

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of)	Case No. 05-O-05173-PEM
)	
CHARLES E. SMITH, JR.)	DECISION
)	
Member No. 152034,)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this contested matter, respondent **CHARLES E. SMITH, JR.**, is charged with four counts of misconduct in one client matter. The charged misconduct includes: (1) failure to perform with competence; (2) failure to obey a court order; (3) improper withdrawal from employment; and (4) failure to inform a client of significant developments in a matter in which respondent had agreed to provide legal services. The court finds, by clear and convincing evidence, that respondent is culpable of three of the charged acts of misconduct.

In view of respondent’s misconduct and the aggravating and mitigating evidence, the court recommends, among other things, that respondent be suspended from the practice of law for two years; that said suspension be stayed; and that he be placed on probation for one year on conditions including actual suspension for 60 days and until he pays the court-ordered sanctions as specified below.

II. Pertinent Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on July 19, 2007. On August 10, 2007, respondent filed a response to the NDC.

A two-day trial was held on January 8 and 9, 2008. The State Bar was represented in this

proceeding by Deputy Trial Counsel (DTC) Wonder J. Liang. Respondent represented himself.

On January 9, 2008, the parties filed a stipulation as to facts and admission of documents which was admitted into evidence.

Following the hearing in this matter, the court took this proceeding under submission on January 9, 2008.

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent was admitted to the practice of law in California on February 4, 1991, and has since been a member of the State Bar of California.

B. The Roberts Matter

Respondent met Jenny Roberts (Roberts) at a senior citizens center in Oakland, California. He had known her for five years. Roberts explained to respondent that she was bruised due to a slip and fall in a restaurant in Oakland. She asked respondent about filing a lawsuit against the restaurant. Respondent told Roberts that he would advance her the filing fee and, if she won the lawsuit, all she would have to do is pay the filing fee.

On August 13, 2004, respondent filed a complaint on behalf of Roberts, against Gordon Tang; Gordon Tang, dba, Grand River Bakery & Restaurant, Alameda County Superior Court case no. WG04170338 (*Roberts v. Tang*). Subsequently, respondent failed to serve the defendants with the summons and complaint.

On December 14, 2004, respondent filed his declaration with the court titled "Declaration of Charles E. Smith, Jr. Re Late Late Filing of Case Management Conference Statement." At paragraph three, respondent stated: "None of the defendants in this case have been served. The reason being that at some point after the complaint was filed, the name of the restaurant was changed. My process server advises me that he can't leave the summons and complaint at the restaurant because the name is different. And, that he, thus far, has been unable to locate "Gordon Tang", although he believes that he is the person to whom he has spoken to on several occasions at the "new" restaurant. He further advises me that he will search the business records to locate the resident address of 'GORDON TANG' and attempt to serve him there." At

paragraph four, respondent stated: "If the process server is unable to locate defendant, Gordon Tang, I will file a motion to serve summon and complaint by publication." Subsequently, respondent failed to serve the defendants in any manner.

When it became apparent that the process server was not going to be able to locate the defendant, respondent told Roberts that she would have to pay for the service by publication in order for him to proceed. Roberts did not pay for the service by publication. As a result, respondent never served the defendants.

Respondent took no action on Roberts' behalf in *Roberts v. Tang*.

On December 17, 2004, respondent attended a case management conference (CMC) in *Roberts v. Tang*. The court's order continued the CMC to January 28, 2005, for proof of service of summons and complaint or application for service of summons and complaint by publication. The court's order also included the following: "Updated Case Management Statements in compliance with CRC 212 and Alameda County Local Rules, Chapter 4, on Judicial Council Form CM-110, must be filed no later than 01/13/2005. If the foregoing date is a court holiday or a weekend, the time is extended to the next business day." The court order was served on respondent at Post Office Box 24074, Oakland, CA 94623-1074. Subsequently, respondent failed to serve the defendants or comply with the court order to file an updated case management statement.

On January 28, 2005, there was a CMC in *Roberts v. Tang*. Respondent appeared on behalf of Roberts at this CMC. The court's order contained the following: "On December 17, 2004 the Court continued this matter for proof of service of summons and complaint or application for service of summons and complaint by publication. Nothing having been filed in compliance with the Court's order, this matter is continued to 03/04/2005 at 9:00 AM in Dept. 139 for plaintiff to show cause why sanctions should not be imposed." The court order was served on respondent at Post Office Box 24074, Oakland, CA 94623-1074. Respondent claims never to have received the court order.

