

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 06-O-10183-LMA
)	
DAVID DEAN MANGAR)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND
Member No. 172628)	INVOLUNTARY INACTIVE
)	ENROLLMENT ORDER
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this disciplinary matter, Sherrie B. McLetchie appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent David Dean Mangar did not appear in person or by counsel.

After considering the evidence and the law, the court recommends, among other things, that respondent be disbarred regardless of whether the California Supreme Court accepts the discipline recommendation in State Bar Court case no. 05-C-1829.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on June 24, 2009, and was properly served on respondent on that same date at his official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section¹ 6002.1,

¹Future references to section are to the Business and Professions Code.

subdivision (c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) On June 29, 2009, the State Bar received by mail the signed return receipt.

On June 29, 2009, respondent was properly served by mail at his official address with a notice advising him, among other things, that a status conference would be held on August 10, 2009.

Respondent did not file a responsive pleading to the NDC. On July 21, 2009, a motion for entry of default was filed and properly served on respondent at his official address by certified mail, return receipt requested. The motion advised him that minimum discipline of disbarment would be sought if he was found culpable. Respondent did not respond to the motion.

On August 4, 2009, he was properly served with a notice rescheduling the August 10, 2009, status conference to August 17, 2009. The notice was served at his official address by first-class mail, postage prepaid.

On August 17, 2009, the court entered respondent's default and enrolled him inactive effective three days after service of the order. The order was filed and properly served on him at his official address on that same date by certified mail, return receipt requested. The court judicially notices its records pursuant to Evidence Code section 452, subdivision (h) which contain the executed return receipt received by mail in the court on August 21, 2009. The return receipt shows the handwritten delivery date of August 18, 2009, and that the correspondence was received by "Cristina Mangar."

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

The matter was submitted for decision without hearing after the State Bar filed a brief on September 14, 2009.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (§6088; Rules of Proc. of State Bar,² rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

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

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 8, 1994, and has been a member of the State Bar at all times since.

B. Facts

On April 20, 2002, Jean Rogers was seriously injured in a boating accident in which she suffered a broken neck, scalp laceration and cerebral concussion. Her injuries required her hospitalization for over one month.

On June 14, 2002, respondent, a solo practitioner, learned that Rogers had been injured. He and attorney Daniel Eisan³ went to Rogers' home where she was recuperating to obtain her as a client.

At the time of the meeting, Rogers was under the influence of pain medication to manage her significant pain and her head was immobilized with a skull tong, which is a halo-like

²Future references to the Rules of Procedure are to this source.

³Eisan, a solo practitioner, was not an associate, shareholder or partner of respondent. He resigned his license to practice law with disciplinary charges pending effective April 20, 2006.

mechanism that surrounded her head.

At the time of the meeting, Rogers discussed with respondent and Eisan the high probability that her case would involve summary judgment motions. Rogers explained to them that she was interested in employing an attorney who had been successful with summary judgment motions.

Respondent represented to Rogers that Eisan specialized in personal injury cases and that Eisan had extensive experience with summary judgment motions and had never lost one. In reality, Eisan had lost many summary judgment motions and respondent knew that the statement was false when he made it. Respondent made the false statement to Rogers regarding Eisan's success with summary judgment motions in order to induce her to employ respondent. Based upon this misrepresentation regarding Eisan's experience, Rogers agreed to employ respondent and Eisan.

On June 14, 2002, Rogers signed the agreement with respondent only. It did not mention Eisan. Respondent did not provide Rogers with a copy of the executed fee agreement. Rogers never executed a fee agreement with Eisan.

When Rogers signed the fee agreement, respondent and Eisan represented to her that it included a 30% contingency fee payment if the case settled before trial, including at arbitration, and a 40% contingency fee if the case proceeded to trial. In reality, the fee agreement respondent presented to Rogers entitled respondent to collect 40% of the settlement funds if the case settled at arbitration. Respondent knew that Rogers was in pain and taking pain medication and, therefore, was unable to carefully review and consider the terms of the fee agreement. He knew that Rogers relied on his representation that the fee agreement included a 30% contingency fee if the case settled before trial when he presented her with the fee agreement. He made misrepresentations to Rogers when he informed her that he would charge her a 30% contingency

fee when he knew that the fee agreement he presented to her included a 40% contingency fee and that he intended to collect that fee.

On June 17 and September 6, 2002, Rogers asked respondent to provide her with a copy of the fee agreement since he had not done so at the time that she hired him. He received her requests for a copy of the fee agreement but did not provide it to her.

On September 19, 2002, Eisan sent Rogers an e-mail indicating that he would provide her with a copy of the fee agreement. Neither respondent nor Eisan provided her with a copy of the fee agreement although it was a significant document relating to respondent's employment.

On February 18, 2003, Rogers participated in an arbitration regarding her boating accident before retired Judge Eugene Lynch.

Prior to the time of the arbitration, respondent had not provided Rogers with a copy of the fee agreements.

