

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No. 07-O-10259-PEM
)	
BRETT ALEXANDER PEDERSEN,)	DECISION
)	
Member No. 146341,)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

This disciplinary matter demonstrates how an attorney, like respondent **Brett Alexander Pedersen**, could easily tarnish public confidence in the legal profession and degrade the high professional standards maintained by attorneys.

A simple billing dispute of \$483 between respondent and his client escalated into a \$7,500 lawsuit in which respondent sued the client for attorney fees and costs. To avoid a mire of legal expenses, the client hired another attorney and paid respondent \$1,483 as settlement. But instead of dismissing the lawsuit, respondent deposited the settlement funds, tried to negotiate for more money and then filed a judgment against the client. Respondent justified his action by insisting that the settlement amount should be \$1,500 and not \$1,483 (a \$17 difference) and that the funds were paid late by three days (a due date that he had arbitrarily imposed). Thus, respondent argues that there was no meeting of the minds. This unwarranted saga went on for a few more months, causing harm to the client and to the administration of justice.

Respondent is charged with two counts of misconduct in one client matter, involving moral turpitude and seeking to mislead a judge. The court finds, by clear and convincing evidence, that respondent is culpable of the alleged misconduct. Based on the extent and serious nature of the present misconduct, as well as the applicable aggravating circumstances, including a prior record of discipline, and no mitigation, the court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of suspension be stayed, that he be placed on probation for three years and that he be suspended for nine months. The recommended discipline reflects respondent's lack of insight as well as the harm to the client and assurance to the public that such conduct will not be tolerated.

II. Pertinent Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on November 17, 2009. On December 4, 2009, respondent filed a response to the NDC. On December 10, 2009, the State Bar filed a motion to strike the response because respondent filed a general denial. And on December 21, 2009, the court granted the State Bar's request and ordered respondent to file an answer that specifically admitted or denied the allegations in the NDC. On January 4, 2010, respondent filed a first amended response to the NDC.

On July 7, 2010, the parties filed a stipulation as to facts and admission of documents. A two-day trial was held on July 7 and 8, 2010. The State Bar was represented by Deputy Trial Counsel Mark Hartman and respondent represented himself. Following closing arguments, the court took this matter under submission on July 12, 2010.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the parties' stipulation, and the evidence and testimony introduced at this proceeding.

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 12, 1990, and has been a member of the State Bar of California since that time.

B. Credibility Determinations

The court found respondent's testimony generally lacked credibility—as discussed below.

C. The Ngo Matter

On or about May 20, 2004, respondent was hired by Annie D. Ngo (Ngo) to represent her in a breach of contract action. On or about April 29, 2005, respondent withdrew from representing Ngo in the breach of contract action. Thereafter, respondent sought payment of attorney's fees and costs for his representation of Ngo in the breach of contract action. Ngo refused to pay any money to respondent. Respondent's May 27, 2005 billing statement to Ngo reflects total costs in the amount of \$483.03 in the breach of contract action.

On February 21, 2006, respondent filed a complaint for money of \$7,494.03 against Ngo in relation to his claim for unpaid attorney's fees and costs in *Pedersen v. Ngo*, San Francisco Superior Court case No. CGC06449652 (the Ngo lawsuit). Soon thereafter, Ngo hired attorney Steven S. Rosenthal (Rosenthal) to represent her in the Ngo lawsuit.

On March 22, 2006, Rosenthal tried to speak with respondent regarding the Ngo lawsuit. Respondent refused to speak with Rosenthal and said he would only respond by either accepting or rejecting a written offer of settlement. Therefore, on March 22, 2006, Rosenthal, on behalf of Ngo, sent an Offer to Compromise to respondent pursuant to Code of Civil Procedure section 998 (CCP 998), offering to settle the Ngo lawsuit for \$1,000, plus costs of suit.

On March 27, 2006, Rosenthal was contacted by respondent's office and advised that respondent would settle the Ngo lawsuit for \$1,000, plus the costs that respondent billed Ngo

while representing her in the breach of contract action. The cost was estimated at or around \$500. Rosenthal believes that the specific amount of costs was never discussed and that he was only given a ballpark figure of \$500. Respondent believes that a specific amount of \$1,500 was given. Respondent backs up his contention that a specific amount of \$1,500 was reached with a March 27, 2006 email sent to him by his associate, Kelly J. Shindell. However, the email does not support his contention as it states that the "costs of suit will be at least \$500 anyway." Respondent also states that Ngo was given until April 3, 2006 to pay the amount of costs and settlement.

