

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

| | | |
|-----------------------------------|---|---------------------------------|
| In the Matter of |) | Case No.: 05-O-03670-RAH |
| |) | |
| TODD CLARK DAVIS, |) | |
| |) | |
| Member No. 186531, |) | DECISION |
| |) | |
| <u>A Member of the State Bar.</u> |) | |

I. INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, Deputy Trial Counsel Melanie J. Lawrence appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Respondent Todd Clark Davis did not appear in person or by counsel.

In the notice of disciplinary charges (hereafter NDC), the State Bar charges respondent with four counts of misconduct. In the first three counts, the State Bar charges respondent with engaging in misconduct in a single client matter, and in the fourth count,¹ the State Bar charges respondent with failing to cooperate in a State Bar disciplinary investigation of his alleged misconduct. The State Bar requests that this court recommend that “Respondent be suspended from the practice of law for one year[,], that execution of the suspension be stayed and that

¹ In the NDC, the State Bar incorrectly denominates this fourth count as count 5. The court deems the NDC amended to correctly denominate the fourth count as court 4.

Respondent be placed on probation with conditions including 60 days [sic.] actual suspension and until Respondent makes restitution”²

The court finds respondent culpable on each of the four counts of charged misconduct. 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 that will continue until respondent makes restitution of \$2,500 in unearned fees with interest and 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

On June 15, 2006, the State Bar filed the NDC and properly served a copy of it 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).³ 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; but see also *Jones v. Flowers* (April 26, 2006) 547 U.S. ____, 126 S.Ct. 1708, 1713-1714, 1717.)

The United States Postal Service (hereafter Postal Service) returned, to the State Bar, the copy of the NDC that was served on respondent stamped “Unclaimed, Return to Sender.”

² 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 declines the State Bar’s request to place respondent on probation.

³ Unless otherwise noted, all further statutory references are to this code.

Respondent's response to the NDC was due no later than July 10, 2006. (Rules Proc. of State Bar, rules 63(a), 103(a).) Respondent, however, failed to timely file a response.

On July 21, 2006, the State Bar filed a motion for entry of respondent's default⁴ 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 August 10, 2006, entering respondent's default and, as mandated in section 6007, subdivision (e)(1), ordering that he be involuntarily enrolled as an inactive member of the State Bar.

On August 10, 2006, a State Bar Court case administrator properly served a copy of the court's August 10, 2006, order of entry of default on respondent at his official address by certified mail, return receipt requested. However, that copy of the order was returned to the court by the Postal Service marked "Return to Sender, Not Deliverable as Addressed, Unable to Forward."

On August 15, 2006, the State Bar filed a request for waiver of default hearing and brief on culpability and discipline. That same day, 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 or the charges) 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.

⁴ The declaration of Deputy Trial Counsel Lawrence which is attached to this motion establishes that, in addition to fulfilling its minimum duty to mail a copy of the NDC to respondent at his official address (§ 6002.1, subd. (c)), the State Bar undertook a couple of steps, albeit nominal, to try and provide respondent with actual notice of the present disciplinary proceeding.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 10, 1996, and has been a member of the State Bar since that time.

B. Misconduct

In March 2005, Michael Heacock employed respondent to represent him in a marital dissolution matter. On about April 4, 2005, Heacock paid respondent \$500. Then, on about April 27, 2005, Heacock paid respondent an additional \$2,000. Heacock paid respondent these sums as advanced attorney's fees.

In April 2005, Heacock asked respondent to proceed with the filing and serving of a petition for dissolution, and respondent agreed to do so. From April 2005 to June 2005, inclusive, Heacock repeatedly telephoned respondent and left messages for respondent asking about the status of his dissolution proceeding. Respondent, however, did not return any of Heacock telephone calls. Sometime in June 2005, Heacock telephoned respondent, but was unable to leave a message because respondent's voicemail box was full.

On about August 15, 2005, Heacock went to respondent's law office and learned, for the first time, that respondent had vacated the office. Respondent never notified Heacock that he was vacating his office. Nor did respondent ever provide Heacock with a change of address or telephone number. Accordingly, Heacock reasonably believed that respondent had abandoned his dissolution matter.

Respondent never performed any legal services on Heacock's dissolution matter. In fact, in about October 2005, Heacock filed a petition for dissolution in propria persona and, thereafter, handled the matter to completion by himself.

