

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 05-O-04079-LMA
)	(06-O-10664; 06-O-12682)
SCOTT MICHAEL KENDALL)	07-O-12385 (Cons.)
)	
Member No. 166156)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND
A Member of the State Bar.)	INVOLUNTARY INACTIVE
<hr style="width: 40%; margin-left: 0;"/>		ENROLLMENT ORDER

I. Introduction

In this disciplinary matter, Manuel Jimenez appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Scott Michael Kendall was represented by counsel Jonathan I. Arons until June 22, 2009 and then represented himself.

After considering the evidence and the law, the court recommends, among other things, that respondent be disbarred.

II. Significant Procedural History

Respondent was admitted to the practice of law in California on December 3, 1993, and has been a member of the State Bar at all times since.

The Notice of Disciplinary Charges (NDC) was filed on September 6, 2007, and was properly served on respondent on that same date at his official membership records address, by

certified mail, return receipt requested, as provided in Business and Professions Code section¹ 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.)

The NDC was filed on October 27, 2008, and was properly served on respondent on that same date at his official address, by certified mail, return receipt requested.

Responses to the two NDCs were filed on December 8, 2008.

The two cases were consolidated on December 15, 2008.

On June 10, 2009, respondent, who was still represented by counsel, tendered his resignation with charges pending from the State Bar. (State Bar Court case no. 09-Q-12954.)

On June 16, 2009, the cases were abated because respondent tendered his resignation.

Respondent substituted himself as counsel in these proceedings on June 22, 2009.

By order filed on December 1, 2010, in no. S177770, the Supreme Court declined to accept the voluntary tender of respondent's resignation after the State Bar's Board of Governors filed a report on July 23, 2010, reconsidering its original recommendation for disposition to the Supreme Court.

On December 27, 2010, the State Bar Court properly served respondent at his official address by regular mail with a notice of a status conference to be held on January 18, 2011.

Respondent did not appear at the status conference.

On January 18, 2011, the State Bar Court filed and properly served on respondent at his official address, with a courtesy copy to his former counsel an order to show cause (OSC) why his answers should not be stricken and his default entered. Respondent's response to the OSC was to be filed and served on or before February 11, 2011. An in-person status conference was

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

also scheduled on February 28, 2011.

Respondent did not file a response to the OSC nor did he appear at the February 28, 2011, status conference. Accordingly, his responses to the NDCs were stricken and his default was entered by order filed February 28, 2011. He was also enrolled inactive effective seven days after service of the order. The order was filed and properly served on him at his official address on that same date by certified mail, return receipt requested.

The State Bar's and the court's efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415.)

The matter was submitted for decision without hearing on March 28, 2011, after the State Bar filed a brief.

III. Findings of Fact and Conclusions of Law

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (§6088; former Rules of Proc. of State Bar², rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

² All further references to Rules of Procedure refer to the Rules of Procedure in effect on January 1, 2011, unless otherwise stated.

A. Case No. 06-O-12682 - The Wisco Matter

Facts

On February 20, 2003, Claro Wisco hired respondent to represent him in a dissolution of marriage proceeding. (*Emma Wisco v. Claro Wisco*, Sacramento Superior Court case no. 02FL08017.) The next day, respondent filed a response in the case and performed some services for Wisco.

In August 2004, the parties agreed to a final settlement of the dissolution of marriage action with reserved issues. Respondent prepared a marital settlement agreement for the parties. He had Wisco sign it and then, in September 2004, sent it to attorney David Ndudim, Mrs. Wisco's counsel.

Ndudim did not return the agreement despite several telephone calls from respondent asking him to do so. Respondent, however, did not take any action to enforce the settlement or protect Wisco's interests.

In November 2004, Mrs. Wisco substituted attorney Cheri Simmons in place of Ndudim. On December 6, 2004, respondent sent Simmons a new marital settlement agreement for her and her client's signature. Neither Mrs. Wisco nor her new attorney returned the new settlement agreement. Between December 6, 2004 and April 27, 2005, respondent did not perform any services for Wisco and did not complete this matter, including not attempting to enforce the settlement agreement.

