

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

In the Matter of)	Case No. 06-O-10874-RAH
)	
JOE ALFRED LEYVA,)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND
Member No. 175131,)	INVOLUNTARY INACTIVE
)	ENROLLMENT ORDER
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this disciplinary matter, Fumiko Kimura appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Joe Alfred Leyva 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.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on June 29, 2006, 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, subdivision (c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) This correspondence was returned undeliverable with the notation "box closed - unable to forward." A courtesy copy sent by regular mail on July 18, 2006, was also returned with the same notation.

Courtesy copies of the NDC were also served on June 29, 2006, at two alternate

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

addresses. Neither was returned as undeliverable.

On July 13, 2006, respondent was properly served at his official and two alternate addresses with a notice advising him, among other things, that a status conference would be held on September 7, 2006. The court judicially notices its records which indicate that all correspondence sent to respondent's official address was returned as undeliverable and none of the correspondence sent to the alternate addresses was so returned.

Respondent did not file a responsive pleading to the NDC. On September 25, 2006, 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 disbarment would be sought if he was found culpable. Respondent did not respond to the motion.

Respondent did not appear at the September 7 status conference. On September 8, 2006, he was properly served with a status conference order at his official and one alternate addresses by first-class mail, postage prepaid.

On October 17, 2006, 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 requested², as well as at two alternate addresses.

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.* (April 26, 2006, No. 04-1477) 547 U.S. ___, 126 S.Ct. 1708, 164 L.Ed.2d 415, <<http://www.supremecourtus.gov/opinions/05slipopinion.html>>.)

The matter was submitted for decision without hearing after the State Bar filed a brief on November 7, 2006.

²The unsigned return receipt was returned; however, as previously noted, the correspondence was also returned as undeliverable.

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 Bar³, 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. The Gregory Matter

1. Facts

On April 26, 2005, Crystal Gregory signed a trust deed giving Beneficial California, Inc., a security interest in her property. On April 28, 2005, Beneficial caused the trust deed to be recorded against Gregory's property.

On April 28, 2005, Gregory changed her mind about obtaining the loan from Beneficial. She contacted Beneficial within the three-day "cooling-off" period to rescind the loan and reconvey the trust deed. Beneficial did not promptly reconvey the trust deed.

On June 28, 2005, Gregory employed respondent to obtain the reconveyance of the trust deed from Beneficial and to seek damages due to Beneficial's failure to reconvey promptly the trust deed, which prevented Gregory from refinancing her property with another company. She paid him \$1,500 in advanced legal fees. Respondent did not provide her with a retainer agreement.

In June 2005, respondent wrote to Beneficial to say that he represented Gregory and that she did not want to go forward with the refinancing. He also asked Beneficial to provide proof

³Future references to the Rules of Procedure are to this source

that the trust deed had been reconveyed.

On July 1, 2005, Theresa Nicchia, Assistant Vice President of Beneficial's Customer Resolution Department, advised respondent in writing that Gregory's loan had been rescinded and that the lien on her property had been released on June 24, 2005. She enclosed a copy of the reconveyance. Respondent received Nicchia's letter but did not inform Gregory that the trust deed had been reconveyed.

On July 18, 2005, respondent wrote to Eric Kimbriel, Beneficial's Branch Sales manager, to inform him that he would be appearing *ex parte* on July 19, 2005, to file a complaint against Beneficial and to file a motion to have the trust deed against Gregory's property removed.

Respondent did not appear in court on July 19, 2005 or file a complaint or motion against Beneficial in the Gregory matter.

On July 21, 2005, respondent prepared and signed a complaint and an *ex parte* motion to be filed against Beneficial in the Gregory matter.

On that same date, respondent wrote to Kimbriel stating that he had been unable to appear at the *ex parte* hearing but would be there on July 22, 2005. He stated that, at that time, he would file a complaint or motion against Beneficial in the Gregory matter. Respondent sent the letter to Kimbriel via facsimile and by United States mail.

Respondent did not appear in court on July 22, 2005 or file a complaint or motion against Beneficial in the Gregory matter.

