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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **CHERYL PARKINSON MARTINSEN,** **Member No. 104678,** A Member of the State Bar.	)	Case No.: **07-O-12851-PEM** **DECISION**

I. INTRODUCTION

In this disciplinary matter, Treva R. Stewart appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent **Cheryl Parkinson Martinsen** did not appear in person or by counsel.

Respondent is charged with and found culpable of nine counts of misconduct involving one client, including: (1) not performing legal services with competence (two counts); (2) not promptly responding to reasonable client status inquires (two counts); (3) not keeping her client informed of significant developments in a matter in which respondent had agreed to provide legal services (two counts); (4) improperly withdrawing from employment; (5) not refunding unearned fees; (6) not cooperating in a disciplinary investigation; and (7) not maintaining a current address with the State Bar.

After considering the evidence and the law, the court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of the

suspension be stayed, and that respondent be actually suspended from the practice of law for 90 days and until she makes restitution to the Ortegas as set forth below; and until she complies with rule 205, Rules Proc. of State Bar.

II. SIGNIFICANT PROCEDURAL HISTORY

The notice of disciplinary charges (NDC) was filed on January 30, 2008, and was served on respondent on that same date, incorrectly setting forth her official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section[1] 6002.1, subdivision (c) (official address). A copy was also sent to an alternate address in Hawaii.

On February 5, 2008, respondent was properly served at her official address and an alternate address with a notice advising her, among other things, that a status conference would be held on March 10, 2008. The correspondence sent to her official address was returned as undeliverable.

Respondent did not appear at the March 10, 2008, status conference. On March 11, 2008, an order was properly served on respondent at her official address and an alternate address memorializing the status conference. The correspondence sent to her official address was returned as undeliverable.

Respondent did not file a responsive pleading to the NDC. On April 25, 2008, a motion for entry of default was served on respondent at her official address, set forth incorrectly, and an alternate address by certified mail, return receipt requested. The motion advised her that minimum discipline of actual suspension for 90 days and until she reimbursed unearned fees would be sought if she was found culpable. Respondent did not respond to the motion.

On May 19, 2008, the court entered respondent's default and enrolled her inactive

[1]Future references to section are to this source.

effective three days after service of the order. The order was filed and properly served on her at her official address on that same date by certified mail, return receipt requested. A courtesy copy was sent by regular mail to the alternate address. Both items were returned as undeliverable.

On September 2, 2008, the court filed an Order to Show Cause (OSC) regarding vacating the entry of default and the order of involuntary inactive enrollment and dismissing the matter without prejudice. The NDC and motion for entry of default had not been served at respondent's correct official address. The OSC was served on respondent at her official and alternate addresses. The correspondence sent to her official address was returned as undeliverable.

On September 10, 2008, the State Bar filed a response to the OSC and served it on respondent at her official and two alternate addresses in Hawaii.

On September 16, 2008, an order vacating the default and inactive enrollment and dismissing the matter without prejudice was filed and properly served on respondent at her official address and an alternate address. The correspondence sent to her official address was returned as undeliverable.

An NDC was filed on September 30, 2008, and was properly served on respondent on that same date at her official membership records address and at an alternate address, by certified mail, return receipt requested. Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.)

On October 20, 2008, respondent was properly served at her official address and an alternate address with a notice advising her, among other things, that a status conference would be held on November 24, 2008. The correspondence sent to her alternate address was returned as undeliverable.

Respondent did not appear at the November 24, 2008, status conference. On November 25, 2008, an order was properly served on respondent at her official address and an alternate

address memorializing the status conference. The State Bar was instructed to file and serve a motion for entry of default. Both items were returned as undeliverable.

On December 3, 2008, a motion for entry of default was properly served on respondent at her official address and an alternate address by certified mail, return receipt requested. The motion advised her that minimum discipline of actual suspension for 90 days and until she reimbursed unearned fees would be sought if she was found culpable. Respondent did not respond to the motion.

On December 23, 2008, the court entered respondent's default and enrolled her inactive effective three days after service of the order. The order was filed and properly served on her at her official address on that same date by certified mail, return receipt requested. The motion was also served by regular mail at two alternate addresses. The correspondence sent to her official address and one alternate address was returned as undeliverable.

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

The matter was submitted for decision without hearing after the State Bar filed a brief on December 26, 2009.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (§6088; Rules of Proc. of State Bar[2], rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

[2]Future references to the Rules of Procedure are to this source.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 3, 1982, and has been a member of the State Bar at all times since.

