

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

In the Matter of	)	<b>Case No. 06-O-12135-RAP</b>
	)	
<b>RAFAEL ARTURO CARDENAS,</b>	)	<b>DECISION AND ORDER OF</b>
	)	<b>INVOLUNTARY INACTIVE</b>
<b>Member No. 59210,</b>	)	<b>ENROLLMENT</b>
	)	
<u>A Member of the State Bar.</u>	)	

**I. Introduction**

In this default matter, respondent **RAFAEL ARTURO CARDENAS** (respondent) is charged with three counts of professional misconduct. The charged misconduct includes: (1) failing to perform legal services with competence; (2) failing to promptly respond to client inquiries; and (3) failing to cooperate in a disciplinary investigation. The court finds, by clear and convincing evidence, that respondent is culpable of these three charged acts of misconduct.

In view of respondent's misconduct and the evidence in aggravation, the court recommends that respondent be disbarred.

**II. Pertinent Procedural History<sup>1</sup>**

On November 30, 2006, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing and properly serving on respondent, at his official membership records address (official address)<sup>2</sup>, a notice of disciplinary charges (NDC).

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<sup>1</sup>Pursuant to Evidence Code section 452, subdivision (d), the court takes judicial notice of its court records.

<sup>2</sup>The court takes judicial notice of the State Bar's official membership records pursuant to Evidence Code section 452, subdivision (h), which reflect that effective September 1, 1992, respondent's official address has been and remains 8447 Wilshire Blvd #117, Beverly Hills, CA 90211.

On December 6, 2006, a Notice of Assignment and Notice of Initial Status Conference was filed in this matter, setting an in-person status conference for January 8, 2007. A copy of said notice was properly served on respondent by first-class mail, postage fully prepaid, on December 6, 2006, addressed to respondent at his official address. The copy of said notice was not returned to the State Bar Court by the U.S. Postal Service.

On January 8, 2007, the court held an in-person status conference in this matter. Respondent was present at this hearing and advised the court that he had not yet received a copy of the NDC. Therefore, after the status conference, the State Bar provided respondent with a courtesy copy of the NDC.

At the January 8, 2007, status conference, the court calendared a subsequent telephonic status conference for February 21, 2007. Respondent advised the court that he would contact the court clerk if he later discovered that he had a calendaring conflict on that day.

On January 10, 2007, the court provided the parties with additional notice of the February 21, 2007 status conference, by filing an order advising the parties of the next status conference date. A copy of said order was properly served on respondent by first-class mail, postage fully prepaid, on January 10, 2007, addressed to respondent at his official address. The copy of said order was not returned to the State Bar Court by the U.S. Postal Service as undeliverable or for any other reason.

On February 21, 2007, respondent failed to appear for the scheduled telephonic status conference. Additionally, respondent failed to contact the court clerk to advise the court of his unavailability.

On March 2, 2007, the State Bar filed a motion for entry of respondent's default due to his failure to file a response to the NDC, as required by rule 103 of the Rules of Procedure of the State Bar of California (Rules of Procedure). A copy of said motion was properly served on respondent on March 2, 2007, by certified mail, return receipt requested, addressed to respondent at his official address.

By March 21, 2007, respondent had neither filed a response to the NDC nor filed a response to the State Bar's motion for entry of his default. Consequently, on March 21, 2007, the court filed

an Order of Entry of Default (Rule 200 - Failure to File Timely Response), Order Enrolling Inactive and Further Orders. The order advised that no default hearing would be held unless one was requested by the State Bar. The order also permitted the State Bar to file any further declarations, exhibits, or legal argument regarding the level of discipline by no later than April 10, 2007. A copy of said order was properly served on respondent on March 21, 2007, by certified mail, return receipt requested, addressed to respondent at his official address. The copy of said order was returned to the State Bar Court by the U.S. Postal Service bearing a stamp indicating that the letter was unclaimed.

On April 10, 2007, the State Bar filed its brief regarding culpability and discipline, including a request for a default hearing. Ultimately, in lieu of a default hearing, the State Bar presented the court with a declaration from Ramon Esparza (Esparza). This declaration was submitted to the court as an attachment to the State Bar's supplemental brief regarding culpability and discipline which was filed on May 4, 2007. In this brief, the State Bar requested that respondent be ordered to pay Esparza restitution in the amount of \$4,173.77

On May 11, 2007, attorney Vicki Fullington, on behalf of respondent, filed a notice of substitution of attorney and a motion to set aside and vacate the order of default. Additionally, the court received, but did not file, respondent's answer to the disciplinary charges. On May 22, 2007, the State Bar filed its opposition to respondent's motion to set aside and vacate the order of default.

On June 18, 2007, the court, finding no good cause, denied respondent's motion to set aside and vacate the order of default.

