

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 06-J-14297-DFM
GARY MICHAEL SEGAL,)	DECISION
Member No. 116200,)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

By order filed on March 25, 2005, respondent Gary Michael Segal (respondent) was ordered by the Nevada Supreme Court to be actually suspended from practice in Nevada for six months and one day. As a result, the State Bar of California initiated this proceeding in August of 2007. (Bus. & Prof. Code, § 6049.1;¹ Rules Proc. of State Bar, rules 620-625.) The Office of the Chief Trial Counsel of the State Bar of California (State Bar) was represented by Deputy Trial Counsel Jean Cha (DTA Cha). Respondent did not appear in person or by counsel.

The issues in this proceeding are limited to: (1) the degree of discipline to be imposed upon respondent in California; (2) whether, as a matter of law, respondent's culpability in the Nevada proceeding would not warrant the imposition of discipline in California under the laws or rules applicable in California at the time of respondent's misconduct in Nevada; and (3) whether the Nevada proceeding lacked fundamental constitutional protection. (Section 6049.1, subdivision (b).)

Respondent bears the burden of establishing that the conduct for which he was disciplined in Nevada would not warrant the imposition of discipline in California and/or that the

¹All references to section(s) are to the Business and Professions Code, unless otherwise stated.

Nevada proceedings lacked fundamental constitutional protection. Unless respondent establishes one or both of these, the record of discipline in the Nevada is conclusive evidence of culpability of misconduct in California. (Section 6049.1, subdivisions (a) & (b).) Since respondent did not participate in this proceeding and, therefore, has not established either factor, the court focuses only on the degree of discipline to be imposed.

For the reasons indicated below, the court recommends, inter alia, that respondent be suspended for two years; that said suspension be stayed; and that he be actually suspended for 90 days and until he complies with Rules of Proc. of State Bar,² rule 205.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on August 22, 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 section 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 returned to the State Bar by the U.S. Postal Service as undeliverable. (Declaration of DTC Cha attached to the State Bar's motion for the entry of respondent's default filed on January 2, 2008.)

On September 11, 2007, a Notice of Assignment and Notice of Initial Status Conference was filed in this matter, setting an in person status conference for October 3, 2007. A copy of said notice was properly served on respondent by first-class mail, postage fully prepaid, on September 11, 2007, addressed to respondent at his official address. The copy of said notice was returned to the State Bar Court as undeliverable.³

On October 3, 2007, the court held an in person status conference in this matter. Respondent failed to appear either in person or through counsel at the time of the status

²References to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

³All mailings sent by the State Bar Court to respondent in this proceeding were returned by the U.S. Postal Service either bearing a sticker stating, "RETURN TO SENDER [¶] ATTEMPTED - NOT KNOWN [¶] UNABLE TO FORWARD [¶]," or a stamp stating, "RETURN TO SENDER [¶] ATTEMPTED [¶] NOT KNOWN [¶]."

conference. On that same date, the court filed an order pursuant to the status conference. The order included notice that a further status conference had been scheduled for November 5, 2007; that the pretrial conference had been scheduled for January 7, 2008; and that the trial date had been scheduled for January 14, 2008. A copy of said order was properly served on respondent by first-class mail, postage fully prepaid, addressed to respondent at his official address. The copy of said order was returned to the State Bar Court as undeliverable.

Respondent did not appear at the November 5 status conference. On that same date, he was properly served at his official address by first-class mail, postage prepaid, with an order memorializing the status conference. The copy of said order was returned to the State Bar Court by the U.S. Postal Service as undeliverable.

Respondent did not file a responsive pleading to the NDC. On November 15, 2007, the State Bar filed a motion for entry of default. However, the State Bar's motion for entry of default was not properly served on respondent at his official address.⁴ Therefore, on December 12, 2007, the court filed an order denying without prejudice the State Bar's motion for entry of default. On that same date, respondent was properly served at his official address by first-class mail, postage prepaid, with a copy of this order. The copy of said order was returned to the State Bar Court by the U.S. Postal Service as undeliverable.

