

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

In the Matter of	)	Case No.: <b>06-O-11452-RAH</b>
	)	
<b>JOHN EARL MORTIMER,</b>	)	
	)	
<b>Member No. 130526,</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 Joseph R. Carlucci appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter “State Bar”). Respondent John Earl Mortimer did not appear in person or by counsel.

In the notice of disciplinary charges (hereafter “NDC”), the State Bar charges respondent with four counts of misconduct. In the first three counts, the State Bar charges respondent with misconduct in a single client matter. In the fourth 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, three years’ probation, and thirty days’ actual suspension.

For the reasons set forth below, the court finds respondent culpable on only one of the four counts of charged misconduct and concludes that the appropriate level of discipline is a public reproof with the requirement that respondent attend and complete ethics school.

## **II. PROCEDURAL HISTORY**

On November 28, 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 “Unclaimed.”

Respondent’s response to the NDC was due no later than December 26, 2006. (Rules Proc. of State Bar, rules 63(a), 103(a).) Respondent, however, failed to timely file a response.

On February 9, 2007, 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 March 1, 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 March 1, 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 both (1) by certified mail, return receipt requested and (2) by first class mail (i.e., regular mail). Thereafter, on March 22, 2007, the copy of the court’s order that was served on respondent by certified mail was returned to the State Bar Court by the Postal Service undelivered and marked “Unclaimed.” However, the

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

copy of the court's order that was mailed to respondent by first class mail was not returned to the State Bar Court by the Postal Service as unclaimed or otherwise. Accordingly, the court finds that respondent actually received the copy of the order that was served on him by first class mail. (Evid. Code, § 641 [mailbox rule].)

On March 19, 2007, the State Bar filed a request for waiver of default hearing and brief on culpability and discipline (hereafter "State Bar's March 19, 2007, brief"). That same day, the court took the case under submission for decision without a hearing.

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

"A default admits *the material allegations of the complaint*, and no more. . . . [T]he relief given to the plaintiff cannot exceed that which the law awards as the legal conclusion *from the facts alleged* [in the complaint]." (*Ellis v. Rademacher* (1899) 125 Cal. 556, 557, italics added.) Thus, the fact that a defaulting respondent cannot contest the truth of the facts alleged against him or her in the NDC does not relieve this court of its independent obligation to examine the factual and legal sufficiency of the State Bar's case.<sup>2</sup> (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 501-502 & fn. 4, 505; cf. *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410; *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 128.)

Even though respondent's default has been entered, this court must still resolve all reasonable doubts in respondent's favor (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1216).

Similarly, when equally reasonable inferences may be drawn from the facts, this court must

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<sup>2</sup> This is consistent with the civil law of this state. "It is imperative in a default case that the trial court take the time to analyze the complaint at issue and ensure that the judgment sought is not in excess of or inconsistent with it. . . . "[I]t is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through." (Citation.)" (*Electronic Funds Solutions, L.L.C. v. Murphy* (2005) 134 Cal.App.4th 1161, 1179.)

accept the inference that leads to a conclusion of innocence. (*In re Aquino* (1989) 49 Cal.3d 1122, 1130; *Himmel v. State Bar* (1971) 4 Cal.3d 786, 793-794.)

The court's findings of fact 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)); (2) the March 14, 2007, declaration of Yvonne Jackson, which is attached as an exhibit to the State Bar's March 19, 2007, brief (Rules Proc. of State Bar, rule 202(c)); and (3) 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 11, 1987, and has been a member of the State Bar since that time.

