STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **RICHARD ERIC HOVE,** **Member No. 53780,** A Member of the State Bar.	Case No.: **05-O-04300-LMA** **DECISION & ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. INTRODUCTION

In this contested, original disciplinary proceeding, respondent **RICHARD ERIC HOVE** is charged with six counts of professional misconduct in two client matters and with one count of failing to cooperate with State Bar disciplinary investigations. The court finds, by clear and convincing evidence, that respondent is culpable on the following five counts of misconduct: two counts of accepting fees from a non-client, one count of failing to account for advanced fees, one count of improper withdrawal and client abandonment, and one count of failing to cooperate in State Bar disciplinary proceedings. The court dismisses the two remaining counts with prejudice.

For the reasons stated *post*, the court recommends that respondent be **DISBARRED**.

II. PERTINENT PROCEDURAL HISTORY

The Office of Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a notice of disciplinary charges (NDC) on January 3, 2007. On March 14,

2007, respondent filed a response to the NDC. The State Bar was represented by Deputy Trial Counsel Manuel Jimenez. Respondent represented himself.

The trial was on August 28 and 29, 2007. On September 10, 2007, the State Bar filed a posttrial motion to augment the record with a copy of respondent's prior record of discipline. The court granted the motion to augment and took case under submission for decision on September 26, 2007.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Many of the court's findings of fact are based in large part on credibility determinations. The court finds that respondent completely lacked credibility whenever he testified to matters pertaining to not receiving phone calls and/or messages. He is also not credible when he testified that he never received various letters that the State Bar mailed to his office. Moreover, respondent's testimony was, in many instances, inconsistent with the clearly more credible and reliable evidence offered by the State Bar.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 13, 1972, and since that time, has been a member of the State Bar of California.

B. Tomlin Client Matter

Clarence Tomlin (Mr. Tomlin) was charged with two murders in *People v. Clarence Tomlin,* Santa Clara Superior Court case number C8950160.[1] One of the charges involved a murder in a different California county. In March 2004, Aaron Tomlin (Aaron), who is one of Mr. Tomlin's sons, retained respondent to represent Mr. Tomlin. Respondent orally agreed to represent Mr. Tomlin for $250,000 if respondent had to defend both murder charges at trial or

[1] Clarence Tomlin remains incarcerated in a California county jail awaiting trial on the two murders.

$160,000 if respondent was successful in severing the two cases. Even though Mr. Tomlin authorized that fee agreement, it was never replaced with a written fee agreement.

Thereafter, Aaron or Rusty Tomlin (Rusty), who is another one of Mr. Tomlin's sons, or both made four or five cash payments totaling $160,000 to respondent. Respondent did not provide receipts at the time those four or five cash payments were made. In fact, respondent did not provide receipts for the $160,000 until after he had withdrawn from representing Mr. Tomlin and only after Aaron demanded them.[2]

Even though Mr. Tomlin directed Aaron to retain respondent to represent him, there was no written fee agreement. Further, even though Mr. Tomlin was aware that Aaron or Rusty or both of them paid respondent $160,000 in attorney's fees for representing him (i.e., Mr. Tomlin), respondent never obtained Mr. Tomlin's informed written consent to the arrangement.

Between March 2004 and April 2005, respondent made five court appearances on behalf of Mr. Tomlin. On each of those occasions, respondent obtained a continuance of Mr. Tomlin's plea hearing.

In about March 2005, respondent learned that another one of his clients had been questioned about and was another suspect in the same two murders with which Mr. Tomlin was charged. Then, on April 7, 2005, respondent filed a motion to withdraw as Mr. Tomlin's attorney of record, asserting a conflict of interest that necessitated his withdrawal. On April 21, 2005, the superior court granted respondent's motion to withdraw and continued Mr. Tomlin's plea hearing yet again.

After April 21, 2005, Aaron repeatedly telephoned respondent and left messages for respondent asking him to account for the $160,000 in fees and to refund the unearned portion of those fees. In addition, Aaron made the same requests to respondent in person on multiple

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[2] One of the receipts states: "I hereby acknowledge under *duress* the receipt of one hundred sixty thousand dollars from Arron [sic] and Rusty Tomlin." (Exhibit 2, italics added.)

occasions. Respondent, however, neither returned any of Aaron's phone calls nor provided an accounting of the $160,000 in fees until April 25, 2007, when respondent appeared at a fee arbitration hearing. (Exhibit 1)

After it permitted respondent to withdraw, the superior court appointed Attorney Patrick H. Kelly to represent Mr. Tomlin. Attorney Kelly was Mr. Tomlin's court appointed counsel when Aaron retained respondent. On June 26, 2006, Attorney Kelly mailed to respondent at his official State Bar Membership Records address a letter asking respondent to give him Mr. Tomlin's client file. And, on August 8, 2006, respondent personally delivered Mr. Tomlin's client file to Attorney Kelly's office in San Jose.