B. The Tagliarini Matter - Counts One through Four

1. Facts

Edward and Trudy Ortega hired Michael Blumfeld[3] to represent them in litigation. (*Tagliarini v. Ortega*, Alameda County Superior Court[4] case no. RG 05-220896.) Blumfeld passed away unexpectedly. Respondent represented to the Ortegas that she was familiar with the case, had all the files and was prepared to continue representation on their behalf.

On June 12, 2006, respondent filed a substitution with the court, substituting herself in the matter instead of Blumfeld.

On August 2, 2006, Erik Van Hespen, counsel for cross-defendant Tagliarini, served a motion to compel responses to interrogatories, special interrogatories and requests for production of documents on Blumfeld at One Kaiser Plaza, The Ordway Building, Suite 1675, Oakland,

[3] Although the NDC originally alleged this name as Michael Blumenfeld, based on other factual allegations contained in the NDC, this appears to be a typographical error. The correct name is Michael Blumfeld and will be so reflected throughout this decision.

[4] The NDC alleges that the case was filed in the "Superior Court, County of Oakland." (NDC 2:18-19.) Pursuant to Evidence Code section 452, subdivision (g), the court judicially notices the fact that there is no such county in California. It is apparent from the context of the allegations that the events occurred in Oakland, California, which is located in Alameda County and the court so finds.

California 94612.[5] This is the same address respondent identified as her address on the substitution she filed on June 12, 2006. He filed the motion the next day.[6]

Attorney Jerry Hauser filed a declaration in support of the motion stating under penalty of perjury that respondent sent a letter to Tagliarini on June 23, 2006, indicating that the discovery responses would be forthcoming in approximately two weeks. Hauser did not receive the responses.

Respondent received the motion to compel addressed to Blumfeld and was aware of its contents, but did not oppose it.

On August 31, 2006, the superior court granted the motion and awarded $340 in sanctions to be paid by defendants/cross-complainants, the Ortegas, by September 14, 2006. The Ortegas were ordered to serve verified responses to the discovery no later than September 14, 2006.

On September 1, 2006, the court served notice of the minute order granting the motion to compel and the sanctions on respondent at One Kaiser Plaza.[7] Van Hespen also served notice of the order on Blumfeld at One Kaiser Plaza.

Although respondent received and knew the contents of the August 31, 2006 order, she did not respond to the discovery.

On September 12, 2006, the Ortegas drove from Palm Desert to Santa Rosa to meet with respondent. On that date, the Ortegas signed a retainer agreement for respondent's services. Respondent agreed to represent the Ortegas in two legal matters, including dispossessing Drocco from the Ortegas' property (discussed below) and completing the aforementioned pending suit

[5] Hereafter, this address will be referenced as "One Kaiser Plaza" even though, in some instances, only the street address is set forth without including the name of the building.

[6] The NDC alleged this date as August 3, *2005*, however, given the context, this appears to be a typographical error.

[7] Although the zip code may have been incorrect on this minute order, respondent received it and was aware of its contents.

involving the fee and/or malpractice dispute with Tagliarini. The Ortegas paid respondent a $3,500 advanced payment, to be billed against for costs and fees for services.

On September 27, 2006, Van Hespen filed a motion to enforce the court order compelling responses to discovery. In his supporting declaration, Van Hespen stated that he had received no response from respondent and that he had faxed and mailed another request to her on September 19, 2006, after she missed the court's deadline. He served this motion on Blumfeld at One Kaiser Plaza. Although respondent received and knew the contents of the motion, she did not respond to it.

On October 13, 2006, Trudy Ortega sent respondent a fax asking for her mailing address and inquiring when Trudy could call her for an update on her case. Although respondent received the faxed message, she did not respond.

On October 25, 2006, the superior court granted the motion to enforce its discovery order. The Ortegas were ordered to serve full and complete responses to the discovery no later than ten court days after the court's ruling and sanctioned them $640. The next day, the court served notice of this order[8] and the sanctions on respondent at One Kaiser Plaza.[9] On that same date, and pursuant to the court's order, Van Hespen also served a notice of entry of order on respondent at One Kaiser Plaza and at her official address.[10] Respondent received the court's October 25, 2006 order and was aware of its contents but did not respond to the discovery.

