

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT -SAN FRANCISCO**

In the Matter of)	Case No. 06-O-12151-PEM
JOHN WILLIAM JOHANSON,)	DECISION
Member No. 82001,)	
<u>A Member of the State Bar.</u>)	

INTRODUCTION

The above-entitled matter was submitted for decision on January 9, 2008, after the State Bar of California, Office of the Chief Trial Counsel (State Bar) waived the hearing in this matter and submitted a brief on the issues of culpability and discipline. Throughout these State Bar Court proceedings, the State Bar has been represented by Deputy Trial Counsel Maria Oropeza (DTC Oropeza). Respondent John William Johanson (respondent) failed to appear or participate in this matter either in person or through counsel and allowed his default to be entered.

In light of respondent's culpability in this proceeding, and after considering all aggravating and mitigating circumstances surrounding respondent's misconduct, the court recommends that respondent be suspended from the practice of law for four years; that execution of said suspension be stayed; and that respondent be actually suspended from the practice of law for two years and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the law, pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, and until the State Bar Court grants a motion to terminate respondent's actual suspension under Rules of Procedure of the State Bar of California, rule 205.

PERTINENT PROCEDURAL HISTORY

On July 31, 2007, the State Bar initiated this proceeding by filing and serving a Notice of Disciplinary Charges (NDC) against respondent. This NDC was served on respondent by certified mail, return receipt requested, at his official membership records address.¹ The NDC was returned by the United States Postal Service (USPS) bearing the stamp “Returned to sender.”

On August 9, 2007, a Notice of Assignment and Notice of Initial Status Conference (Notice of Assignment) was filed and served on respondent by first-class mail, postage fully prepaid, at his official membership records address. This Notice of Assignment was returned to the State Bar Court stamped: “Return to Sender Attempted Not Known” and “Undeliverable - Commercial Mail Receiving Agency No Authorization To Receive Mail At This Address.”

On September 10, 2007, the court held a status conference in this matter. DTC Oropeza appeared for the State Bar; respondent did not appear in person or through counsel. On September 11, 2007, the State Bar Court filed and served a Status Conference Order. Besides showing the parties’ appearances, the order stated: “proceeding by default.” This order was properly served on respondent by first-class mail, postage fully prepaid, at his official membership records address. This order was returned to the State Bar Court bearing the same

¹Attached to the State Bar’s motion for entry of respondent’s default as exhibit 1 is a print out of respondent’s address history as of December 4, 2007. This exhibit is not, by itself, competent evidence to establish respondent’s official membership records address, since it is not a certified copy of respondent’s official membership records address history. Moreover, it does not establish that documents served after December 4, 2007, were properly served upon respondent. However, the court notes that DTC Oropeza “checked the respondent’s address and telephone number as noted in the case file and confirmed its accuracy against the official membership records address for the respondent on the AS/400 computer records maintained by the State Bar.” (Para. 3 of Decl. of DTC Oropeza attached to Notice of Motion and Motion for Entry of Default.) The court accepts DTC Oropeza’s declaration into evidence. Included in the State Bar’s motion for the entry of respondent’s default was a request that the court take judicial notice, pursuant to Evidence Code section 452, subdivision (h), of all respondent’s official membership addresses. In view of the evidence presented by the State Bar regarding its attempt to verify respondent’s official membership records address, the court grants the request and takes judicial notice of all respondent’s official membership addresses to the date of the filing of this decision.

stamps as were on the August 9, 2007, Notice of Assignment.

On September 14, 2007, the State Bar filed and served a Motion to Amend Notice of Disciplinary Charges. The motion was served on respondent by regular mail at his official membership records address, and an additional courtesy copy was sent by regular first-class mail to an alternate address at which the State Bar had been communicating with respondent in October 2006 (alternate address). The copy of the motion that was sent to the official membership records address was returned by the USPS bearing the stamp "Return to Sender - Refused." The courtesy copy sent to the alternate address was not returned.

On October 11, 2007, the court filed and served an Order Granting State Bar's Motion to Amend Notice of Disciplinary Charges. This order was served on respondent at his official membership records address by first-class mail, postage fully prepaid, and was returned to the State Bar Court bearing the same stamps as were on the Notice of Assignment and the September 11, 2007, Status Conference Order.