On April 27, 2005, almost five months after sending Simmons the new marital settlement agreement, respondent filed a motion to enforce the settlement and enter judgment. On July 1, 2005, respondent and Simmons renegotiated the settlement agreement. Respondent agreed to prepare a revised marital settlement agreement.

On September 2, 2005, respondent sent Simmons the signed revised marital settlement agreement with instructions to file it. However, respondent did not prepare or file a status-only judgment as required when there is a settlement with reserved issues.

Simmons filed the revised marital settlement agreement and judgment. On October 28, 2005, the court clerk rejected and returned the judgment to Simmons because a status judgment had not been prepared.³ On November 4, 2005, Simmons faxed the clerk's letter rejecting the judgment to respondent and asked him to draft a status-only judgment. Although respondent received this fax, he did not inform his client that the court rejected the judgment.

Respondent did not promptly prepare the status-only judgment. On December 21, 2005, 47 days after learning that the court had rejected the judgment, he sent Simmons a status-only judgment for filing. However, he did not include a notice of entry of status-only judgment and a stipulation for nunc pro tunc order for status only or a declaration showing good cause for a nunc pro tunc order. On February 14, 2006, the clerk's office rejected the status-only judgment and the entry of judgment because the aforementioned documents were not submitted. In mid-February 2006, respondent received notice that the court rejected the status-only judgment and the revised judgment but he did not tell Wisco about it.

After December 21, 2005, respondent did not communicate with Wisco or inform him of the status of his matter, despite Wisco's numerous requests. He did not inform Wisco that the court rejected the judgments on October 28, 2005, and February 14, 2006.

Wisco telephoned respondent's office on January 19, 2006 because opposing counsel had informed him that the final decree had not been filed with the court. Respondent made telephone appointments with Wisco for January 26 and February 2, 2006, but respondent did not answer when Wisco telephoned for these appointments. Wisco left telephone messages for respondent

³ A judgment on reserved issues cannot be entered until after a status-only judgment has been entered by the court.

on January 26 and 31 and February 2, 2006 asking respondent to contact him about the status of his case. Although respondent received the messages, he did not contact Wisco or provide him with information on the status of his case.

Wisco also sent respondent a letter on February 6, 2006 by certified mail to his official address asking respondent to contact him and provide him with the status of his case.

Respondent received the letter, but did not contact or communicate with Wisco or inform him of the status of his matter.

After February 16, 2006, respondent and Simmons filed the appropriate documents in this matter. On March 3, 2006, the court filed a notice of entry of judgment. Subsequently, respondent received notice of the entry of judgment, but did not tell Wisco about it.

Conclusions of Law

1. Count 1A – (§6068, subd. (m) [Failure to Communicate])

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

By not returning Wisco's telephone calls to responding to his letter asking respondent to communicate with him and provide him with the status of his case; by not informing Wisco that the court had rejected two requests for entry of judgment; and by not telling him that the court filed and entered a final judgment of divorce and that his divorce was complete, respondent did not respond promptly to Wisco's reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services or keep him reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in wilful violation of section 6068, subdivision (m).

2. Count 1B – (Rule 3-110(A) [Failure to Perform Competently])

Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently.

By not taking any action for at least two months when Ndudim did not return the marital settlement agreement or for almost five additional months when Simons did not return the marital settlement agreement; and by not promptly preparing and filing a status-only judgment and obtaining a final judgment in this matter, respondent intentionally, recklessly, or repeatedly did not perform legal services competently in wilful violation of rule 3-110(A).

B. Case No. 06-O-10664 - The Flynt Matter

Facts

In early 2003, James Flynt hired Aames Paralegal Clinics (Aames) to assist him in filing for divorce. Aames Paralegal Clinic prepared a marital settlement agreement and escrow settlement statement which Flynt and his ex-wife signed.

On February 4, 2003, Flynt filed a petition for dissolution of marriage. (*James G. Flynt v. Teena Marie Flynt*, Sacramento Superior Court, case no. 03FL00702.)

On February 11, 2003, respondent met with Flynt regarding his divorce, reviewed the documents Aames had prepared and told him that he could assist with the property settlement.