On July 6, 2007, respondent filed a motion requesting reconsideration of the court's denial of respondent's motion to set aside and vacate the order of default. On July 12, 2007, the State Bar filed its opposition to this motion. On July 30, 2007, the court denied respondent's request for reconsideration. The matter was submitted for decision that same day.

On August 20, 2007, respondent filed a petition for interlocutory review with the Review Department of the State Bar Court. Respondent's petition sought review of, inter alia, the court's denial of respondent's request to vacate the default. On August 31, 2007, the Review Department

issued an order summarily denying respondent's petition for interlocutory review.<sup>3</sup>

On September 20, 2007, respondent filed a motion for reconsideration of the Review Department's denial of his petition for interlocutory review. On October 16, 2007, the Review Department denied respondent's motion for reconsideration.

On October 18, 2007, the court filed an order vacating the submission date and notifying the parties that the court intended to abate the instant matter due to the fact that the State Bar filed a new matter against respondent on September 11, 2007. On October 24, 2007, the State Bar filed an opposition to vacating the submission date and abating the proceedings. That same day, however, the instant proceeding was abated. On December 6, 2007, the court issued a subsequent order unabating the proceedings and submitting the matter for decision.

### **III. Findings of Fact and Conclusions of Law**

#### **A. Jurisdiction**

Respondent was admitted to the practice of law in California on June 18, 1974, and has been a member of the State Bar since that time.

#### **B. Findings of Fact**

On February 10, 2003, Esparza employed respondent to represent him in a personal injury claim arising out of an automobile accident that occurred on December 16, 2002 (accident). Respondent was employed by Esparza on a contingency fee basis.

In March 2003 respondent referred Esparza to chiropractor Mark Greenspan (Dr. Greenspan), for medical treatment. On March 6, 2003, respondent executed a medical lien in favor of Dr. Greenspan. Between March 2003 and August 2003, Esparza received medical treatment from Dr. Greenspan approximately three times each month.

Between March 2003 and November 2003, Esparza telephoned respondent approximately three times each month to inquire about the status of his legal matter. On each call, Esparza left a message asking respondent to call him back. Respondent did not return any of the calls, and he did

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<sup>3</sup>The Review Department's order noted that no abuse of discretion or error of law had been shown.

not otherwise inform Esparza about the status of his legal matter.

On November 20, 2003, respondent informed Esparza that “everything was okay,” and that respondent was handling Esparza’s medical bills. As a result, Esparza believed that respondent was working on his legal matter, and that respondent was paying or otherwise resolving his medical bills.

Between November 20, 2003 and February 2, 2005, Esparza telephoned respondent approximately two to three times each month to inquire about the status of his legal matter. On each call, Esparza left a message asking respondent to call him back. On approximately five calls, Esparza spoke with respondent’s secretary who informed him that “everything was okay” with his case. Respondent himself did not return any of the calls, and he did not otherwise inform Esparza about the status of his legal matter.

On February 2, 2005, Esparza received a bill from Pacific Hospital of Long Beach asking for payment for the medical services he had received in connection with the accident.

Between February 2005 and April 2005, Esparza telephoned respondent at least twice each month to inquire about the status of his legal matter and to discuss the medical bill he had received. On each call, Esparza left a message asking respondent to call him back. Respondent did not return any of the calls, and he did not otherwise inform Esparza of the status of his legal matter.

In September 2005, the bill from Pacific Hospital was referred to a collection agency. On September 7, 2005, the collection agency sent a letter to Esparza demanding payment on behalf of Pacific Hospital of Long Beach.

On September 20, 2005, Esparza sent respondent, by fax, a copy of the medical bills he had received. Respondent did not reply to the fax or address any of the medical bills in any way.

After September 20, 2005, Esparza telephoned respondent at least twice each month. On each call, a member of respondent’s office staff informed him that respondent was not available to take the call and that “everything was okay” with his case.

In February 2006, Dr. Greenspan sent a bill to respondent demanding payment for services rendered to Esparza. Respondent received the bill. Respondent did not reply, in any way, to the bill.

On March 13, 2006, Dr. Greenspan again sent his bill, in the sum of \$2,023, to respondent, demanding a response and payment for services rendered to Esparza. Respondent received the bill. Respondent did not reply, in any way, to the bill.

On March 25, 2006, Dr. Greenspan sent his bill to Esparza for the sum of \$2,023.

At no time did respondent communicate with Dr. Greenspan or otherwise negotiate his medical bills on behalf of Esparza. At no time did respondent file a personal injury claim on behalf of Esparza for any insurance benefits. At no time did respondent file a personal injury lawsuit on behalf of Esparza.

Respondent did not inform Esparza that he did not file a personal injury insurance claim or a personal injury lawsuit on his behalf. Additionally, respondent did not inform Esparza about Dr. Greenspan's February 2006 and March 2006 bills.

