

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 07-O-10180-PEM
)	08-O-12270-PEM
COLIN JON KOOYUMJIAN,)	(Consolidated.)
)	
Member No. 172216,)	DECISION & ORDER OF
)	INACTIVE ENROLLMENT
A Member of the State Bar.)	
_____)	

I. INTRODUCTION

In this consolidated, original disciplinary proceeding, the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar) charges respondent **COLIN JON KOOYUMJIAN** with (1) failing to perform, failing to communicate, and failing to refund unearned fees in a single client matter; (2) failing to cooperate with a State Bar disciplinary investigation; and (3) violating his duty to comply with all disciplinary probation conditions. Deputy Trial Counsel Treva R. Stewart (hereafter DTC Stewart) appeared for the State Bar. As noted in more detail *post*, respondent's default was entered when he failed to appear for trial.

The court finds respondent culpable of almost all of the charged misconduct. According to the State Bar, the appropriate level of discipline is disbarment. For the reasons set forth *post*,

the court agrees. Because the court recommends respondent's disbarment, it must also order his involuntary inactive enrollment. (Bus. & Prof. Code, § 6007, subd. (c)(4).)¹

II. KEY PROCEDURAL HISTORY

The State Bar filed the notice of disciplinary charges (hereafter NDC) in case number 07-O-10180-PEM on February 22, 2008, and respondent filed a response to that NDC on June 17, 2008.

The State Bar filed the NDC in case number 08-O-12270-PEM on July 14, 2008, and respondent filed a response to that NDC on September 11, 2008.

In an order filed on September 15, 2008, the court consolidated case numbers 07-O-10180-PEM and 08-O-12270-PEM for all purposes and set the consolidated matter for trial on February 3, 2009.

On December 24, 2008, the State Bar filed a motion for an order that the requests for admission it served on respondent be deemed admitted because respondent failed to respond to them. In an order filed on January 6, 2009, the court ordered that the State Bar's requests for admission be deemed admitted against respondent.

On January 6, 2009, the State Bar filed and served on respondent a notice in lieu of subpoena requiring respondent to attend the trial in this matter. (Code Civ. Proc., § 1987.)

When the court called the matter for trial on February 3, 2009, DTC Stewart appeared for the State Bar, but respondent failed to appear. Accordingly, the court ordered that respondent's default be entered under Rules of Procedure of the State Bar, rule 201(b). Minutes later, respondent appeared, and the court exercised its discretion to set aside the default and permit the parties to privately discuss settlement. The parties were unable to reach a settlement. Thus, the

¹ Unless otherwise noted, all further statutory references are to the Business and Professions Code.

court ordered the parties to return to court for trial at 11:15 a.m. that same day (i.e., February 3, 2009). Respondent then left the courtroom and did not return that day. Accordingly, the court again ordered that respondent's default be entered under rule 201(b). Moreover, because his default was entered, respondent was involuntarily enrolled as an inactive member of the State Bar of California effective February 6, 2009. (§ 6007, subd. (e).)

On April 6, 2009, the State Bar filed a request for waiver of default hearing and evidence brief (with written evidence attached). The next day (i.e., April 7, 2009) the court took the matter under submission for decision without a hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings of fact are based on (1) the well-pleaded factual allegations (not the legal contentions or the charges) contained in the two NDC's, which allegations are deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of State Bar, rules 200(d)(1)(A), 201(c)); (2) the State Bar's requests for admissions that are deemed admitted against respondent; and (3) the written evidence attached to the State Bar's April 6, 2009 request for waiver of default hearing and evidence brief¹ (Rules Proc. of State Bar, rule 202(c)).

¹ The court must disregard all of the uncharged facts in the written evidence attached to this April 6, 2009 pleading. Even though the State Bar is entitled to present declarations and other written evidence with its request for waiver of default hearing (Rules Proc. of State Bar, rule 202), the declarations and other written evidence should not contain uncharged facts. It is well established that the State Bar cannot rely on any uncharged fact to establish either culpability or aggravation in a default proceeding. (*In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 589-590; *In the Matter of Hazelkorn* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 602, 606.) To do so would violate the attorney's right to due process because the attorney has never been fairly apprised that the uncharged facts would be used against him or her. (*Ibid.*)

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 2, 1994, and has been a member of the State Bar of California since that time.

