

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case Nos. 06-O-11743-LMA;
CARL EDGAR CABANA JACOBA,)	06-O-13647 (Cons.)
Member No. 200565,)	
<u>A Member of the State Bar.</u>)	DECISION

I. Introduction

In this consolidated default disciplinary matter, respondent **Carl Edgar Cabana Jacoba** is charged with multiple acts of professional misconduct in two client matters, including (1) failing to perform services competently; (2) failing to obey court orders; (3) failing to communicate with clients; (4) improperly withdrawing from employment; (5) failing to report judicial sanctions to the State Bar; (6) failing to cooperate with the State Bar; and (7) making a misrepresentation.

The court finds, by clear and convincing evidence, that respondent is culpable of the 10 alleged counts of misconduct. In view of respondent’s misconduct and the evidence in aggravation, the court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of suspension be stayed, and that he be actually suspended from the practice of law for six months and until the State Bar Court grants a motion to terminate respondent’s actual suspension. (Rules Proc. of State Bar, rule 205.)

II. Pertinent Procedural History

A. First Notice of Disciplinary Charges (Case No. 06-O-11743)

On December 5, 2006, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a Notice of Disciplinary Charges (NDC) at his official membership records address.

Respondent filed a response on February 2, 2007. (Rules Proc. of State Bar, rule 103.) Due to respondent's subsequent failure to participate in the proceedings, his response was stricken and his default was entered on September 17, 2007.

B. Second Notice of Disciplinary Charges (Case No. 06-O-13647)

On March 29, 2007, the State Bar filed a second NDC against respondent at respondent's official membership records address. Respondent received the NDC but did not file a response.

Respondent's default was entered on July 6, 2007, and respondent was enrolled as an inactive member on July 9, 2007.

Respondent did not participate in the disciplinary proceedings. On October 22, 2007, the court vacated the submission date of July 26, 2007, consolidated these two cases and submitted the matter for decision on October 19, 2007, following the filing of State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

Respondent was admitted to the practice of law in California on March 15, 1999, and has since been a member of the State Bar of California.

A. The Sultani Matter

On October 22, 2004, respondent filed a civil complaint on behalf of his client Ahmad Sultani in *Sultani v. Niaz*, Alameda County Superior Court, case No. RG04181631.

On December 28, 2004, respondent received the court's notice of case management conference and order. The court ordered respondent to (1) serve all named defendants and file proofs of service on those defendants with the court within 60 days of the filing of the complaint; and (2) file and serve a completed case management conference statement (statement) by February 15, 2005 – at least 15 days before the case management conference scheduled for March 2, 2005 – and appear in person at the conference.

Respondent did not file a completed statement by February 15.

At the March 2 conference, respondent appeared in person. The court ordered (1) that another conference be scheduled for May 20, 2005; (2) that updated statements be filed no later than May 6, 2005; and (3) that Sultani obtain responsive pleadings or defaults against any defendant before the updated statements were due. Moreover, the court admonished respondent that the next failure to timely file a statement would result in sanctions of \$100.

Respondent did not timely file his statement by May 6, 2005, as ordered. He did not file it until May 19, 2005.

On May 20, 2005, respondent sent a letter to the court apologizing for his failure to comply with the court's March 2, 2005 order by not filing his statement timely and by not serving all named defendants. Furthermore, respondent represented that if his office still could not personally serve the one remaining defendant in the next 30 days, his office would seek permission to serve the remaining defendant by publication.

On May 20, 2005, the court reviewed the case without a conference and scheduled a further conference for September 26, 2005. The court ordered that updated statements be filed no later than September 12, 2005, and that the conference order be served by mail.

On September 12, 2005, respondent filed his statement, stating that defendant Charanjett Marwaha remained unserved because he could not be located.

On September 26, 2005, respondent sent a letter to the court by facsimile stating that he could not attend the conference because he was ill and requested that additional time be given to allow plaintiff "to file a motion for leave to serve process by publication on defendant Charanjett Marwaha whom we are unable to serve by regular process despite diligent efforts." In addition, respondent called the court stating he was unable to appear due to illness.

To date, he has not served the remaining defendant Marwaha.