On April 7, 2006, the State Bar opened an investigation, case no. 06-O-12135, pursuant to a complaint submitted by Esparza (Esparza matter). On June 6, 2006, a State Bar investigator (investigator) sent a letter to respondent informing him of the allegations against him in the Esparza matter and requesting a written response to the allegations by June 20, 2006. Respondent received this letter but did not respond.

On July 21, 2006, the investigator sent respondent another letter again requesting a written response to the allegations in the Esparza matter by August 4, 2006. Respondent received this letter but did not respond.

As of the date the State Bar filed the NDC, respondent had not responded to either of the investigator's letters, provided a written response to the allegations in the Esparza matter, or otherwise communicated with the investigator.

### **C. Conclusions of Law**

#### ***Count 1: Failure to Perform with Competence (Rules Prof. Conduct, Rule 3-110(A))***<sup>4</sup>

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail

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<sup>4</sup> References to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

to perform legal services with competence.

Respondent intentionally, recklessly and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A), by willfully failing to file a personal injury claim or lawsuit on behalf of Esparza, by not otherwise pursuing any legal claim on behalf of Esparza, and by not responding to or otherwise negotiating the medical bills incurred by Esparza.

***Count 2: Failure to Communicate (Bus. & Prof. Code, § 6068(m))***<sup>5</sup>

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 willfully failing to return any of Esparza's telephone calls or facsimile correspondence between March and mid-November of 2003, and by not returning any of Esparza's telephone calls after February 2005, respondent failed to respond promptly to reasonable status inquiries of a client in a matter in which respondent agreed to provide legal services, in violation of section 6068, subdivision (m).

Respondent also willfully violated section 6068, subdivision (m), by failing to keep his client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services by failing to inform Esparza that he did not file an insurance claim, that he did not file a lawsuit, and that he had received medical bills from Dr. Greenspan.

***Count 3: Failure to Cooperate with the State Bar (§ 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.

Respondent failed to cooperate in a disciplinary investigation, in willful violation of section 6068, subdivision (i), by failing to provide a response to any of the letters from the State Bar investigator, by not providing a response to the allegations in the Esparza matter, and by not otherwise participating in the investigation of the Esparza matter.

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<sup>5</sup>References to section are to provisions of the Business and Professions Code.

#### **IV. Mitigating and Aggravating Circumstances**

##### **A. Mitigation**

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct<sup>6</sup>, std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors.

##### **B. Aggravation**

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

Respondent has a record of four prior impositions of discipline; however, as explained below, only three of his prior discipline records will be considered in aggravation. (Std. 1.2(b)(i).)

On May 12, 1993, the California Supreme Court issued an order (S031528) suspending respondent from the practice of law for two years, stayed, with a two-year probationary period, and an actual suspension of 30 days. This matter involved six separate clients and ten acts of misconduct. Respondent's violations consisted of three counts of failing to communicate with clients, two counts of failing to return or turn over client property, two counts of failing to diligently perform, two counts of failing to respond to allegations contained in State Bar investigative letters, and one count of failing to pay a court ordered sanction. In mitigation, respondent had no prior record of discipline and had been candid and cooperative with the State Bar. In aggravation, respondent's misconduct demonstrated a pattern of misconduct over several years; his misconduct significantly harmed one of his clients; respondent demonstrated indifference toward the rectification of the consequences of his misconduct; and respondent displayed a lack of cooperation with several of his clients and/or their successor attorneys.

On June 17, 1994, the California Supreme Court issued an order (S039264) suspending respondent from the practice of law for one year, stayed, with two years' probation. In this single-client matter, respondent was found culpable of one count of failing to properly supervise his

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<sup>6</sup>Future references to standard or std. are to this source.



employees and failing to competently perform, and a second count of failing to inform his client of a significant development. In mitigation, respondent had suffered extreme emotional difficulties and physical disabilities. Due to a previous agreement of the parties, there were no aggravating circumstances.<sup>7</sup>

On September 14, 2001, the California Supreme Court issued an order (S098836) suspending respondent from the practice of law for twelve months, stayed, with a three-year probationary period, and an actual suspension of 30 days. In this single-client matter, respondent failed to perform legal services with competence, failed to keep his client informed of significant developments, and failed to cooperate in the State Bar's investigation. In mitigation, respondent had suffered extreme emotional difficulties. In aggravation, respondent had a prior record of discipline and his misconduct significantly harmed his client.