On March 4, 2005, there was a CMC in *Roberts v. Tang*. Respondent failed to appear. The court's minutes state as follows: "Counsel for Plaintiff having failed to appear at the

court-ordered Case Management Conference on 3/04/2005, the following sanctions are imposed. The matter is continued 30 days for an Order to Show Cause why further sanctions should not be imposed. Failure to appear may result in DISMISSAL. Court orders sanctions as follows: Sanctions of \$250.00 are ordered against Plaintiff's counsel Smith Jr, Charles E payable to Court on or before 4/8/2005. Case continued to 09:00 AM on 04/08/2005 in Department 139." Notice of the court's action was served on respondent at Post Office Box 24074, Oakland, CA 94623-1074. Respondent says that he never received the court's March 4 order to pay sanctions.

On April 8, 2005, there was a CMC in *Roberts v. Tang*. Respondent failed to appear. The court's minutes state as follows: "Counsel for Plaintiff having failed to appear at the court-ordered Case Management Conference on 4/8/2005, the matter is continued to 5/13/2005 at 2:00 PM for an Order to Show Cause why further sanctions should not be imposed and case dismissed." Notice of the court's action was served on respondent at Post Office Box 24074, Oakland, CA 94623-1074.

On May 13, 2005, there was a CMC in *Roberts v. Tang*. Respondent failed to appear. The court's minutes state as follows: "Plaintiff's counsel having failed to appear at the court-ordered Compliance Hearing of 5/13/05, the matter is continued to 6/17/05 at 2:00 PM for an Order to Show Cause why further sanctions should not be imposed and a report made to the California Bar Association. Court orders sanctions as follows: Sanctions of \$500.00 are ordered against Plaintiff's counsel Smith Jr, Charles E payable to Court on or before 6/17/2005." Notice of the court's action was served on respondent at Post Office Box 24074, Oakland, CA 94623-1074. Respondent again states he never received the order. Subsequently, respondent failed to serve the defendants or comply with the court's order to pay sanctions.

On June 17, 2005, there was a CMC in *Roberts v. Tang*. Respondent failed to appear. The court's minutes state as follows: "Plaintiff's counsel having failed to comply with the previous court order and failed to appear at the court-ordered Compliance Hearing of 6/17/05, the matter is continued 30 days. FAILURE TO APPEAR SHALL RESULT IN A NEGATIVE REPORT TO THE CALIFORNIA STATE BAR ASSOCIATION. Case; continued to 9:00 AM on 07/22/2005. Notice of the court's action was served on respondent at Post Office Box 24074,

Oakland, CA 94623-1074. Subsequently, respondent failed to serve defendants or to comply with the court's order to pay sanctions.

On July 22, 2005, there was a CMC in *Roberts v. Tang*. Respondent failed to appear. The court's minutes state as follows: "Case continued to 09:00 AM on 8/19/2005 in Department 139, Compliance Hearing, Allen E. Broussard Justice Center, 600 Washington Street, Oakland." Notice of the court's action was served on respondent at Post Office Box 24074, Oakland, CA 94623-1074. Subsequently, respondent failed to serve the defendants or to comply with the court's order to pay sanctions.

On August 19, 2005, there was a CMC in *Roberts v. Tang*. Respondent failed to appear. The court's minutes state as follows: "Plaintiff's counsel having failed to appear at the court-ordered Compliance Hearing of 8/19/05, the matter is continued to 10/27/05 at 9:00 AM for an Order to Show Cause why further sanctions should not be imposed and a report made to the California Bar Association. . . Monetary sanctions in the sum of \$500.00 are ordered . . ." Notice of the court's action was served on respondent at Post Office Box 24074, Oakland, CA 94623-1074. Subsequently, respondent failed to serve the defendants, comply with previous court orders or comply with the court's order to pay sanctions.

On October 27, 2005, there was a compliance hearing in *Roberts v. Tang*. Respondent failed to appear. The court's minutes state as follows: "Case dismissed by Court with Prejudice - Failure to comply with previous OSC order." Notice of the court's action was served on respondent at Post Office Box 24074, Oakland, CA 94623-1074. Subsequently, respondent failed to serve the defendants or comply with previous court orders.

On October 27, 2005, the court issued its Order Dismissing Action and Referring Counsel to the State Bar of California. The order detailed respondent's failure to appear on March 4, 2005; May 13, 2005; June 17, 2005; August 19, 2005; and October 27, 2005. The court also detailed the amount respondent had been sanctioned, \$1,250.00, and that the respondent to that date had not paid any of the sanctions. Notice of the court's action was served on respondent at Post Office Box 24074, Oakland, CA 94623-1074. Subsequently, respondent took no action on Roberts' behalf in *Roberts v. Tang*.

As of November 29, 2007, respondent has not paid any of the sanctions ordered in *Roberts v. Tang* because he believes the State Bar should defend him regarding the court-ordered sanctions.