At the September 26 conference, the court ordered that a further conference be scheduled for January 20, 2006, and that the statements be filed no later than January 6, 2006. Furthermore, the court ordered \$250 sanctions against respondent because he failed to serve defendant Marwaha as previously ordered. The sanctions were stayed until the next conference.

A copy of the September 26, 2005 order was served on respondent.

Respondent did not file an updated statement by January 6, 2006, nor did he appear at the January 20, 2006 conference. The court then ordered (1) respondent to pay sanctions of \$1,000 by February 21, 2006, which included the previous ordered sanctions of \$250; and (2) respondent and Sultani to appear personally at the next conference, warning them that failure to appear would result in dismissal of the case. The January 20, 2006 order was served on respondent and he knew about the sanctions order the next day.

To date, respondent has not mailed his report of the sanctions to the State Bar.

On February 26, 2006, respondent executed a substitution of counsel form which was later filed with the court on March 2, 2006. On March 3, 2006, respondent paid the January 20, 2006 court sanctions of \$1,000.

On May 1 and May 19, 2006, the State Bar wrote to respondent regarding the Sultani matter. The letters were not returned as undeliverable.

The letters requested respondent to respond in writing to the specified allegations of misconduct being investigated by the State Bar. Respondent did not respond to the letters or otherwise communicate with the State Bar.

Count 1: Failure to Obey Court Orders (Bus. & Prof. Code, § 6103)¹

Section 6103 requires attorneys to obey court orders and provides that the willful disobedience or violation of such orders constitutes cause for disbarment or suspension.

By repeatedly failing to timely file a statement by February 15 and May 6, 2005, and January 6, 2006; by not timely serving all named defendants; and by failing to appear at the January 20, 2006 conference, as ordered by the court, respondent willfully disobeyed court orders requiring him to do acts in the course of his profession which he ought in good faith to do in willful violation of section 6103.

¹References to section are to the provisions of the Business and Professions Code.

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

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence.

By failing to file statements, to appear at the January 20, 2006 conference, and to serve the remaining defendant, respondent recklessly and repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).

Count 3: Failure to Report Court Sanctions (Bus. & Prof. Code, § 6068, Subd. (o)(3))

Section 6068, subdivision (o)(3), requires an attorney to report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of the imposition of any judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than \$1,000.

The time for reporting judicial sanctions runs from the time the attorney knows the sanctions were ordered, regardless of the pendency of any appeal. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862.) The willful violation of the reporting requirement of section 6068, subdivision (o)(3), does not require a bad purpose or an evil intent. All that is required is a general purpose of willingness to commit the act or omission. (*Ibid.*)

Therefore, by failing to report to the State Bar, in writing, within 30 days of the time respondent had knowledge of the January 20, 2006 sanctions, respondent willfully failed to report the imposition of judicial sanctions against him in willful violation of section 6068, subdivision (o)(3).

Count 4: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney.

²References to rule are to the current Rules of Professional Conduct, unless otherwise noted.

Respondent failed to cooperate with the State Bar in willful violation of section 6068, subdivision (i), by failing to respond to the State Bar's May 1 and May 19, 2006 letters or participate in the investigation of the Sultani matter.

B. The Colgan Matter

On September 19, 2003, Esther Colgan hired respondent to represent her in a personal injury matter against Diablo Valley College. Respondent agreed to take the case on a contingency fee basis.

Shortly thereafter, respondent advised Colgan that he had filed a lawsuit against Diablo Valley College on her behalf and was waiting for Diablo Valley College to respond to the suit.

But in fact, respondent had not filed any case on behalf of Colgan against Diablo Valley College or any other entity at that time.

Colgan later called respondent about 10 times regarding the status of her case. Respondent returned a few of her calls, but did not provide her with the case status. Then he stopped returning Colgan's phone calls.

On March 11 and May 18, 2004, Colgan sent respondent a fax, asking him to provide her with his telephone number. Respondent received the faxes but did not respond.

Two years later, on September 2, 2005, respondent filed a lawsuit against Diablo Valley College, entitled *Esther L. Colgan v. Contra Costa Community College District*, Contra Costa County Superior Court, case No. MSC05-1822 (Colgan case).

