: Failure to Cooperate With the State Bar [Section 6068(i)]

By not providing a written response to the allegations of misconduct in the Curiel matter or otherwise cooperating in the investigation, respondent failed to cooperate and participate in a disciplinary investigation pending against respondent, in wilful violation of section 6068, subdivision (i).

Aggravating Circumstances

The State Bar bears the burden of proving 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).)[3] There are several aggravating factors present here.

Multiple Acts of Misconduct

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

Respondent has been found culpable of multiple counts of misconduct in the present proceeding involving four separate matters. The existence of such multiple acts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

Significant Harm

Respondent's misconduct significantly harmed his clients. (Std. 1.2(b)(iv).) Respondent's failure to return unearned fees deprived his clients of their funds. Additionally, Fleming had to hire another attorney to substitute in his place.

Lack of Insight and Remorse

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) His failure to return unearned fees totaling $13,350 to three clients and his failure to return their files, despite repeated requests, demonstrate

[3] All further references to standard(s) are to this source.

indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).)

Lack of Participation in Disciplinary Proceeding

Respondent's failure to participate in this disciplinary proceeding before the entry of his default is also an aggravating factor. (Std. 1.2(b)(vi).) Although respondent appeared telephonically for the initial status conference, he failed to file an answer to the NDC. He then allowed his default to be taken in the action without any further participation by him. Such conduct by respondent is an aggravating factor.

However, because of the nexus between this aggravating circumstance and respondent's culpability for violating section 6068(i), the court gives this aggravating factor only slight weight. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).)

No Prior Discipline

At the time of respondent's misconduct in 2004, he had practiced law for 10 years without any record of discipline. That is a mitigating factor. (Std. 1.2(e)(i).) "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.)

IV. DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the

standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *In the Matter of Van Sickle, supra*; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

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.

Standards 2.4, 2.6 and 2.10 apply in this matter.

Standard 2.4 provides that culpability of a member's wilful failure to perform services and wilful failure to communicate with a client must result in reproval or suspension, depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

Standard 2.10 provides that culpability of other provisions of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client.

The State Bar urges that discipline here include five-years stayed suspension, and actual suspension for two years and until respondent (a) pays restitution to his clients of his unearned fees, (b) files and the State Bar Court grants a motion to terminate his suspensions under rule 205, and (c) establishes his rehabilitation, fitness to practice, and learning in the general law (Std. 1.4(c)(ii).) In support of this recommendation, the State Bar cites to *In the Matter of Bailey*, *supra*, 4 Cal. State Bar Ct. Rptr. 220, and *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074. Both cases involve facts and considerations quite similar to those present here.

The court agrees that a lengthy period of stayed and actual suspension is necessary here to protect the public and the profession. Respondent had perpetrated multiple acts of misconduct with numerous different clients; his conduct has caused significant harm to those clients; he has repeatedly ignored his obligation to participate in the disciplinary process in the past and still refuses to do so; and he continues to withhold the unearned fees he wrongfully withheld from his clients. Under such circumstances, stern measures must be taken and care taken that the member not be allowed to return to practice until this court has greater assurance the prior misconduct is not likely to be repeated.

V. RECOMMENDED DISCIPLINE

Suspension Recommended

Accordingly, the court hereby recommends that respondent **Howard Michael Cohen** be suspended from the practice of law for four years, that said suspension be stayed, and that

respondent be actually suspended from the practice of law for two years and until all of the following conditions are satisfied:

A. He makes restitution to: (1) Olga Giron in the amount of $1,000 plus 10% interest per annum from November 18, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Olga Giron, plus interest and costs, in accordance with Business and Professions Code section 6140.5); (2) Jorge Tomas Fleming in the amount of $2,650 plus 10% interest per annum from December 23, 2005 (or to the Client Security Fund to the extent of any payment from the fund to Jorge Tomas Fleming, plus interest and costs, in accordance with Business and Professions Code section 6140.5); and (3) Martha Lorentzen in the amount of $9,700 plus 10% interest per annum from January 4, 2007 (or to the Client Security Fund to the extent of any payment from the fund to Martha Lorentzen, plus interest and costs, in accordance with Business and Professions Code section 6140.5); and furnishes satisfactory proof of payments thereof to the State Bar's Office of Probation[4];

B. 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) (Rules Proc. of State Bar, rule 205.); and

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

Future Probation

It is 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).)

[4] Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

MPRE

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination during the period of his actual suspension. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

Rule 9.20

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.[5]

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment.

Dated: April _____, 2009

DONALD F. MILES
Judge of the State Bar Court

[5] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or a contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)