

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

In the Matter of)	Case No. 06-O-14390-DFM
HOWARD LAWRENCE RIFKIN,)	DECISION
Member No. 82671,)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this default case, Jean Cha appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Howard Lawrence Rifkin did not appear in person or by counsel.

After considering the evidence and the law, the court recommends, among other things, that respondent be suspended for one year; that said suspension be stayed; and that he be actually suspended for six (6) months and until he complies with rule 205 of the Rules of Procedure of the State Bar of California.¹

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on November 26, 2007, and was properly served on respondent on that same date at his official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section² 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.)

On November 28, 2008, respondent was properly served at his official address with a

¹Future references to Rules of Procedure are to this source.

²Future references to section(s) are to this source.

notice advising him, among other things, that a status conference would be held on January 7, 2008. Respondent did not appear at the status conference. On January 11, 2008, he was properly served with a status conference order at his official address by first-class mail, postage prepaid. This order advised him, among other things, that a status conference would be held on March 12, 2008. Respondent did not appear at that status conference either. On March 12, 2008, he was properly served at his official address with an order memorializing same.

Respondent did not file a responsive pleading to the NDC. On March 27, 2008, a motion for entry of default was filed and properly served on respondent at his official and three alternate addresses by certified mail, return receipt requested. The motion advised him that minimum discipline of nine months' actual suspension would be sought if he was found culpable. Respondent did not respond to the motion.

On April 17, 2008, the court entered respondent's default and enrolled him inactive effective three days after service of the order. The order was filed and properly served on him at his official address on that same date by certified mail, return receipt requested. Copies were sent to him by first-class mail to three alternate addresses as well, but these were all returned as undeliverable.

The State Bar's and the court's efforts to contact respondent were unsuccessful. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415.)

The matter was submitted for decision without hearing after the State Bar filed a brief on May 6, 2008.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (§6088; Rule of Procedure 200(d)(1)(A).) The findings are also based on any evidence admitted.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr.

163, 171.)

A. Jurisdiction

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

B. The King Matter

1. Facts

In August 2000, Addison L. King (King) retained respondent to represent him in two worker's compensation matters. On August 4, 2000, respondent filed an application for adjudication of claim on King's behalf with the Worker's Compensation Appeals Board of California (WCAB). (*Addison King v. Beverly Hospital; Thomas Saucedo*, case numbers POM 0250036 and POM 0250037.) The case against Saucedo was resolved in July 2005.

In October or November 2005, respondent accepted a settlement offer of \$30,000 from Beverly Hospital. Thereafter, he did not take any further action or perform any additional legal services on King's behalf.

In November 2005, Peter Kim (Kim), Beverly Hospital's counsel, unsuccessfully tried to contact respondent on numerous occasions by telephone but respondent did not respond to Kim's attempts.

On December 14, 2005, Kim sent respondent a letter confirming the settlement to respondent's address of record in the WCAB matter which, at the time, was also his official State Bar membership records address. The final issue for settlement was a recommended Medicare set-aside. Kim properly sent the letter by first class mail, postage prepaid. It was not returned as undeliverable or for any other reason. Respondent received the letter, but did not respond to it.

On February 21, 2006, King telephoned respondent at the number respondent had given him and left a message requesting a status update. Respondent received the message but did not return King's call.

On February 24, 2006, Kim properly sent respondent a letter dated February 22, 2006, addressed to respondent's WCAB and then-official State Bar address of record, which were the same, and to an alternate address. The letter inquired about the status of the Medicare set-aside

and requested releases from King, which had been sent in November 2005. The releases were necessary to obtain approval on the set-aside recommendation. The letter also indicated that Kim had unsuccessfully tried to reach respondent at two telephone numbers but neither was in service. Respondent had not filed a change of address or given notice of a change of address to any of the parties, the WCAB or his client. The letter sent to respondent's then-official State Bar address was not returned as undeliverable or for any other reason. Respondent received the letter but did not respond to it. The letter sent to the alternate address was returned to Kim, bearing a stamp and sticker stating: "Returned to Sender Forwarding Order Expired Attempted Not Known Unable to Forward."

On March 20, 2006, King sent respondent an email at hrifkinesq@yahoo.com, seeking information about the status of his case. In the message, King stated that he had called respondent on several occasions and sent emails with no response. Respondent received this email but did not respond to it.

On March 21, 2006, King properly sent respondent a letter to respondent's then-official State Bar address. It was sent by priority mail, signature confirmation receipt requested. It was not returned as undeliverable or for any other reason. Respondent received the letter but did not respond to it. King received confirmation that the letter was delivered.

On April 27, 2006 Kim properly sent respondent a letter to another address (Deep Creek address), indicating that he had been trying to contact respondent for the past few months without success. Kim stated that his client informed him of the new Dry Creek address. He also reminded respondent that defendants were still in the process of obtaining approval for a Medicare set-aside and that the signed release forms from respondent's client were needed. The letter was not returned as undeliverable or for any other reason. Respondent received the letter but did not respond to it.