On October 12, 2007, the State Bar filed and served a First Amended NDC. Copies of this document were served on respondent by certified mail, return receipt requested, at both his official membership records address and his alternate address. The copy sent to the official membership records address was returned by the USPS on October 22, 2007, indicating that the certified mail item had been refused. Respondent's agent signed for the courtesy copy sent to respondent's alternate address on October 15, 2007.

On November 29, 2007, the court filed and served a Notice of Status Conference. The notice was properly served on respondent by first-class mail, postage fully prepaid, at his official membership records address and was returned bearing the stamps "Return to Sender Attempted Not Known" and "Undeliverable - Commercial Mail Receiving Agency No Authorization to Receive Mail At This Address."

On December 4, 2007, the State Bar filed and served a motion for entry of respondent's default and request for judicial notice. This motion was served on respondent via certified mail, return receipt requested, at both his official membership records address and his alternate

address. The record does not reflect whether or not either of these copies was returned by the USPS.

On December 17, 2007, the court held a status conference. DTC Oropeza appeared for the State Bar; respondent did not appear in person or through counsel. On December 18, 2007, the State Bar Court filed and served a Status Conference Order. This order stated that the matter was proceeding by default and that respondent's default would be entered on December 20, 2007. This order was properly served on respondent by first-class mail, postage fully prepaid, at his official membership records address. The order was returned to the State Bar Court bearing the same stamps as were on all communications previously returned to the State Bar Court.

Because respondent failed to file a response to the motion for entry of his default, on December 20, 2007, the court filed and served an Order of Entry of Default (Rule 200 - Failure to File Timely Response), Order Enrolling Inactive and Further Orders.² A copy of this order was properly served on respondent by certified mail, return receipt requested, at his official membership records address. The copy served on respondent was returned to the State Bar Court bearing the stamp "Return to Sender Attempted - Not Known Unable to Forward."

On January 9, 2008, the State Bar filed a request for waiver of default hearing and a brief on culpability and discipline. The matter was submitted for decision on that same date.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent was admitted to the practice of law in the State of California on November 29, 1978, and has been a member of the State Bar since that time.

Facts - Count One - The Huelsmann Matter

On April 6, 1995, Mary Huelsmann (Huelsmann) employed respondent to represent her in a Worker's Compensation Appeals Board (WCAB) case. Respondent began to represent Huelsmann's interests in April 1995, and he obtained a partial settlement of her claim on July 21,

²Respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (e) was effective three days after service of this order by mail.

1998. The remaining disputes were to go forward.

On July 11, 2005, Huelsmann received a notice of a mandatory settlement conference set for September 8, 2005, in her WCAB case. On August 31, 2005, Huelsmann left a voice-mail message for respondent, requesting information on the status of her case and asking what she needed in order to prepare for the hearing. Respondent received this voice-mail message but failed to respond to Huelsmann or to advise her of the status of her case.

On September 9, 2005, the WCAB served Huelsmann with notice of another mandatory settlement conference to be held on November 17, 2005. On October 19, 2005, Huelsmann left a voice-mail message for respondent requesting information on the status of her case and stating that she wanted to know how to prepare for the hearing. Respondent received this voice-mail message but failed to respond or otherwise advise Huelsmann of the status of her case.

On October 31, 2005, Huelsmann attempted to telephone respondent but was unable to leave a message because the answering machine was full.

On November 7, 2005, Huelsmann placed at least four telephone calls to respondent's office number but was unable to leave any message because the answering machine was full. On the same date, Huelsmann placed two more telephone calls and was able to leave one message requesting a status update on her case. Respondent received the November 7, 2005, message from Huelsmann but did not return her call.

On November 8, 2005, Huelsmann called respondent's office telephone number but was unable to leave a message because the answering machine was full.

On November 14, 2005, respondent received a letter from James Lammers (Lammers), a Minnesota lawyer stating that he now represented Huelsmann. On November 15, 2005, Lammers wrote to the WCAB and informed them that he was now representing Huelsmann. After the WCAB received this letter from Lammers, respondent was no longer served with any notices in the Huelsmann case; the WCAB served only Huelsmann.

