FILED OCTOBER 31, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **JOHN HARVEY BRAMLETT,** **Member No. 171763,** A Member of the State Bar.	)	Case No.: **05-O-03932-RMT** **DECISION**

I. INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, Deputy Trial Counsel Shari Sveningson appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Respondent John Harvey Bramlett did not appear in person or by counsel.

In the notice of disciplinary charges (hereafter NDC), the State Bar charges respondent with three counts of misconduct. In the first two counts, the State Bar charges respondent with misconduct involving a single client matter, including failure to competently perform the legal services for which he was retained (Rules Prof. Conduct, rule 3-110(A)) and conversion of law books worth more than $1,000 that were loaned to him by his employer/co-counsel (Bus. & Prof.

Code, § 6106).[1] In the third count, the State Bar charges respondent with failure to cooperate in a State Bar disciplinary investigation (§ 6068, subd. (i)).

The State Bar contends that the appropriate level of discipline is three years' stayed suspension and six months' actual suspension and until a motion to terminate respondent's actual suspension is made and granted and until respondent makes restitution in the total sum of $1,400 ($400 in fees and $1,000 for unreturned law books) together with interest thereon. The court cannot agree because the record establishes that respondent is culpable only on the counts charging failure to competently perform and failure to cooperate in a disciplinary investigation. The record does not establish respondent's culpability on the count charging conversion of law books. Nor does the record establish a basis for requiring respondent to make restitution for either $400 in fees or $1,000 for unreturned law books.

In light of the misconduct actually established by the record and the other relevant factors, the court concludes that the appropriate level of discipline is two years' stayed suspension and forty-five days' actual suspension continuing until respondent makes and the State Bar Court grants a motion to terminate his actual suspension in accordance with Rules of Procedure of the State Bar, rule 205.

II. PROCEDURAL HISTORY

On May 10, 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 section 6002.1, subdivision (c). 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.)

[1] Unless otherwise noted, all further statutory references are to the Business and Professions Code.

Thereafter, the State Bar never received, from the United States Postal Service (hereafter Postal Service), a return receipt (i.e., green card) for the copy of the NDC that was served on respondent at his official address. However, the copy of the NDC (i.e., the letter) itself was not returned to the State Bar by the Postal Service as undeliverable or otherwise.

On May 12, 2006, the court's case administrator filed a notice of assignment and notice of initial status conference in this matter and properly served a copy of it respondent at his official address by first class mail. That copy was not returned to the court by the Postal Service as undeliverable or otherwise. Accordingly, the court finds that respondent actually received it. (Evid. Code, § 641 [mailbox rule].) Respondent, however, failed to appear at the initial status conference on June 26, 2006.

On June 27, 2006, the court filed a status conference order, and the court's case administrator properly served a copy of that order on respondent at his official address by first class mail. That copy of the order was not returned to the court by the Postal Service as undeliverable or otherwise. Accordingly, the court finds that respondent actually received it. (Evid. Code, § 641.)

Respondent's response to the NDC was due no later than Monday, June 5, 2006. (Rules Proc. of State Bar, rules 63(a), 103(a).) Respondent, however, failed to timely file a response. Accordingly, on June 26, 2006, Deputy Trial Counsel Sveningson telephone respondent at (909) 522-2376, which is the telephone number that the State Bar has in files for respondent and left voicemail message for respondent identifying herself as an attorney with the State Bar who was calling about a complaint filed against him and asking him to return her phone call. Respondent, however, never responded to Sveningson's voicemail message. (See declaration of DTC Sveningson that is attached to the State Bar's June 27, 2006, motion for entry of default.)

On June 27, 2006, the State Bar filed a motion for entry of respondent's default[2] 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 July 13, 2006, entering respondent's default and, as mandated in section 6007, subdivision (e)(1), placing him on involuntary inactive enrollment.

Also, on July 13, 2006, the court's case administrator properly served a copy of the court's July 13, 2006, order of entry of default and of inactive enrollment on respondent at his official address by certified mail, return receipt requested in accordance with Rules of Procedure of the State Bar, rules 60 and 200(c) and section 6002.1, subdivision (c). That copy of the court's order was returned to the court by the Postal Service marked as "unclaimed" after the Postal Service gave respondent notice to pick up the mailing on July 15, 2006, and again on July 25, 2006.[3] Nonetheless, the service of the court's order was deemed complete when mailed even if respondent did not receive it. (Cf. § 6002.1, subd. (c); *Bowles v. State Bar*, *supra*, 48 Cal.3d at pp. 107-108.)