On January 2, 2008, the State Bar filed a second motion for entry of default. Said motion was properly served on respondent at his official address by certified mail, return receipt requested. The motion advised respondent that minimum discipline consisting of a 90-day actual suspension would be sought if he was found culpable. No response was filed to the motion.

On January 7, 2008, the court conducted its scheduled pretrial conference. Respondent did not attend the pretrial conference. The court ordered that the trial remain on calendar, as scheduled. On January 10, 2008, respondent was properly served with the copy of the order

⁴The address listed in the State Bar's proof of service did not accurately reflect respondent's official address.

memorializing the pretrial conference. The copy of said order was returned to the State Bar Court by the U.S. Postal Service as undeliverable.

On January 14, 2008, respondent failed to appear for trial. As a result, on January 15, 2008, the court entered respondent's default for his failure to appear at trial and enrolled him inactive effective three days after service of the order. The order was filed and properly served on respondent at his official address on that same date by certified mail, return receipt requested. The copy of said order was returned to the State Bar Court by the U.S. Postal Service as undeliverable.

The State Bar's and the court's efforts to contact respondent were fruitless.⁵ The court concludes that respondent was given sufficient notice of the pendency of this proceeding 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].)

III. JURISDICTION

Respondent was admitted to the practice of law in California on December 3, 1984, and has been a member of the State Bar at all times since.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 6049.1(a) provides, in pertinent part, that a certified copy of a final order by any court of record of any state of the United States, determining that a member of the State Bar committed professional misconduct in that jurisdiction shall be conclusive evidence that, subject to limited exceptions, the member is culpable of professional conduct in this state.

The court admits into evidence the certified copy of the Nevada disciplinary proceedings entitled *In Re: Discipline of Gary M. Segal*, Supreme Court No. 44401, Order of Suspension filed March 25, 2005; the Findings of Fact, Conclusions of Law, and Recommendation of the Southern Nevada Disciplinary Board in *State Bar of Nevada v. Gary M. Segal, Esq.*, Case No.

⁵Pursuant to the State Bar's January 2, 2008 motion for entry of default, the State Bar's efforts to locate respondent included: (1) calling respondent's membership records telephone number; (2) searching for new contact information through directory assistance, Parker's directory, and Zabasearch.com; and (3) mailing courtesy copies of the NDC to two possible alternative addresses identified in the State Bar's directory assistance and internet searches.

04-034-1008, et al., filed on November 30, 2004; and the applicable Nevada Supreme Court Rules on the regulation of the practice of law.⁶

The record of the Nevada disciplinary proceeding establishes the following facts:

A. Actual Suspension from the State Bar of Nevada

At all times pertinent herein, respondent was a licensed attorney in the State of Nevada, having his principal place of business for the practice of law in Clark County, Nevada.

On March 25, 2005, the Supreme Court of Nevada issued an Order of Suspension in Supreme Court No. 44401, actually suspending respondent for six months and one day based upon his misconduct involved in five separate grievances.

The Supreme Court of Nevada's order was based on the November 30, 2004 Findings of Fact, Conclusions of Law, and Recommendation of the Southern Nevada Disciplinary Board in the matter of *State Bar of Nevada v. Gary M. Segal, Esq*, Case No. 04-034-1008, et al.

A hearing was held before a designated Formal Hearing Panel of the Southern Nevada Disciplinary Board on November 18, 2004. Although respondent was present at the hearing, he had previously failed to file an answer or otherwise respond to the complaint filed by the Nevada State Bar on July 21, 2004. As a result, respondent's default had been entered and all charges were deemed admitted pursuant to Nevada Supreme Court Rule 105(2).⁷ Consequently, respondent was found to have violated several of Nevada's Supreme Court Rules in the five matters set forth below.