On March 31, 2006, Rosenthal sent a letter to respondent, stating: "This will confirm your associate Annie's [sic] telephone call of March 27th offering to settle your claims against Ms. Ngo for the \$1,000.00 earlier offered, but with the additional payment of billed costs. My client is amenable to that arrangement. Enclosed you will find two checks, one for \$483.00 [sic] representing the billed costs and another in the sum of \$1,000.00 for the amount offered under our C.C.P. section 998 offer of compromise. You are authorized to negotiate the enclosed checks after first forwarding to this office a request for dismissal of the above-noted action with prejudice and providing us either your social security number or federal tax identification number. We will forbear from filing the request for dismissal pending your confirmation that the checks have been honored by the respective drawees."

In the March 31, 2006 letter, Rosenthal enclosed check No. 520 from Ngo in the amount of \$483.03 and check No. 7951 from Rosenthal in the amount of \$1,000. Both checks were made payable to respondent. The check from Ngo is dated March 25, 2006, and on the face of it are the words "Fee and Cost." The check from Rosenthal's office has the words "Settlement Funds" written on the left hand side of the check. Respondent received Rosenthal's March 31,

2006 letter shortly after March 31, 2006. Respondent admits that the postmark on Rosenthal's letter is April 3, 2006.

On April 11, 2006, respondent deposited check Nos. 520 and 7951 (settlement checks) into his general operating account. Respondent deposited the settlement checks without advising Rosenthal of his actions. Before depositing the settlement checks, respondent admits that he failed to provide Rosenthal with a request for dismissal and failed to provide his social security or tax identification number.

On April 12, 2006, respondent called Rosenthal to discuss the Ngo lawsuit. As of that date, Rosenthal did not know that respondent had deposited the settlement checks the day before. During the discussion, respondent attempted to negotiate for more money from Ngo, believing that he was entitled to not only the costs for the original breach of contract matter but also, for the Ngo lawsuit. After some discussion about more money, Rosenthal told respondent while he believed there was a binding contract, that if respondent wanted to vitiate the contract it was not a problem. In short, respondent could either accept the Offer to Compromise as written in the March 31 letter, providing for \$1,000 principal, together with his costs in the pending action or alternatively, retain the full \$1,483.03 earlier forwarded to him in exchange for a dismissal of the Ngo lawsuit. At no time during the discussion with Rosenthal did respondent advise Rosenthal that he had already deposited the settlement checks.

On April 21, 2006, without returning the settlement funds and/or communicating with Rosenthal, respondent filed the following three documents in the Ngo lawsuit: 1) Rosenthal's Offer of Compromise dated March 22, 2006; 2) respondent's Acceptance of Offer to Compromise dated April 12, 2006; and 3) a proposed judgment against Ngo pursuant to CCP 998.

On May 3, 2006, again without further communication with Rosenthal, respondent filed a motion for attorney's fees in the Ngo lawsuit. In the motion, respondent stated that judgment was entered pursuant to stipulation of the parties, through counsel, pursuant to CCP 998 and that respondent had incurred attorney fees in connection with the lawsuit and as such was entitled to attorney fees under Civil Code section 1717. Respondent requested an award of \$2,337 incurred with this action and the amount be added to and become part of the judgment entered on April 26, 2006.

On May 17, 2006, Rosenthal sent a letter to respondent requesting him to withdraw the motion for attorney's fees, to file a motion to set aside the judgment and to file a request for dismissal pursuant to the settlement agreement. Rosenthal's position was that a dismissal of the action was required as respondent had accepted and negotiated the \$1,483.03 checks. He told respondent that if respondent did not take appropriate steps to set aside the judgment and have a dismissal entered, he would oppose the fee motion, and thereafter, move to set aside the judgment and have a dismissal entered. Soon thereafter, respondent received Rosenthal's May 17, 2006 letter, but failed to withdraw the motion for attorney's fees, failed to file a motion to set aside the judgment and failed to file a request for dismissal.

On June 1, 2006, Rosenthal acknowledged receiving a letter from respondent's office that was dated May 18, 2006, but actually postmarked May 23, 2006. Enclosed was a check for \$1,483.03, dated May 23, 2006. Rosenthal returned the check, stating his position that the check belonged to respondent pursuant to their prior agreement and that respondent could not now undo his acceptance of acknowledged terms by simply refunding monies accepted long ago.