On November 13, 2006, Van Hespen filed a motion to enforce the court's October 25,

[8] It was incorrectly alleged that the court served notice of the order granting the motion to *compel* and the sanctions rather than the motion to enforce the court's discovery order. (NDC 4:20.) This is an insignificant error as the true meaning is apparent from the context of the NDC.

[9] Although the zip code on this notice may have been incorrect, respondent received the court's October 25, 2006 order and was aware of its contents.

[10] There was an inconsequential error in part of the name of the street of respondent's official address ("Spring" instead of "Springs") in the NDC. (I.e., NDC at 4:24, 5:9, 6:2, 9 and 23; and 7:1.) It is unclear whether the error occurred solely in the NDC or in the service documents in question.

2006 order, alleging that respondent did not provide discovery responses as ordered. He served the motion on respondent at One Kaiser Plaza and at her official address. Although she received it and was aware of its contents, she did not respond to it.

On November 15, 2006, Trudy sent respondent a fax asking that she contact her immediately. Trudy noted that she had tried to reach respondent at her home phone, which was disconnected, and she could not get through to the cell phone number. Although respondent received the fax, she did not respond to it.

On November 28, 2006, respondent sent Trudy an email stating that she was in Hawaii and that she would call Trudy "at 11 a.m. on Thursday." She did not do so.

Respondent did not appear at the December 14, 2006 hearing on the motion to enforce the court's discovery order although the date and time set for this hearing was on the pleadings that respondent received. The Ortegas did not appear either although, in its tentative ruling, the court had ordered them parties to appear. The court granted the motion and, as a sanction, struck the Ortegas' cross-complaint and struck the third affirmative defense from their answer. On that same date, it served notice of the order on respondent at One Kaiser Plaza.[11] On December 19, 2006, Van Hespen also served a notice of entry of order on respondent at One Kaiser Plaza and at her official address. Respondent received the order and was aware of its contents.

On December 14, 2006, respondent told Trudy by email that a telephone meeting scheduled for that morning had to be cancelled, but that respondent would call "tomorrow at 11 and if that isn't convenient we can do it some other time Friday or Monday." Thereafter, respondent did not conduct telephone conferences with the Ortegas to apprise them of the status of the Tagliarini case.

[11] Although the zip code may have been incorrect, respondent received the court's December 14, 2006 order and was aware of its contents.

On or between July 16 and July 19, 2007, Tagliarini filed and served respondent with a motion for summary judgment, or, alternatively, a motion for summary adjudication at One Kaiser Plaza and her official address. Respondent received the motion and was aware of its contents.

On July 24, 2007, the court served respondent with a notice of case management conference and order, setting the matter for August 27, 2007[12] at 9:00 a.m. in Department 520. The court served respondent at One Kaiser Plaza; however, this correspondence was returned to the court by the United States Postal Office, with the stamped notation, "Return to Sender. Attempted-Not Known. Unable to Forward." Respondent relocated from the One Kaiser address to her official address in Santa Rosa, California on August 4, 2006, and did not notify the court.

On August 27, 2007, the court called the matter and continued it to September 7, 2007.

On September 6, 2007 (sic),[13] the court held a case management conference, and set trial for November 30, 2007 at 9:00 a.m. in Dept. 520. Neither respondent nor defendants appeared. The clerk served notice of the case management order on respondent at her official address. She received notice of the order and was aware of its contents.

On Monday, October 16, 2007, the court continued Tagliarini's motion for summary judgment or summary adjudication to November 16, 2007 and, the next day, served respondent at her official address with notice of the order continuing the matter. Respondent received notice of the order and was aware of its contents.

After the September 12, 2006 meeting, respondent gave the Ortegas no information regarding their case. Respondent did not advise them of the court-ordered sanctions, the motion

[12] Although the NDC alleges this date as August 27, *2008*, this is obviously a typographical error. The content of the NDC makes clear the correct date is August 27, 2007. (NDC 6:20.)

[13] This date is set forth in the NDC as "September 6, 2007 (sic)."

to compel discovery, the motion to enforce the court orders, the summary judgment motion, the striking of the cross-complaint and the third affirmative defense or the court conferences in the Tagliarini matter.

By not communicating with the Ortegas and by not taking action on their behalf in the Tagliarini matter, respondent constructively terminated her representation of the Ortegas. She did not advise the court or the Ortegas of her withdrawal.

