

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

|                                   |   |                                 |
|-----------------------------------|---|---------------------------------|
| In the Matter of                  | ) | Case No.: <b>06-O-10523-RAH</b> |
|                                   | ) |                                 |
| <b>TODD CLARK DAVIS,</b>          | ) |                                 |
|                                   | ) |                                 |
| <b>Member No. 186531,</b>         | ) | <b>DECISION</b>                 |
|                                   | ) |                                 |
| <u>A Member of the State Bar.</u> | ) |                                 |

**I. INTRODUCTION**

In this original disciplinary proceeding, which proceeded by default, Deputy Trial Counsel Melanie J. Lawrence appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Respondent Todd Clark Davis did not appear in person or by counsel.

In the notice of disciplinary charges (hereafter NDC), the State Bar charges respondent with two counts of misconduct. In the first count, the State Bar charges respondent with engaging in acts involving moral turpitude in a single client matter, and in the second count, the State Bar charges respondent with failing to cooperate in the State Bar's disciplinary investigation into his alleged misconduct. The State Bar contends that the appropriate level of discipline is two years' stayed suspension and nine months' actual suspension. The State Bar also contends that respondent should be required to take and pass a professional responsibility examination and to comply with California Rules of Court, rule 9.20.

The court finds respondent culpable on both counts of charged misconduct. However, for the reasons set forth below, the court concludes that the appropriate level of discipline is two years' stayed suspension and sixty days' actual suspension that will continue until respondent makes and the State Bar Court grants a motion to terminate his suspension (Rules Proc. of State Bar, rule 205). In addition, the court does not recommend that respondent be require to take and pass a professional responsibility examination because the Supreme Court ordered him ordered to take and pass the Multistate Professional Responsibility Examination (hereafter the MPRE) in its March 29, 2007, order in case number S149812 (State Bar Court case number 05-O-03670-RAH) (hereafter *Davis I*).

## II. PROCEDURAL HISTORY

On November 3, 2006, the State Bar filed the NDC and served a copy of it on respondent at his latest address shown on the official membership records of the State Bar (hereafter official address) by certified mail, return receipt requested in accordance with Business and Professions Code section 6002.1, subdivision (c).<sup>1</sup> However, the United States Postal Service (hereafter Postal Service) returned, to the State Bar, that copy of the NDC undelivered and stamped "Return to Sender, Not Deliverable as Addressed, Unable to Forward."<sup>2</sup>

Respondent's response to the NDC was due no later than November 28, 2006. (Rules Proc. of State Bar, rules 63(a), 103(a).) Respondent, however, failed to timely file a response.

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<sup>1</sup> Unless otherwise noted, all further statutory references are to this code.

<sup>2</sup> The declaration of Deputy Trial Counsel Lawrence (which is attached to the State Bar's December 7, 2006, motion for entry of default) establishes (1) that the State Bar mailed a second copy of the NDC to respondent at his official address by regular first class mail on November 27, 2006, and (2) that the Postal Service did not return the second copy to the State Bar. However, these two facts add nothing to the record with respect to whether respondent has knowledge of this proceeding since Postal Service returned the first copy of the NDC to the State Bar because it was undeliverable as addressed and because it could not forward it to respondent (presumably, because there was no forwarding order on file for respondent).

On December 7, 2006, the State Bar filed a motion for entry of respondent's default and served a copy of it on respondent at his official address by certified mail, return receipt requested. Respondent failed to respond to the State Bar motion or to file a response to the NDC. Because all of the statutory and rule prerequisites were met, the court filed an order on January 3, 2007, entering respondent's default and, as mandated in section 6007, subdivision (e)(1), ordering that he be involuntarily enrolled as an inactive member of the State Bar.

On January 3, 2007, a State Bar Court case administrator properly served a copy of the court's order of entry of default on respondent at his official address by certified mail, return receipt requested.

On January 18, 2007, the State Bar filed a request for waiver of default hearing and brief on culpability and discipline. That same day, the court took the case under submission for decision without a hearing.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The court's findings are based on: (1) the well-pleaded factual allegations (not the legal contentions or the charges) contained in the NDC, which allegations are deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)); and (2) the facts in this court's official file in this matter.

#### **A. Jurisdiction**

Respondent was admitted to the practice of law in the State of California on December 10, 1996, and has been a member of the State Bar since that time.

#### **B. Misconduct**

At some unknown time, Craig Garner (hereafter Garner) was married to a woman named Kimberly; and they had two children. The marriage thereafter ended. In about 2001, Garner started making, to Kimberly, court-ordered child support payments for their two children.

In August 2005, Garner employed respondent to obtain a reduction in his court-ordered support payments and paid respondent about \$1,500 in advanced attorney's fees. Respondent knew that the matter was urgent and that Garner had suffered a drastic reduction in his salary.