#### **B. Misconduct**

In about June 1997, Yvoone Jackson was injured in a work related accident and retained respondent to represent her with respect to her worker's compensation claim.<sup>3</sup> For about the next nine years (i.e., from about June 1997 until July 2006), Jackson repeatedly asked respondent to change her treating worker's compensation physicians from those located in Downey,

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<sup>3</sup> Noticeably absent from the NDC is a clear factual allegation that Jackson retained respondent to represent her. Even though it is a close call, the court finds that the NDC does, in fact, allege that Jackson retained respondent, but does not allege when. Accordingly, the court may rely on the explanatory facts in Jackson's March 14, 2007, declaration to establish that she retained respondent in about June 1997. Of course, had the NDC not alleged that Jackson retained respondent, the court would have been precluded from relying on Jackson's declaration to establish that she had. In default proceedings, material uncharged facts (even when proved by evidence admitted under Rules of Procedure of the State Bar, rule 202) cannot be relied on to establish culpability or aggravation since the respondent was not given notice, before the entry of default, that the uncharged fact would be used against him or her. (E.g., *In Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 589-590; *In the Matter of Hazelkorn* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 602, 606; accord, *Jackson v. Bank of America* (1986) 188 Cal.App.3d 375, 387-388, disapproved on another ground in *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1747.)

California to physicians closer to her residence in Glendora, California. It was unsafe for Jackson to drive to Downey because she was taking three or four anti-depressants or anti-psychotics. Respondent repeatedly told Jackson that he would arrange a change of her treating physicians, but did not do so.

In January 2006 and February 2006, Jackson's mother, Marilyn Michelsen, called respondent and left him one to two voicemail messages each week in which Michelsen asked respondent to call her to discuss Jackson's case. Respondent did not respond to Michelsen's messages.

On about February 9, 2006, Jackson executed a durable power of attorney appointing Michelsen as her agent. The next month, Michelsen mailed respondent a letter notifying him of her appointment as Jackson's agent and asking him to call her regarding Jackson's case. Shortly thereafter, respondent telephoned Michelsen and briefly discussed Jackson's case with her.

On about June 5, 2006, respondent changed his mailing address from a Post Office Box in Pasadena, California to a Post Office Box in Anza, California. Respondent did not notify Jackson or Michelsen of the change.

From March 2006 to July 2006, Michelsen repeatedly called respondent and left him one or two messages per month. The record, however, is silent as to the content of these messages.<sup>4</sup> Thereafter, respondent did not respond to Michelsen's messages or otherwise communicate with Jackson or Michelsen.

In about July 2006, Michelsen terminated respondent's employment and retained another attorney to represent Jackson. Jackson's new attorney promptly arranged for her to be treated by doctors close to her home.

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<sup>4</sup> For example, the record does not even indicate whether, in these March to July 2006 messages, Michelsen asked respondent to return her calls.

On about May 1, 2006; July 26, 2006; August 17, 2006; September 11, 2006, and again on October 6, 2006, a State Bar investigator sent respondent letters regarding the State Bar's investigation of various complaints that Michelsen filed against him. Respondent received each of those five letters.

In each of the five letters, the investigator asked respondent to provide the State Bar with a written response to specific allegations of misconduct involving his representation of Jackson. Respondent responded to the investigator's letters of May 1, 2006; July 26, 2006; and August 17, 2006; but his responses were "non-responsive" in that they did not provide all of the information the investigator requested.

Respondent never responded to the investigator's letters of September 20, 2006, and October 6, 2006. Nor did he thereafter communicate with the State Bar during its disciplinary investigation.

***Count 1: Failure to Respond to Client Status Inquires (§ 6068, subd. (m))***

In count 1, the State Bar charges that respondent violated section 6068, subdivision (m), which requires that an attorney "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." Specifically, the State Bar charges that respondent violated section 6068, subdivision (m) "By failing to respond to Michelsen's messages from January to July 2006, Respondent willfully failed to respond promptly to reasonable status inquires of a client." The record, however, does not clearly establish any such willful violation.

First, even though the record establishes that, in January 2006 and February 2006, Michelsen left respondent multiple messages "requesting that [respondent] call her to discuss Jackson's claim," there is no evidence to suggest, much less establish by clear and convincing

evidence, that Jackson had authorized respondent to speak to her mother about her case. In fact, the record all but establishes that Michelsen was not authorized to obtain any information from respondent until March 2, 2006, when Jackson executed the power of attorney naming Michelsen as her agent. The record fails to establish that respondent had an obligation to respond Michelsen's January 2006 and February 2006 messages. Moreover, the record establishes that once Michelsen notified respondent that Jackson had executed the power of attorney, respondent promptly contacted Michelsen, and they discussed Jackson's case.