Respondent did not take reasonable steps to avoid reasonably foreseeable prejudice to the Ortegas in the Tagliarini matter. To the contrary, unbeknownst to the Ortegas, the court ordered sanctions against them and they faced a summary judgment motion as well as court-scheduled conferences.

2. Legal Conclusions

a. Count One – Rule 3-110(A) of the Rules of Professional Conduct[14]

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

By not responding to discovery, discovery motions and the motion for summary judgment/adjudication and by not appearing at court proceedings, respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A).

b. Counts Two and Three – Section 6068, subd. (m)

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

By not responding to Trudy Ortegas's faxes of October 12 and November 15, 2007, respondent did not respond promptly to her reasonable status inquiries. Also, respondent did not

[14] Unless otherwise indicated, all further references to rules refer to this source.

keep the Ortegas reasonably informed of significant developments because she did not tell them about the court-ordered sanctions, the striking of their cross-complaint and their third affirmative defense in the Tagliarini matter, the discovery motions and the motion for summary judgment/adjudication or the court-scheduled conferences on their case. Accordingly, she wilfully violated section 6068, subdivision (m).

c. Count Four – Rule 3-700(A)(2)

Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until she has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of a client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) and with other applicable laws and rules.

By not responding to discovery or complying with the court's discovery orders; not participating in court proceedings; and not responding to the motion for summary judgment/adjudication, respondent effectively withdrew from employment. She did not tell the Ortegas that she was withdrawing from employment. Respondent's withdrawal prejudiced them because monetary and legal sanctions were ordered against them. By not informing them of her intent to withdraw from employment, respondent failed to take reasonable steps to avoid reasonably foreseeable prejudice to the clients in wilful violation of rule 3-700(A)(2).

B. The Drocco Matter – Counts Five and Six

1. Facts

In addition to the Tagliarini matter, respondent was also retained to represent the Ortegas in ongoing litigation attempting to dispossess Drocco from the Ortegas' property. (*Drocco v. Ortega*, Contra Costa County Superior Court case no. C02-03614.)

On December 19, 2002, Drocco filed a complaint for breach of contract, negligence, fraud and slander of title, alleging that the Ortegas were not honoring an agreement to rent or

lease property in Lafayette, California and the ensuing real estate purchase agreement and contract of sale.

The Ortegas originally were represented by attorney Dewey Wheeler as defendants and Thomas Tagliarini represented them as cross-complainants.

The matter went to trial on March 3, 2004, and the jury agreed that the Ortegas breached the real estate purchase contract. They awarded Drocco $1.00 (sic)[15] in damages. The parties still had some remaining equitable issues before the court.

Commencing on February 4, 2005, attorney Michael Blumfeld represented the Ortegas in this matter.

On March 25, 2005, the court issued a decision on the equitable issues which Blumfeld reduced to a written judgment and filed. The judgment allowed Drocco to prepay his real estate loan to the Ortegas. He was ordered to open an escrow within one week of the judgment and to prepay all sums ($46,016.60) owed to the Ortegas. The Ortegas were ordered to execute a quitclaim deed to Drocco upon receipt of the funds. If Drocco did not prepay the loan by April 30, 2005, then, the court ruled, Drocco elected to keep paying under the contract of sale. A subsequent motion for modification of the judgment was denied. Drocco also filed an appeal and then abandoned it.

On June 28, 2006, respondent filed a substitution in the case, substituting herself for Blumfeld as the Ortegas' counsel.

The Ortegas had ongoing complaints against Drocco for not honoring the judgment and/or contract of sale. They hired respondent to dispossess Drocco from their property.

On December 28, 2006, respondent faxed the Ortegas a draft complaint against Drocco for breach of contract. In her cover letter, respondent said that she intended to file the suit

[15] The NDC alleges "[t]hey awarded Drocco $1.00 (sic) in damages." (NDC 10:25-26.)

against Drocco, that she would fax some additional materials to the Ortegas and then call them to discuss any questions or comments. She never faxed the materials or filed the lawsuit against Drocco. She took no further action on the Drocco matter after December 28, 2006.

On January 2, 2007, Trudy sent and respondent received a fax regarding the Drocco "brief," asking her to call so that they could discuss the matter.

On January 22, 2007, Trudy faxed and mailed a letter to respondent stating that respondent's home phone was disconnected; her cell phone was full; and that, although all the faxes sent had gone through, Trudy had received no response. She asked respondent to contact her immediately regarding the Drocco matter. Respondent received the January 22, 2007 fax and was aware of its contents.