On July 27, 2005, Tiffany J. Hofeldt, Beneficial's counsel, told respondent in writing that Beneficial had reconveyed its interest in Gregory's property in June 2005 and enclosed another copy of the reconveyance. Respondent received Hofeldt's letter and enclosure but did not timely tell Gregory that the reconveyance had been filed.

In July 2005, respondent represented to Gregory that he had filed a complaint against Beneficial although he knew he had not done so.

In August 2005, respondent represented to Gregory that Beneficial had offered to settle the case for \$100,000 although he knew that there had been no settlement offer whatsoever.

In the fall of 2005, respondent informed Gregory that Beneficial had filed the

reconveyance.

On January 15, 2006, respondent prepared a declaration for Gregory, telling her that it was necessary for the mediation of her case, although he knew that there was no mediation occurring or scheduled in the case.

On January 18, 2006, because of respondent's lack of communication, Gregory employed other counsel, Adam L. Rollins, to pursue her action against Beneficial. By letter dated January 19, 2006, Rollins requested Gregory's complete file from respondent. Although respondent received the letter on January 20, 2006, he did not respond to it or return the client's file.

On January 25, 2006, Rollins again wrote to respondent asking for Gregory's file and that respondent contact him immediately to make arrangements to turn over the file. Although respondent received the letter, which was sent via facsimile and United States mail, on that same date, he did not respond to the letter or return the file.

On January 26, 2006, respondent gave Gregory a case number purportedly assigned to her case against Beneficial. He also gave her nonconformed copies of a complaint against Beneficial and of an *ex parte* motion to rescind the trust deed. Respondent took these actions although he knew that there was no case number assigned to Gregory's matter; that no complaint had been filed; and that he had not filed an *ex parte* motion in her case.

On January 26, 2006, Rollins again wrote to respondent, asking that respondent turn over Gregory's file and for a response to Rollins' inquiries. Although respondent received the letter, which was sent via facsimile and United States mail, on January 27, 2006, he did not respond timely to the letter.

In February 2006, respondent turned over Gregory's file by leaving it on the sidewalk outside of Rollins' office door.

On February 24, 2006, Rollins wrote to respondent seeking a full refund and accounting of the \$1,500 Gregory paid respondent. Although respondent received the letter, which was sent via facsimile and United States mail, on February 24, 2006, he did not respond to the requests for an accounting and refund.

Respondent did not file a complaint or perform any services of value on Gregory's behalf,

except for writing the June 2005 letter to Beneficial. He did not earn the entire advanced fee that Gregory paid him nor did he refund any part of the \$1,500 advanced fee.

On February 24, 2006, the State Bar opened an investigation pursuant to a complaint filed by Gregory regarding allegations of misconduct by respondent in this matter. On March 23 and April 10, 2006, a State Bar investigator sent respondent letters requesting that respondent answer in writing specific allegations of misconduct regarding the Gregory complaint. The letters were addressed to respondent's official membership records address and two alternate addresses and sent by first-class mail, postage prepaid. The letters sent to the official address were returned as undeliverable on May 30 and 31, 2006. The letters sent to the alternate addresses were not returned to the State Bar as undeliverable or for any other reason. Respondent received these letters but did not answer them or otherwise communicate with the investigator.

2. Conclusions of Law

a. Count 1 - 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 misrepresenting to Gregory that he was pursuing a civil case against Beneficial; that a case number had been assigned to it; that the case was going to be mediated; and that Beneficial had made a settlement offer. Accordingly, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

b. Count 2 - Section 6068, subdivision (m) (Communication)

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.

By not promptly informing Gregory that Beneficial had reconveyed the trust deed in June 2005, respondent did not keep Gregory reasonably informed of significant developments in wilful violation of section 6068, subdivision (m).

c. Count 3 - Rule of Professional Conduct⁴ 3-110(A) (Competence)

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

There is not clear and convincing evidence that respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A). Since the reconveyance was recorded and the lien released in June 2005, there was no apparent need to initiate legal proceedings against Beneficial. Accordingly, this charge is dismissed with prejudice.

d. Count 4 - Rule 3-700(D)(2) (Unearned Fees)

Rule 3-700(D)(2) requires an attorney whose employment has terminated to promptly return any part of a fee paid in advance that has not been earned. This rule does not apply to true retainer fees paid solely for the purpose of ensuring the availability of an attorney to handle a matter.