In mid-September 2005, respondent had Garner execute an order to show cause to initiate child support proceedings (hereafter first OSC). Respondent, however, never filed the first OSC. Later that same month, Garner asked respondent about the status of the child support matter, and respondent lied and told Garner that he was waiting for the court to set the first OSC for a hearing.

In October 2005, Garner again asked respondent about the status of the child support matter. Respondent lied and told Garner that the court had rejected the first OSC and that they would have to file a second OSC. In two separate telephone conversations later that same day, Garner asked respondent for a copy of the first OSC and for a written summary of the developments in the child support matter. Respondent did not provide Garner with the requested documents. Thus, about a week later, Garner requested them again for a third time, and respondent assured Garner that the documents had already been sent and that he would send Garner another copy of the documents. Garner, however, still did not receive the documents so he asked respondent for them a fourth time a few days later. At that point, respondent finally admitted to Garner that he could not provide him with a copy of the first OSC because it had never been filed.

Respondent finally filed an order to show cause for Garner in late October 2005. Thereafter, in late November 2005, respondent and Garner appeared at a hearing on that OSC. At that hearing, respondent asked for a continuance so that he could give notice of the hearing to Kimberly (i.e., the opposing party), and the court continued the hearing until mid-December 2005. Shortly before that hearing, Garner terminated respondent's employment.

On April 13, 2006, and then again on April 27, 2006, a State Bar investigator mailed, to respondent, a letter in which the investigator asked respondent for a written response to specific allegations of misconduct that Garner had made against respondent. Respondent actually received both of those letters, but never responded to them. Nor did respondent otherwise properly cooperate in the State Bar's investigation of Garner's complaints against him.

***Count 1: Moral Turpitude (§ 6106)***

In count 1, the State Bar charges that respondent willfully violated section 6106, which proscribes acts involving moral turpitude, dishonesty, or corruption. The record establishes, by clear and convincing evidence, that respondent purposely misled Garner about the status of the child support matter when he falsely told Garner (1) that he (i.e., respondent) was waiting on the court to set the first OSC for a hearing; (2) that the court rejected the first OSC; and (3) that he sent, to Garner, a copy of the first OSC and a written summary of developments. Without question, such conduct involves moral turpitude in willful violation of section 6106. (*Stevens v. State Bar* (1990) 51 Cal.3d 283, 289.)

***Count 2: Failure to Cooperate with State Bar (§ 6068, subd. (i))***

In count 2, the State Bar charges that respondent willfully violated section 6068, subdivision (i), which requires that an attorney "cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. . . ." The record clearly establishes that respondent willfully violated section 6068, subdivision (i) by failing to respond to the State Bar investigator's April 13, 2006, and April 27, 2006, letters and by failing to otherwise participate in the State Bar's disciplinary investigation of Garner's complaints.

## IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

### A. Aggravating Circumstances

#### 1. Prior Record

Respondent has a prior record of discipline: *Davis I.* (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (hereafter standards), std. 1.2(b)(i).)

In *Davis I.*, the Supreme Court placed respondent on one year's stayed suspension and thirty days' actual suspension, which will continue until respondent pays \$2,500 restitution (with interest) to a former client and until respondent makes and the State Bar Court grants a motion, under Rules of Procedure of the State Bar, rule 204, to terminate his actual suspension. In addition, the Supreme Court ordered respondent to take and pass the MPRE within the longer of one year or the period of his actual suspension. Like in the present proceeding, respondent defaulted in *Davis I.*

In *Davis I.*, respondent was found culpable of four counts of misconduct. In the first three counts, respondent was found culpable, in a single client matter, of (1) failing to perform legal services competently (Rules Prof. Conduct, rule 3-110(A)); (2) failing to adequately communicate with the client (§ 6068, subd. (m)); and (3) failing to refund \$2,500 in unearned fees (Rules Prof. Conduct, rule 3-700(D)(2)). In the fourth count, respondent was found culpable of failing to cooperate with a State Bar disciplinary investigation (§ 6068, subd. (i)).

#### 2. Multiple Acts of Misconduct

The fact that respondent has been found culpable on two counts of misconduct in the present proceeding is an aggravating circumstance. (Std. 1.2(b)(i).)

#### 3. Failure to Cooperate

Respondent's failure to participate in this disciplinary proceeding before the entry of his default is an aggravating factor. (Std. 1.2(b)(vi).) However, contrary to the State Bar's

contention, it warrants little weight in aggravation because the conduct relied on for this aggravating factor closely equals the misconduct relied on to find respondent culpable of violating section 6068, subdivision (i) and to enter his default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

## **B. Mitigating Circumstances**

There is no clear and convincing evidence of any mitigating circumstances.

## **V. DISCUSSION ON DISCIPLINE**

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In this case, the most severe sanction for respondent's misconduct is found in standard 2.3, which provides "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon 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 member's acts within the practice of law."