On March 20, 2003, Flynt hired respondent to represent him in the divorce action and signed a written fee agreement.

On April 1, 2003, respondent filed a substitution of attorney form substituting himself in as Flynt's attorney and an amended petition for dissolution of marriage.

Attorney Terri D. Newman represented Ms. Flynt in this matter.

On August 2, 2004, Newman served and respondent later received a demand

for production of documents and a request to answer form interrogatories. The discovery responses were due by September 5, 2004. Respondent did not serve or provide Newman with the discovery responses.

On September 9, 2004, Newman sent and respondent later received a letter demanding that the discovery responses be provided within 10 days or she would file a motion to compel. He did not respond to Newman's letter provide the discovery responses.

On October 21, 2004, Newman filed and served and respondent received a motion to compel and request for sanctions. On November 18, 2004, respondent filed and served his response to the motion. The response indicated that he did not consent to the order Newman sought but did not explain why there was no response to the discovery. Respondent also did not provide the requested interrogatory and document production responses or documents.

Respondent did not perform any other services for or on behalf of Flynt.

On November 22, 2004, the court granted Newman's motion and ordered sanctions against Flynt for not responding to discovery and ordered that he do so by December 10, 2004. The hearing was continued to December 13, 2004. Respondent received notice of this order but did not provide the documents demanded and the responses to the interrogatories.

Respondent did not appear at the December 13 hearing. The court found that no documents or answers or responses were provided. The court granted Newman's motion for issue sanctions, ordering that Flynt was precluded from presenting evidence at trial regarding the existence, characterization, and/or value of property. It also precluded him from presenting evidence concerning income or other factors regarding spousal support. The order was filed on December 13, 2004. Respondent received it.

On January 26, 2005, Newman sent to respondent at his official address a letter enclosing the findings and order after hearing that she had prepared for the court. Respondent received the letter and enclosures. He did not inform Flynt about the order granting issue sanctions.

When Flynt telephoned respondent on January 5, 2005, respondent's secretary told him that respondent was no longer representing him. Respondent refused to speak to Flynt. Respondent had not previously informed Flynt that he would no longer represent him. He did not obtain Flynt's consent to the withdrawal or file a motion to withdraw or obtain the court's permission to withdraw as Flynt's attorney. Respondent thereafter performed no services for Flynt although he was still Flynt's attorney of record.

On February 22, 2005, the court filed the findings and order granting the issue sanctions against respondent and his client. Respondent received notice of this order but he did not inform Flynt about it.

Respondent had received notice of the March 10, 2005, trial date but neither he nor his client appeared at trial. He did not advise Flynt about the trial date. At the trial, the court granted the requests in Ms. Flynt's statement of issues.

On April 5, 2005, the court filed a notice of entry of judgment in Flynt's matter and served respondent at his official address. Respondent received it. On April 5, 2005, Newman served respondent with the judgment which he also received. Respondent did not tell Flynt about the judgment or the entry of judgment.

On July 11, 2005, Newman filed and served a motion to garnish respondent's wages. Respondent received it with notice of its hearing date. He did not notify Flynt of the hearing, file a response to the motion or appear on Flynt's behalf.

Neither respondent nor Flynt appeared at the August 10, 2005⁴, hearing on the motion to garnish Flynt's wages. The court ordered a wage garnishment of \$75 per month against Flynt. On August 10, 2005, respondent was served with the findings and order garnishing Flynt's wages for \$75 per month. Although respondent received the order, he did not tell Flynt about it.

On September 9, 2005, respondent filed a notice of withdrawal of attorney of record.

After November 18, 2004, respondent, in effect, withdrew from representing Flynt without advising him or obtaining his consent or court permission to do so as required by the rules of the court. Respondent remained the attorney of record in Flynt's matter until September 9, 2005.⁵

Despite Flynt's numerous attempts to contact him, respondent did not communicate with him after November 2004. He did not inform Flynt of the order compelling discovery response or of the order granting issue sanctions, or of the trial, or of the motion for garnishment of his wages, or of the order garnishing his wages or of the entry of judgment in this matter.