The court issued a notice of case management conference, advising respondent that a case management conference was scheduled for January 20, 2005, and requiring that he file a case management conference statement.

Respondent was served with a copy of the notice and was aware of its contents. But he failed to file a statement. Respondent also failed to file a proof of service on defendant.

On November 16, 2005, the court issued an order to show cause (OSC), requiring him to show cause why he should not be sanctioned for failure to file a proof of service. The OSC hearing was set for December 7, 2005. Respondent received the OSC but he failed to appear at the hearing or file a proof of service.

The court dismissed the Colgan case due to respondent's lack of prosecution and entered a judgment of dismissal. Respondent received this judgment and was aware of its contents but he did not inform Colgan about the dismissal.

Between January and April 2006, Colgan repeatedly called respondent, inquiring about the status of her case. Respondent received the messages but did not return the calls.

In September 2006, Colgan contacted Diablo Valley College directly and found out that the case had been dismissed.

On July 19, October 24 and November 8, 2006, the State Bar wrote to respondent, informing him of the allegations in the Colgan matter and requesting a response to the allegations. Respondent received the letters but did not respond to them.

Count 1: Failure to Perform Competently (Rules Prof. Conduct, Rule 3-110(A))

Respondent recklessly and repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A) by failing to file the statement, by failing to serve the Colgan lawsuit on the defendant and by failing to appear at the OSC hearing, resulting in the dismissal of the Colgan case.

Count 2: Misrepresentation and Dishonesty (Bus. & Prof. Code, § 6106)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

By misrepresenting to Colgan that he had filed the suit in 2003, when he in fact had not done so until two years later, respondent committed an act involving dishonesty in willful violation of section 6106.

Count 3: Failure to Communicate (Bus. & Prof. Code, § 6068, Subd. (m))

Section 6068, subdivision (m), provides that it is the duty of 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 failing to respond to Colgan's repeated telephone calls and faxes regarding the status of her case and by failing to advise Colgan that he failed to file a proof of service, that he failed to appear at an OSC hearing and that her case had been dismissed, respondent failed to respond to client

inquiries and failed to inform his client of significant developments in a matter in which he agreed to provide legal services, in willful violation of section 6068, subdivision (m).

Count 4: Improper Withdrawal From Employment (Rules Prof. Conduct, Rule 3-700(A)(2))

Rule 3-700(A)(2) states: “A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.”

By failing to communicate with Colgan; by failing to appear at the OSC hearing; and by failing to file a proof of service, which resulted in the dismissal of the case, respondent effectively withdrew from the case.

By withdrawing from the case without advising Colgan of his withdrawal, respondent failed, upon termination of employment, to take reasonable steps to avoid reasonably foreseeable prejudice to Colgan, in willful violation of rule 3-700(A)(2).

Count 5: Failure to Obey Court Orders (Bus. & Prof. Code, § 6103)

By failing to appear at the OSC hearing on December 7, 2005, respondent willfully disobeyed a court order, in willful violation of section 6103.

Count 6: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

Respondent failed to cooperate with the State Bar in willful violation of section 6068, subdivision (i), by failing to respond to the State Bar’s July, October and November 2006 letters or participate in the investigation of the Colgan matter.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)³

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

³All further references to standards are to this source.

Respondent committed multiple acts of wrongdoing, including failing to perform services, failing to communicate, committing an act of dishonesty, improperly withdrawing from employment, failing to report judicial sanctions to the State Bar and failing to obey court orders. (Std. 1.2(b)(ii).)

Respondent's misconduct harmed his client and the administration of justice. Colgan's case was dismissed due to his failure to perform. In the Sultani matter, respondent's repeated failures to submit a statement, which resulted in the case management conferences being rescheduled multiple times, wasted the court's time and resources. Respondent was ultimately sanctioned for \$1,000. (Std. 1.2(b)(iv).)

Respondent's failure to participate in this disciplinary matter before the entry of his default is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. 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.)

Respondent's misconduct involved two client matters. The standards provide a broad range of sanctions ranging from reproof to disbarment, depending upon the gravity of the offenses and the harm to the victim. The standards applicable to this case are standards 1.6, 2.3, 2.4(b), 2.6, and 2.10. The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980.) It has been long-held that the court "is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court or a client must result in actual suspension or disbarment.