On September 22, 2005, the California Supreme Court issued an order (S135539) suspending respondent from the practice of law for eighteen months, stayed, with an eighteen-month probationary period, and an actual suspension of 60 days. In a two-client matter, respondent failed to respond to his client's reasonable status inquiries and failed to perform legal services with competence. In mitigation, respondent had suffered extreme emotional difficulties. In aggravation,

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<sup>7</sup>While negotiating respondent's first disciplinary matter, the parties effectively stipulated that the discipline imposed in respondent's second disciplinary matter would not constitute a prior record of discipline. The misconduct involved in respondent's second disciplinary matter was originally alleged as part of respondent's first disciplinary proceeding. At the request of the parties, this case was severed and ordered to be tried separately. The parties stipulated, however, that if respondent was ultimately found culpable of the misconduct involved in the severed matter, then respondent's first discipline would not constitute a prior discipline. Additionally, the parties stipulated that respondent's first and second disciplinary matters would be considered as a single imposition of discipline for the purposes of any future discipline imposed on respondent. Therefore, the court considers respondent's first and second disciplinary matters to represent a single prior record of discipline.

The court further notes that respondent, in his second disciplinary matter, originally stipulated to additional misconduct involving a probation violation. Pursuant to the terms of the stipulation, the probation violation was expected to constitute a second prior record of discipline. This allegation of misconduct, however, was subsequently dismissed by the State Bar Court in its Supplemental Order to Order Approving Stipulation filed on February 28, 1994.

respondent had two prior records of discipline and his misconduct significantly harmed his client.

The court also finds in aggravation that respondent's misconduct significantly harmed his client. (Std. 1.2(b)(iv).) As a result of respondent's misconduct, Esparza lost his cause of action related to his accident.<sup>8</sup>

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) However, it warrants little weight in aggravation because this conduct closely parallels that which supports the entry of his default and that used to find respondent culpable of violating section 6068, subdivision (i). (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

## **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.)

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 must be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.4(b), 2.6, and 2.10 each apply in this matter. Of these, the most severe sanction is found with standard 2.6 which recommends suspension or disbarment (depending on the gravity

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<sup>8</sup>Additionally, based upon respondent's recommendation, Esparza sought treatment with chiropractor Mark Greenspan, physical therapy with PCH Health, and had an MRI taken at Pacific Hospital. The cost of these services totaled \$4,173.77. Of this amount, Esparza has paid \$2,650.77. Esparza still owes his medical providers \$1,523.00. The State Bar requested that the court recommend that respondent pay restitution to Esparza in the total amount of his medical bills. The court, however, declines to award restitution due to the insufficient evidence regarding Esparza's medical treatments, including whether the treatments were actually necessary or beneficial to Esparza.

of the offense or the harm to the victim) for culpability of a member of a violation of Business and Professions Code section 6068.

Due to respondent's prior record of discipline, standard 1.7(b) is also applicable. In fact, standard 1.7(b) is central to the court's analysis in this case. Standard 1.7(b) provides that, if a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of two prior impositions of discipline, the degree of discipline in the current proceeding must be disbarment unless the most compelling mitigating circumstances clearly predominate.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silvertown* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) 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.)

The Supreme Court and Review Department have not historically applied standard 1.7(b) in a rigid fashion. Instead, the courts have weighed the individual facts of each case, including whether or not the instant misconduct represents a repetition of offenses for which the attorney has previously been disciplined. (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 977.) When such repetition has been found, the courts have typically found disbarment to be the appropriate sanction. (See *Morgan v. State Bar* (1990) 51 Cal.3d 598, 607; *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841; *In the Matter of Thomson, supra*, 4 Cal. State Bar Ct. Rptr. at p. 977.)

Here, respondent's instant misconduct is remarkably similar to the misconduct that resulted in his three prior impositions of discipline. Each of respondent's prior three disciplinary matters included findings that respondent failed to properly communicate with his clients and that he failed to perform legal services with competence or diligence. Additionally, the misconduct in two of respondent's three prior disciplinary matters included his failure to respond to allegations contained

in State Bar investigative letters.

The court finds respondent's unwavering pattern of causing harm to his clients equally disturbing. In each of respondent's three prior disciplinary matters, his misconduct resulted in significant harm to a client. Here, yet again, respondent's misconduct significantly harmed his client. Due to respondent's misconduct, Esparza lost his personal injury cause of action relating to his accident.

The imposition of discipline in three prior matters has apparently had no effect on respondent's conduct. Respondent has habitually repeated the mistakes of his past, resulting in additional harm to the public. Furthermore, respondent's failure to participate in the instant proceedings in a proper and timely fashion is yet another indication that his conduct has not changed.

Therefore, after weighing the evidence, including the factors in aggravation and mitigation, the court finds no compelling reason to deviate from standard 1.7(b). The court agrees with the State Bar's recommendation that respondent should be disbarred.

#### **VI. Recommended Discipline**

The court recommends that respondent **Rafael Arturo Cardenas** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

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.

#### **VII. Order of Inactive Enrollment**

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of California effective three days after service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).

#### **VIII. 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.

Dated: February 27, 2008.

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**RICHARD A. PLATEL**  
Judge of the State Bar Court