Conclusions of Law

1. Count 2A – (Rule 3-110(A) [Failure to Perform Competently])

By not responding to Newman's discovery requests or complying with the court's November 27, 2004 order to provide the discovery responses and documents; by not appearing at the December 13, 2004 hearing, resulting in issue of sanctions against Flynt; by not appearing for trial on March 10, 2005 without properly withdrawing from the case; by not responding to the wage garnishment motion; and by not appearing at the August 10, 2005 hearing, resulting in

⁴ The NDC sets forth two different dates, July 11 and August 10, 2005, as the date for the motion hearing. (NDC filed September 6, 2007, 9:6-16.) From the context, it appears that the hearing date was August 10, 2005.

⁵ The NDC sets forth two different dates, September 9 and 14, 2005, as the date respondent filed a notice of withdrawal of attorney of record. (NDC filed September 6, 2007, 9:17-18 and 10:13-14.) This is a minor error as the specific date is not an issue.

the garnishment of Flynt's wages, respondent intentionally, recklessly, or repeatedly did not perform legal services competently in wilful violation of rule 3-110(A).

2. Count 2B – (Rule 3-700(A)(1) [Withdrawal Without Tribunal's Permission])

Rule 3-700(A)(1) provides that, if permission for termination of employment is required by the rules of a tribunal, an attorney shall not withdraw from employment in a proceeding before that tribunal without obtaining its permission.

Although the tribunal's rules required him to obtain permission to withdraw from representation, respondent withdrew from employment in a pending matter without obtaining its permission. In so doing, he wilfully violated rule 3-700(A)(1).

3. Count 2C – (Rule 3-700(A)(2)) [Improper Withdrawal from Representation]

Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until he has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of a client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) and with other applicable laws and rules.

Although respondent's secretary told Flynt that respondent was no longer representing him, respondent did not take reasonable steps to avoid reasonably foreseeable prejudice to the client in wilful violation of rule 3-700(A)(2). His inaction after January 2005 prejudiced Flynt because an order for issue sanction was entered against him; trial date was sent and was not attended; judgment was entered against him resulting in the granting of a motion for wage garnishment.

4. Count 2D – (§6068, subd. (m) [Failure to Communicate])

By not communicating with Flynt despite his numerous attempts to contact respondent; and by not informing Flynt of the orders compelling discovery responses, granting issue sanctions, setting the trial date, granting the wage garnishment (and motion seeking same) and of

the entry of judgment , respondent did not respond promptly to reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services or keep Flynt reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in wilful violation of section 6068, subdivision (m).

C. Case No. 05-O-04079 - The Licciardello Matter

Facts

Theresa Constance Licciardello hired respondent in early 1999 to represent her in a personal injury matter. On April 29, 1999, respondent filed an action on her behalf. (*Theresa Constance Licciardello v. Jerry Wallace Fowler and the County of Sacramento*, El Dorado Superior Court, case no. PV4974.)

On July 13, 2001, defendants served on respondent at his official address form interrogatories and a request for production of documents. Respondent received them.

There was a trial. The court granted a motion for a new trial. The matter was set for a new trial on February 25, 2003.

At a February 25, 2003, meeting with the parties, the court continued the trial to June 3, 2003 and issued an order that counsel may request answers to previously propounded interrogatories. Respondent was present when the court issued its order. The court also served respondent with the order and he received it.

On March 27, 2003, the defendants, through attorney Demond L. Philson, sent respondent a letter requesting responses to the previously-propounded interrogatories and the production of documents within 10 days, by March 1, 2003. Respondent received the letter but did not tell his client about it.

Respondent did not provide the requested discovery. On April 21, 2003, defendants filed a motion to compel answers to the interrogatories and production of the requested documents as

well as sanctions against plaintiff. Respondent was served at his official address with the motion and he received it but did not tell his client about it nor did he respond to the motion.

On May 19, 2003, the court issued an order directing respondent to answer the interrogatories and produce the requested documents within 10 days. The court also ordered respondent's client to pay sanctions of \$850. Respondent was served with the order at his official address and he received it but did not tell his client about it.