B. Case Number 07-O-10180-PEM

1. The Parker Client Matter

In July 2002, Larry Parker retained respondent for several legal matters related to his conviction for manslaughter. First, Parker retained respondent to appeal his conviction through the state and federal courts. Second, Parker also retained respondent to investigate issues of improper jury conduct. Parker thought that one of the jurors was related to a victim in the case. Third, Parker retained respondent to defend him in a civil suit brought against him by the victim's family. Finally, Parker retained respondent to file bankruptcy for him if it were necessary to protect his assets.

For respondent's services, Parker paid respondent \$45,000 in advanced fees (\$25,000 for the criminal appeals; \$10,000 to defend the civil suit; and \$10,000 to investigate the jury's conduct).

Respondent met with Parker only once -- at the initial consultation. Thereafter, Parker did not hear from respondent.

On about September 10, 2002, respondent filed an appeal for Parker in the California Court of Appeal for the Fourth Appellate District. Thereafter, respondent filed an opening brief for Parker in March 2003. Respondent's brief did not address any issues of jury tampering. And the state filed its reply brief in about September 2003. Respondent, however, never filed a rebuttal brief for Parker. The Court of Appeal denied Parker's appeal and affirmed the trial court's decision in full in October 2003.

Respondent did not tell Parker that his appeal had been denied. Respondent took no further action on Parker's case. He did not pursue any additional appeals or habeas. Nor did he conduct an investigation of the jury conflict matter. Therefore, he did not earn any portion of the \$10,000 Parker paid him for that investigation. Respondent has not returned the \$10,000 to Parker.

On about June 16, 2003, respondent appeared in the San Bernardino County Superior Court on behalf of Parker at the trial in the civil suit filed by the victim's family. Respondent did not consult or advise Parker regarding his defense in the civil suit. Respondent did not tell Parker of the civil trial dates.

Parker wanted to testify at the civil trial. He had additional statements he wished to make. And, if Parker could not testify due to his incarceration, Parker wanted to be deposed. Respondent, however, did not arrange for Parker to participate in the civil trial in any fashion. Instead, respondent merely submitted the testimony from the criminal trial at the civil trial.

In the civil trial, respondent failed to respond to requests for admission. Respondent did not consult with Parker about the requests for admission. Nor did respondent respond to related court orders that were dated April 21, 2003 and April 30, 2003. As a result, a series of 10 requests for admission were deemed admitted against Parker. The admissions established both liability and malice against Parker.

On about October 6, 2003, the superior court issued a \$500,690.57 judgment against Parker and in favor of the victim's family. Respondent did not tell Parker that this civil judgment had been entered against him. Respondent did not consult with Parker about the affect of the judgment on Parker's assets. Parker was notified by a neighbor that he lost his house.

Parker did his own legal research to discover the result of his criminal appeals and civil case and to discover that no additional appeals were filed on his behalf. On between four to ten

occasions, Parker mailed letters to respondent in which he requested a status update on his cases. Respondent received those letters, but failed to respond or otherwise advise Parker of the status of his cases.

Because of his incarcerated status and respondent's lack of communication, Parker did not learn that he lost his criminal appeal until about 2003 or 2004. Parker did not discover the status of the civil suit against him until approximately July 2007. Parker had to write the respective courts to learn the disposition of his criminal appeal and the civil suit.

On about November 3, 2003, respondent changed his membership address records to 2100 Tulare Street, Fresno, California. Respondent did not advise Parker of his new address.

Count 1 – Failure to Perform (Rules Prof. Conduct, rule 3-110(A))²

In count 1, the State Bar charges that respondent willfully violated rule 3-110(A), which provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. Specifically, the State Bar charges:

By failing to advise Parker of the results of the criminal appeal; by failing to confer with Parker regarding additional appeal or habeas options; by failing to advise and consult Parker regarding the civil suit and arrange [sic] for him to testify; by failing to advise Parker of the . . . results of the civil suit; by failing to take action resulting in the admissions against Parker in the civil suit; by failing to confer with Parker regarding the admissions, and by failing to research the issue of juror conflict, respondent failed to perform, in wilful violation of . . . rule 3-110(A).

The record clearly establishes each of these charged rule 3-110(A) violations.