Respondent's Contentions

Respondent contends that after December 17, 2004, he stopped receiving notices from the court in the *Roberts v. Tang* matter. He is not even sure, although the court documents indicate otherwise, that he was present at the January 28, 2005 hearing. Respondent claims that he has had consistent problems with receiving mail. The court admitted into evidence a June 24, 2005 letter that respondent had sent to other post office box holders re: misdelivery of mail and his concern that he was not receiving mail. The letter was admitted not for the truth of the matter asserted but as corroborative evidence that respondent believed that he was having problems receiving mail. While the court believes that respondent had problems with his mail, he did not present enough evidence to overcome the presumption that a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. (Evid. Code, § 641.) None of the notices were returned to the superior court as undeliverable. Furthermore, if respondent believed his mail was not being delivered or was being misdelivered, he should have gone to court to determine the status of his cases.

Furthermore, this court rejects respondent's argument that the State Bar had a duty to defend him against the sanction orders in the superior court. Although respondent may have had an honest belief that the State Bar had such a duty, it was not a reasonable belief and, therefore, cannot be afforded mitigating credit for good faith. (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 331; *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653.)

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

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence.

¹References to rule are to the current Rules of Professional Conduct, unless otherwise stated.

There is clear and convincing evidence that respondent violated rule 3-110(A) by not serving the defendants; not filing updated case management statements as ordered; and not appearing at several CMCs in *Roberts v. Tang*, which resulted in the dismissal of Roberts' case with prejudice. By these actions, respondent intentionally, recklessly and repeatedly failed to perform legal services with competence.

2. Count Two: Failure to Obey a Court Order (Bus. & Prof. Code, section 6103)²

Section 6103 requires attorneys to obey court orders and provides that the wilful disobedience or violation of such orders constitutes cause for disbarment or suspension. By not complying with the court's orders of March 4, 2005, April 8, 2005; May 13, 2005; June 17, 2005; July 22, 2005; August 19, 2005; and October 27, 2005 and by not paying the \$1,250 in court-ordered sanctions, respondent wilfully disobeyed court orders requiring him to do acts in the course of his profession which he ought in good faith to do.

3. Count Three: Improper Withdrawal from Employment (Rules Prof. Conduct, Rule 3-700 (A)(2))

Respondent is charged with a violation of rule 3-700(A)(2) of the Rules of Professional Conduct, which provides that a member shall not withdraw from employment until the member has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel and refunding any part of a fee paid in advance that has not been earned.

There is not clear and convincing evidence that respondent wilfully violated rule 3-700(A)(2).

4. Count Four: Failure to Inform Client of Significant (Bus. & Prof. Code, § 6068, subd.(m))

Business and Professions Code section 6068, subdivision (m) provides that it is the duty of an attorney to keep a client reasonably informed of significant developments in a matter in which the respondent had agreed to provide legal services. The State Bar alleges respondent

² Future references to sections are to this source.

failed to inform Roberts that he would not attend the March 4, 2005; April 8, 2005; May 13, 2005; June 17, 2005; July 22, 2005 and August 19, 2005 hearings in *Roberts v. Tang*. The State Bar further alleges that respondent failed to inform Roberts that her case was dismissed with prejudice on August 19, 2005.

The court finds respondent culpable, by clear and convincing evidence, of a violation of section 6068, subdivision(m). Respondent admits that he did not inform Roberts of the various CMCs. Furthermore, it is clear that respondent did not inform Roberts of the dismissal of her case, given that he claimed to have been unaware of the dismissal. By failing to attend the CMCs and to inform Roberts that her case had been dismissed with prejudice, respondent failed to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e).)³ There are some mitigating factors.

Respondent testified as to his pro bono and community service. He is a volunteer at the Emeryville Senior Center and the Emeryville Advisory Council, providing monthly socials and dance parties for the benefit of Bay Area seniors. He has been a volunteer instructor of ballroom dance classes for several years at the Emeryville Senior Center.

Respondent presented two mitigation witnesses, Danetta Logan and Antonio Secapure Jr. Both witnesses testified that he was an honest and trustworthy lawyer who did pro bono legal work for them. Both of them believed that he would not wilfully fail to make court appearances. This testimony by two witnesses is insufficient to award full mitigation credit because it does not meet the requirement that good character be established by a wide range of references. Also, Danetta

³All further references to standards are to this source.

Logan did not know that respondent had a prior record of discipline.

B. 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. Misconduct⁴, std. 1.2(b).)

Respondent has one prior instance of discipline. (Std. 1.2(b)(i).) In S065977 (State Bar Court case no. 94-O-18560), filed February 3, 1998), the Supreme Court imposed discipline consisting of six months' stayed suspension and one year's probation on conditions including 30 days' actual suspension. Respondent was found culpable of violating rule 3-110(A) and section 6068(l) in one client matter. There were no mitigating circumstances. The court found his failure to participate in the proceedings and client harm as aggravating factors. The effect of this prior instance of discipline is somewhat mitigated by the fact that prior misconduct was relatively minor and took place about a dozen years ago (approximately in 1994 and 1995). (*In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96, 105; Std. 1.7(a).)