Respondent did not comply with the discovery order. He did not produce the documents requested and respond to the interrogatories. He also did not have his client pay the monetary sanctions.

On June 16, 2003, the defendants filed a motion requesting sanctions against plaintiff for not obeying the discovery order. Respondent was served with the motion at his official address. He received it but did not tell his client about it or file a response to the motion.

On July 28, 2003, the court issued an order granting in part and denying in part the defendant's June 16, 2003 motion. The court ordered respondent's client to answer the interrogatories and produce the documents requested within 10 days. It also ordered respondent's client to pay \$1,425 in additional monetary sanctions within ten days. Respondent was served with this order and received it but did not inform his client about it.

Respondent did not comply with the order. He did not produce the documents requested or respond to the interrogatories or have his client pay the monetary sanctions.

On August 21, 2003, defendants filed a motion to impose sanctions against plaintiff for failure to obey a discovery order. Respondent was served with this motion at his official address and received it but did not tell his client about it.

Respondent did not file a response within the time limits required by the rules.

On September 26, 2003, respondent filed a declaration asserting that he had provided the discovery responses in 2000. This declaration was not part of any response and the time for filing a response had elapsed with no request for late filing. Further, respondent had an obligation to provide updated responses to the discovery requests, as ordered by the court.

On September 29, 2003 the court continued the hearing on this motion to October 27, 2003. Respondent was present at the October 27 hearing during which the court ordered terminating sanctions, dismissed Licciardello's matter and imposed \$1,425 in monetary sanctions on her. Respondent was served with this court order and received it. He also received the notice of order dismissing the action and imposing sanctions that defendants served on him on December 11, 2003.

On January 23, 2004, attorney Angelo Vitale filed on Licciardello's behalf a motion to set aside dismissal sanction and judgment, alleging respondent's neglect. On March 11, 2004, the court denied the motion.

On May 17, 2004, the notice of entry of judgment was filed and served on respondent. He received it. On July 12, 2004, respondent appealed the judgment for Licciardello.

On August 23, 2005, the Court of Appeals reversed the judgment and set aside the terminating sanctions, finding respondent's neglect as the cause of the noncompliance with the discovery requests and for the subsequent court orders. The court ordered respondent to pay reasonable compensatory legal fees and costs to defendants and their attorneys.

Conclusions of Law

1. Count 3A – (Rule 3-110(A) [Failure to Perform Competently])

By not responding to the defendant's discovery requests or to the motions to compel discovery and impose sanctions on respondent's client, respondent intentionally, recklessly, or repeatedly did not perform legal services competently in wilful violation of rule 3-110(A).

2. Count 3B – (§6068, subd. (m) [Failure to Communicate])

By not advising Licciardello about the requests for discovery, the motions to compel and impose sanctions and two of the orders imposing sanctions, respondent did not keep his client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in wilful violation of section 6068, subdivision (m).

D. Case No. 07-O-12385 – The Knudsen-Heryford Matter

Facts

On May 1, 2002, Brian Knudsen-Heryford filed a petition to establish parental relationship with his son, J.O. (*Knudsen-Heryford v. Owens*, Sacramento County Superior Court case no. 02FL02994.) J.O.'s mother is Shayna Owens.

On June 14, 2002, the court issued a custody order which granted joint custody of J.O. to Knudsen-Heryford and Owens, with physical custody to Owens and visitation every Tuesday and Saturday to Knudsen-Heryford.

Before August 14, 2004, Knudsen-Heryford and Owens agreed that he would keep J.O. until August 16, 2004 and return him to Owens on that same date.

Before August 16, 2004, Knudsen-Heryford learned from Owens' family that she was back on drugs and had stolen some of her father's checks and his automobile. Knudsen-Heryford decided to seek custody of J.O. because he believed she would flee with J.O. to evade criminal charges.

On August 16, 2004, Knudsen-Heryford hired respondent to represent him in seeking a post-judgment modification of child custody, visitation and support. His then-girlfriend, Ashley Emery, also attended the meeting with respondent.

On that same date, Knudsen-Heryford's mother, Carol Heryford (Heryford), paid respondent \$3,000 in advanced fees for his services. She paid an additional \$500 on October 20, 2004; \$250 on February 1, 2005; and \$200 on May 23, 2005, for a total of \$3,950 in advanced fees.