Another applicable standard is standard 1.7(a), which provides that, when an attorney has one prior record of discipline, the discipline imposed in the current proceeding shall be greater than that imposed in the prior. However, standard 1.7(a) must not be strictly applied in the

present proceeding because most of the misconduct found in this proceeding was committed during the same time period in which respondent committed the misconduct found in *Davis I.* (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619; *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 351.) Instead, the correct analysis is to "consider the totality of the findings in the two cases to determine what the discipline would have been had all the charged misconduct been brought as one case." (*In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.)

To support its contention that the appropriate level of discipline is two years' stayed suspension and nine months' actual suspension, the State Bar cites *Hansen v. State Bar* (1978) 23 Cal.3d 68 and *Conroy v. State Bar* (1991) 53 Cal.3d 495 without any meaningful analysis or discussion. Nonetheless, the court has reviewed those two cases in the interest of justice and determined that they are not instructive for purposes of determining discipline. The court independently concludes that *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332 and *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83 are instructive.

In *Mitchell*, the attorney committed acts of dishonesty in violation of section 6106 by knowingly misrepresenting his education on a resume sent to various law firms and by failing to correct the misrepresentation during an interview with a law firm. The attorney's use of the false resumes extended for about three years. As the review department aptly noted in *Mitchell*: "An attorney's statements in a resume, job interview, or research paper should be as trustworthy as that professional's [statements] to a court or client." (1 Cal. State Bar Ct. Rptr. at p. 341.)

In aggravation, the attorney in *Mitchell* gave deceitful answers to interrogatories served on him by the State Bar. In mitigation, very little weight was given to the attorney's five years of discipline free practice and to a single letter about his good character. The attorney was given

some mitigating credit because of his personal problems (i.e., stress over his wife's loss a child in the eighth month of pregnancy and over his wife's subsequent pregnancy); because his misconduct did not occur during the actual practice of law; and because there was only minimal harm. The attorney in *Mitchell* was placed on one year's stayed suspension, one year's probation, and sixty days' actual suspension.

In *Wyrick*, the attorney deliberately failed to disclose, on two applications for employment as an attorney, that he had previously been actually suspended from the practice of law because of disciplinary charges. On a third application, which was for employment as a judicial arbitrator, the attorney failed to disclose (i.e., misstated by omission), through gross negligence, that he was on interim suspension following a criminal conviction. In addition, the attorney served as a judicial arbitrator while on interim suspension in violation of California Rules of Court, rule 1604(b). As the review department aptly noted in *Wyrick*: "Employers, clients and the public are entitled to rely on the statements of a lawyer for what they say." (2 Cal. State Bar Ct. Rptr. at p. 94.)

In aggravation, the attorney in *Wyrick* had a prior record of discipline based on the attorney's conviction for attempting to receive stolen property, which the attorney stipulated involved moral turpitude. There was little, if any, mitigation. The attorney in *Wyrick* was placed on two years' stayed suspension, two years' probation, and six months' actual suspension.

The misconduct and aggravation in both *Mitchell* and *Wyrick* are more serious than the misconduct and aggravation in this case. However, there is mitigation in *Mitchell* that is not present in this case. In addition, respondent defaulted in this proceeding. On balance, the court concludes that, if respondent's misrepresentations to Garner and failures to cooperate in the State Bar's disciplinary investigation of Garner's complaints had been brought in *Davis I*, the appropriate level of discipline would have been two years' stayed suspension and ninety days'

actual suspension. Accordingly, the court will recommend, among other things, that respondent be placed on two years' stayed suspension and sixty days' actual suspension. As noted above, the court does not recommend that respondent be ordered to take and pass the MPRE because he was ordered to do so in *Davis I*.

## **VI. DISCIPLINE RECOMMENDATION**

The court recommends that respondent Todd Clark Davis be suspended from the practice of law in the State of California for two years, that execution of the two-year suspension be stayed, and that Davis be actually suspended from the practice of law for sixty days and until he makes and the State Bar Court grants a motion, under Rules of Procedure of the State Bar, rule 205, to terminate his actual suspension. The court also recommends that, if Davis's actual suspension in this matter continues for two or more years, he remain actually suspended from the practice of law until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

The court also recommends that Davis be ordered to comply with the conditions of probation, if any, hereinafter imposed on him by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

## **VII. RULE 9.20 & COSTS**

The court also recommends that, if the period of Davis's actual suspension in this matter extends for 90 or more days, he be required to comply with California Rules of Court, rule 9.20 (formerly rule 955) and to perform the acts specified in subdivisions (a) and (c) of that rule

within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court order in this matter.<sup>3</sup>

Finally, the court further 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 17, 2007

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RICHARD A. HONN  
Judge of the State Bar Court

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<sup>3</sup> Davis is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) At least in the absence of compelling mitigating circumstances, an attorney's failure to comply with rule 955 almost always results in disbarment. (E.g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 296.)