In response to King's complaint, the State Bar, on June 21, 2006, properly sent respondent a letter to his then-official State Bar address asking him to address allegations that he did not respond to King's status inquiries. The letter was not returned as undeliverable or for any other reason. Respondent received the letter.

On July 5, 2006, respondent, in answer to the State Bar's letter, stated that, when he informed the parties in King's WCAB matter of his change of address, telephone numbers and email, either King did not receive his copy or respondent's office inadvertently did not send him one.³ He admitted that, if it was the latter, he was responsible. He said that once he heard further from the State Bar, he would contact King. Respondent also stated that he was waiting for the defendants' final approval of the settlement and estimated that it would be finalized in the next 45 to 60 days. Then the settlement would be prepared, circulated among the parties and sent to the WCAB for approval. Respondent's letterhead bore the Deep Creek address.

Respondent's official State Bar address remained unchanged from April 30, 2003 to July 25, 2006. On July 25, 2006, he changed it to the Deep Creek address.

In light of respondent's July 5, 2006 letter, on July 25, 2006, the State Bar sent King and respondent letters advising both that King's complaint would be closed. The letter to King also stated that respondent had represented that respondent would give King a status update and send King a letter with new contact information. Thereafter, respondent never contacted King.

On August 22, 2006, King wrote another letter to the State Bar, stating that respondent had not communicated with him in over a year.

On September 14, 2006, the State Bar gave King respondent's new contact information so that King could contact respondent directly.

On September 17, 2006, King properly sent respondent a letter to the Deep Creek address seeking the status of his matter. It was not returned as undeliverable or for any other reason. Respondent received the letter but did not respond to it.

On September 20, 2006, Kim properly sent King and respondent a notice stating that defendants intended to file a petition for dismissal for lack of prosecution within 30 days after the

³These factual findings are supported by evidence submitted by the State Bar, namely a copy of the July 5 letter. The NDC at paragraph 23, however, indicates otherwise, that is, that respondent admitted that he did not notify the parties of his change of address, telephone number and email address. Because of this conflict, the court rejects the allegation in the NDC and makes the finding as supported by the evidence. (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 55.)

date of the letter unless King or his attorney showed in writing a good reason for not dismissing it. The letter stated that defendants had attempted on numerous occasions to contact respondent to obtain the signed release forms for the Medicare set-aside, with no response for over nine months. Respondent's letter was sent to the Deep Creek address by certified mail, return receipt requested. It was not returned as undeliverable or for any other reason. Respondent received the certified letter, as the receipt was signed by "P. Taylor" on September 23, 2006, but he did not respond to it.

On October 3, 2006, King properly sent respondent a letter to his new official State Bar address seeking a status update. It was not returned as undeliverable or for any other reason. Respondent received it but did not respond to it.

On October 23, 2006, Kim sent respondent a certified letter to respondent's official State Bar address, mentioning the notice of intent sent to respondent on September 20, 2006 and the dismissal for lack of prosecution that was then being requested of King's case. The letter was not returned as undeliverable or for any other reason. Respondent received it but did not respond to it.

On October 31, 2006, respondent was properly served at his official State Bar address with a petition for dismissal of King's case. It was not returned as undeliverable or for any other reason. He received it but did not take any action in response.

On November 6, 2006, King sent respondent an email to hrifkinesq@yahoo.com in which King fired respondent. King later sent Kim a letter enclosing a copy of this email.

On December 5, 2006, the WCAB rejected the petition for dismissal on the conclusion that it was procedurally deficient as filed.

On December 18, 2006, King notified the WCAB and the State Bar that he had fired respondent.

On March 7, 2007, King hired new counsel, attorney Richard Maietta.

On October 19, 2006, the State Bar opened an investigation based on King's complaint. On November 8 and December 11, 2006, a State Bar investigator properly sent respondent letters, asking him to answer in writing specific allegations of misconduct regarding the King

complaint. The letters were addressed to respondent's official membership records address and sent by first-class mail, postage prepaid. They were not returned as undeliverable or for any other reason. Respondent did not respond to the letters..

On December 13, 2006, a State Bar investigator called respondent, who offered to answer the letters by December 15, 2006. However, the State Bar did not receive any response.

2. Conclusions of Law

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

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

By not taking any action on King's case after October or November 2005, respondent intentionally, recklessly and repeatedly did not perform competently in wilful violation of rule 3-110(A).

b. Count Two - Section 6068, subd. (m) (Communication)

Section 6068, subdivision (m) requires an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

Respondent did not promptly respond to King's numerous and reasonable status inquiries, made by telephone, letter and email, in wilful violation of section 6068, subdivision (m).

c. Count Three - Section 6068, subd. (i) (Not Participating in Disciplinary Investigation)

Section 6068, subdivision (i) requires an attorney to participate and cooperate in any disciplinary investigation or other disciplinary or regulatory proceeding pending against him- or herself.

By not responding to the State Bar's letters and telephone calls regarding its investigation of King's complaint, respondent did not participate and cooperate in the investigation of the allegations of his misconduct case in wilful violation of section 6068, subdivision (i).