As of August 16, 2004, respondent was aware of the custody order and the agreement that J.O. would be returned to Owens on that same date.

At the August 16, 2004 meeting, respondent informed Knudsen-Heryford that he would file an application requesting an ex parte hearing on August 18, 2004 to seek full custody of J.O. In the presence of Heryford and Emery, respondent advised him to keep J.O. pending the outcome of the ex parte hearing in violation of the custody order. He did not advise Knudsen-Heryford of the possible consequences for violating the custody order.

On August 16, 2004, Knudsen-Heryford advised Owens about the August 18 ex parte hearing and that he would keep J.O. pending the outcome of the ex parte hearing.

On August 17, 2004, respondent called Owens to give her notice of the date, time and location of the ex parte hearing and that Knudsen-Heryford would keep J.O. pending the outcome of the ex parte hearing.

On August 17, 2004, respondent called the Butte County Sheriff to advise that Knudsen-Heryford would keep J.O. pending the outcome of the ex parte hearing.

Before August 18, 2004, Owens filed a police report with the Roseville Police Department because Knudsen-Heryford did not return J.O. in violation of the custody order.

On August 18, 2004, respondent filed the application for the ex parte hearing and appeared at the ex parte hearing. Knudsen-Heryford, Owens, Heryford and Emery were also present. Before the ex parte hearing began, Knudsen-Heryford was arrested by the Roseville Police Department for child abduction.

At the time of his arrest, respondent promised to defend Knudsen-Heryford in the criminal matter, free of charge, and personally pay for his bail.

On August 18, 2004, respondent paid Knudsen-Heryford's bail in the amount of \$1,615. On the same date, respondent advised Knudsen-Heryford that he would file a civil suit against the Roseville Police Department for the arrest and would keep track of the fees in relation to the criminal matter for the civil suit. Respondent also advised that he would not file the civil suit until one year after the criminal charges were dropped.

There is no written fee agreement between respondent and Knudsen-Heryford for respondent's representation in the criminal matter.

On August 18, 2004, the court issued an order denying Knudsen-Heryford's ex parte application on the merits.

On September 3, 2004, the Placer County District Attorney's Office filed a specified misdemeanor complaint against Knudsen-Heryford. (*People v. Knudsen-Heryford*, Placer County Superior Court case no. 62-045877.) The two-count complaint alleged that Knudsen-Heryford committed child stealing on August 18, 2004, in violation of California Penal Code section 278, and disobeyed a court order on August 15, 2004, in violation of California Penal Code section 166, subdivision (a)(4).

Hearings in the criminal matter were held on September 8 and 29, October 13, November 3 and December 8, 2004. Respondent appeared at the hearings on September 8 and 29, and December 8, 2004. Respondent's colleague, attorney Jonathan Huber, appeared at the October 13 and November 3, 2004, hearings.

On November 3, 2004, the court issued a temporary restraining order (TRO) prohibiting Knudsen-Heryford from contact with the minor child, subject to court-ordered visitation in the *Knudsen-Heryford v. Owens* matter.

On December 8, 2004, the district attorney's office dismissed the charges against Knudsen-Heryford in the interests of justice and the TRO was lifted.

Approximately one year after the charges were dropped, Knudsen-Heryford scheduled an appointment with respondent to discuss the civil suit against the Roseville Police Department. At that meeting, respondent advised him that the case had little value and would pose a huge financial risk to pursue. Upon hearing respondent's assessment, Knudsen-Heryford advised respondent that he would not pay any fees for the work performed on the criminal matter.

Respondent's billing statements to Knudsen-Heryford reflected charges for work performed in the *Knudsen-Heryford v. Owens* and the *People v. Knudsen-Heryford* matters from August 14, 2004, through April 11, 2005. The statements included charges of at least \$2,127.50 in fees for work performed in the criminal matter, plus \$1,615 for Knudsen-Heryford's bail.

The August 31, 2004, statement reflects charges of at least \$77.50 in fees in relation to the criminal matter and \$1,615 for Knudsen-Heryford's bail.