B. Misconduct in Nevada⁸

The Smith Matter

In 2002, Steven Smith (Smith) retained respondent to finalize his divorce after his former Nevada counsel left private practice. Following the divorce trial in September 2003, respondent

⁶Copies of these documents were attached to the NDC as Exhibits 1, 2 and 3.

⁷Despite being in default, respondent was permitted to testify as to mitigating circumstances.

⁸The facts set forth below were laid out in the Southern Nevada Disciplinary Board's Findings of Fact, Conclusions of Law, and Recommendation in the matter of *State Bar of Nevada v. Gary M. Segal*, Case No. 04-034-1008, et al.

was to (1) pursue Smith's former wife's failure to make timely support payments and (2) facilitate the transfer of title to a boat and trailer awarded to Smith, thereby enabling Smith to register and insure those items.

Pursuant to respondent's advice, Smith transported the boat and trailer to Arizona, after which time they were impounded. Smith was subsequently required to pay \$500 to repossess them.

In a separate case, respondent was to facilitate recovery of Smith's former wife's half of an outstanding loan made to the couple by Smith's father prior to the divorce.

Beginning at or about the end of 2003, Smith unsuccessfully attempted to speak with respondent on numerous occasions to discuss the status and/or delays in his case(s). On numerous occasions, Smith left messages requesting return calls; on several occasions, respondent's phone was out of service.

Respondent failed to return Smith's calls or respond to the numerous letters and facsimiles Smith sent requesting the status of his cases, except in two instances. In those two instances, respondent promised Smith that he would take care of the remaining matters.

Despite his assurances to Smith, respondent failed to finalize Smith's cases and failed to respond to Smith's repeated requests for information. Ultimately, Smith filed a grievance with the Nevada State Bar.

On February 23, 2004, respondent met with a Nevada State Bar representative to discuss, among other things, Smith's grievance. At that time, respondent was provided with copies of Smith's grievance and advised that he would be requested by Bar Counsel to respond to Smith's grievance within the next week or two. Thereafter, respondent failed to respond to the Nevada State Bar counsel's letters regarding Smith's grievance.

The LaFair Matter

Herb LaFair (LaFair) was a California resident referred to respondent by his California attorney, Jeff Norton, who is respondent's brother-in-law. LaFair retained respondent late in 2000 to represent his claims against the Venetian Hotel in Las Vegas, Nevada, arising from injuries sustained when LaFair fell at the hotel while attending a convention.

LaFair contacted respondent telephonically on numerous occasions to discuss concerns that his case was not being timely pursued. On those occasions, respondent requested LaFair's patience and assured him that his case would be resolved in due time.

During December of 2002, respondent contacted LaFair and requested his attendance at a hearing in Las Vegas. Subsequent to his appearance, LaFair was hospitalized in Las Vegas for symptoms characteristic of a stroke. After LaFair returned to California, respondent never contacted him again.⁹

In June 2003, LaFair advised respondent via facsimile that the witness to LaFair's fall at the Venetian Hotel would be in Las Vegas in August (LaFair's case was scheduled for trial during the autumn of 2003.). Respondent then contacted the witness and scheduled a meeting for August 29, 2003.

LaFair was hospitalized in California during August 2003. Upon his release, he contacted the witness who informed him that respondent "stood him up" and had not contacted him since.

A friend referred LaFair to another Nevada attorney, who within minutes obtained LaFair's case status online, which revealed that respondent failed to advise LaFair of numerous dates and developments pertinent to his case, including the fact that his case was closed.

During November of 2003, LaFair contacted respondent and respondent's brother-in-law, Jeff Norton, via two facsimiles requesting that his case file be returned to him. Respondent has never returned the file or otherwise responded to LaFair's requests.

On February 23, 2004, respondent met with a Nevada State Bar representative to discuss, among other things, LaFair's grievance. At that time, respondent was provided with copies of LaFair's grievance and advised that he would be requested by Bar Counsel to respond to LaFair's grievance within the next week or two. Thereafter, respondent failed to respond to the Nevada State Bar counsel's letters regarding LaFair's grievance.

