

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

In the Matter of)	Case No. 07-H-13022-RAH
ANDREW E. RUBIN,)	DECISION
Member No. 62587,)	
<u>A Member of the State Bar.</u>)	

INTRODUCTION

The above-entitled matter was submitted for decision on February 26, 2008, after the State Bar of California, Office of the Chief Trial Counsel (State Bar), requested a waiver of the hearing in this matter and submitted a brief on the issues of culpability and discipline. Since January 31, 2008, the State Bar has been represented in this matter by Deputy Trial Counsel Eli D. Morgenstern (DTC Morgenstern).¹ Although he was aware of the proceeding and was given an opportunity to participate in this matter, respondent Andrew E. Rubin (respondent) failed to file a response to the Notice of Disciplinary Charges in this matter and allowed his default to be entered.

In this proceeding, respondent is found culpable, by clear and convincing evidence, of violating conditions attached to a private reproof previously imposed on him by the State Bar Court.

In light of respondent's culpability, and after considering any and all aggravating and mitigating circumstances surrounding respondent's misconduct, the court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of said suspension be stayed, and that respondent be actually suspended from the practice of law for 90 days and until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules

¹From October 25, 2007 to January 30, 2008, the State Bar was represented in this matter by Deputy Trial Counsel Margaret P. Warren (DTC Warren).

Proc. of State Bar, rule 205.)

PERTINENT PROCEDURAL HISTORY

On October 3, 2007, a letter from DTC Warren was mailed to respondent at the official membership records address (official address) maintained by respondent pursuant to Business and Professions Code section 6002.1, subdivision (a).² The letter advised respondent that unless a pre-filing settlement was reached, a notice of disciplinary charges would be filed. The letter requested that respondent call DTC Warren immediately to arrange a meeting to take place on or before October 25, 2007. As of November 30, 2007, neither respondent nor anyone acting on his behalf had contacted DTC Warren in response to her letter, and the letter had not been returned to the State Bar by the U.S. Postal Service as undeliverable or for any other reason.

On October 25, 2007, the State Bar filed a Notice of Disciplinary Charges (NDC) against respondent with the State Bar Court. A copy of the NDC was properly served on respondent on the same date, by certified mail, return receipt requested, addressed to respondent at his official membership record address (official address). As of November 30, 2007, neither the copy of the NDC, nor the certified mail return receipt for the NDC, had not been returned to the State Bar by the U.S. Postal Service as undeliverable or for any other reason.

On November 7, 2007, a Notice of Assignment and Notice of Initial Status Conference was filed in this matter, setting an in-person status conference for December 4, 2007. A copy of said notice was properly served on respondent by first-class mail, postage fully prepaid, on November 19, 2007, addressed to respondent at his official address.³ The copy served on respondent on November 19, 2007, was not returned to the State Bar Court by the U.S. Postal Service as undeliverable or for any other reason.

A status conference was held on December 4, 2007. Respondent did not appear in person or through counsel.

²All further statutory references are to the Business and Professions Code unless otherwise indicated.

³A copy of the notice was improperly served on an earlier date.

As respondent did not 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), the State Bar filed a motion to enter respondent's default on November 30, 2007. Attached to the motion was the declaration of DTC Warren and Exhibits 1-6 attached thereto and the declaration of Robert John Melone. A copy of this motion was served on respondent on November 30, 2007, by certified mail, return receipt requested, and by regular mail, addressed to respondent at his official address. A copy of this motion was also served on respondent on the same date by regular mail addressed to respondent at 21228 Pacific Coast Highway, Malibu, CA 90265. A copy of the motion was also sent by facsimile transmission on November 30, 2007, to (310) 442-6442.⁴

An Order Pursuant to In Person Status Conference was filed on December 10, 2007. A copy of the order was served on respondent on the same date by first-class mail, postage fully prepaid, addressed to respondent at his official address. The copy sent to respondent was not returned to the State Bar Court as undeliverable or for any other reason.

On December 11, 2007, the court filed an order noting that the motion for the entry of respondent's default was defective, as it failed to attach a certified copy of the official records identified as Exhibit 1. The court ordered the Deputy Trial Counsel to re-file and serve the motion with the proper exhibit attached to the motion. A copy of said order was properly served on respondent on that same date by first-class mail, postage fully prepaid, 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. Respondent was aware of this ruling as of December 13, 2007.

On December 14, 2007, respondent telephoned DTC Warren and left his cell number and a message that respondent and DTC Warren should talk about a possible resolution of the case.