Count 1-- Accepting Fees from a Non-Client

In count 1, the State Bar charges that respondent violated Rules of Professional Conduct, rule 3-310(F).[3] To avoid conflicts of interest and to prevent interference with the attorney-client relationship, rule 3-310(F) provides, inter alia, that an attorney must not accept compensation for representing a client from someone other than the client unless the attorney first obtains the client's informed written consent.

Respondent never obtained Mr. Tomlin's informed written consent to respondent's accepting payment of his fees for representing Mr. Tomlin from either Aaron or Rusty. Thus, the record clearly establishes that respondent willfully violated rule 3-310(F) when he accepted, from Aaron or Rusty or both, the $160,000 in attorney's fees for representing Mr. Tomlin.

Count 2-- Failure to Account for Client Funds

In count 2, the State Bar charges that respondent violated rule 4-100(B)(3), which requires, inter alia, that an attorney maintain records of all client funds coming into the attorney's possession and to render appropriate accounts to the client regarding those funds. Even though

[3] Unless otherwise noted, all further references to rules are to these Rules of Professional Conduct of the State Bar of California.

flat fees and hourly fees paid in advance to an attorney are *not* "client funds" coming into an attorney's possession and are *not* required to be deposited into a client trust account (Handbook on Client Trust Accounting for California Attorneys (Cal. State Bar 2003) p. 14; see also Vapnek, Tuft, Peck, and Wiener, Cal. Practice Guide: Professional Responsibility (The Rutter Group) 2007) ¶ 5:279, p. 5-38.2.), the review department has held that attorneys have a duty, under rule 4-100(B)(3), to maintain adequate records of and to account for flat fees and hourly fees paid in advance (*In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757-758).

Moreover, even though it was Aaron (and not respondent's client Mr. Tomlin) who requested an accounting of the $160,000 in fees, respondent was required to account to Aaron. (See *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 949, 952 [attorney was required to account to the client's mother-in-law for $5,800 in advanced fees she paid the attorney to represent her daughter-in-law].) Of course, without Mr. Tomlin's express authorization, respondent could not disclose any privileged information in such an accounting to Aaron. (Bus. & Prof. Code, § 6068, subd. (e)(1); rule 3-310(F)(2).)

Despite Aaron's numerous requests by telephone and in person beginning in early 2005 that respondent account for the $160,000 in fees and that respondent return any unearned portion of the $160,000, respondent never returned Aaron's telephone calls and failed to account for the fees until the April 25, 2007 fee arbitration hearing. In sum, the record clearly establishes that respondent willfully violated rule 4-100(B)(3) by failing to render an accounting of the $160,000 in fees to Aaron (or Mr. Tomlin) for about two years (between early 2005 and April 25, 2007).

Count 3 -- Failing to Avoid Foreseeable Prejudice After Withdrawal

Rule 3-700(A)(2) requires an attorney, upon termination of employment, to take reasonable steps to avoid reasonably foreseeable prejudice to his client. Such reasonable steps

must, of course, include returning any unearned fee to the client and, at the request of the client, releasing the client's file to the client or the client's new attorney. (Rule 3-700(A)(2)&(D).)

In count 3, the State Bar charges that, after the superior court authorized respondent's withdrawal from employment in April 2005, respondent violated rule 3-700(A)(2) by (1) failing to promptly and fully return Mr. Tomlin's papers and property to him or Attorney Kelly despite a request for them and (2) "failing to refund any portion of the unearned fees, even though he had not earned those fees, his fee agreement was void, and he had not accounted for those fees."