Trudy sent the January 22, 2007 letter by certified mail to respondent at an address on Waikoloa Road in Hawaii. She had obtained this address from returned mail sent to respondent's official address in Santa Rosa, California. Trudy received a return receipt, executed by someone other than respondent, for the mail.

On February 11, 2007, Trudy sent respondent another fax asking her to confirm receiving her letter that had been mailed and to contact her regarding their case. Respondent received the February 11, 2007 fax and was award of its contents.

On February 26, 2007, respondent emailed Trudy, apologized for her lack of communication and advised that she would call her "at one p.m. tomorrow." She did so.

On February 28, 2007, Trudy sent respondent another fax about the Drocco matter. Respondent received the fax and was aware of its contents.

On March 18, 2007, Trudy sent respondent a fax asking that she contact her regarding some questions about the Drocco matter. The Ortegas' calculations indicated that Drocco owed

over $51,000 in missed payments and, overall, owed more than $244,000 on the loan from the Ortegas related to the real property.

On April 2, 2007, Trudy sent and respondent received a fax asking her to contact Trudy about the Drocco matter. Respondent received the fax and was aware of its contents.

On April 15, 2007, Trudy called respondent on her cell phone number and left a message requesting a return call. Respondent received the phone message.

Respondent did not contact Trudy thereafter.

2. Legal Conclusions

a. Count Five – Rule 3-110(A)

By not filing suit or otherwise pursuing the Ortegas' claims against Drocco, respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A).

b. Count Six – Section 6068, subd. (m)

By not responding to Trudy Ortega's phone calls, faxes, and letters between January 2 and February 25, 2007 and on March 18 and April 2 and 15, 2007; and by otherwise not apprising Trudy of the status of her case, respondent did not respond to reasonable status inquiries of a client in a matter in which she agreed to perform legal services, in wilful violation of section 6068, subdivision (m).

C. Other Matters – Counts Seven through Nine

1. Fees - Count Seven – Rule 3-700(D)(2)

a. Facts

Respondent performed no services of any value to the Ortegas. She did not earn the $3,500 advanced fee she received from them.

By not communicating after April 15, 2007 and by taking no action on the case, respondent constructively withdrew from the Ortegas' employment.

On January 28, 2008, Trudy wrote to respondent at the Hawaii and Santa Rosa addresses requesting the return of her fees. Respondent did not return any fees to the Ortegas.

b. Legal Conclusion

Rule 3-700(D)(2) requires an attorney whose employment has terminated to promptly return any part of a fee paid in advance that has not been earned. This rule does not apply to true retainer fees paid solely for the purpose of ensuring the availability of an attorney to handle a matter.

Respondent did not return the $3,500 advanced, unearned fee to the Ortegas in wilful violation of rule 3-700(D)(2).

2. <u>Cooperation in State Bar Investigation - Count Eight – Section 6068, subd. (i)</u>

a. Facts

On August 14 and September 10, 2007, a State Bar investigator sent respondent letters asking her to respond, by specified dates, to the investigation of the Ortegas' complaint to the State Bar. Each letter was sent by United States mail, postage prepaid, to respondent at her official membership record. Neither letter was returned by the postal authorities. Respondent received the letters and was aware of their contents; however, she did not respond to them or otherwise respond to the State Bar investigation of this matter.

b. Legal Conclusions

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

By not responding to the State Bar's letters of August 14 and September 10, 2007, respondent did not participate in the investigation of the allegations of misconduct regarding the

Ortega matters in wilful violation of 6068, subdivision (i).

3. Maintaining Membership Address - Count Nine[16] – Section 6068, subd. (j)

a. Facts

It was found, *supra*, in regard to the Drocco matter that Trudy Ortega sent a letter on January 22, 2007 by certified mail to respondent at an address on Waikoloa Road in Hawaii. She had obtained this address from returned mail sent to respondent's official address in Santa Rosa, California.

On November 6, 2007, the State Bar sent respondent a notice of intent to file an NDC. It was sent by United States mail, postage prepaid, to respondent's official membership records address in Santa Rosa, California.

This correspondence was returned by the postal authorities with a notation indicating that the forwarding time had expired and to return it to the sender. Respondent's address was noted as being on Waikoloa Road in Hawaii.