Second, even though the record establishes that, from March 2006 to July 2006, Michelsen left respondent multiple messages, there is no evidence suggesting, much less establishing by clear and convincing evidence, that Michelsen's messages included (or amount to) a "reasonable status inquiry." (E.g., *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 922.) In fact, the record does not even establish that, in her March 2006 to July 2006 messages, Michelsen's asked respondent to call her back. The NDC alleges only that Michelsen left respondent "one to two messages per month" from March 2006 to July 2006.

When the State Bar fails to meet its burden of proof, this court's duty is to find against the State Bar and to recommend only that degree of discipline which is warranted by the evidence presented. (Cf. *In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888, 892.) Therefore, count 1 is dismissed with prejudice for want of proof.

***Count 2: Failure to Competently Perform (Rules of Prof. Conduct, Rule 3-110(A))***

In count 2, the State Bar charges that respondent willfully violated rule 3-110(A) "By failing to change Jackson's treating physicians from June 1997 until July 2006, Respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence." The record, however, does not clearly establish any such violation.

Even though the record clearly establishes (1) that Jackson asked respondent to change her treating physicians from June 1997 until July 2006 and (2) that respondent did not do so, the record does not contain clear and convincing evidence that changing Jackson's treating physicians is a "legal service" that respondent had a duty to competently perform under rule 3-110(A). Nor does the record contain clear and convincing evidence that changing Jackson's treating physicians otherwise rose to the level of a legal service that respondent agreed to perform in his retainer agreement with Jackson. Clearly, the court does not condone respondent's failure to keep his word and to arrange for Jackson to see a doctor closer to her home. Nonetheless, the court is unable to conclude that his failure to do so is a failure to perform legal services competently based on the vague and imprecise allegations in the NDC, which were deemed admitted by the entry of respondent's default. Therefore, count 2 is dismissed with prejudice for want of proof.

***Count 3: Failure to Inform Client of Significant Developments (§ 6068, subd. (m))***

In count 3, the State Bar charges that respondent violated section 6068, subdivision (m) "By failing to inform Jackson or Michelsen that he changed his mailing address." The record, however, does not clearly establish any such violation.

There is no evidence that Jackson or Michelsen unsuccessfully tried to communicate with respondent by mail from June 5, 2006, until Michelsen terminated his employment in July 2006. Nor is there any other evidence suggesting, much less establishing, that respondent would not have received a letter mailed to him at his postal box in Pasadena during that same time period. Accordingly, the court is unable to find that, during the time period from June 5, 2006, to July 2006, respondent's change of mailing address was a "significant development in a matter with which Respondent had agreed to provide legal services."

Moreover, even assuming that respondent's change of address was a significant development in Jackson's worker's compensation matter, there is no clear and convincing evidence that respondent's failure to notify Jackson of that fact from June 5, 2006, to July 2006, rises to the level of a willful violation of section 6068, subdivision (m), which requires that attorneys keep their clients "reasonably informed" (not immediately informed). This is particularly true in light of the somewhat more specific level of "wilfulness required for violations of the State Bar Act, as opposed to violations of the Rules of Professional Conduct." (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603.)

Furthermore, resolving all reasonable doubts in respondent's favor (*Young v. State Bar*, *supra*, 50 Cal.3d at p. 1216), absent contrary evidence, the court must find that, when he changed his mailing address, respondent properly submitted a forwarding order to the Postal Service in Pasadena such that had Jackson (or Michelsen) mailed respondent a letter between June 5, 2006, and July 2006, respondent would have received it. Count 3 is also dismissed with prejudice for want of proof.

***Count 4: Failure to Cooperate with State Bar (§ 6068, subd. (i))***

In count 4, 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. . . ." Even though he at least replied to the State Bar investigator's letters of May 1, 2006, July 26, 2006, and August 17, 2006, respondent failed to even respond to the investigator's letters of September 20, 2006, and October 6, 2006. Thus, the record clearly establishes, at a minimum, that respondent willfully violated section 6068, subdivision (i) by failing to respond to the investigator's letters of September 20, 2006, and October 6, 2006, and by failing to thereafter communicate with the State Bar during its disciplinary investigation.