The Higuera Matter

Martha Higuera (Higuera) and her boyfriend, both Mexican citizens, retained respondent

⁹It is unclear from the record when LaFair actually returned to California.

to pursue personal injury claims arising from an automobile accident in May 1997. An action was subsequently filed.

During the latter part of 1999, in hearings regarding the defendant's motion to dismiss, respondent advised the court that he had not had the opportunity to conduct discovery, wherein the court denied the motion to dismiss without prejudice.

In October 2000, during a hearing on Defendant's Motion to Dismiss and for Fees and Costs, respondent argued that dismissal was a harsh remedy and offered to pay \$500 in sanctions for the inconvenience to all parties. The court denied the motion to dismiss and directed respondent to pay \$2,500 to opposing counsel within one week to preclude dismissal of the case, which he did.

In December 2000, respondent was sanctioned another \$250 for his failure to timely file the case conference report, and he was directed to file the report by December 29, 2000, to avoid further sanctions.

Respondent failed to appear at an April 16, 2001 hearing on the defendant's motion for summary judgment. The defendant's motion for summary judgment was granted, and the case was closed in March 2002.

Higuera learned through other sources that her case was closed and contacted the Mexican Consulate in Nevada. The Mexican Consulate referred her to the Nevada State Bar where she subsequently filed a grievance.

On February 23, 2004, respondent met with a Nevada State Bar representative to discuss, among other things, Higuera's grievance. At that time, respondent was provided with copies of Higuera's grievance and advised that he would be requested by Bar Counsel to respond to Higuera's grievance within the next week or two. Thereafter, respondent failed to respond to the Nevada State Bar counsel's letters regarding Higuera's grievance.

The Nuefeld Matter

Steven Nuefeld (Nuefeld) resided in Laughlin, Nevada and was a pro se litigant in divorce proceedings. Respondent represented Nuefeld's wife in the divorce proceedings.

In December 2003, Nuefeld prepared a divorce decree in accordance with court rulings and forwarded the decree to respondent to approve as to form and content. Respondent never revised or returned the document, and never submitted it to the court.

When on several occasions Nuefeld contacted respondent telephonically and inquired about the decree, respondent stated that he would mail the decree out that week. However, Nuefeld received neither the decree nor any further contact from respondent, and the document was never filed with the court.

On February 23, 2004, respondent met with a Nevada State Bar representative to discuss, among other things, Nuefeld's grievance. At that time, respondent acknowledged the Nuefeld case and was unable to cite any specific reason for the delays. Respondent was provided with copies of Nuefeld's grievance and advised that he would be requested by Bar Counsel to respond to Nuefeld's grievance within the next week or two. Thereafter, respondent failed to respond to the Nevada State Bar counsel's letters regarding Nuefeld's grievance.

The Mentoring Agreement Matter

On December 18, 2002, an Informal Hearing Panel of the Southern Nevada Disciplinary Board issued an order requiring respondent to enter into a mentoring agreement for one year to address problems arising from improper management and/or operation of his law office. (Nevada State Bar Case No. 02-097-1008.) Pursuant to Nevada Supreme Court Rule 105.5, respondent entered into this mentoring agreement in lieu of discipline.¹⁰

The order required respondent to "provide timely responses to requests from the State Bar for information" and dictated that, if respondent failed to comply with the terms of the agreement, the agreement would be terminated and formal disciplinary proceedings shall be initiated.

On March 9, 2004, a State Bar representative left a recorded message on respondent's voice-mail informing respondent that his participation in the Mentoring Program was

¹⁰Pursuant to Evidence Code section 452(a), the court takes judicial notice of Nevada Supreme Court Rule 105.5. This rule permits a respondent to participate in an approved diversion program as an alternative to a disciplinary sanction.

unsuccessful due to his failures to respond to the grievances of Smith, LaFair, Higuera, and Nuefeld, and properly represent their interests.