On June 7, 2006, respondent's office sent Rosenthal a letter setting forth proposed terms for settlement of the matter and a final conclusion of the affairs between respondent and Ngo. One of the terms included respondent's conditioning his filing of a request for dismissal on

obtaining a general release from Ngo. And on June 15, 2006, Rosenthal advised respondent to have the judgment set aside or alternatively, cooperate with his efforts to do so without requiring a general release.

On June 29, 2006, Rosenthal received a telephone call from attorney Barbara Jagiello (Jagiello), who he believed shared an office space with respondent. She informed Rosenthal that respondent would seek an order setting aside the judgment by the end of the following week and thereafter file a request for dismissal.

On June 30, 2006, the court issued an order denying respondent's motion for attorney's fees. Between June 30 and July 13, Rosenthal never received an acknowledgment of satisfaction nor the requested tax information. However, on July 13, 2006, respondent filed an ex parte application to set aside the judgment. In the memorandum in support of the ex parte application, respondent stated that when he received money tendered by Ngo this money was submitted separately from the CCP 998 stipulation and he credited Ngo for those funds against the clerk's judgment pending a motion for attorney's fees on the underlying contract.

And on August 22, 2006, respondent filed a Notice of Settlement of Entire Case (Notice). The Notice stated that the parties reached an unconditional settlement on June 29, 2006, and that a request for dismissal would be filed within 45 days of the settlement. It was not until September 5, 2006, that respondent filed a request for dismissal of the Ngo lawsuit.

D. Conclusions of Law

Count One: Moral Turpitude (Bus. & Prof. Code, § 6106)¹

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

¹ All further references to section(s) are to the provisions of the Business and Professions Code, unless otherwise indicated.

Respondent argues inasmuch that there was no binding contract under CCP 998 because Rosenthal had met neither of respondent's settlement terms: not the dollar amount nor time of performance. He asserts that the amount should have been \$1,500 and not \$1,483 and that the due date of performance was April 3, 2006, and not April 7, 2006. He further contends that he was fully within his rights to negotiate the settlement checks under Code of Civil Procedure section 1525, which gives him the right to accept the tendered funds and provide credit to the debtor (Ngo) against the debt and then proceed with his rights at law under CCP 998. Essentially, he claims that he had the right to negotiate the checks and then to accept Rosenthal's "open CCP 998."

The court rejects his arguments. The two checks were settlement funds and not part payment of disputed sum under Code of Civil Procedure section 1525. Respondent's entitlement to the settlement funds was predicated on his dismissing the Ngo lawsuit and providing his tax identification number. Since he did not comply with either of the settlement terms, respondent's deposit of the checks was premature.

The court further rejects respondent's testimony that he thought Rosenthal in sending two checks for \$1,483.03 was rejecting his firm offer of \$1,500. It would make no sense that Ngo would want to litigate a dispute over \$17. Part of the reason Rosenthal offered to settle the case was to insure that his client did not have to incur unnecessary legal costs. Moreover, even if respondent had honestly held such a belief, it could not have been held in good faith because any such belief is objectively unreasonable. Rejecting an agreement over a \$17 difference defies logic when the whole purpose of reaching an agreement was to avoid litigation. The purpose of the checks was clearly for settlement and not partial payment of a disputed sum. Hence, the court finds that respondent's testimony on these issues lacks credibility. The court has also considered his other assertions and finds them unconvincing and unpersuasive.

Therefore, by depositing the settlement checks without complying with the conditions attached to the settlement checks, by failing to comply with the terms attached to the settlement agreement, by failing to advise Rosenthal that he deposited the settlement checks, by attempting to negotiate for more money from Ngo after depositing the settlement checks, by filing the CCP 998 documents which respondent knew violated the settlement agreement and misrepresented the terms of the settlement agreement, by filing the motion for attorney's fees, which respondent knew violated the settlement agreement and misrepresented the terms of the settlement agreement, by conditioning the filing of a request for dismissal on obtaining a general release from Ngo, and by filing the Notice on or about August 22, 2006, which misrepresented the terms and date of the settlement, respondent intentionally committed acts involving moral turpitude and dishonesty, in willful violation of section 6106.

Count Two: Seeking to Mislead a Judge (Bus. & Prof. Code, § 6068, Subdivision (d))

Section 6068, subdivision (d), provides that it is the duty of an attorney to employ, for the purposes of maintaining the causes confided to him or her, those means only as are consistent with the truth, and never seek to mislead a judge or any judicial officer by an artifice or false statement of fact or law.

The Supreme Court has held that “[t]he presentation to a court of a statement of fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of [section 6068, subdivision (d)].” (*Pickering v. State Bar* (1944) 24 Cal.2d 141, 144.)

