

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No. 07-O-10401-DFM
)
OTTO IVAN PENA,) DECISION INCLUDING DISBARMENT
) RECOMMENDATION AND
Member No. 182379,) INVOLUNTARY INACTIVE
) ENROLLMENT ORDER
)
A Member of the State Bar.)

INTRODUCTION

Respondent Otto Ivan Pena (“Respondent”) is charged here with willfully violating (1) Business and Professions Code¹ section 6068(a) [failure to support laws/unauthorized practice of law]; (2) section 6103 [failure to obey court order]; (3) section 6106 [moral turpitude]; and (4) rule 3-700(A)(2) of the Rules of Professional Conduct² [improper withdrawal from employment]. In view of Respondent’s misconduct and the evidence of aggravation, the court recommends, inter alia, that Respondent be disbarred from the practice of law.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (“NDC”) was filed in this matter by the State Bar of California on May 7, 2010. On May 26, 2010, Respondent filed his response to the NDC. An

¹ Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

² Unless otherwise noted, all future references to rule(s) will be to the State Bar Rules of Professional Conduct.

initial status conference was held on June 2, 2010, and the case was scheduled to commence trial on October 6, 2010.

Trial was commenced and completed on October 6, 2010, at which time the matter was submitted. The State Bar was represented at trial by Deputy Trial Counsel Michael Glass. Respondent acted as counsel for himself.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the stipulation of facts filed by the parties in this matter, the admissions contained in Respondent's Response to the NDC, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on June 11, 1996, and has been a member of the State Bar at all relevant times.

Case Number 07-O-10401-DFM (Lopez)

In about November 2004, William Lopez ("Lopez") employed Respondent to seek an adjustment of the immigration status for Lopez.

In January 2005, during the course of Respondent's representation of Lopez, Respondent entered into a Stipulation regarding Facts, Conclusions of Law and Disposition with the State Bar of California in State Bar Court case numbers 03-O-04798 and 03-O-04966 ("the Stipulation").

On June 16, 2005, the California Supreme Court issued an order, based on the Stipulation, suspending Respondent from the practice of law for three years, stayed, and placing Respondent on probation for three years with conditions, including the condition that he be actually suspended for 90 days ("the Supreme Court Order"). On or about June 16, 2005, the California Supreme Court served Respondent with a copy of the order, and the order was

received by Respondent. The effective date of the Supreme Court Order and of the commencement of Respondent's actual suspension was July 16, 2005.

In the Supreme Court Order, Respondent was also ordered to comply with former rule 955 of the California Rules of Court ("rule 955") 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 order. Thirty and forty calendar days after the effective date of the Supreme Court Order were August 15, 2005, and August 25, 2005, respectively.

Thus, Respondent was required to comply with subdivision (a) of rule 955 no later than August 15, 2005, by, inter alia, notifying all clients being represented by him in pending matters of his suspension and consequent disqualification to act as an attorney after the effective date of the suspension. Such notice was required by the rule to be given by registered or certified mail, return receipt requested. And Respondent was required to comply with subdivision (c) of rule 955 no later than August 25, 2005, by filing with the Clerk of the State Bar Court an affidavit ("compliance declaration") showing that he had fully complied with the requirements of subdivision (a).

On August 23, 2005, Respondent timely filed his rule 955 compliance declaration. In his declaration, Respondent represented under penalty of perjury that, by August 15, 2005, he had:

- a. notified by certified or registered mail, return receipt requested, all clients in matters that were pending on the date upon which the order to comply with rule 955 was filed, of his consequent disqualification to act as an attorney after the effective date of the order and that he had urged such clients to seek legal advice elsewhere, calling attention to any urgency in seeking another attorney; and
- b. delivered to such clients any papers or other property to which they were entitled or notified such clients of a suitable time and place where the papers or other property could be obtained, and called attention to any urgency for obtaining the papers or other property.