On February 14, 2006, respondent filed with the WCAB in Huelsmann's case a document entitled Declaration of Readiness to Proceed, indicating that he expected to present one witness

and needed one hour for the hearing. The document was signed on February 2, 2006, but not filed until February 14, 2006. Respondent did not advise Huelsmann that he had filed this document.

On March 15, 2006, Huelsmann filed a Notice of Dismissal of Attorney in her WCAB matter and served respondent with the notice by certified mail, return receipt requested. Huelsmann received the return receipt, which had been directed to respondent at his official membership records address.

Conclusions of Law - Count One - Business and Professions Code Section 6068,

Subdivision (m)³

The State Bar proved by clear and convincing evidence that respondent willfully violated section 6068, subdivision (m). This statute 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. Respondent failed to respond to Huelsmann's voice mail messages of August 31, October 19, and November 7, 2005, seeking status updates on her case. In addition, respondent failed to inform Huelsmann that he had filed a Declaration of Readiness to Proceed in her WCAB case on February 14, 2006, a significant development in her case. By failing to respond to Huelsmann's reasonable status inquiries and by failing to inform Huelsmann that respondent had filed a Declaration of Readiness to Proceed, respondent willfully violated section 6068, subdivision (m).

Facts - Count Two - Section 6068, Subdivision (j)

From December 15, 2004, through September 13, 2007, respondent's official membership records address was 2657 Windmill Pkwy #246, Henderson, Nevada 89074 (the Windmill address). In October 2006, respondent had abandoned this address and ceased to receive mail directed to that address.

In October 2006, the State Bar had been communicating with respondent at an alternate

³Unless otherwise indicated, all further references to section(s) refer to provisions of the California Business and Professions Code.

address, 183 Bethany Street, Henderson, Nevada 89074.

Respondent did not attempt to effectuate a change of his official membership records address within 30 days of vacating the Windmill address or at any time from October 2006 through September 13, 2007.

On April 11, 2007, State Bar Investigator Mike Maacks (Maacks) wrote to respondent at his official membership records address regarding the Huelsmann matter. Maacks's letter was placed in a sealed envelope correctly addressed to respondent at his official membership records address. The letter was properly mailed by first-class mail, postage prepaid, by depositing for collection by the USPS in the ordinary course of business. The April 11, 2007, letter was returned by the USPS with the stamped notation "Return to Sender Attempted Not Known" and "Undeliverable - Commercial Mail Receiving Agency - No Authorization to Receive Mail at This Address."

On June 1, 2007, Deputy Trial Counsel Robin Brune (DTC Brune) sent respondent a letter at his official membership records address regarding the Huelsmann matter. DTC Brune's letter was placed in a sealed envelope correctly addressed to respondent at the official membership records address. The letter was properly mailed by first-class mail, postage prepaid, by depositing for collection by the USPS in the ordinary course of business. On June 15, 2007, DTC Brune's letter was returned by the USPS with the stamped notation "Return to Sender Attempted Not Known" and "Undeliverable - Commercial Mail Receiving Agency - No Authorization to Receive Mail at This Address."

To the date of filing the First Amended NDC, respondent's official membership records address was listed as the Windmill address. However, all State Bar mail directed to that address was returned as undeliverable.

Conclusions of Law - Count Two - Section 6068, Subdivision (j)

The State Bar proved by clear and convincing evidence that respondent violated section 6068, subdivision (j). That section requires an attorney to comply with the requirements of section 6002.1. As relevant here, section 6002.1 requires an attorney (1) to maintain on the State

Bar's official membership records the attorney's current office address and telephone number, or if no office is maintained, an address to be used for State Bar purposes; and (2) to notify the State Bar's membership records office of any change of current address or telephone number within 30 days of any change. Respondent willfully violated section 6068, subdivision (j) by failing to notify the State Bar's membership records office of the change in his current address within 30 days after he abandoned the Windmill address.