On August 2, 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.

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[2] In its motion, the State Bar incorrectly recites respondent's response to the NDC was due no later than May 30, 2006. The court deems the error (see Rules Proc. of State Bar, rule 200(a)(2)) harmless in light of the fact that the time for respondent's to file his response was effectively extended until July 12, 2006 by the filing and service of motion for entry of default (Rules Proc. of State Bar, rules 64(a) and 200(a)(4), (c)).

[3] With respect to this copy of the court's order being returned to the court as "unclaimed," the court notes the long standing legal principle that one cannot willfully avoid receiving notice and then claim that he or she had none. (E.g., *Simmons Creek Coal Co. v. Doran* (1892) 142 U.S. 417, 437 [one " 'has no right to shut his eyes or his ears to the inlet of information, and then say he is . . . without notice' "].)

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 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.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on October 21, 1994, and has been a member of the State Bar since that time.

B. Misconduct

In March 2005, respondent (who lived in Blue Jay, California) began working on an occasional, part-time basis for Attorney Ellen Winterbottom. Winterbottom (who lived in Crestline, California) had law offices in Newport Beach and Laguna Beach, California.

Attorney Winterbottom was scheduled to have major surgery in early July 2005. In light of that fact, she and respondent agreed that respondent would take on a more active role in her law practice. By drafting, signing, and filing pleadings and by speaking to and corresponding with opposing counsel, respondent had previously appeared as cocounsel with Winterbottom (1) in a complex litigation matter that was pending in the Los Angeles Superior Court (hereafter the state court case) and (2) in a qui tam action that was pending in the United States District Court for the Northern District of California (hereafter the federal court case). In the federal court case, Winterbottom and respondent represented Patricia Westerfield.

On June 24, 2005, respondent and Attorney Winterbottom met at Winterbottom's home. At that meeting, respondent agreed (1) to finalize and file a motion to withdraw as counsel that Winterbottom had drafted in the state court case and (2) to prepare an amended complaint for their client Westerfield in the federal court case.

At the June 24, 2005, meeting, Attorney Winterbottom paid respondent $400[4] and gave him her copies of (1) John Boese, Civil False Claims and Qui Tam Actions (which is a two-volume treatise with a value of more than $1,000) and (2) a law book that is authored by Claire Sylvia. It was agreed that respondent would use these three books in preparing the amended complaint in the federal court case and return them to Winterbottom. Finally, at that meeting, respondent and Winterbottom agreed to meet again at Winterbottom's home on June 29, 2005, for the purpose of reviewing the motion to withdraw and the amended compliant. Respondent, however, did not return to Winterbottom's home on June 29, 2005.

In early July 2005, client Westerfield telephoned respondent on several occasions to obtain information about the status of her case (i.e., the federal court case) and to remind him that the amended complaint had to be filed no later than July 28, 2005. On at least one of those several occasions, Westerfield left a detailed message for respondent in which she requested information about the status of her case and asked respondent to return her phone call. Respondent, however, did not return any of Westerfield's several calls.

On July 9, 2005, upon her discharge from the hospital, Attorney Winterbottom sent respondent an e-mail message in which she asked respondent, inter alia, about the status of the amended complaint in the federal court case and reminded him that, even though he had not formally associated into that case as cocounsel, his name was on all of the most recent correspondence and pleadings in that case. In that e-mail, Winterbottom also asked respondent why he did not return to her home on June 29, 2005, to review the motion to withdraw and the amended complaint. Respondent, however, failed to respond to Winterbottom's e-mail. In fact, respondent never contacted Winterbottom after June 24, 2005. Nor did respondent ever contact

[4] The record does not indicate, much less establish, why Attorney Winterbottom gave respondent this $400.

client Westerfield. Nor did respondent perform any work on the federal court case after the June 24, 2005, meeting at Winterbottom's home.

On November 22, 2005, and then again on January 3, 2006, a State Bar investigator mailed, to respondent at his official address, a letter regarding the State Bar investigation into the complaints that Attorney Winterbottom filed against him. In those two letters, the investigator asked respondent to provide the State Bar with a written response to specific allegations of misconduct no later than December 6, 2005, and January 13, 2006, respectively. Even though respondent actually received those two letters, he failed to respond to either of them. In addition, respondent failed to otherwise participate in the State Bar's disciplinary investigation into Winterbottom's complaints.