Count 2 – Failure to Communicate (§ 6068, subd. (m))

In count 2, the State Bar charges that respondent willfully violated section 6068, subdivision (m), which provides that an attorney must respond promptly to reasonable status

² Unless otherwise indicated, all further references to rules are to these Rules of Professional Conduct of the State Bar of California.

inquiries of a client and keep a client reasonably informed of significant developments in a matter in which the attorney has agreed to provide legal services.

Specifically, the State Bar charges that:

By failing to advise Parker of the results of the criminal appeal; the admissions against him in the civil suit, and the judgment in the civil suit, and by failing to apprise Parker of his new address, respondent failed to keep his client reasonably informed in a matter in which respondent agreed to provide legal services, in wilful violation of . . . section 6068 [subdivision] (m).

By failing to respond to Parker's numerous letters, respondent failed to respond to the reasonable status inquiries of a client in a matter in which he agreed to provide legal services, in wilful violation of . . . section 6068 [subdivision] (m).

The record clearly establishes each of these charged section 6068, subdivision (m) violations. However, the only two violations that are not duplicative of the violations charged and found under count 1 *ante* are (1) that respondent failed to apprise Parker of his new address and (2) that respondent failed to respond to Parker's reasonable status inquiries. Accordingly, the court finds respondent culpable of willfully violating section 6068, subdivision (m) only by failing to apprise Parker of his new address and by failing to respond to Parker's reasonable status inquiries.

Count 3 – Failure to Refund Unearned Fee (Rule 3-700(D)(2))

In count 3, the State Bar charges that respondent willfully violated rule 3-700(D)(2), which provides that, upon the termination of employment, an attorney must promptly refund any unearned fee. Specifically, the State Bar charges that "By failing to return the \$10,000 fee to Parker for the jury conflict issue, when he performed no services in that regard, respondent failed to refund promptly any part of a fee paid in advance which he did not earn, in wilful violation of . . . rule 3-700(D)(2)." The record clearly establishes this charged rule 3-700(D)(2) violation.

2. State Bar Disciplinary Investigation Matter

On about February 14, 2007, and again on about March 5, 2007, a State Bar investigator wrote to respondent at his official membership records address (effective December 27, 2005). In each of his letters, the investigator requested information from respondent about Parker's complaints to the State Bar. Respondent received the letters, but failed to respond to them or otherwise respond to the investigation of this complaint.

Count 4 – Failure to Cooperate in Disciplinary Investigation (§ 6068, subd. (i))

In count 4, the State Bar charges that respondent willfully violated section 6068, subdivision (i), which mandates that attorneys cooperate in State Bar disciplinary investigations. Specifically, the State Bar charges that "By failing to respond to the letters of [the State Bar] Investigator . . . and by failing to otherwise respond to this complaint, respondent failed to cooperate and participate in a disciplinary investigation pending against him, in wilful violation of . . . section 6068 [subdivision] (i)." The record clearly establishes this charged section 6068, subdivision (i) violation.

C. Case Number 08-O-12270-PEM

On September 28, 2007, the Supreme Court filed an order in *In re Colin Jon Kooyumjian on Discipline*; case number S154926 (State Bar Court case numbers 04-O-12673, et al.) (hereafter *Kooyumjian I*) in which it placed respondent on two years' stayed suspension, two years' probation, and eighteen months' actual suspension, which will continue until respondent establishes his rehabilitation, fitness to practice, and learning in the law (see Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii)).³ The discipline imposed on respondent in the Supreme Court's September 2007 order was imposed on

³ All further references to standards are to this source.

respondent in accordance with a stipulation that respondent entered into with the State Bar. That stipulation contained all the conditions of probation.

The Supreme Court's September 2007 order became effective on October 28, 2007, and has remained in effect at all times thereafter. Accordingly, respondent's actual suspension and disciplinary probation began on October 28, 2007.

A copy of the Supreme Court's September 2007 order was properly served on respondent in accordance with California Rules of Court, rule 8.532(a). At all times material hereto, respondent had notice and was aware of that Supreme Court order.