⁴Future references to rule are to this source, except as otherwise noted.

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,⁵ std. 1.2(b).)

Respondent has one prior instance of discipline. (Std. 1.2(b)(i).) In case no. S017538 (State Bar Court case no. 88-O-12948), filed February 14, 1991, the California Supreme Court imposed discipline consisting of 90 days' stayed suspension and one year probation on conditions including 30 days' actual suspension. Respondent and the State Bar there stipulated that, in one client matter, respondent violated sections 6068, subdivision (m), and 6106, as well as former Rule of Professional Conduct 6-101(A)(2). Mitigating factors at that time included candor, cooperation and no prior discipline. There were no aggravating factors. The court in the instant proceeding concludes that respondent's prior disciplinary record, although remote in time, was not minimal in nature and encompassed conduct similar to that in the instant case. Therefore, it merits consideration as an aggravating factor.⁶

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

Respondent's misconduct significantly harmed his client and the administration of justice. (Std. 1.2(b)(iv).) His client and opposing counsel repeatedly tried to contact him. The settlement of the case could not be finalized due to respondent's inattention to the Medicare set-aside issue and resulted in the filing of a notice of intent to dismiss his client's case. King had to retain new counsel.

⁵Future references to standard or std. are to this source.

⁶In the prior case, the last acts of misconduct occurred in 1988. In the present case, the first acts of misconduct occurred in October or November of 2005, approximately 17 years later. In the prior case, respondent was found culpable of not performing competently by not bringing a case to trial within the requisite five-year period; not opposing a motion to dismiss the case for lack of prosecution; not communicating truthfully with his client; and not notifying his client that her case had been dismissed. This conduct, but for the misrepresentation, is similar to that found in the present case and was not minimal in nature. (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 713.)

Respondent's failure to participate in this disciplinary proceeding is also an aggravating factor. (Std. 1.2(b)(vi).) However, it warrants little weight in aggravation because this conduct closely parallels that used 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

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors.

C. Discussion

Respondent has been found culpable of violating sections 6068, subdivisions (i) and (m), as well as rule 3-110(A). In aggravation, the court has found harm to the client and the administration of justice, multiple acts of misconduct, and one prior instance of discipline. There were no mitigating factors.

The most severe sanction recommended by the standards is found at standard 2.6(a) which recommends suspension or disbarment for violations of sections 6067 and 6068, depending on the gravity of the offense or harm, if any to the victim, with due regard to the purposes of imposing discipline. (Std. 1.6(a).) Discipline is progressive. (Std. 1.7.)

The State Bar recommends nine months' actual suspension, among other things. The court believes that six months' actual suspension to continue until respondent complies with rule 205 of the Rules of Procedure, among other things, is sufficient to protect the public, the courts and the legal profession from further misconduct by respondent.

In decisions of the Supreme Court and State Bar Court involving abandonment of a client's case, where the attorney has no prior record of discipline, the discipline ranges for no actual to 90 days actual suspension. (*In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 206.) In the present case, respondent has a prior record of discipline which, although remote, is for similar misconduct as that in the present case. Moreover, there are considerable aggravating factors and no mitigating circumstances in this default matter.

Respondent's case merits greater discipline than 90 days' actual suspension, but less than the nine months sought by the State Bar.⁷

Respondent's misconduct and lack of participation in this matter raises concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. No explanation has been offered that might persuade the court otherwise and the court can glean none. Having considered the evidence and the law, the court believes that a one-year suspension (stayed) and a six-month actual suspension, to remain in effect until respondent complies with rule 205, Rules Proc. of State Bar, among other things, is necessary and adequate to protect the public and proportionate to the misconduct found..

V. DISCIPLINE RECOMMENDATION

Accordingly, it is hereby recommended that respondent **HOWARD LAWRENCE RIFKIN** be suspended from the practice of law for one year; that said 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 at its conclusion or upon such later date ordered by the court. (Rule 205(a), (c), Rules Proc. of State Bar.)

It is also recommended that he be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also, rule

⁷The State Bar relies on *Conroy v. State Bar* (1991) 53 Cal.3d 495 for its suggestion of nine months' actual suspension. In *Conroy*, discipline was imposed including one year's 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. *Conroy* presents much greater misconduct as well as two prior disciplinary records and two defaults and, therefore is distinguishable from the present case.

205(b).)

It is also recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in this matter, and file within 40 days of the effective date of the order the affidavit provided for in paragraph (c) of the rule, showing his compliance with said order.⁸

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, Multistate Professional Responsibility Examination Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the State Bar Office of Probation, within one year of the effective date of the discipline herein. **Failure to pass the Multistate Professional Responsibility Examination within the specified time results in actual suspension by the Review Department, without further hearing, until passage. But see rule 9.10(b), California Rules of Court, and rule 321(a)(1) and (3), Rules of Procedure of the State Bar.**

VI. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: July 28, 2008

DONALD F. MILES
Judge of the State Bar Court

⁸Failure to comply with rule 9.20 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent 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.)