On December 14, 2007, the State Bar filed a motion seeking reconsideration of the court's December 11, 2007, order. A copy of this motion was served on respondent on December 14, 2007,

⁴The Malibu address and the facsimile number were obtained by State Bar paralegal Robert John Melone while attempting to locate alternative contact information for respondent.

by certified mail, return receipt requested, and by regular mail addressed to respondent at his official address. A copy of this motion was also served on respondent on the same date by regular mail addressed to respondent at 21228 Pacific Coast Highway, Malibu, CA 90265. A copy of the motion was also sent by facsimile transmission that same date to (310) 442-6442.

Respondent received a copy of the motion for reconsideration by facsimile transmission.

Respondent did not receive a telephone call from DTC Warren in response to his telephone message of December 14, 2007.

On December 18, 2007, respondent filed a motion seeking a stay of the proceedings so he could respond to the substantive allegations and the State Bar's motion for reconsideration. A copy of the motion was properly served on DTC Warren on December 15, 2007, by regular mail, postage fully prepaid.

On December 20, 2007, the State Bar filed an opposition to respondent's motion. A copy of the opposition was properly served on respondent by regular mail on that same date addressed to respondent at his official address.

On January 18, 2007, the court filed an order denying the State Bar's motion for reconsideration and denying respondent's request for a stay as moot in light of the court's ruling on the State Bar's motion for reconsideration. The order also granted respondent an extension of time to respond to the NDC until January 25, 2008. A copy of the order was properly served on respondent on that same date by first-class mail, postage fully prepaid, addressed to respondent at his official address. The copy of said order was not returned to the State Bar Court as undeliverable or for any other reason.

Also on January 18, 2008, a Notice of In-Person Status Conference was filed, setting an in-person status conference for February 6, 2008. A copy of said notice was properly served on respondent by first-class mail, postage fully prepaid, on that same date, 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 as undeliverable or for any other reason.

A status conference was held on February 6, 2008. Respondent did not appear in person or through counsel. The court noted that as respondent had not filed a response to the NDC, which was

due January 25, 2008, the court would entertain a motion for the entry of respondent's default from the State Bar. The State Bar's motion was to be filed by February 13, 2008.

On February 6, 2008, the State Bar filed a motion for the entry of respondent's default. The motion also contained a request that the court take judicial notice, pursuant to Evidence Code section 452, subdivision (h), of all of respondent's official addresses,⁵ the declaration of DTC Morgenstern and Exhibit 1. A copy of this motion was properly served on respondent on that same date by certified mail, return receipt requested, addressed to respondent at his official address.

An Order Pursuant to In Person Status Conference was filed on February 11, 2008. A copy of the order was properly served on respondent on that same date by first-class mail, postage fully prepaid, 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.

Because respondent failed to file a written response within ten days after service of the motion for the entry of his default, on February 25, 2008, the court filed an Order of Entry of Default (Rule 200 - Failure to File Timely Response), Order Enrolling Inactive and Further Orders.⁶ This order was properly served on respondent on February 25, 2008, by certified mail, return receipt requested, addressed to respondent at his official address. The green return receipt card was returned to the State Bar Court signed as received by "Yvette S."

On February 26, 2008, the State Bar filed a brief on the issues of culpability and discipline, requesting the waiver of the hearing in this matter. The matter was submitted for decision on that date.⁷

⁵The court grants the State Bar's request and takes judicial notice of all of respondent's official membership addresses to the date of the filing of this decision.

⁶Respondent's involuntary inactive enrollment pursuant to section 6007, subdivision (e) was effective three days after the service of this order by mail.

⁷The following are admitted into evidence: (1) the declaration of DTC Warren and Exhibits 1-6, as well as the declaration of Robert John Melone, attached to the November 30, 2007, motion for the entry of respondent's default; (2) respondent's declaration dated December 15, 2007, attached to respondent's motion for a stay of the proceedings; (3) the declaration of DTC Morgenstern and Exhibit 1 attached to the State Bar's February 6, 2008, motion for the entry of respondent's default; and (4) Exhibits 1 and 2 attached to the State Bar's brief on the

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 18, 1974, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

Count One - Failure to Comply with Conditions of a Private Reproval

On June 30, 2006, respondent entered into a Stipulation Re Facts, Conclusions of Law and Disposition (Stipulation) with the State Bar of California in Case No. 01-O-02402.

On July 7, 2006, the Hearing Department of the State Bar Court filed an Order approving the Stipulation and imposing on respondent a private reproval with conditions (Order).

On July 7, 2006, the Order was properly served on respondent at his official State Bar membership records address by the State Bar Court. Respondent received the Order.

The Order and private reproval became effective on July 28, 2006.