The October 5, 2004, billing statement reflects charges of at least \$1,425 in fees in relation to the criminal matter. Of the \$1,425 billed, respondent charged Knudsen-Heryford \$612.50, at a rate of \$175 per hour for 3.5 hours, for Huber's appearance at the October 13, 2004, hearing. However, Huber submitted a bill to respondent, dated October 13, 2004, charging only \$210, at a rate of \$60 per hour for 3.5 hours for that appearance. Respondent charged Knudsen-Heryford \$402.50 more than Huber charged respondent for attendance at the October 13, 2004 hearing.

The November 1, 2004, billing statement reflects charges of at least \$625 for fees in the criminal case.

In total, respondent charged Knudsen-Heryford at least \$3,742.50 (\$2,127.50 in fees, plus \$1,615 for bail) in relation to the criminal matter.

On May 23, 2007, respondent filed a complaint against Knudsen-Heryford alleging breach of contract for his failure to pay respondent's attorney's fees in the amount of \$9,236.26. (*Kendall v. Knudsen-Heryford*, Sacramento Superior Court case no. 07AM05230.) Included in that amount were \$2,127.50 in fees, plus \$1,615 for bail, charged by respondent in the criminal case.

Conclusions of Law

1. Count 1 - (Rule 3-210) [Advising Violation of Law]

Rule 3-210 of the Rules of Professional Conduct prohibits an attorney from advising the violation of any law, rule or ruling of a tribunal unless he believes in good faith that such law, rule or ruling is invalid. An attorney may take appropriate steps in good faith to test the validity of any law, rule or ruling of a tribunal.

There is clear and convincing evidence that respondent violated rule 3-210 by advising Knudsen-Heryford to keep J.O. pending the outcome of the ex parte hearing which respondent knew violated the custody order without believing in good faith that the law, rule, or ruling was invalid.

2. Count 2 – (Rule 3-110(A) [Failure to Perform Competently])

By advising Knudsen-Heryford to violate the custody order without informing him of the possible consequences for violating it, respondent intentionally, recklessly, or repeatedly did not perform legal services competently in wilful violation of rule 3-110(A).

3. Count 3 – (§6106) [Moral Turpitude]

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106 by charging Knudsen-Heryford at least \$2,127.50 for fees and \$1,615 for bail in the *People v. Knudsen-Heryford* matter after promising to pay the bail and to represent him for free and by charging him \$402.50 more than Huber charged respondent for attendance at the October 13, 2004 hearing in the criminal matter. Accordingly, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

IV. Aggravation and Mitigation

A. Aggravation

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct⁶, std. 1.2(b).)

1. Multiple Acts/Pattern of Misconduct

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

2. Harm to Client/Public/Administration of Justice

Respondent's misconduct significantly harmed clients, the public or the administration of justice. (Std. 1.2(b)(iv).) Flynt was subject to issue sanctions; was not represented or appeared at trial; and his wages were garnished without the opportunity to defend against the order because of respondent's malfeasance. Licciardello was subject to monetary and terminating sanctions. Knudsen-Heryford was arrested and subject to criminal proceedings and then to civil litigation for nonpayment of respondent's attorney fees. In all of these matters, additional court proceedings were required because of respondent's misconduct.

⁶ Further references to standard or std. are to Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct.

3. *Lack of Candor/Cooperation to Victims/State Bar*

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) He has demonstrated his contemptuous attitude toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the court to participate therein, a serious aggravating factor. (Std. 1.2(b)(vi); *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 104, 109.)

B. Mitigation

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors other than the absence of a prior record of discipline over many years of practice prior to the commencement of the misconduct (a little over nine years) is a mitigating factor. (Standard 1.2(e)(i); *In the Matter of Respondent Z* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 85 [approximately nine years of blemish-free practice].)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.3, 2.4(b), 2.6(a) and 2.10 apply in this matter. Standards 2.3 and 2.6(a) recommend the most severe sanctions. Standard 2.3 suggests actual suspension or disbarment for culpability of an act of moral turpitude, fraud, intentional dishonesty or of concealment of a material fact from a court, client or other person, depending on the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the attorney's acts within the practice of law. Standard 2.6(a) recommends suspension or disbarment for violations of sections 6067 and 6068, depending on the gravity of the offense or harm, if any to the victim, with due regard to the purposes of imposing discipline.