Respondent contacted the Nevada State Bar approximately two weeks later and left a recorded message indicating that he wanted to meet and discuss the matter further. A Nevada State Bar representative returned his call on March 31, 2004, and, upon finding respondent's voice mailbox full, advised a receptionist at respondent's law office that respondent's call was being returned. Thereafter, the Nevada State Bar received no further contact from respondent regarding this matter.

C. Violations of Nevada Supreme Court Rules

The Nevada Supreme Court found, based on the findings and facts of the Southern Nevada Disciplinary Board, that respondent had violated the following Supreme Court Rules:¹¹

Nevada Supreme Court Rule (NSCR) 151- Competence

NSCR 151 states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Respondent violated NSCR 151 in the LaFair, Higuera and Nuefeld matters by failing to competently litigate his clients' personal injury lawsuits (LaFair and Higuera) and by failing to competently finalize a divorce decree (Nuefeld).

NSCR 152- Scope of Representation

NSCR 152 states:

1. A lawyer shall abide by a client's decision concerning the objectives of representation, subject to subsections 3, 4 and 5, and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

¹¹Effective May 1, 2006, rules 150 through 203.5 of the Nevada Supreme Court Rules were repealed. The subject matter of those repealed rules is now covered in the newly adopted Nevada Rules of Professional Conduct. However, because respondent's misconduct and his resulting Nevada Supreme Court discipline occurred prior to May 1, 2006, all references to Nevada Supreme Court Rules 150 through 203.5 refer to the Nevada Supreme Court Rules then in effect.

2. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
3. A lawyer may limit the objectives of the representation if the client consents after consultation.
4. A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
5. When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Respondent violated NSCR 152 in the Higuera matter by allowing his client's personal injury lawsuit to be closed without his client's consent or knowledge.

NSCR 153- Diligence

NSCR 153 states, "A lawyer shall act with reasonable diligence and promptness in representing a client."

Respondent violated NSCR 153 in the Smith, LaFair and Nuefeld matters by failing to diligently pursue alimony payments and the transfer of titles in a divorce matter (Smith), by failing to diligently litigate his client's personal injury lawsuit (LaFair), and by failing to diligently finalize a divorce decree (Nuefeld).

NSCR 154- Communication

NSCR 154 states:

1. A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
2. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Respondent violated NSCR 154 in the Smith, LaFair and Higuera matters by not communicating with his clients (Smith, LaFair and Higuera) and by failing to inform his client that her case had been closed (Higuera).

NSCR 165- Safekeeping Property

NSCR 165 states:

1. A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third

person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

2. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

3. When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

Respondent violated NSCR 165 in the LaFair matter by failing to return his client's file upon termination of employment.

NSCR 171- Expediting Litigation

NSCR 171 states:

1. A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.
2. The duty stated in subsection 1 does not preclude a lawyer from granting a reasonable request from opposing counsel for an accommodation, such as an extension of time, or from disagreeing with a client's wishes on administrative and tactical matters, such as scheduling depositions, the number of depositions to be taken, and the frequency and use of written discovery requests.

Respondent violated NSCR 171 in the Nuefeld matter by failing to make reasonable efforts to expedite the litigation of a divorce proceeding.

NSCR 200(2)- Bar Association and Disciplinary Matters

NSCR 200 states:

An applicant for admission to the board, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

1. Knowingly make a false statement of material fact; or
2. Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 156.

Respondent violated NSCR 200(2) in each of the five noted Nevada State Bar matters by failing to respond to lawful demands for information from the Nevada State Bar.

NSCR 203(4)- Misconduct

NSCR 203 states:

It is professional misconduct for a lawyer to:

1. Violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
2. Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
3. Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
4. Engage in conduct that is prejudicial to the administration of justice;
5. State or imply an ability to influence improperly a government agency or official; or
6. Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Respondent violated NSCR 203(4) in the Mentoring Agreement matter by failing to comply with the terms of his mentoring agreement.