As of November 6, 2007, respondent had not updated her membership records address to reflect the Hawaii address.

b. Legal Conclusions

Section 6068, subdivision (j) requires an attorney to comply with the requirements of section 6002.1, which, among other things, requires her to maintain a current address and telephone number with the State Bar and to notify the State Bar within 30 days of any change in same.

By not maintaining a current address and telephone number with the State Bar and notifying it within 30 days of a change of address, respondent wilfully violated section 6068, subdivision (j).

[16] Although the NDC refers to this count as Count Seven, the counts in the NDC are numbered incorrectly.

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct[17], std. 1.2(b).)

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

Respondent's misconduct significantly harmed clients and the administration of justice. (Std. 1.2(b)(iv).) Trudy Ortega made repeated attempts to locate and contact respondent. Because of respondent's misconduct, monetary sanctions were ordered against the Ortegas and their cross-complaint and third affirmative defense were stricken. The court had to hold various proceedings due to respondent's inaction.

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) However, it warrants little weight in aggravation because this conduct closely parallels that used to find respondent culpable of violating section 6068, subdivision (i) and to enter her default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors, other than approximately 23-1/2 years of blemish-free conduct prior to the commencement of the misconduct herein. This is a significant mitigating factor.

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[17]Future references to standard or std. are to this source.

C. 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. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.4(b), 2.6(a) and 2.10 apply in this matter. The most severe sanction is found at standard 2.6(a) which recommends suspension or disbarment for violations of sections 6067 and 6068, depending on the gravity of the offense or harm, if any to the victim, with due regard to the purposes of imposing discipline.

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.) Although 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.)

Respondent has been found culpable of nine counts of misconduct involving one client, including: (1) not performing legal services with competence (two counts); (2) not promptly responding to reasonable client status inquires (two counts); (3) not keeping her client informed

of significant developments in a matter in which respondent had agreed to provide legal services (two counts); (4) improperly withdrawing from employment; (5) not refunding unearned fees; (6) not cooperating in a disciplinary investigation; and (7) not maintaining a current address with the State Bar. In aggravation, the court considered multiple acts of misconduct and harm to the clients and to the administration of justice. Respondent's approximately 23-1/2 years of blemish-free practice prior to the commencement of misconduct is a significant mitigating factor.

The State Bar recommends actual suspension for 90 days and until respondent makes restitution to the Ortegas. The court agrees.

The court found instructive *King v. State Bar* (1990) 52 Cal.3d 307. In *King*, the Supreme Court actually suspended the attorney for 90 days with a four-year stayed suspension and probation for neglecting two clients and causing substantial harm to one who had lost his personal injury action due to the attorney's inaction. An aggravating factor was respondent's indifference and lack of insight. He had no prior record of discipline in 14 years of practice. A mitigating factor was candor and cooperation with victim. King participated in the proceedings. In the instant case, respondent did not participate in the proceedings. This case also presents less aggravation and more mitigation than *King*.

Respondent's misconduct and lack of participation in this matter raises concerns about her ability or willingness to comply with her ethical responsibilities to the public and to the State Bar. No explanation has been offered that might persuade the court otherwise and the court can glean none. Having considered the evidence and the law, the court believes that a 90-day actual suspension to remain in effect until she makes restitution to the Ortegas and until she complies with the requirements of rule 205, Rules Proc. of State Bar, among other things, is adequate to protect the public and proportionate to the misconduct found and the court so recommends.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent **CHERYL PARKINSON MARTINSEN** 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 she makes restitution to Edward and Trudy Ortega in the amount of $3,500 plus 10% interest per annum from September 12, 2006 (or to the Client Security Fund to the extent of any payment from the fund to Edward and Trudy Ortega, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d); and until the State Bar Court grants a motion to terminate respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Rules Proc. of State Bar, rule 205(a)-(c).)

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until she has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii). (See also, Rules Proc. of State Bar, rule 205(b).)

It is also recommended that respondent be ordered to comply with any probation conditions reasonably related to this matter that may hereinafter be imposed by the State Bar Court as a condition for terminating respondent's actual suspension. (Rules Proc. of State Bar, rule 205(g).)

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

her actual suspension, whichever is later, and furnish satisfactory proof of such to the State Bar's Office of Probation within said period.

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

VI. 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: April _____, 2009

PAT E. McELROY
Judge of the State Bar Court