By not refunding any part of the unearned fees to Gregory, respondent did not return an advanced, unearned fee in wilful violation of rule 3-700(D)(2).⁵

e. Count 5 - Rule 4-100(B)(3) (Accounting)

Rule 4-100(B)(3) requires, in relevant part, that an attorney maintain complete records of all client funds, securities or other property coming into the attorney's or law firm's possession and render appropriate accounts to the clients regarding them. The attorney is to preserve such records for no less than five years after final appropriate distribution of the funds or property.

By not providing Gregory or Rollins with an accounting of the unearned fees (Gregory's funds), respondent wilfully violated rule 4-100(B)(3).

⁴Future references to rule are to this source.

⁵No evidence was submitted proving the amount of the fees that was unearned, therefore the court cannot recommend that respondent be ordered to make restitution.

f. Count 6 - Section 6068, subdivision (i) (Not Participating 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 investigator's letters, respondent did not participate in the investigation of the allegations of misconduct regarding the Gregory 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. Misconduct⁶, std. 1.2(b).)

Respondent has one prior instance of discipline. (Std. 1.2(b)(i).) In Supreme Court order no. S147878 (State Bar Court case no. 05-O-02581), filed January 18, 2007, discipline was imposed consisting of one year's stayed suspension and actual suspension for one year and until respondent complies with rule 205 of the Rules of Procedure of the State Bar, among other things. In one client matter during the period of February 2003 and July 2005, respondent was found culpable of violating rule 3-110(A) and sections 6103, 6106 and 6068, subdivisions (i) and (m). In mitigation, the court noted that respondent had practiced law without discipline for eight years. In aggravation, the court found multiple acts of misconduct; harm to clients and to the administration of justice; indifference toward rectification of or atonement for the consequences of the misconduct; and not participating in the disciplinary matter.

The court notes that respondent has been engaged in a nearly continuous course of misconduct since February 2003. Moreover, the misconduct in the present and prior cases is similar and serious. In the prior case, he repeatedly misrepresented the status of the case to his

⁶Future references to standard or std. are to this source.

clients and to the court. For example, in the prior case, he, too, misrepresented to the clients that he had filed litigation on their behalf and gave them nonconformed copies of the suit. In reality, the complaint was not filed until about one year later. He told the clients that the defendants had been sent the complaint and that he was trying to schedule a mediation, voluntary settlement conference or arbitration. The defendants, however, had never even been served with the complaint and there were no efforts being made to schedule such proceedings. He misrepresented to the court that the defendants had been served.

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

Respondent's misconduct significantly harmed his client. (Std. 1.2(b)(iv).) She had to retain other counsel to finalize her case.

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).)

Standards 2.2(b), 2.3, 2.6(a) and 2.10 apply in this matter. The most severe sanction is suggested by standard 2.2(b): at least three months' actual suspension regardless of mitigating circumstances for commingling entrusted funds or property with personal property or committing another violation of rule 4-100, none of which result in the wilful misappropriation of entrusted funds or property.

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 rules 3-700(D)(2) and 4-100(B)(3) and sections 6068, subdivisions (i) and (m) and 6106. In aggravation, the court found multiple acts of misconduct; harm to the client; and not participating in the proceedings prior to the entry of default. There were no mitigating factors.

The State Bar recommends disbarment. The court agrees.

Lesser discipline than disbarment is not warranted. (Std. 1.7(a), (c).) The serious and unexplained nature of the misconduct and the lack of participation in these and the prior disciplinary proceedings 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.

The court is most concerned about respondent's continued course of dishonesty toward clients and, in the first disciplinary case, the court. "Deceit by an attorney is reprehensible misconduct whether or not harm results and without regard to any motive or personal gain. (Citations.)" (*Codiga v. State Bar* (1978) 20 Cal.3d 788, 793.) Respondent's continued dishonest conduct demonstrates that he does not embrace this fundamental rule of ethics for attorneys. (*Gold v. State Bar* (1989) 49 Cal.3d 908, 914.) Therefore, 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.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent JOE ALFRED LEYVA 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: January __, 2007

RICHARD A. HONN
Judge of the State Bar Court