MITIGATING/AGGRAVATING CIRCUMSTANCES

As respondent's default was entered in this matter, respondent failed to introduce any evidence in mitigation, and no mitigation can be gleaned from the record in this proceeding. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁴

In aggravation, respondent has a record of having been disciplined twice previously as a result of attorney disciplinary proceedings (std. 1.2(b)(i)), as follows:⁵

On August 28, 1998, the Supreme Court issued an order imposing on respondent a two-year stayed suspension and a two-year probation. This discipline resulted from respondent's failure to perform legal services competently, misappropriation of client funds, failure to withdraw from a trust account funds belonging to him at the earliest reasonable time after his interest became fixed, and misrepresentations of fact to his client and a medical provider. In mitigation, respondent had no prior record of discipline; no harm resulted from the misconduct; respondent displayed spontaneous candor and cooperation to the State Bar; respondent promptly took objective steps to spontaneously demonstrate recognition of wrongdoing; the Nevada Bar investigated and found no ethical violation; respondent acted in good faith in obtaining approval by the Nevada Bar of his advertising, which advertising clearly stated that he was licensed only

⁴Unless otherwise indicated, all further references to standards refer to provisions of these Standards for Attorney Sanctions for Professional Misconduct.

⁵The State Bar attached as exhibits 1 and 2 to its brief on culpability and discipline certified copies of respondent's prior records of discipline. The court admits these exhibits into evidence.

in California and would handle only California matters; and the delay in paying two medical providers was caused by a miscommunication with one provider and an office error with respect to the other provider. No aggravating factors were identified in that case.

Respondent was again disciplined on November 28, 2006, when the Supreme Court issued an order imposing a two-year stayed suspension, a two-year probation, and a 60-day actual suspension. This discipline was imposed as a result of respondent's failure to release the client file to a client at the client's request promptly upon termination of employment, violation of a court order, and failure to deposit client funds into a client trust account. In aggravation, respondent had one prior record of discipline, the misconduct significantly harmed his client and the public, and respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. In mitigation, respondent displayed candor and cooperation with the State Bar, admitted the truth of facts and culpability, and suffered the death of his father and two close friends.

Also in aggravation in the present case, respondent displayed a lack of cooperation during disciplinary proceedings by his failure to participate in these State Bar Court proceedings prior to the entry of his default. (Std. 1.2(b)(vi).)

DISCUSSION

In determining the appropriate discipline to recommend in this matter, the court looks to the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

The court looks first to the standards for guidance as to the appropriate level of discipline. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) While the standards are not binding, they are entitled to significant weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

Standard 2.6(a) provides that suspension or disbarment is the appropriate discipline for

violations of section 6068, “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.”

Standard 1.7(b) provides that when an attorney is found culpable of professional misconduct in a disciplinary proceeding “and the member has a record of two prior impositions of discipline . . . , the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate.”

The State Bar recommends disbarment, citing *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829 (*Shalant*), and *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63 (*Hunter*). *Shalant*, however, involved an attorney who had previously been disciplined four times, as opposed to two prior impositions of discipline as in this case, and *Hunter* involved more serious and extensive misconduct in the most current disciplinary proceeding than that involved here.

Respondent has been found culpable of failing to respond promptly to reasonable client status inquiries and to keep his client reasonably informed of a significant development in her case and of failing to notify the State Bar’s membership records office of a change in his current address within 30 days of the change. Although respondent has previously been disciplined twice, the totality of respondent’s record, including the misconduct in the present case, is not so severe as to warrant disbarment. (Cf. *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192.) The court determines that a lengthy period of actual suspension, coupled with the requirement that respondent prove his rehabilitation, present fitness to practice, and present learning and ability in the general law before being relieved of the actual suspension, is sufficient to fulfill the goals of attorney discipline.

RECOMMENDED DISCIPLINE

Accordingly, it is recommended that respondent John William Johanson be suspended from the practice of law for four years, that execution of that suspension be stayed, and that he be actually suspended from the practice of law for two years and until: (1) he has shown proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present

learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct;⁶ and (2) he makes and the State Bar Court grants a motion, under rule 205 of the Rules of Procedure of the State Bar of California, to terminate his actual suspension. The court also recommends that respondent be ordered to comply with the conditions of probation, if any, hereinafter imposed on him by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and that he perform the acts specified in paragraphs (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order.

It is also recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners during the period of his actual suspension and furnish satisfactory proof of such passage to the State Bar's Office of Probation within the same period.

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: April ___, 2008

PAT McELROY
Judge of the State Bar Court

⁶See Rules of Procedure of the State Bar, rule 205(b).