As noted *ante*, Attorney Kelly first requested Mr. Tomlin's client file from respondent in a letter he mailed to respondent on June 26, 2006, and respondent thereafter personally delivered Mr. Tomlin's file to Attorney Kelly's office in San Jose about a month later on August 8, 2006. In this court's view, the record fails to establish, by clear and convincing evidence, that this delay of about one month rises to the level of a willful violation of either rule 3-700(A)(2) or rule 3-700(D)(1). (Cf. *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 958 [violation of rule 3-700(D)(1) was found because, despite several requests from the client and three demand letters from the client's new counsel, the attorney waited at least two months to release the client's file]; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 432-433 [violation of rule 3-700(D)(1) found because, despite two written requests from the client (the first of which clearly stated that the client needed her file for a hearing in case the following week), the attorney waited over six weeks to release the client's file].)

Moreover, contrary to the State Bar's contention, the record does not establish, by clear and convincing evidence, that 2,500 pages of various transcripts were missing from Mr. Tomlin's file when respondent delivered the file to Attorney Kelly's office. In addition, the record fails to establish that respondent did not earn all of the $160,000 in fees in the Tomlin client matter. Nor does the record establish that respondent should have otherwise refunded a

portion of the $160,000 to Aaron, Rusty, or Mr. Tomlin. Count 3 is dismissed with prejudice for want of proof.

C. Smith Client Matter

In late January 2006, Dr. Joy Johnson retained respondent to represent Johnson's 26-year-old son, Aaron Smith, on a driving under the influence charge pending in the Alameda Superior Court and on a related license suspension proceeding before the Department of Motor Vehicles (DMV). Smith was with Johnson when she retained respondent. At the time he was retained, respondent told Johnson and Smith that Smith should not appear at the upcoming initial hearings before the superior court and the DMV.

Respondent orally agreed to represent Smith for $1,500. And Johnson promptly paid respondent $1,000 of that $1,500 fee. There was no written fee agreement. Smith knew that Johnson was paying respondent's fee for representing him in the superior court and before the DMV. But respondent never obtained Smith's informed written consent to respondent's accepting payment of his fees for representing Smith from Johnson.

On at least 12 occasions between mid-February 2006 and July 2006, either Smith or Johnson telephoned respondent at his office or on his cell phone and left messages for him asking that he contact them about Smith's case. Respondent, however, failed to respond to those messages. Moreover, respondent failed to otherwise communicate with either Smith or Johnson except for one instance in which Smith called respondent on respondent's cell and respondent told Smith that he would have to get back to Smith to advise Smith of any new court dates.

After respondent failed to respond to Smith's and Johnson's numerous telephone messages or to otherwise communicate with them in any way, Smith went to respondent's law office in about March 2006 and left, with respondent's office assistant, a note for respondent. In that note, Smith asked respondent to contact him. Respondent, however, failed to do so. Thus,

on the morning of May 22, 2006, Smith and Johnson packed a lunch and went to respondent's office with the intent of waiting there until respondent spoke with them about Smith's cases. After waiting for several hours at respondent's office, an office assistant told Smith and Johnson that respondent was at the Alameda County Superior Courthouse in Oakland. Smith and Johnson then drove to that courthouse, but respondent had left before they got there.

On July 24, 2006, respondent's office assistant telephoned Johnson and told her that there was a hearing set in Smith's case on July 28, 2006. Thereafter, both Smith and Johnson appeared at that hearing, but respondent did not. Instead, respondent sent Attorney Richard Stone to appear for him. Attorney Stone, however, was not a partner or an associate of respondent.

Respondent never told Smith or Johnson that Attorney Stone would be representing Smith at the July 28, 2006, hearing. In fact, they did not learn that Attorney Stone would be representing Smith at the hearing until Attorney Stone introduced himself to Smith at the courthouse shortly before the hearing. Later that same day, Johnson attempted to contact respondent to discuss respondent's failure to appear and represent Smith at the hearing. Johnson left a message for respondent to contact her or Smith to discuss Smith's matter. Respondent again failed to contact either Smith or Johnson.

On July 29, 2006, both Johnson and Smith signed and mailed a certified letter to respondent in which they detailed the numerous times they had tried to speak with him and in which they asked, inter alia, that respondent contact them within two days after receiving the letter to discuss whether he wished to continue as Smith's attorney.[4] Respondent actually received that July 29, 2006, certified letter, but still failed to communicate with Smith or Johnson

[4] In the letter, Johnson and Smith also described how respondent's failure to properly represent Smith caused Smith significant stress and to have his driver's license suspended for at least four months.

in any way. Thus, beginning on August 3, 2006, Smith and Johnson left multiple messages for respondent at his office and on his cell phone's voicemail in which they asked respondent to release Smith's client file to them. Respondent failed to respond to these messages.