The State Bar charges respondent with violating the following three conditions of his probation: (1) quarterly probation reports; (2) substance abuse conditions; and (3) restitution requirements. The State Bar further charges that, when respondent violated these three probation conditions, he also violated his duty, under section 6068, subdivision (k), "To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney." As noted *post*, the court finds respondent culpable of willfully violating each of these three probation conditions, but not to the full extent of the charges.

1. Quarterly Probation Reports

Under his probation conditions in *Kooyumjian I*, respondent is required to submit written quarterly reports to the State Bar on every January 10, April 10, July 10, and October 10 for two years. In each of those reports, respondent is required to state, under penalty of perjury, whether he has complied with the Rules of Professional Conduct of the State Bar of California, the State Bar Act (§ 6000, et seq.), and the conditions of his probation during the preceding calendar quarter. Respondent never filed the quarterly probation report that was due no later than January 10, 2008.

2. Substance Abuse Conditions

Under his probation conditions in *Kooyumjian I*, respondent was also required "to attend four (4) meetings per month of Alcoholics Anonymous and four (4) meetings per month of Narcotics Anonymous." In addition, respondent's probation conditions required that, "As a separate reporting requirement, Respondent must provide to the Office of Probation satisfactory proof of attendance during each month, on or before the tenth (10th) day of the following month, during the condition or probation period."

Respondent was required (1) to attend Alcoholics Anonymous meetings in November 2007 and April 2008 and (2) to provide proof of his attendance no later than December 10, 2007, and May 10, 2008, respectively. Respondent willfully failed to attend Alcoholics Anonymous meetings in either November 2007 or April 2008. Accordingly, the record clearly establishes that respondent willfully violated section 6068, subdivision (k) by failing to attend Alcoholics Anonymous meetings in November 2007 and April 2008. Even though the record also establishes that respondent failed to submit, to the Office of Probation, proof of his attendance at Alcoholics Anonymous meetings for those two months, the court declines to find any additional section 6068, subdivision (k) violations based on those failures. Respondent's duty to report his attendance at meetings arises only when he attends one or more meetings during a reporting period.

Also, respondent was required (1) to attend Narcotics Anonymous meetings in November 2007, December 2007, and April 2008 and (2) to provide proof of his attendance no later than December 10, 2007; January 10, 2008; and May 10, 2008, respectively. Respondent willfully failed to attend Narcotics Anonymous meetings in either November 2007, December 2007, or April 2008. Accordingly, the record clearly establishes that respondent willfully violated section 6068, subdivision (k) by failing to attend Narcotics Anonymous meetings in November 2007,

December 2007, and April 2008. Even though the record also establishes that respondent failed to submit, to the Office of Probation, proof of his attendance at Narcotics Anonymous meetings for those three months, the court declines to find any additional section 6068, subdivision (k) violations based on those failures. Again, respondent's duty to report his attendance at meetings arises only when he attends one or more meetings during a reporting period.

Another one of respondent's probation conditions requires respondent to file a screening report to be submitted to the Office of Probation by a licensed medical laboratory as follows:

Respondent must select a license [sic] medical laboratory approved by the Office of Probation. Respondent must furnish to the laboratory blood and/or urine samples as may be required to show that Respondent has abstained from alcohol and/or drugs. The samples must be furnished to the laboratory in such a manner as may be specified by the laboratory to ensure specimen integrity. Respondent must cause the laboratory to provide to the Office of Probation, at the Respondent's expense, a screening report on or before the tenth day of each month of the condition or probation period, containing an analysis of Respondent's blood and/or urine obtained not more than ten (10) days previously.

Respondent willfully failed to file the laboratory reports that were due no later than November 10, 2007; December 10, 2007; January 10, 2008; March 10, 2008; April 10, 2008; and May 10, 2008. Accordingly, the record clearly establishes that respondent willfully violated section 6068, subdivision (k) by failing to file the laboratory reports due those six months.

In addition, respondent willfully filed the laboratory report that was due no later than February 10, 2008, eleven days late on February 21, 2008. Accordingly, the record clearly establishes that respondent willfully violated section 6068, subdivision (k) by filing his February 2008 laboratory report 11 days late.