On August 16, 2005, and then again on August 23, 2005, and on September 7, 2005, a State Bar investigator mailed, to respondent, a letter in which the investigator asked respondent

to provide, by a specified date, the investigator with a written response to specific allegations of misconduct that Heacock had made against respondent. Respondent actually received each of those three letters. Respondent apparently responded to the investigator's August 16, 2005, letter, but the response was deficient. Moreover, respondent never responded to the investigator's August 23, 2005, and September 7, 2005, letters. Nor did respondent otherwise properly cooperate in the State Bar's investigation of Heacock's complaints.

Count 1: Failure to Perform (Rules of Prof. Conduct, Rule 3-110(A))⁵

In count 1, the State Bar charges that respondent willfully violated rule 3-110(A), which provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. The record establishes, by clear and convincing evidence, that respondent willfully violated that rule by never filing and serving a petition for dissolution for Heacock as respondent had agreed to do. Because Heacock repeatedly left telephone messages for respondent inquiring as to the status of his dissolution proceeding, it is clear that respondent's failure to file and serve the petition was not just negligent, but was reckless (*In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 16) and repeated, if not intentional.

Moreover, the record clearly establishes that respondent willfully violated rule 3-110(A) by vacating his office without notice to Heacock and by not providing Heacock with his new address and telephone number.⁶ (Cf. *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782 [before the adoption of section 6068, subdivision (m) in 1986, attorney's failure to adequately communicate with client was held to violate former rule 6-101(A)(2) (now rule 3-110(A))].)

⁵ Unless otherwise noted, all further rule references are to these Rules of Professional Conduct of the State Bar.

⁶ It would have been more appropriate for the State Bar to include this misconduct in its charged violation of section 6068, subdivision (m), which (as noted below) specifically addresses an attorney's duty to adequately communicate with his or her clients. (E.g., *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 527, 541.)

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

In count 2, the State Bar charges that respondent willfully violated section 6068, subdivision (m), which requires that an attorney “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.” The record clearly establishes that respondent willfully violated section 6068, subdivision (m) by failing to respond to any of numerous telephone messages that Heacock left for him between April 2005 and June 2005 in which Heacock inquired into the status of his dissolution proceedings.

Count 3: Failure to Refund Unearned Fees (Rule 3-700(D)(2))

In count 3, the State Bar charges that respondent willfully violated rule 3-700(D)(2), which requires that an attorney whose employment has terminated “Promptly refund any part of a fee paid in advance that has not been earned.” The record clearly establishes that respondent willfully violated rule 3-700(D)(2). Respondent did not earn any portion of the \$2,500 in advanced fees that Heacock paid him. (Cf. *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 424 [to justify retention of legal fees, an attorney must perform more than minimal services that are effectively of no value to the client]; see also *Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 450-451 [services rendered must benefit client to justify recovery under quantum meruit].)

Moreover, the court finds that respondent effectively terminated his employment with Heacock no later than August 15, 2005, the day on which Heacock discovered that respondent had vacated his law office without notifying Heacock. (Cf. *Baker v. State Bar* (1989) 49 Cal.3d 804, 816-817, fn. 5.) Accordingly, respondent should have refunded the \$2,500 in unearned fees to Heacock within a reasonable amount of time after August 15, 2005. The court concludes that

60 days was a reasonable time in which respondent should have refunded the \$2,500. Sixty days after August 15, 2005, was October 14, 2005.

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

In count 4, the State Bar charges that respondent willfully violated section 6068, subdivision (i), which requires that an attorney "cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. . . ." The record clearly establishes that respondent willfully violated section 6068, subdivision (i) by failing to respond to the State Bar investigator's August 23, 2005, and September 7, 2005, letters and by failing to otherwise participate in the State Bar's disciplinary investigation of Heacock's complaints. Contrary to the State Bar's contention, the record does not clearly establish that respondent violated section 6068, subdivision (i) with respect to the investigator's August 16, 2005, letter because the record indicates that respondent responded, albeit inadequately, to that letter by sending the investigator a copy of his (i.e., respondent's) August 4, 2005, letter to the State Bar's Intake Unit.

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 (hereafter 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.)

3. Significant Client Harm and Indifference

Respondent's failure to refund the \$2,500 in unearned fees to Heacock caused significant harm to Heacock. (Std. 1.2(b)(iv).)

4. Indifference

Respondent's continuing failure to refund the unearned fees to Heacock demonstrates indifference and a disregard for the rights of his former client Heacock. (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

B. Mitigating Circumstances

There is no clear and convincing evidence of any mitigating circumstances. The court, however, notes that the State Bar has not alleged, as aggravation, that respondent has a prior record of discipline.