On August 9, 2006, Smith and Johnson mailed respondent a second certified letter. In this second letter, they asked respondent to advise them of what efforts he had made to settle Smith's matters and of the date and location of the next scheduled hearing. In addition, they recited the fact that, on August 3, 2006, Johnson had left messages for respondent at his office and on his cell phone asking that he release to them Smith's client file. Respondent actually received the August 9, 2006, certified letter, but still failed to communicate with Smith or Johnson or to release Smith's file.

On August 22, 2006, Smith and Johnson sent respondent yet another certified letter. In this third certified letter, they notified respondent that they were seeking to have him removed as Smith's attorney of record because he failed to respond to their prior letters and that a hearing on whether respondent should be removed was set for August 28, 2006. Respondent actually received this third certified letter, but still failed to contact Smith or Johnson. In addition, respondent failed to appear at the August 28, 2006 hearing on Smith's request to have respondent removed as his attorney. The superior court granted Smith's request to have respondent removed as his attorney and referred Smith to the public defender's office.

Thereafter, on November 7, 2006, Johnson or Smith mailed respondent another letter. In this November 7, 2006 letter, they asked respondent for an accounting with respect to the $1,000 in advanced fess Johnson paid, to refund the unearned portion of the $1,000, and to provide them (or the public defender's office) with Smith's client file. Respondent failed to fulfill any of these requests.

Count 4 -- Accepting Fees from a Non-Client

As noted *ante* in the Tomlin client matter, rule 3-310(F) provides, inter alia, that an attorney must not accept compensation for representing a client from someone other than the client unless the attorney first obtains the client's informed written consent. At a minimum, respondent was required, before accepting the $1,000 payment from Johnson, to inform Smith of the terms of the arrangement and of the potential conflicts and then obtain Smith's informed written consent. Respondent, however, failed to obtain Smith's informed written consent.

In sum, record clearly establishes that respondent willfully violated rule 3-310(F) when he accepted, from Johnson, $1,000 of his fees for representing Smith.

Count 6 -- Improper Withdrawal from Employment[5]

Rule 3-700(A)(2) provides that an attorney must "not withdraw from employment until the [attorney] has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) [by ensuring the return of the client's file and any unearned fees], and complying with applicable laws and rules."

In count 6, the State Bar charges (1) that respondent effectively withdrew from employment by failing to communicate with Smith and by failing to appear at hearings in Smith's cases and (2) that respondent violated rule 3-700(a)(2) because he withdrew without giving Smith notice of his intent to withdraw, because he failed to refund the $1,000 unearned fee, and because he failed to release Smith's client file in accordance with Smith's and Johnson's requests. The court agrees.

When viewed collectively, respondent's refusal to communicate with Smith (or Johnson), respondent's failure to respond to Smith's (and Johnson's) reasonable status inquires,

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[5] Because count 6 most aptly addresses respondent's misconduct, the court addresses count 6 before count 5.

respondent's failure to inform Smith (and Johnson) of significant developments in Smith's cases, and respondent's failure to perform the legal services for which he was retained (e.g., to appear and represent Smith at the hearing before the superior court and the DMV) clearly establish that respondent effectively, if not intentionally, withdrew from representation and abandoned Smith. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 5235-536; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 641.)

What is more, the record clearly establishes that respondent willfully violated rule 3-700(A)(2) because he withdrew from employment and abandoned Smith without giving due notice to Smith, because he failed to release Smith's client file as requested, and because he failed to refund the unearned $1,000 fee.[6]

Count 5 -- Failure to Communicate

In count 5, the State Bar charges that respondent violated Business and Professions Code section 6068, subdivision (m),[7] which provides that attorneys must "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."

According to the State Bar, respondent violated section 6068, subdivision (m) by failing to respond to Smith's and Johnson's numerous telephone calls, letters, and notes and by failing

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[6] "It is common in State Bar matters involving the failure to perform services [or client abandonment] to require as a rehabilitative condition, restitution of unearned fees kept by the attorney and to deem as unearned the entire fee when only preliminary services were performed which did not result in benefit to the client. [Citations.] It is also common to recommend the payment of interest incident to such restitution. [Citation.]" (*In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 231.) "To justify retention of legal fees, respondent was required to perform more than minimal preliminary services of no value to the client. [Citation.]" (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 324.) Here, the record establishes that respondent failed to perform any services of value to Smith. Accordingly, the court will recommend that respondent be required to make restitution of the entire $1,000 fee together with interest thereon from December 7, 2006 (which is 30 days after Smith and Johnson sent their November 7, 2006, letter to respondent asking that he refund the unearned fee).