Standard 2.4(b) provides that culpability of failing to communicate with a client must result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

Standard 2.10 provides that culpability of other provisions of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client.

The State Bar urges a one-year actual suspension, citing *King v. State Bar* (1990) 52 Cal.3d 307 in support of its recommendation.

In *King*, the Supreme Court actually suspended the attorney for three months with a four-year stayed suspension and probation for neglecting two clients and causing substantial harm to one client who had lost his personal injury action due to the attorney's inaction. He had no prior record of discipline in 14 years of practice and participated in the proceedings.

The State Bar argues that because respondent defaulted, his discipline should be more severe than that of *King*. The court agrees that a three-month actual suspension would be inadequate. But, increasing the level of discipline four folds is not warranted in this matter.

The court finds these cases in which the attorneys defaulted in the proceedings to be instructive: *Conroy v. State Bar* (1991) 53 Cal.3d 495; *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585; and *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, whose level of discipline ranges from 30 days to one year actual suspension.

In *Conroy*, discipline was imposed encompassing five years stayed suspension, five years probation and one year actual suspension for improperly withdrawing from representation, failing to perform and communicate and making misrepresentations in one client matter. No mitigating circumstances were found. In aggravation, it was noted that the attorney had two prior instances of discipline and that he had defaulted in the present case and one of the prior disciplinary proceedings.

In *Johnston*, the attorney who had no prior record of discipline in 12 years of practice was actually suspended for 60 days for misconduct in a single client matter. The attorney failed to communicate with his client and failed to perform competently which caused his client to lose her case. He also improperly held himself out as entitled to practice law by misleading his client into believing he was still working on her case while he was on suspension for not paying his State Bar dues. He defaulted in the disciplinary proceedings as well.

And in *Lilley*, the attorney who had no prior record in 13 years of practice defaulted and was suspended for one year, stayed, placed on probation for one year, with 30 days of actual suspension, for abandoning one client and failing to cooperate with the State Bar. In aggravation, the attorney's misconduct caused harm both to his client, the administrator of a decedent's estate, and to the estate's beneficiary. As a result of his actions, respondent's client was forced to hire another attorney to complete the probate and a third party incurred additional financial burden.

Here, respondent's misconduct was more egregious than the misconduct in *Johnston* and *Lilley* in that he abandoned not one but two clients. But unlike *Conroy*, respondent does not have a prior record of discipline.

The gravamen of respondent's misconduct is his failure to perform services. Respondent's misconduct reflects a blatant disregard of professional responsibilities. He had flagrantly breached his fiduciary duties to his clients and abandoned their causes.

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.)

Failing to appear and participate in the hearing shows that respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar, supra*, 53 Cal.3d at pp. 507-508.) While respondent may have been ill at the time of his misconduct, his failure to participate in this proceeding leaves the court without information about the underlying cause of respondent's misconduct or of any mitigating circumstances surrounding his misconduct.

However, in light of the foregoing case law, the State Bar's recommendation of one year actual suspension is excessive. Balancing all relevant factors – respondent's misconduct, the

standards, the case law, and the aggravating evidence, the court finds that placing respondent on an actual suspension for six months would be appropriate to protect the public and to preserve public confidence in the profession.

VI. Recommended Discipline

Accordingly, the court hereby recommends that respondent **Carl Edgar Cabana Jacoba** be suspended from the practice of law for two years, that said suspension be stayed, and that respondent be actually suspended from the practice of law for six months and until he files and the State Bar Court grants a motion to terminate his actual suspension. (Rules Proc. of State Bar, rule 205.)

It is recommended that respondent be ordered to comply with any probation conditions hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

It is also recommended that if respondent is actually suspended for more than two years, he will remain actually suspended until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii). (Rules Proc. of State Bar, rule 205.)

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination within one year or during the period of his actual suspension, whichever is longer. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

The court 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. Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.⁴

⁴Respondent 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.)

VII. Costs

It is further 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.

Dated: January __, 2008

LUCY ARMENDARIZ
Judge of the State Bar Court