At the arbitration, Rogers expressed concern regarding the amount that she would recover from the settlement funds since she was obligated to pay respondent a contingency fee from the settlement proceeds.

During the arbitration, respondent represented to Judge Lynch and Rogers that the fee agreement entitled respondent to collect 30% of the settlement funds received as a result of settlement at arbitration. In reality, respondent knew that the fee agreement provided that he was entitled to collect 40% of the settlement funds. He knew that he later intended to assert a claim for 40% of the settlement funds. He misrepresented the amount of the contingency fee in order to induce Rogers to accept a settlement offer.

Respondent made misrepresentations to Judge Lynch and Rogers at the settlement conference when he stated that he was entitled to collect 30% contingency fee when he knew that he was entitled to collect 40%. He made the misrepresentation in order to induce Rogers to

accept a settlement offer by leading her to believe that she would receive 70% of the settlement amount when, in fact, he knew that she would only collect 60% pursuant to the fee agreement. Based upon his misrepresentation that she would collect 70% of the settlement funds, Rogers agreed to settle her claim for \$315,000.

Between June 2, 2002 and February 18, 2003, Eisan performed almost all of the services required on Rogers' matter and respondent did very little work on it.

Rule 2-200 of the Rules of Professional Conduct (rule) states that a member shall not divide a fee for legal services with a lawyer who is not a partner, associate of, or shareholder of the member unless the client has consented in writing to the fee division after full disclosure to the client in writing that there will be a fee division in the terms of the fee division.

Prior to February 27, 2003, respondent and Eisan entered into an agreement to split equally the contingency fees generated from their representation of Rogers. They agreed that respondent would receive his portion as a referral fee and Eisan would receive his portion for performing most of the work required in their representation of Rogers.

At the time that respondent and Eisan entered into the fee-splitting agreement, they did not inform Rogers or obtain her written consent after full disclosure in writing that they would be equally dividing the contingency fee.

On February 27, 2003, respondent and Rogers met with opposing counsel to sign the release and pick up the settlement draft, which was made payable to Rogers, Eisan and respondent.

After leaving opposing counsel's office, respondent suggested that he and Rogers go to her bank to deposit the check into her account. Respondent informed her that he could not deposit the check into his client trust account because his assets had been frozen. Instead, respondent suggested that he forge Eisan's name on the check. Then, Rogers could deposit the

check into her account and write respondent a check for the amount of the attorney's fees and costs. Respondent stated that he would provide Eisan with his portion of the fees from the money respondent received from Rogers.

During this discussion, respondent informed Rogers for the first time that she was required to pay a 40% contingency fee pursuant to the fee agreement.

Rogers declined respondent's suggestion and kept the check.

On February 27, 2003, Rogers terminated respondent and provided Eisan with the settlement check to deposit into his client trust account.

On March 6, 2003, Eisan and Rogers discussed distribution of the settlement proceeds. During that discussion, Eisan informed Rogers that: (1) she was required to pay a 40% contingency fee pursuant to the fee agreement; and (2) Eisan and respondent had an agreement that each would receive 50% of the attorney fees.

During the discussion, Rogers learned for the first time that Eisan and respondent had entered into a fee-sharing agreement wherein they would equally share the contingency fee on her matter.

At no time did respondent or Eisan inform Rogers in writing that they had a fee-sharing agreement nor did they obtain her consent in writing to the fee-sharing arrangement.

Respondent attempted to split the fees with Eisan when he suggested on February 27, 2003, that he receive the entire attorney fees portion of the settlement proceeds and he would thereafter provide Eisan with his share of the fees.

Respondent entered into the fee-sharing arrangement and attempted to split the fee with Eisan without complying with rule 2-200's requirements that he obtain Rogers' written consent to the fee division after full disclosure in writing that he would split the contingency fee equally with Eisan.

At the time that respondent entered into the fee-sharing agreement with Eisan and at the time that respondent attempted to collect Eisan's portion of the attorney's fees, respondent knew that rule 2-200 required him to obtain Rogers' written consent to the fee division after full disclosure in writing that there would be a fee division and the terms thereof.

On August 26, 2005, the State Bar opened an investigation in this matter. On June 23, 2006, a State Bar investigator sent respondent a letter requesting that respondent answer in writing specific allegations of misconduct regarding his conduct in this matter. The letter was addressed to respondent's official membership records address and sent by first-class mail, postage prepaid. It was not returned to the State Bar as undeliverable or for any other reason.

On July 5, 2006, respondent telephoned the State Bar investigator to discuss the June 23 letter. During the discussion, the investigator granted respondent a two-week extension, until July 21, 2006, to respond to the June 23 letter.

Respondent did not answer the June 23 letter.

On August 9, 2006, the State Bar investigator wrote respondent another letter regarding his conduct in this matter and enclosed a copy of the June 23 letter. The letter requested that respondent answer in writing by August 22, 2006. It was addressed to respondent's official membership records address and sent by first-class mail, postage prepaid. It was not returned to the State Bar as undeliverable or for any other reason. Soon after August 9, 2006, respondent received the letter but he did not respond to it.