[7] Unless otherwise stated, all further statutory references are to this code.

to notify Smith and Johnson of significant developments in Smith's case (e.g., the dates and times of the superior court and DMV hearings). However, the court has already relied on these same failures to find respondent culpable, in count 6 *ante*, of improper withdrawal and client abandonment in willful violation of rule 3-700(A)(2). And it would be inappropriate (i.e., duplicative) for the court to rely on the same failures again to find respondent culpable of violating section 6068, subdivision (m). (Cf. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 43.) It is generally inappropriate to find duplicative violations because "the appropriate level of discipline for an act of misconduct does not depend upon how many rules of professional conduct or statutes proscribe the misconduct. [Citation.]" (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 128, 148.) Count 5 is dismissed with prejudice.

D. State Bar Disciplinary Investigations

On June 27, 2006 and then again on July 17, 2006, a State Bar investigator mailed to respondent a letter in which the investigator asked respondent to provide a written response to certain allegations of misconduct that the State Bar was investigating with respect to the Tomlin client matter. Notwithstanding respondent's contentions and testimony to the contrary, the court finds that respondent actually received both the June 27, 2006 letter and the July 17, 2006 letter. (See, e.g., Evid. Code, § 641 [mailbox rule].) Respondent, however, failed to respond to either letter or to other otherwise communicate with the State Bar investigator regarding the Tomlin client matter.

On September 29, 2006 and then again on October 24, 2006, the same State Bar investigator mailed to respondent a letter in which the investigator asked respondent to provide a written response to certain allegations of misconduct that the State Bar was investigating with respect to the Smith client matter. Even though respondent testified that he did not receive the

June 27, 2006 letter or the July 17, 2006 letter, the court finds that he actually received both of them. (See Evid. Code, § 641.) Respondent failed to respond to either of those two letters. Moreover, respondent failed to other otherwise communicate with the State Bar investigator regarding the Smith client matter.

On November 7, 2006, a deputy trial counsel (DTC) sent respondent a notice of intent to file an NDC with respect to the Tomlin client matter and requested that respondent contact him to set up a meeting to discuss the specified allegations. Respondent actually received that letter, but did not respond to it or otherwise communicate with the State Bar.

On November 14, 2006, the same DTC sent respondent a notice of intent to file an NDC with respect to the Smith client matter and similarly requested that respondent contact him to set up a meeting to discuss the specified allegations. Again, respondent actually received the letter, but did not respond to it or otherwise communicate with the State Bar.

On December 6, 2006, the DTC sent respondent yet a third letter regarding both the Tomlin and Smith client matters. Respondent received that letter, but did not respond to it or otherwise communicate with the State Bar.

Count 7-- Failure to Cooperate with State Bar Disciplinary Investigations

Section 6068, subdivision (i), provides that it is the duty of an attorney to cooperate and participate in any disciplinary investigation or proceeding pending against himself or herself.

The court finds, by clear and convincing evidence, that respondent willfully violated section 6068, subdivision (i) by failing to respond to the four letters that the State Bar investigator sent him in June, July, September, and October 2006 and by failing to respond to the three letters that the DTC sent him in November and December 2006.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

Respondent expressly declined to proffer any mitigating circumstance. (Rule Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[8] Nonetheless, he testified about, inter alia, his extensive experience in criminal defense, good personal reputation, and dedication to his clients. However, respondent's testimony was not sufficiently credible or detailed to establish any mitigating circumstance by clear and convincing evidence.

B. Aggravation

The record establishes several aggravating circumstance by clear and convincing evidence. (Std. 1.2(b).)

1. Prior Record of Discipline

Most troubling, respondent has *four* prior records of discipline. (Std. 1.2(b)(i).)

a. First Prior Record

In 1994, in his first prior record of discipline, respondent stipulated to six months' stayed suspension, one year's probation, and thirty days' actual suspension. This discipline arose from two bases. First, respondent's willfully failed to timely comply with former rule 955 (now rule 9.20), California Rules of Court when he was placed on interim suspension in a conviction referral proceeding.[9] Respondent's rule 955 violation resulted from his miscalculation of the affidavit's due date by nine days. Second, respondent's willfully violated section 6068, subdivision (i) by not replying to two letters from a State Bar Investigator in May and July 1992. (*In re Richard Eric Hove on Discipline*, Supreme Court case number S039769, order filed on July 21, 1994, [State Bar Court Case numbers 92-O-12619 and 93-N-14141 (consolidated)] (*Hove* I).)