Pursuant to the Order, respondent was required to comply with certain terms and conditions attached to the private reproval for a period of one (1) year from the effective date of the Order, including the following:

(a) Within thirty (30) days from the effective date of discipline, respondent was required to contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss the terms and conditions of his reproval⁸;

(b) Respondent was required to submit written quarterly reports to the Office of Probation no later than October 10, 2006, and January 10, April 10, and July 10, 2007, and a final quarterly report no later than July 28, 2007, during the condition period of the private reproval;

(c) Within one (1) year of the effective date of the Order, respondent was required to provide to the Office of Probation satisfactory proof of attendance of Ethics School and passage of the test given at the end of that session; and

issues of culpability and discipline.

⁸Although both the NDC and the actual language of the condition itself refer to the conditions of respondent's "probation," these are actually conditions of respondent's reproval.

(d) Within one (1) year of the effective date of the Order, respondent was required to provide proof of passage of the Multistate Professional Responsibility Examination (MPRE) to the Office of Probation.

On August 15, 2006, a Probation Deputy in the State Bar's Office of Probation mailed a letter to respondent, reminding him of the terms of his private reproof which became effective July 28, 2006. The letter was properly addressed and mailed to respondent at his official State Bar membership records address at 12304 Santa Monica Boulevard, #300, Los Angeles, CA 90025. The letter was not returned by the U.S. Postal Service as undeliverable or for any other reason. Respondent received the letter.

As of October 25, 2007, respondent had not contacted any Probation Deputy or anyone else in the Office of Probation; had not submitted any quarterly reports to the Office of Probation; had not submitted to the Office of Probation proof of attendance and successful completion of Ethics School; and had not submitted to the Office of Probation proof of passage of the MPRE.

Count One - Rule 1-110 of the Rules of Professional Conduct of the State Bar of California⁹

Rule 1-110 requires, among other things, that State Bar members comply with conditions attached to reproofs. The State Bar has proven by clear and convincing evidence that respondent wilfully violated rule 1-110 by failing to: (1) contact any Probation Deputy or anyone else in the Office of Probation; (2) submit any quarterly reports to the Office of Probation; (3) submit to the Office of Probation proof of attendance and successful completion of Ethics School; and (4) submit to the Office of Probation proof of passage of the MPRE during his one year condition period.

MITIGATING/AGGRAVATING CIRCUMSTANCES

A. Mitigation

No evidence in mitigation was offered in this proceeding, and none can be gleaned from the record. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std.

⁹Unless otherwise indicated, all further references to rule(s) refer to the Rules of Professional Conduct of the State Bar of California.

1.2(e).)¹⁰

B. Aggravation

Respondent's prior record of discipline is an aggravating factor. (Std. 1.2(b)(i).) In the underlying matter, case number 01-O-02402, respondent was privately reprovved with a one-year condition period for misconduct in a single client matter involving failing to comply with a Supreme Court order. There was no aggravation in the prior case; however, there were mitigating circumstances, including that respondent had no prior record of discipline in about 30 years of practice, extensive community, school and bar association service, and pro bono legal services.

Respondent's violation of multiple reprovval conditions in this matter constitutes multiple acts of misconduct and is an aggravating factor. (Standard 1.2(b)(ii); Cf. *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 76 [violating three separate conditions of probation constituted misconduct involving multiple acts of wrongdoing].)

Respondent's minimal participation in this disciplinary proceeding prior to the entry of his default is a further aggravating circumstance, particularly in light of the fact that respondent was aware of this proceeding and given ample opportunity to participate in this matter. (Standard 1.2(b)(vi).)

In addition, respondent's failure to belatedly comply with his reprovval conditions, even though he was aware of this disciplinary proceeding, demonstrates indifference toward rectification. (Standard 1.2(b)(v).)

The State Bar urges the court to also find as an aggravating factor that respondent's conduct harmed the administration of justice. (Std. 1.2(b)(iv).) The harm to the administration of justice that occurred was inherent in the reprovval violation. Therefore, the court declines to make such a finding as it would be duplicative. (Cf. *In the Matter of Hunter, supra*, 3 Cal. State Bar Ct. Rptr. at p. 76 [where the harm that occurred to the administration of justice was the harm inherent in the violation of probation, giving aggravating weight to that same harm would be duplicative].)

¹⁰All further references to standards are to this source.

DISCUSSION

The purpose of 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; std. 1.3.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*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 2.9 provides that an attorney's willful violation of rule 1-110 shall result in suspension. Standard 1.6(b) adds that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions. Further, standard 1.7(a) provides that if an attorney found culpable of professional misconduct in a disciplinary proceeding has a record of one prior imposition of discipline, the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline was so remote in time and the offense so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.

Respondent's misconduct involved failing to: (1) contact any Probation Deputy or anyone else in the Office of Probation; (2) submit any quarterly reports to the Office of Probation; (3) submit to the Office of Probation proof of attendance and successful completion of Ethics School; and (4) submit to the Office of Probation proof of passage of the MPRE.