#### **IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES**

##### **A. Aggravating Circumstances**

Respondent's failure to participate in this disciplinary proceeding before the entry of his default is an aggravating factor. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std 1.2(b)(vi) (all further references to standards are to this source).)

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**

The State Bar admits that respondent, who was admitted to practice in 1987, does not have a prior record of discipline, which is a mitigating circumstance under standard 1.2(e)(i). Nonetheless, "The State Bar objects to any such credit being given" because the record does not clearly establish that respondent has actually practiced law for many years without discipline. Even though there is some evidence in the record that respondent has practiced law for a significant period of time without discipline, it is not clear and convincing evidence. Accordingly, respondent's lack of a prior record of discipline is not a mitigating circumstance. Nonetheless, respondent's lack of a prior record of discipline is "relevant to [the court's] determination of the appropriate level of discipline." (*In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527, 532.)

#### **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.)

The applicable standard for the only proved misconduct is standard 2.6(a), which provides, among other things, that a violation of section 6068 “shall 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.” Of course, according to standard 1.3, the primary purposes of imposing discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Accord, *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) Thus, the generalized language of standard 2.6 provides little guidance. (*In re Morse* (1995) 11 Cal.4th 184, 206.) In any event, “ ‘While the State Bar Court should always look to the Standards . . . for guidance when making a disciplinary recommendation, it is not compelled to strictly follow them in every case.’ ” (*Conroy v. State Bar, supra*, 53 Cal.3d at p. 506.) For example, in the recent case of *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994-996, the review department recommended and the Supreme Court imposed ninety days’ actual suspension on the attorney even though the applicable standard purported to mandate at least six months’ actual suspension irrespective of mitigating circumstances.

Turning to case law, the court is unaware of any published opinion in which the only misconduct found is the failure to cooperate in a State Bar disciplinary investigation (§ 6068, subd. (i)). The court is, however, aware that in *Middleton v. State Bar* (1990) 51 Cal.3d 548, 560, the Supreme Court noted that the “wilful failure to cooperate or participate in disciplinary investigations or proceedings itself supports discipline, even severe discipline.” However, in light of the fact that respondent has not been previously disciplined, the court finds that even a

stayed period of suspension would be excessive discipline for respondent's violation of section 6068, subdivision (i). This is particularly true in light of the fact that respondent did not completely disregard his duty to participate in State Bar disciplinary investigations. Even though his responses were incomplete, respondent did, in fact, respond in writing to the investigator's first three letters.

In light of the record as a whole, the court concludes that the appropriate level of discipline in the present proceeding is a public reproof with an attached condition requiring respondent to attend and successfully complete the State Bar's Ethics School within one year after the effective date of the reproof.<sup>5</sup>

## **VI. PUBLIC REPROVAL**

It is ORDERED that respondent JOHN EARL MORTIMER be PUBLICLY REPROVED effective upon the finality of this decision. (Bus. & Prof. Code, §§ 6078, 6086.5; Rules Proc. of State Bar, rule 270(a), (b).) As a condition attached to that reproof, Mortimer is ORDERED to attend and satisfactorily complete the State Bar's Ethics School within one year after the effective date of the reproof and to provide satisfactory proof of his completion of that school to the State Bar's Office of Probation in Los Angeles within that same time period.<sup>6</sup> (Cal. Rules of Court, rule 9.19(a).)

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<sup>5</sup> The court finds that this ethics school condition will serve to protect the public and will serve respondent's interests. Moreover, respondent is warned that his failure to comply with this attached conditions may result in additional discipline. (Cal. Rules of Court, rule 9.19; Rules of Prof. Conduct, rule 1-110.)

<sup>6</sup> This reproof condition is separate and apart from Mortimer's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Mortimer is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

## **VII. COSTS**

Costs are 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: June 15, 2006.

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RICHARD A. HONN  
Judge of the State Bar Court