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[8] All further references to standards are to this source.

[9] Respondent's criminal conviction was subsequently overturned.

b. Second Prior Record

In 1997, in his second prior record of discipline, also by stipulation, respondent was publicly reproved for failing to timely attend the State Bar's Ethics School in accordance with the Supreme Court's July 21, 1994, order in *Hove* I. Due to his inadvertence, respondent did not complete the Ethics School requirement until a year after the compliance deadline. (State Bar Court case number 96-O-02426, order filed on March 18, 1997, as modified by order filed April 2, 1997 (*Hove* II).)

c. Third Prior Record

In 2002, in his third prior record of discipline, respondent was placed on two years' stayed suspension, two years' probation and seventy-five days' actual suspension continuing until he paid $500 (plus interest) in restitution. This discipline resulted from respondent's misconduct involving two clients, primarily in failing to perform legal services, to return unearned fees, to communicate with a client, and to cooperate with a State Bar investigation. (*In re Richard Eric Hove on Discipline*, Supreme Court case number S103872, order filed on April 5, 2002, [State Bar Court Case numbers 99-O-12690; 00-O-12490 (consolidated)] (*Hove* III).)

d. Fourth Prior Record

Respondent's fourth prior record of discipline is the review department's August 8, 2007, opinion in *In the Matter of Richard E. Hove* (Review Dept. 2007, case number 01-O-01267) 5 Cal. State Bar Ct. Rptr. ___ (*Hove* IV) in which the review department recommended that respondent be placed on three years' stayed suspension, three years' probation, and two years' actual suspension continuing until respondent establishes his rehabilitation, present fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii). Even though the review department's opinion in *Hove* IV has only recently been transmitted to the Supreme Court, this

court must still consider it a prior record of discipline. (Rules Proc. of State Bar, rule 216(a)&(c).)

Ordinarily, this court would make two discipline recommendations in the present proceeding. (Rules Proc. of State Bar, rule 216(c).) One based on the assumption that the review department's discipline recommendation in *Hove* IV is adopted by the Supreme Court, and the other based on the assumption that the review department's discipline recommendation in *Hove* IV is rejected or modified. (Rules Proc. of State Bar, rule 216(c).) However, this court need not and does not make two such discipline recommendations in the present proceeding because the court concludes that disbarment is the appropriate level of discipline regardless of whether the review department's discipline recommendation in *Hove* IV is rejected or modified.

In *Hove* IV, the review department's discipline recommendation is based on respondent's misconduct involving three clients including a conflict of interest, the practice of law while under suspension, charging illegal fees, the failure to refund unearned fees, to obtain consent for receipt of fees from a non-client and to cooperate with a State Bar investigation.

2. Multiple Acts and Pattern of Misconduct

Respondent has been found culpable of committing multiple acts of wrongdoing in the present proceeding, including accepting fees from non-clients without obtaining the clients' informed written consent, failing to render an account of clients funds, failing to respond to reasonable client inquires, improper withdrawal and client abandonment, and failing to cooperate with a State Bar investigation. (Standard 1.2(b)(ii).)

Respondent's present and prior misconduct clearly establish a pattern of misconduct in which he fails to communicate with clients, fails to perform, fails to obtain consent for receipt of fees from non-clients, and fails to cooperate with State Bar investigations of his misconduct. This is a weighty aggravating factor. (Std. 1.2(b)(ii).) Respondent has not learned from his

mistakes and has not adequately learned from the prior disciplines in order to avoid future professional misconduct. Thus, respondent's current and continued misconduct and his failure to learn from previous discipline warrant disbarment.

V. DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve confidence in the profession and to maintain the highest possible professional standards for attorneys. (Std. 1.3; C*hadwick v. State Bar* (1989) 49 Ca.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025.) 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 Cr. Rptr. 615, 628.) As the review department noted more than 14 years ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not to do so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) 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 the present proceeding, the most severe sanction for respondent's misconduct is found in standard 1.7(b), which provides that, if an attorney has two prior records of discipline, the discipline imposed in the current proceeding is to be disbarment unless the most compelling mitigating circumstances clearly predominate.