The State Bar urges a two-year stayed suspension and an actual suspension of 90 days and until the State Bar Court grants a motion to terminate respondent's actual suspension pursuant to rule 205 of the Rules of Procedure. In support of its recommended discipline, the State Bar cites *Conroy v. State Bar* (1990) 51 Cal.3d 799 (*Conroy*) and *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 (*Meyer*).

Conroy received a one-year stayed suspension, a one-year probation, and a 60-day actual suspension based upon his failure to timely take and pass the Professional Responsibility

Examination (PRE) as he had been ordered to do as a condition of a private reproof. In aggravation, Conroy had one prior record of discipline, the underlying private reproof imposed after, in three separate matters, respondent: failed to communicate; failed to relinquish his clients' file to a new attorney; failed to file a timely inventory of estate property or an accounting prior to the disposition of funds while acting as an executor; abandoned a client resulting in the issuance of an arrest warrant; and subsequently failed to assist in having the arrest warrant withdrawn. Also in aggravation, Conroy failed to appreciate the seriousness of the charge; showed that he failed to comprehend the importance of participating in disciplinary proceedings by failing to appear at trial; and failed to comprehend the gravity of his earlier misdeeds, showing a lack of remorse. The court gave some weight in mitigation to Conroy's belated passage of the PRE but concluded that "this single extenuating factor [was] substantially outweighed by numerous aggravating circumstances." (*Conroy, supra*, 51 Cal.3d at p. 805.)

Meyer received a two-year stayed suspension, three years of probation, and a 90-day actual suspension based upon his failure to timely file two quarterly reports and provide timely proof of completion of six hours of continuing legal education as he had been ordered to do as a condition of a private reproof. In aggravation, Meyer had two prior records of discipline. In his first prior disciplinary matter, Meyer was privately reproofed with conditions for failing to respond to reasonable status inquiries and failing to inform a client of significant developments in a client's matter, as well as for failing to forward a client's file to a client's new counsel at the request of the client. In his second prior disciplinary matter, Meyer was privately reproofed with conditions for failing to comply with conditions of his earlier private reproof by not filing one quarterly report, filing another quarterly report twelve days late, and by failing to take and complete Ethics School. Also in aggravation, Meyer engaged in multiple acts of misconduct; his failure to rectify his misconduct through belated compliance established indifference toward rectification; and he failed to cooperate by failing to file a pre-trial statement and failing to attend certain hearings.

Respondent violated more conditions of his prior reproof than did Conroy or Meyer, and the nature of respondent's violations was more serious, as respondent failed to comply with several of the most important conditions attached to his disciplinary reproof, demonstrating that he has not

even begun to take steps toward rehabilitation for his prior misconduct. (Cf. *In the Matter of Hunter, supra*, 3 Cal. State Bar Ct. Rptr. at p. 78.) Conroy received credit in mitigation for belated compliance with his PRE requirement, while no mitigation appears in the instant case. However, *Conroy* and *Meyer* involved more serious aggravation than the present case in that Conroy’s prior record of discipline was based on three matters and numerous acts of misconduct, as opposed to respondent’s single act of failing to comply with a Supreme Court order, and Meyer had two prior records of discipline. Moreover, while both respondent and Conroy failed to participate in the proceedings before the State Bar Court, Conroy implied to the Supreme Court “that his misconduct constituted a mere technical lapse” (*Conroy, supra*, 51 Cal.3d at p. 806), showing an absence of remorse for his earlier misdeeds.

However, the court agrees with the State Bar that this case is more serious than *Conroy*. Respondent’s failure to participate in this disciplinary proceeding prior to the entry of his default is particularly troublesome to the court, as respondent was aware of the pending disciplinary proceeding and was given ample opportunity to participate in this matter. The court therefore determines that a 90-day period of actual suspension, as in *Meyer*, is sufficient in this case to protect the public, preserve public confidence in the profession, and maintain high standards for attorneys.

RECOMMENDED DISCIPLINE

The court hereby recommends that respondent Andrew E. Rubin be suspended from the practice of law for two years, that execution of said suspension be stayed, and that respondent be actually suspended from the practice of law for 90 days and until he files and the State Bar Court grants a motion to terminate his actual suspension. (Rules Proc. of State Bar, rule 205.) 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).)

The court further recommends that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court and to 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.¹¹

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 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. (See also Rules Proc. of State Bar, rule 205(b).)

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 within one year after the effective date of the discipline imposed herein or during the period of his actual suspension, whichever period is longer, and to 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: May 23, 2008

RICHARD A. HONN
Judge of the State Bar Court

¹¹Failure to comply with rule 9.20 (formerly rule 955) of the California Rules of Court could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a California Rules of Court, rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)