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

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 not meeting with Attorney Winterbottom on June 29, 2005, not responding to any of Westerfield's several telephone calls, not replying to Winterbottom's July 9, 2005, e-mail, and not preparing an amended complaint in the federal court case. At a minimum, respondent's failure to competently perform legal services was reckless and repeated.

The record clearly establishes that respondent did not perform any work on the federal court case after June 24, 2005. However, the record does not establish whether respondent performed any work on the state court case after that date. Accordingly, in light of the principle that the court must resolve all reasonable doubts in respondent's favor (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1216; *In re Aquino* (1989) 49 Cal.3d 1122, 1130 [when equally reasonable

inferences may be drawn from a fact, the court must accept the inference that leads to a conclusion of innocence]), the court must find that respondent earned the $400 that Attorney Winterbottom gave him on June 24, 2005, for work he performed on the state court case and for meeting with her at her home on June 24, 2005.[5] Accordingly, there is no basis on which to require respondent to make restitution of $400 in fees.

Count 2: Act of Moral Turpitude (§ 6106)

In count 2, the State Bar charges that respondent willfully violated section 6106 (which proscribes acts involving moral turpitude, dishonesty, or corruption) because he purportedly converted the three law books that Attorney Winterbottom loaned him on June 24, 2005. However, the record fails to establish, by clear and convincing evidence, that respondent converted the books because there is no evidence indicating much less establishing that Winterbottom requested that respondent return the books to her. Such a request is required to establish conversion by one who lawfully obtained possession of property from its owner. (See *Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609, and cases there cited ["Unjustified refusal to turn over possession on demand constitutes conversion . . . where possession by the withholder was originally obtained lawfully . . . ."].) Accordingly, count 2 is dismissed with prejudice, and there is no basis on which to require respondent to make restitution of $1,000 for the books.

Count 3: Failure to Cooperate with State Bar (§ 6068, subd. (i))

In count 3, 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,

[5] In addition, the court notes that the State Bar did not charge respondent with failing to refund unearned fees (Rules Prof. Conduct, rule 3-700(D)(2)).

subdivision (i) by failing to respond to the State Bar investigator's November 22, 2005, and January 3, 2006, letters and by failing to otherwise participate in the State Bar's disciplinary investigation of Attorney Winterbottom's complaints.

IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravating Circumstances

1. Multiple Acts of Misconduct

The fact that respondent has been found culpable on two 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

Contrary to the State Bar's contentions, the record fails to establish, by clear and convincing evidence, any significant client harm or any indifference towards rectification aggravation.

B. Mitigating Circumstances

There is no clear and convincing evidence of any mitigating circumstances.

V. DISCUSSION ON DISCIPLINE

The primary purposes of attorney 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. (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 Ba*r (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylo*r (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In this case, the most severe sanction for respondent's misconduct is found in standard 2.6(a), which states that the culpability of an attorney of a violation of, inter alia, 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."[6] Unfortunately, the generalized language of standard 2.6 provides little guidance. (*In re Morse* (1995) 11 Cal.4th 184, 206.) Accordingly, the court must rely on decision law.

The State Bar cites as relevant *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211; *Harris v. State Bar* (1990) 51 Cal.3d 1082; *In the Matter of Aulakh* (Review

[6] The other relevant standard is standard 2.4(b), which states that "Culpability of a member of wilfully failing to perform services in an individual matter or matters not demonstrating a pattern of misconduct or culpability of a member of wilfully failing to communicate with a client shall result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client."

Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690; and *Wren v. State Bar*(1983) 34 Cal.3d 81. The court finds that Wren is the most applicable and that is supports recommending two years' stayed suspension and forty-five days' actual suspension under.

In *Wren v. State Bar*, 34 Cal.3d 81, the Supreme Court placed the attorney on two years' stayed suspension, two years' probation, and 45 days' actual suspension because, in a single client matter, he failed to communicate, misrepresented the status of a case to the client, failed and refused to perform, and gave false and misleading testimony in the State Bar Court. Even though the misconduct was greater in *Wren* than in the present proceeding, there was substantial mitigation in *Wren* (the attorney did not have a prior record of discipline in 22 years of practice) while there is none in the present proceeding. Thus, the court concludes that it is appropriate to recommend that the discipline imposed on the attorney in *Wren* be imposed on respondent.

VI. DISCIPLINE RECOMMENDATION

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

The court also recommends that, if the period of Bramlett's actual suspension in this matter extends for 90 or more days, he be required to comply with California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[7]

[7] Bramlett 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.)

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: October 31, 2006.

ROBERT M. TALCOTT
Judge of the State Bar Court