B. Conclusions of Law

1. Counts 1 and 3 - Section 6106 (Moral Turpitude)

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

There is clear and convincing evidence that respondent violated section 6106 by making misrepresentations to Rogers about Eisan's experience and to Rogers and Judge Lynch about the amount of the contingency fee. Accordingly, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

2. Count 2 – Rule of Professional Conduct,⁴ rule 3-500 (Failure to Communicate)

Rule 3-500 requires an attorney to keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

By not providing Rogers promptly with a copy of her fee agreement despite being asked to do so, respondent did not keep her reasonably informed about significant developments in her case in wilful violation of rule 3-500.

3. Count 4 - Rule 1-120 (Assisting, Soliciting or Inducing Violations)

Rule 1-120 prohibits an attorney from knowingly assisting in, soliciting or inducing any violation of the Rules of Professional Conduct or the State Bar Act.

By entering into a fee-sharing agreement with Eisan and by attempting to split that fee with Eisan without complying with rule 2-200, respondent knowingly assisted in, solicited and induced a violation of the rules of professional conduct in wilful violation of rule 1-120.

4. Count 5 - Section 6068, subd. (i) (Nonparticipation in 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 him- or herself.

By not responding to the State Bar investigator's letters dated June 23 and August 9,

⁴Future references to rule are to this source.

2006, respondent did not participate in the investigation of the allegations of misconduct regarding the Rogers case in wilful violation of 6068, subdivision (i).

IV. 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. Misconduct⁵, std. 1.2(b).)

Respondent has two prior instances of discipline. (Std. 1.2(b)(i).) In order no. S115357 (State Bar Court case no. 00-O-15476), filed July 18, 2003, the Supreme Court imposed discipline consisting of one year's stayed suspension and one year's probation on conditions, including 120 days of actual suspension. Respondent stipulated to culpability for violation of rules 4-100(A) (two counts); 4-100(B)(4) (one count) and 3-310(B)(3) of the Rules of Professional Conduct. Trust account violations were the aggravating factor. In mitigation, the court considered the absence of a prior disciplinary record and respondent's candor and cooperation.

In State Bar Court case no. 05-C-1829-LMA, filed June 29, 2009, this court recommended discipline consisting of three years' stayed suspension and actual suspension for six months and until respondent complies with rule 205, Rules Proc. of State Bar, based on a conviction of violating Pen. Code, §602, subdivision (m) (entering and occupying real property or structures of any kind without the consent of the owner), a misdemeanor. This matter is pending before the California Supreme Court and is not yet final but may, nonetheless, be considered a prior instance of discipline although it is not yet final. (Rule of Procedure 216(c).) The aggravating effect of this disciplinary record is lessened as the misconduct upon which it is

⁵Future references to standard or std. are to this source.

based occurred subsequent to the bulk of the misconduct in the present case, with some overlap.

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

In relevant part, standard 1.2(b)(iii) permits consideration as an aggravating circumstance whether respondent's misconduct was surrounded or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct. In the instant case, he overreached his vulnerable client by making misrepresentations in order to induce her to retain him and to settle the litigation.

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

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors.

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.)

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).) Discipline is progressive. (Std. 1.7.)

Standards 2.3, 2.4, 2.6 and 2.10 apply in this matter. The most severe sanction is found at standard 2.3 which recommends actual suspension or disbarment for culpability of an act of moral turpitude, fraud, intentional dishonesty or of concealment of a material fact from a court, client or other person, depending on the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the attorney's acts within the practice of law.

Standard 1.7(b) also applies. It provides that, if an attorney has two prior records of discipline, the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate.

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 of violating sections 6106 (two counts) and 6068, subdivision (i) as well as rules 1-120 and 3-500. In aggravation, the court found prior instances of misconduct, multiple acts, concealment and overreaching, as well as lack of participation in these proceedings.

The State Bar recommends disbarment. The court agrees. Lesser discipline than disbarment is not warranted because there are no extenuating circumstances that clearly predominate in this case. (Std. 1.7(b).) The serious and unexplained nature of the misconduct,

the lack of participation in these proceedings as well as the self-interest underlying respondent's actions 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 prior discipline has not served to rehabilitate him or to deter him from further misconduct.

Moreover, the court recommends disbarment regardless of whether the California Supreme Court accepts the discipline recommendation in State Bar Court case no. 05-C-1829. (Std. 1.7(c).) The court is very concerned about respondent's overreaching such a vulnerable client for his own financial benefit in this case. His initial disciplinary matter also involved client funds and the misuse of his client trust account.

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 regardless of whether the California Supreme Court accepts the discipline recommendation in State Bar Court case no. 05-C-1829.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent DAVID DEAN MANGAR be DISBARRED from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

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

VI. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VII. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: December _____, 2009

LUCY ARMENDARIZ
Judge of the State Bar Court