3. Restitution Requirements

Under his probation conditions in *Kooyumjian I*, respondent was also required to make restitution to the following three individuals (and to provide proof of payment to the Office of Probation) no later than August 1, 2007: (1) S. Steagall in the amount of \$1,500 together with 10

percent interest from August 23, 2003; (2) J. J. Sanchez in the amount of \$1,000 together with 10 percent interest from January 1, 2004; and (3) H. Pardo in the amount of \$2,000 together with 10 percent interest from April 23, 2004. Respondent willfully failed to pay this restitution to these three individuals. Accordingly, the record clearly establishes that respondent willfully violated section 6068, subdivision (k) by failing to pay this restitution.

Even though the record also establishes that respondent willfully failed to provide proof of his restitution to the Office of Probation, the court declines to find any additional section 6068, subdivision (k) violations based on those failures. Respondent's duty to report restitution payments arises only when he makes one or more restitution payments during a reporting period.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Factors in Mitigation

There are no mitigating circumstances.

B. Factors in Aggravation

Respondent has a prior record of discipline: *Kooyumjian I.* (Std. 1.2(b)(i).) In *Kooyumjian I.*, respondent stipulated to engaging in serious client misconduct. Specifically, respondent stipulated to failing to perform legal services competently in four client matters; failing to communicate in one client matter; failing to release client papers and property in two client matters; failing to refund unearned fees in three client matters; making seven court appearances on three different days while on inactive status; failing to cooperate in four State Bar disciplinary investigations; and failing to maintain his State Bar official membership records address.

Respondent's misconduct in this proceeding involves multiple acts of misconduct. (Std. 1.2(b)(ii).)

Respondent's misconduct caused significant harm to Parker because he failed to refund \$10,000 in unearned fees. (Std. 1.2(b)(iv).)

V. DISCUSSION ON DISCIPLINE

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.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for respondent's misconduct is found in standard 2.6, which applies to respondent's violations of section 6068, subdivisions (k) and (m). Standard 2.6 provides, in relevant part, that an attorney's violation of section 6068 is to "result in disbarment or suspension 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 1.3 provides:

The primary purposes of disciplinary proceedings conducted by the State Bar of California and of sanctions imposed upon a finding or acknowledgment of a member's professional misconduct are 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. Rehabilitation of a member is a permissible object of a sanction imposed upon the member but only if the imposition of rehabilitative sanctions is consistent with the above-stated primary purposes of sanctions for professional misconduct.

The generalized language of standard 2.6 provides little guidance to the court. (*In re Morse* (1995) 11 Cal.4th 184, 206.)

Moreover, the court must consider standard 1.7(a), which provides that, when an attorney has a prior record 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 imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.”

To support its contention that respondent should be disbarred, the State Bar cites to, inter alia, *Borré v. State Bar* (1991) 52 Cal.3d 1047, 1053 (attorney’s abandonment of an incarcerated client was serious misconduct warranting substantial discipline) and *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 71-74, 79 (even though attorney’s abandonment of clients in four matters did not necessarily constitute a pattern of misconduct, it reflected indifference to court orders and justified disbarment).

Notably, respondent’s combined misconduct in *Kooyumjian I* and the present proceeding include failing to perform legal services in six client matters over about a two-year period. And, in three of those client matters, the clients were incarcerated.

Moreover, respondent’s misconduct in the present proceeding includes multiple, serious probation violations. Those violations strongly support a finding that, for whatever reason, respondent is either unwilling or unable to undertake a rehabilitative course under the watchful eye of the State Bar or to conform his conduct to the standards of the profession. In short, the court concludes that only disbarment will adequately further the goals of attorney discipline.

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent COLIN JON KOOYUMJIAN be DISBARRED from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state. The court further recommends that

COLIN JON KOOYUMJIAN be ordered to make restitution to Larry Parker in the amount of \$10,000 plus 10 percent interest per annum from November 26, 2003 (or to the Client Security Fund to the extent of any payment from the fund to Larry Parker plus interest and costs, in accordance with Business and Professions Code section 6140.5). The court further recommends that any restitution to the Client Security Fund be enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

VII. RULE 9.20 & COSTS

The court further recommends that COLIN JON KOOYUMJIAN 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.

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that they be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VIII. ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4) and rule 200(c) of the Rules of Procedure of the State Bar, it is ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of California. The inactive enrollment will become effective 3 calendar days after service of this order.

Dated: July 6, 2009.

PAT McELROY
Judge of the State Bar Court