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

Respondent's misconduct significantly harmed a client, the public or the administration of justice. (Standard 1.2(b)(iv).) Roberts' case was dismissed with prejudice. The superior court had to hold numerous hearings to address respondent's lack of performance and failure to make appearances in the Roberts case.

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Standard 1.2(b)(v).) As of November 29, 2007, he still had not paid the court-ordered sanctions.

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

⁴Future references to standard or std. are to this source.

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 2.4(b) and 2.6(a) and (b) apply in this matter. The most severe sanction is found at standard 2.6(a) and (b) which recommend, in relevant part, suspension or disbarment for violations of sections 6068 and 6103, depending on the gravity of the offense or harm, if any to the victim, with due regard to the purposes of imposing discipline.

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 Silvertan* (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 one client matter, of not performing competently or communicating with his client and of not obeying court orders. Aggravating factors include one prior instance of discipline, somewhat discounted due to its age, multiple acts of misconduct, harm to the client and to the administration of justice and indifference toward rectification of or atonement for the consequences of his misconduct.

The State Bar recommends a long period of actual suspension to continue until he pays the court-ordered sanctions. The court believes that actual suspension for 60 days and until he pays the court-ordered sanctions, among other things, is sufficient to protect the public.

In *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, the attorney was given a one-year stayed suspension and three-year probation, including 45 days actual

suspension and restitution of \$3,000, for his misconduct in a single client matter. The misconduct included failure to perform, improper withdrawal and failure to account for or refund unearned fees and resulted in harm to the client. Respondent Aulakh had no prior record of discipline in 20 years of practice but was uncooperative during the disciplinary process. The instant case merits greater discipline than *Aulakh* because it presents substantially less mitigation and greater aggravation than that case.

In *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, discipline was imposed consisting of two years' stayed suspension and two years' probation on conditions including 30 days' actual suspension for not performing, communicating or returning an unearned fee and improperly withdrawing in two client matters. Aggravating factors included multiple acts, client harm and failure to cooperate with the State Bar. In mitigation, the attorney had no prior discipline in 11 years of practice. The instant case merits greater discipline than *Kennon* because it presents substantially less mitigation and greater aggravation than that case.

Having considered the facts and the law, the court believes that the public would be protected from further misconduct by respondent by a 60-day actual suspension to continue until he pays the sanctions ordered by the Alameda County Superior Court.

VI. Recommended Discipline

Therefore, it is recommended that respondent CHARLES E. SMITH, JR., be suspended from the practice of law for two years; that execution of that suspension be stayed, and that respondent be placed on probation for one year, with the following conditions:

1. Respondent shall be actually suspended from the practice of law for the first 60 days of probation and until he pays the \$1,250 in sanctions ordered by the court in *Roberts v. Tang*, Alameda County Superior Court case no. WG04170338, and submits satisfactory proof thereof to the State Bar Office of Probation. If respondent is actually suspended for two years or more, he shall remain actually suspended until he provides proof to the satisfaction of the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct;

2. During the period of probation, respondent shall comply with the State Bar Act and the Rules of Professional Conduct.

3. Within ten (10) days of any change, respondent shall report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, **and** to the State Bar Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.

4. Respondent shall submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent shall state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report shall be submitted on the next following quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, respondent shall answer fully, promptly, and truthfully, any inquiries of the State Bar Office of Probation which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein.

6. Within one year of the effective date of the discipline herein, respondent shall provide to the State Bar Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent shall not receive MCLE credit for attending Ethics

School (Rule 3201, Rules of Procedure of the State Bar.).

8. The period of probation shall commence on the effective date of the order of the Supreme Court imposing discipline in this matter.

9. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for two years shall be satisfied and that suspension shall be terminated.

10. It is also recommended that the Supreme Court order respondent to comply with rule 9.20(a) of the California Rules of Court within 30 calendar days after the effective date of the Supreme Court order in the present proceeding and to file the affidavit provided for in rule 9.20(c) within 40 calendar days after the effective date of the order showing respondent's compliance with said order.⁵

11. It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, Multistate Professional Responsibility Examination Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the State Bar Office of Probation, within one year of the effective date of the discipline herein. **Failure to pass the Multistate Professional Responsibility Examination within the specified time results in actual suspension by the Review Department, without further hearing, until passage. But see rule 9.10(b), California Rules of Court, and rule 321(a)(1) and (3), Rules of Procedure of the State Bar.**

VII. Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and

⁵Respondent is required to file a rule 9.20(c) affidavit even if he has no clients. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 130.)

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: March ____, 2008

PAT McELROY
Judge of the State Bar Court