On July 20, 2005, four days after Respondent became ineligible to practice law because of his suspension, he held himself out to Lopez as still entitled to practice law. On that date,

respondent went with Lopez to the offices of the U.S. Citizenship and Immigration Services, where Lopez was scheduled to be interviewed in conjunction with his application for an adjustment of status. Both Lopez and Respondent understood that Respondent was there as the legal representative of Lopez. While there, Respondent signed and submitted a form to the immigration services, indicating that he was there to act as the attorney for Lopez. However, when the interview was delayed in starting, Respondent told Lopez that he could not wait any longer because of another scheduled appointment. Respondent then left Lopez at the immigration office alone, resulting in the scheduled interview being cancelled.

At no time prior to July 20, 2005, did Respondent disclose to Lopez that he was suspended from the practice of law. Nor did Respondent thereafter disclose that fact to Lopez by August 15, 2005, as required by rule 955(a). He also did not urge Lopez to seek legal advice elsewhere or make any effort to provide Lopez with his file by August 15, 2005, as required by rule 955(a). Although Respondent was obligated to make such disclosures to Lopez with a written notification sent by certified or registered mail no later than August 15, 2005, Respondent did not do so.

Count 1 – Section 6068(a) [Failure to Support Laws/Unauthorized Practice of Law]

By holding himself out to Lopez on July 20, 2005, as entitled to practice law at a time when he was not eligible to practice, and then going with Lopez to the immigration offices as his attorney, Respondent held himself out as authorized to practice law when he was not authorized to do so. Such conduct by Respondent constituted a willful violation by him of sections 6068(a) and 6126(b).

Count 2 – Section 6103 [Failure to Obey Court Order]

Section 6103 provides, in pertinent part, that a member's "willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the

course of his profession, which he ought in good faith to do or forbear . . . [constitutes cause] for disbarment or suspension.” Respondent’s failure to notify Lopez of his disqualification to practice law, in the time and manner required by the Supreme Court Order, constituted willful violations by him both of that order and of section 6103.

Count 3 – Section 6106 [Moral Turpitude]

The rule 955 compliance declaration filed by Respondent with this court falsely represented that Respondent had notified all clients in pending matters, via certified or registered mail, that he had been suspended from the practice of law and that respondent had additionally urged all of such clients to seek legal advice elsewhere. That compliance declaration was materially false with regard to Respondent’s continued dealings with Lopez, and Respondent knew it was materially false when he filed it on August 23, 2005.

Worse, even though Respondent was aware that he was not entitled to practice law, he continued to misrepresent to Lopez that he was entitled to do so, and he allowed Lopez to continue to depend on him to secure an adjustment of his immigration status.

Such misrepresentations and deceptive acts by Respondent involve moral turpitude and dishonesty in willful violation of section 6106.

Count 4 – Rule 3-700(A)(2) [Improper Withdrawal From Employment]

Rule 3-700(A)(2) provides, “A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.” An attorney may effectively withdraw from a case without any intent to do so, when that attorney virtually abandons the client and is grossly negligent in communicating with the client. (See, e.g., *In the*

Matter of Brockway (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 951, and cases there cited.)

First, rule 3-700(A)(2) is not applicable to attorneys while they are suspended from the practice of law. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 574.) As noted *ante*, under the Supreme Court Order, Respondent was suspended from practice for 90 days beginning on July 16, 2005. Second, the State Bar has failed to present clear and convincing evidence that Respondent violated rule 3-700(A)(2) with regard to Lopez.

Although the NDC alleges that Respondent effectively terminated his representation of Lopez on July 16, 2005, the evidence indicates quite the contrary. Rather, Respondent continued to assist Lopez in seeking an adjustment of his status well after Respondent was again eligible to practice law. It was only in June 2006 that Respondent ceased to represent Lopez. At that time, he notified Lopez in writing of that fact and urged him to seek another attorney. Thereafter, Respondent refunded \$1,000 of the \$1,590 fee that had previously been advanced by Lopez for the status adjustment effort. Lopez then went to another attorney for assistance, but decided not to pursue the matter at that time.³

This count is dismissed with prejudice.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)⁴

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³ Lopez's testimony that he abandoned his effort to secure an adjustment of his immigration status because of Respondent was not credible.

⁴ All further references to standard(s) or std. are to this source.