By filing the CCP 998 documents which respondent knew violated the settlement agreement and misrepresented the terms of the settlement agreement, by filing the motion for attorney's fees, which respondent knew violated the settlement agreement and misrepresented the terms of the settlement agreement, and by filing the Notice on or about August 22, 2006, which misrepresented the terms and date of the settlement, respondent sought to mislead the judge or

judicial officer by an artifice or false statement of fact or law in willful violation of section 6068, subdivision (d).

IV. Mitigating and Aggravating Circumstances

A. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std 1.2(e).)²

There is no evidence in mitigation.

B. Aggravation

It is the State Bar's burden to establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).) The record establishes three factors in aggravation.

Respondent has a prior record of discipline. (Std. 1.2(b)(i).) On January 14, 2009, the California Supreme Court suspended respondent from the practice of law for six months, that execution of the suspension be stayed, and placed him on probation for one year with an actual suspension of 30 days. Respondent's misconduct involved moral turpitude and a failure to employ only those means consistent with the truth in a single client matter. (Supreme Court case No. S166502.) The court notes that his prior misconduct which occurred in 2004 is remarkably similar to his behavior in this case. "Respondent's past and present misconduct show a disturbing willingness to employ deceitful means to accomplish his objectives." (See *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 177.)

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) Respondent continues to assert, despite overwhelming evidence to the contrary, that he was entitled to deposit the checks tendered by

² All further references to standard(s) are to this source.

Rosenthal, credit Ngo with payment of the amount of \$1,483.03 and then proceed under CCP 998. “The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]” (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.)

Respondent’s misconduct significantly harmed a client, the public or the administration of justice. (Std. 1.2(b)(iv).) Respondent’s misrepresentations to the court and dishonesty to the client caused undue burden to the client and the administration of justice.

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline.

In this case, the standards provide for the imposition of sanctions ranging from suspension to disbarment. (Std. 2.3.) The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) The standards are not mandatory; they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

In the present matter, the State Bar recommends that a two-year actual suspension be imposed. Respondent, on the other hand, requests that the case be dismissed and that costs be awarded to respondent.

In *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, the attorney was suspended for 30 days because he sued a court reporter for fraud and deceit, seeking \$14,000 in punitive damages, over a simple \$45 billing dispute. The Supreme Court found the attorney's conduct to be of ill will, absent of good judgment and failed to recognize the ethical responsibilities of attorneys. The attorney "was motivated in large measure by spite and vindictiveness, and he acted on those base impulses by selecting the most oppressive and financially taxing means of redress, out of all proportion to the minor sum and rather innocuous incident in controversy." (*Id.* at pp. 1042-1043.) He had no prior record of discipline.

Like Sorensen, respondent's lawsuit filed against his client for \$7,494 was completely out of proportion to a simple \$483 billing dispute. To further aggravate the situation, when the client offered to pay \$1,000 above and beyond the amount of the billing dispute, respondent demanded that the settlement be \$1,500, and not \$1,483 – a \$17 difference. He then misrepresented to the court regarding the terms of the settlement and sought additional attorney fees. "A reasonable attorney who was truly interested in simply resolving a billing dispute could and would have taken a number of lesser measures that [respondent] apparently either failed to consider, or worse, considered and rejected." (*Sorensen v. State Bar, supra*, 52 Cal.3d 1036, 1043.)

The court is greatly concerned by the nature of respondent's misconduct and his failure to acknowledge or appreciate the impropriety of his actions. Therefore, in the interests of public protection and in view of lack of any mitigation, the court recommends, among other things, that respondent be actually suspended for nine months from the practice of law.

VI. Recommendations

A. Discipline

Accordingly, it is recommended that respondent **Brett Alexander Pederson** be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that he be placed on probation for a period of three years³ subject to the following conditions:

1. Respondent must be suspended from the practice of law for the first nine months of probation;
2. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct;
3. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period;

4. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein;
5. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, and to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1;
6. Within one year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles,

³ The probation period will commence on the effective date of the Supreme Court's order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201);⁴ and

7. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for two years that is stayed, will be satisfied and that suspension will be terminated.

B. Multistate Professional Responsibility Exam

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the Office of Probation, within one year after the effective date of this order. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

C. California Rules of Court, Rule 9.20

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter. Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.⁵

⁴ Respondent is not required to complete the Ethics School again if he previously completed the course within the prior two years. (Rules Proc. of State Bar, rule 290.)

⁵ 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.)

D. Costs

The court further recommends 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: September _____, 2010

PAT McELROY
Judge of the State Bar Court