The court also considered standard 1.7(c) which indicates that a prior disciplinary record is not a prerequisite for imposing any appropriate sanction, including disbarment.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Respondent has been found culpable, in four client matters, of violating rules 3-110(A) (four counts), 3-210, 3-700(A)(1) and (2) (one count each), as well as sections 6068, subdivision (m) (three counts) and 6106 (one count). In aggravation, the court considered multiple acts of misconduct, harm and lack of candor and cooperation. The sole mitigating factor was a little over nine years of blemish-free practice.

The State Bar recommends, among other things, two years’ actual suspension to remain until respondent paid court-ordered sanctions and complied with standard 1.4(c)(ii).

The court believes that this recommendation is insufficient after balancing respondent's relatively short tenure as an attorney prior to the commencement of the misconduct (a little over nine years) with the severity and duration (about four and a half years) of the misconduct and the magnitude of the aggravating factors, notably his default and the harm to clients and the administration of justice.

The court found *McMorris v. State Bar* (1983) 35 Cal.3d 77 instructive. In *McMorris*, the attorney was disbarred for habitually disregarding his clients' interests. In seven matters for five clients over a period of nine years, Respondent McMorris was found culpable of failing to perform and to communicate, improperly withdrawing from representation and committing an act of moral turpitude in violation of section 6106. Client harm was found in aggravation, including the entry of a default judgment and the need for the client to retain other counsel to have it set aside. He did not participate in the discipline hearing and had three prior instances of discipline.

The Supreme Court noted: "As we have repeatedly stated, willful failure to perform legal services for which an attorney has been retained in itself warrants disciplinary action, constituting a breach of the good faith and fiduciary duty owed by the attorney to his clients. [Citations.]' (Citation omitted.) Moreover, habitual disregard by an attorney of the interests of his or her clients combined with failure to communicate with such clients constitute acts of moral turpitude justifying disbarment. (Citations omitted.)" (*McMorris v. State Bar, supra*, 35 Cal.3d at p. 85.)

In determining its recommended degree of discipline, the Supreme Court considered respondent's prior disciplinary record and the harm resulting from his misconduct.

"Significantly, in examining the combined record of this disciplinary proceeding and [respondent's] prior discipline, we are confronted not by isolated or uncharacteristic acts but by 'a

continuing course of serious professional misconduct extending over a period of several years.' (Citation omitted.) We are therefore concerned with what appears to have become an habitual course of misconduct. We believe that the risk of petitioner repeating this misconduct would be considerable if he were permitted to continue in practice. Citation omitted.) As [respondent] has previously demonstrated, the public and the legal profession would not be sufficiently protected if we merely, once again, suspended [him] from the practice of law. (Citation omitted.)" (*McMorris v. State Bar*, *supra*, 35 Cal.3d at p. 85.) Although the extent of the misconduct and the prior disciplinary record distinguish the present case and *McMorris*, the Supreme Court's reasoning is equally applicable.

The serious and unexplained nature of the misconduct and the lack of participation in these proceedings suggest that respondent is capable of future wrongdoing and raise concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. Having considered the evidence, the standards and other relevant law, the court believes that disbarment is the only adequate means of protecting the public from further wrongdoing by respondent. Accordingly, the court so recommends.

VI. Recommendations

A. Disbarment

The court recommends that respondent **Scott Michael Kendall**, be disbarred from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

B. Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with rule 9.20, paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in

paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.

C. Costs

It is 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.

VII. Order of Involuntary Inactive Enrollment

It is ordered that respondent **Scott Michael Kendall**, be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4) and *new* rule 5.111(D)(1) of the Rules of Procedure of the State Bar, effective January 1, 2011. The inactive enrollment will become effective three days from the date of service of this order and will terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: July ____, 2011

LUCY ARMENDARIZ
Judge of the State Bar Court