Prior Discipline

Respondent has been previously disciplined on three different occasions.

On August 28, 2000, in State Bar Court case number 00-O-12090, Respondent was publicly reprovved. That discipline resulted from Respondent’s violations of rule 3-100(A) [failure to perform legal services with competence] and section 6068(m) [failure to keep client advised of significant developments].

On July 18, 2002, in Supreme Court case number S106619 (State Bar Court case number 01-H-04165), discipline was imposed as to Respondent, consisting of a thirty-day stayed suspension, and one year of probation with conditions. That discipline resulted from Respondent’s failure to comply with several conditions of his prior public reprovval, in willful violation of rule 1-110 [violation of conditions of public reprovval] and section 6103 [violation of court order].

On January 13, 2005, in Supreme Court case number S128827 (State Bar Court case numbers 02-O-13938, 02-O-14173, and 02-O-13025), discipline was imposed as to Respondent, consisting of a stayed two-year suspension, a two-year probation with conditions, and a thirty-day actual suspension. That discipline resulted from Respondent’s violation of section 6068(m) in two separate client matters.

Respondent’s record of multiple prior disciplines is an extremely serious aggravating circumstance. (Std. 1.2(b)(i).)

Multiple Acts of Misconduct

Respondent’s multiple acts of misconduct in the present proceeding are an aggravating factor. (Std. 1.2(b)(ii).)

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Significant Harm

Significant harm to a client resulting from a member's misconduct is an aggravating factor. (Std. 1.2(b)(iv).) Although the State Bar contends that Lopez incurred significant harm from Respondent's misconduct, it failed to prove that fact with clear and convincing evidence.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Standard 1.2(e).) The court finds the following two mitigating factors.

Cooperation

Respondent did not admit culpability in this matter, but he entered into an extensive stipulation of facts, thereby assisting the State Bar in the prosecution of the case. For such conduct Respondent is entitled to some mitigation. (Std. 1.2(e)(v); see also *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50; cf. *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [mitigating credit given for stipulating to facts, but "very limited" where culpability is denied].)

Candor

Respondent demonstrated candor to the State Bar and this court regarding the circumstances showing his misconduct. Such is a mitigating factor. (Std. 1.2(e)(v).)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys.

Respondent's willful failure to comply with rule 955 (now rule 9.20) is extremely serious misconduct for which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) A disciplined member's failure to

comply with rule 955 undermines the rule's prophylactic function in ensuring that all concerned parties learn about an attorney's suspension from the practice of law. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.) A disciplined member's deliberate falsification of a rule 955 compliance declaration, such as Respondent's, effectively destroys the rule and warrants the greatest level of discipline.

The standards also suggest that disbarment is the appropriate discipline if a member is found culpable of professional misconduct and has a record of two or more prior impositions of discipline. (Std. 1.7(b).) Respondent here has had three prior instances of discipline. Each of those prior disciplines was ordered with the intent and expectation by the involved courts that such discipline would cause Respondent to comply with his professional obligations.

Respondent's ongoing instances of misconduct make clear that the courts' efforts have had no such effect. The fact that the instant misconduct represents the second time when Respondent has violated a disciplinary order is also particularly troubling. Because of Respondent's ongoing unwillingness or inability to comply with his professional obligations, his disbarment has become necessary to protect the public, the courts, and the legal community; and to preserve public confidence in the legal profession. (*In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382.)

RECOMMENDED DISCIPLINE

Disbarment

The court recommends that respondent **Otto Ivan Pena**, Member Number 182379, 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.

Rule 9.20

The court further 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.

Costs

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. Respondent must also reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds, and such payment is enforceable as provided under Business and Professions Code section 6140.5.

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **OTTO IVAN PENA**, Member Number 182379, be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).⁵

Dated: October _____, 2010.

DONALD F. MILES
Judge of the State Bar Court

⁵ An inactive member of the State Bar of California cannot lawfully practice law in this state. (Bus. & Prof. Code, § 6126, subd. (b); see also Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to practice law, or to even hold himself or herself out as entitled to practice law. (*Ibid.*) Moreover, an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Ibid.*; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)