D. Legal Conclusions

Rule 3-110(A) (Failure to Perform)

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

In the Smith, Higuera and Nuefeld matters, respondent recklessly failed to perform legal services with competence in willful violation of rule 3-110(A), as follows:

1. By continually failing to perform legal services in the Smith matter, including failing to pursue timely support payments, facilitate the transfer of title to a boat and trailer, and facilitate the recovery of an outstanding loan;
2. By failing to perform legal services in the Higuera matter, including failing to timely file the case conference report and failing to appear at a hearing regarding the defendant's motion for summary judgment which was thereafter granted; and
3. By failing to perform legal services in the Nuefeld matter, including repeatedly failing to approve the divorce decree as to form and content despite advising Nuefeld on several occasions that he would mail it out that week.

The court notes that although the Nevada Supreme Court found violations of NSCR 151 (Competence) and NSCR 153 (Diligence) in the LaFair matter, insufficient evidence exists within the record to support the determination of a violation of rule 3-110(A). The record

demonstrates that respondent failed to meet with a witness on one occasion and that the case was closed without the client's knowledge. However, there is no indication in the record that the LaFair matter was closed as a result of respondent's failure to perform or even that the matter was improperly closed. Respondent's single failure to meet with a witness does not constitute an intentional, reckless or repeated failure to perform.¹²

Section 6068, subd. (m) (Failure to Properly Communicate with Clients)

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.

In the Smith, LaFair and Higuera matters, respondent willfully violated section 6068, subdivision (m) as follows:

1. By continually failing to return all but two of Smith's numerous phone calls, letters and facsimiles, and failing to respond to Smith's repeated requests for information regarding the status and/or delays of his case;
2. By failing to inform LaFair of significant developments in his case, including the fact that LaFair's case was closed; and
3. By failing to inform Higuera of significant developments in her case, including the fact that Higuera's case was closed.

Rule 3-700(D)(1) (Failure to Return Client Papers or Property)

Rule 3-700(D)(1) requires an attorney whose employment has been terminated to promptly release to the client, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. This includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

In the LaFair matter, respondent willfully violated rule 3-700(D)(1) by failing, upon LaFair's request, to return LaFair's case file.

¹²It is unclear if the LaFair matter was closed at the time of the scheduled meeting.

Section 6068, subd. (l) (Failure to Comply with an Agreement in Lieu of Discipline)

Section 6068, subdivision (l) requires an attorney to keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.

In the Mentoring Agreement matter, respondent willfully violated section 6068, subdivision (l) by failing to provide timely responses to requests from the Nevada State Bar for information, in violation of the terms of his previous agreement in lieu of discipline.

Section 6068, subd. (i) (Participation in a Disciplinary Investigation)

Section 6068, subdivision (i) requires an attorney to participate and cooperate in any disciplinary investigation or other disciplinary or regulatory proceeding pending against the attorney.

In the Smith, LaFair, Higuera and Nuefeld matters, respondent willfully violated section 6068, subdivision (i) as follows:

1. By failing to respond to the Nevada State Bar's letters regarding the Smith grievance;
2. By failing to respond to the Nevada State Bar's letters regarding the LaFair grievance;
3. By failing to respond to the Nevada State Bar's letters regarding the Higuera grievance; and
4. By failing to respond to the Nevada State Bar's letters regarding the Nuefeld grievance.

The Nevada Supreme Court also found respondent culpable of violating NSCR 200(2) in the Mentoring Agreement matter. The evidence before the court demonstrates that respondent received a phone call from a representative of the Nevada State Bar advising respondent that his participation in his mentoring agreement was unsuccessful. However, there is no indication that respondent was requested to respond to this allegation or otherwise participate in the investigation in any way. Therefore, there is insufficient evidence to establish that respondent's conduct in the Mentoring Agreement matter constitutes a violation of section 6068, subdivision (i).

V. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

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. Misconduct, std. 1.2(b).)¹³ Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).) Additionally, the court finds that respondent's misconduct resulted in significant harm to his clients; as evidenced by the closing of LaFair's and Higuera's civil lawsuits without their consent or knowledge. (Std. 1.2(b)(iv).)

B. Mitigating Circumstances.

No mitigating factors were submitted into evidence.¹⁴ (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).) Respondent, however, has no prior record of discipline in nearly 16 years of practice prior to engaging in his first act of misconduct in the current proceeding (from 1984-2000).¹⁵ Practicing law for nearly 16 years before committing misconduct is entitled to significant weight in mitigation.

C. 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.)

¹³All further references to standard(s) are to this source.

¹⁴Respondent testified before the Southern Nevada Disciplinary Board regarding mitigation. He testified that he has been receiving treatment and therapy for depression and alcohol abuse. However, there was no showing that respondent's depression and alcohol abuse were directly responsible for his misconduct. Further, there is no evidence that respondent no longer suffers from depression and alcohol abuse. Therefore, the evidence on this subject is insufficient to warrant consideration in mitigation. (See standard 1.2(e)(iv).)

¹⁵Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of respondent's membership records.

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), 2.6 and 2.10 apply in this matter. The most severe sanction is found at standard 2.6 which states that the culpability of a member of a violation of section 6068 must result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3.

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.) The standards are not mandatory, and 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.)

The State Bar recommends that respondent be actually suspended for 90 days. The court agrees with the State Bar’s recommendation.

“In a proceeding under section 6049.1, the appropriate degree of discipline is not presumed by the other state’s discipline, but is open for determination in this state. [Citations.]” (*In re Kauffman* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 213, 217.) The California Supreme Court has generally considered actual suspension to be appropriate where multiple instances of misconduct involving client inattention have occurred. (*In re Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14.)

The court finds *King v. State Bar* (1990) 52 Cal.3d 307, to be instructive. In *King*, the respondent abandoned two clients, failed to forward their files promptly to successor counsel, and gave false assurances to one of the clients regarding the status of his case. The respondent demonstrated a failure to accept responsibility for his actions and to appreciate the severity of his misconduct. In mitigation, the respondent had no prior record of discipline. Additionally, he

was experiencing depression and financial difficulties, and was going through a marital dissolution. The Supreme Court ordered that the respondent be suspended for four-years, stayed, with four-years' probation, and three-months' actual suspension.

The court finds respondent's misconduct to be similar to *King*. While *King* involved only two clients and more mitigation, it did include the added element of deceit. In the case before the court, respondent's misconduct affected more clients, but there is no indication that his misconduct was shrouded in deception. Like *King*, respondent has no prior record of discipline.

Respondent's misconduct and lack of participation in this matter raises concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. No explanation has been offered that might persuade the court otherwise. Having considered the evidence and the law, the court believes that a 90-day actual suspension to remain in effect until respondent complies with rule 205 of the Rules of Procedure, among other things, is adequate to protect the public and proportionate to the misconduct found.

VI. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent **GARY MICHAEL SEGAL** be suspended from the practice of law for two years; that said suspension be stayed; and that he be actually suspended from the practice of law for 90 days and until the State Bar Court grants a motion to terminate respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Rules Proc. of State Bar, rule 205 (a)(c).)

It is also recommended that respondent be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court of rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also, rule 205(b).)

The court further recommends that within one year after the effective date of the

discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar 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, and passage of the test given at the end of the 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 will not receive MCLE credit for attending Ethics School. (Rule 3201, Rules of Procedure of the State Bar of California.)

The court also recommends that respondent 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.¹⁶

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners within one year after the effective date of this order or during the period of his actual suspension, whichever is longer, and furnish satisfactory proof of such to the State Bar Office of Probation within said period.

VII. COSTS

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.

Dated: April 14, 2008

DONALD F. MILES
Judge of the State Bar Court

¹⁶Respondent is required to file a 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 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).)