There are no mitigating circumstances, much less compelling mitigating circumstances that would justify departing from the disbarment provided for in standard 1.7(b).

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 two client matters, of violating rules 3-310(F), 4-100(B)(3), 3-700(A)(2) of the Rules of Professional Conduct and sections 6068 subdivision(i). There was no mitigation factors and this case presents substantial aggravating factors, extensively discussed above, including prior discipline, a pattern of misconduct and not learning from the prior disciplinary cases.

The State Bar recommends disbarment. The court agrees.

Respondent has engaged in an approximately twelve-year pattern of misconduct in which seven clients were involved, and in which he did not cooperate with the State Bar's disciplinary investigations of misconduct, among other things.

Cases involving a pattern of misconduct even where the attorney has no prior record of discipline, generally result in the attorney's disbarment. (*In re Billings* (1990) 50 Cal.3d 358 [15 matters of partial or complete abandonment of clients; disbarment]; *Coombs v. State Bar* (1989) 49 Cal.3d 679 [13 matters of failure to perform services; disbarment]; *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1 [14 matters involving systematic failures to competently perform and client abandonment; disbarment].)

When disbarment is not imposed for a pattern of misconduct, the attorney provided significant mitigation beyond merely having a discipline-free practice. (*Pineda v. State Bar*, 49 Cal. 3d 753 (1989) 49 Cal.3d 753 [Although attorney failed to competently perform and abandoned clients in seven matters, disbarment was not called for in view of mitigating factors, including the attorney's cooperation with the State Bar throughout the disciplinary proceedings, his demonstrated remorse and determination to rehabilitate himself, and his concurrent family problems]; *Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071 [Ethical violations in 14 matters demonstrating a pattern of misconduct involving client abandonment did not warrant disbarment in light of fact that attorney fully cooperated with the State Bar in the proceedings, attorney was experiencing severe financial and emotional problems during period of misconduct, and attorney thereafter substantially improved her condition through counseling]; *Frazer v. State Bar* (1987) 43 Cal.3d 564 [Disbarment not recommended where attorney failed to perform competently and abandoned clients in 14 matters due to evidence of attorney's financial problems, depression, agoraphobia and rehabilitation there from].) Respondent's matter is devoid of the compelling mitigation which could justify a discipline recommendation short of disbarment.

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.

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.) The Supreme Court's reasoning is equally applicable in this case.

Lesser discipline than disbarment is not warranted because there are not extenuating circumstances that clearly predominate in this case. The serious, similar and prolonged nature of the misconduct in this and the four prior instances of discipline suggest that he 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. Moreover, it is evident that the prior instances of discipline have not served to rehabilitate respondent or to deter him from further misconduct. There is no point in placing him on probation again since he did not comply with probation conditions in two separate time periods. He has not learned from the past despite repeated opportunities to do so. 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. RECOMMENDED DISCIPLINE

The court recommends that respondent **RICHARD ERIC HOVE** be disbarred from the practice of law in the State of California; that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state; and that he be ordered to make restitution to Joy Johnson in the amount of $1,000 plus 10 percent interest per annum from December 7, 2006, until paid or to the Client Security Fund to the extent of any payment from the fund to Joy Johnson plus interest and costs, in accordance with California Business and Professions Code section 6140.5. In addition, the court recommends that any restitution to the Client Security Fund be enforceable as provided in California Business and Professions Code section 6140.5, subdivision (c) and (d).

VII. RULE 9.20 AND COSTS

The court recommends that **HOVE** 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.[10]

Finally, the court 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.

VIII. ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **HOVE** be involuntary enrolled as an inactive member of the State Bar of California

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[10] Hove is required to file a California rule 9.20(c) affidavit even if he has no clients to notify. (*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 California rule 9.20 is also, inter alia, a ground for denying his or her petition for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

effective three days after service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).

Dated: December 20, 2007

LUCY ARMENDARIZ
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on December 21, 2007, I deposited a true copy of the following document(s):

DECISION & ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

RICHARD ERIC HOVE
24072 MYRTLE ST
HAYWARD CA 94541

[X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

MANUEL JIMENEZ, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **December 21, 2007**.

Bernadette C. O. Molina
Case Administrator
State Bar Court