V. DISCUSSION ON DISCIPLINE

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (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 Taylor* (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(a), which applies to respondent's violations of section 6068. Standard 2.6(a) 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, *Chadwick 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)(2), respectively, provides little guidance in this case.

Turning to case law, the court concludes that the misconduct and aggravating circumstances found in the present proceeding against respondent are similar to the misconduct and aggravation found in *Bach v. State Bar* (1991) 52 Cal.3d 1201. In *Bach*, the attorney (1) repeatedly and recklessly failed to perform legal services competently for a client in an uncontested marital dissolution proceeding by failing, for more than two and one-half years, to conclude the case; (2) failed to communicate with his client over much of that time; (3) improperly withdrew without his client's or the court's approval; (4) failed to refund \$2,000 in unearned fees; and (5) failed to cooperate in the State Bar's investigation of his former client's complaints. (*Id.* at pp. 1204-1205, 1207-1208.)

Moreover, the attorney in *Bach* (1) frivolously asserted that there were numerous mitigating circumstances and (2) displayed a blatant lack of insight into his misconduct. (*Id.* at pp. 1205, fn. 3, 1209.) The Supreme Court concluded that the attorney's frivolous assertion of

extremely significant mitigation disclosed that he had improper attitude towards attorney discipline, which strengthened the need for the Supreme Court to impose “a period of actual suspension, however brief,” on the attorney. (*Id.* at p. 1209.) In addition, the Supreme Court noted the attorney’s blatant lack of insight into his misconduct alone might have warranted significantly greater discipline but for the attorney’s many years in practice without a prior record of discipline. (*Id.* at p. 1209, fn. 8.) in the Supreme Court placed the respondent attorney on 12 months’ stayed suspension and 12 months’ probation on conditions including 30 days’ actual suspension that continued until the attorney made restitution of \$2,000 in unearned fees to a former client. In *Bach*, the Supreme Court placed the attorney on 12 months’ stayed suspension and on 12 months’ probation with conditions, including 30 days’ actual suspension and until the attorney made restitution of \$2,000 in unearned fees plus interest.

The misconduct in *Bach* is greater than that found in the present proceeding. In *Bach*, the attorney was found culpable of willfully violating former rule 2-111(A)(1)&(2) [now rule 3-700(A)(1)&(2)] by improperly withdrawing without the client’s and court’s approval, but respondent was not. Moreover, the aggravation in *Bach* is greater than that found in the present proceeding. In *Bach*, the attorney displayed both an improper attitude toward discipline and a blatant lack of insight into his misconduct, but respondent did neither. However, there was mitigation for many years of practice in *Bach*, but there is no mitigation in the present proceeding. Furthermore, respondent defaulted in the present proceeding while the attorney in *Bach* did not. Nonetheless, the court concludes that it is appropriate to recommend that the discipline imposed on the attorney in *Bach* be imposed on respondent in the present proceeding.

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent Todd Clark Davis 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 Davis be actually suspended from the practice of law for thirty days and until (1) he makes restitution to Michael Heacock in the amount of \$2,500 plus 10 percent simple interest thereon per annum from October 14, 2005, until paid (or to the Client Security Fund to the extent of any payment from the fund to Heacock, plus interest and costs, in accordance with Business and Professions Code section 6140.5);⁷ (2) he furnishes satisfactory proof such restitution to the State Bar's Office of Probation in Los Angeles; and (3) he makes and the State Bar Court grants a motion, under Rules of Procedure of the State Bar, rule 205, to terminate his actual suspension.

The court also recommends that, if Davis'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 that Davis be ordered to comply with the conditions of probation, if any, hereinafter imposed on him by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

VII. PROFESSIONAL RESPONSIBILITY EXAM, RULE 955 & COSTS

The court recommends that Davis 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,

⁷ Of course, any restitution payable to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

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);⁸ Rules Proc. of State Bar, rules 320, 321(a)(1)&(3).)

The court also recommends that, if the period of Davis's actual suspension in this matter extends for 90 or more days, he be required to comply with California Rules of Court, rule 955⁹ 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.¹⁰

Finally, the court further 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: November ____, 2006.

RICHARD A. HONN
Judge of the State Bar Court

⁸ Rule 951(b) will be renumbered as rule 9.10(b) of the California Rules of Court effective January 1, 2007.

⁹ Rule 955 will be renumbered as rule 9.20 of the California Rules of Court effective January 1, 2007.

¹⁰ Davis 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.) At least in the absence of compelling mitigating circumstances, an attorney's failure to comply with rule 955 almost always results in disbarment. (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.)