FILED JUNE 4, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **HOWARD LAWRENCE RIFKIN** **Member No. 82671** A Member of the State Bar.	)	Case No.: **07-O-13100-RAH** **DECISION**

I. Introduction and Pertinent Procedural History

This default matter was submitted for decision on April 1, 2009. At the time of submission, the State Bar of California ("State Bar") was represented in this matter by Deputy Trial Counsel Jean Cha. Respondent Howard Lawrence Rifkin ("respondent") failed to participate in this matter either in-person or through counsel.

The State Bar filed a Notice of Disciplinary Charges ("NDC") against respondent on December 16, 2008. A copy of the NDC was properly served on respondent on December 16, 2008, in the manner set forth in rule 60 of the Rules of Procedure of the State Bar of California ("Rules of Procedure").[1]

[1] Unless otherwise indicated, all documents were properly served pursuant to the Rules of Procedure.

As respondent did not file a response to the NDC, the State Bar filed and properly served a motion for the entry of respondent's default on February 24, 2009.[2]

Following respondent's failure to file a written response within ten days after service of the motion for the entry of his default, the court, on March 12, 2009, filed an order of entry of default and involuntary inactive enrollment.[3] That same day a copy of said order was properly served on respondent at his membership records address; however, it was subsequently returned to the court by the U.S. Postal Service as undeliverable.

Thereafter, the State Bar waived the hearing in this matter, and this matter was submitted for decision.[4]

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 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].)

II. Findings of Fact

A. Jurisdiction

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

Respondent was admitted to the practice of law in California on November 29, 1978, and has been a member of the State Bar of California at all times since that date.

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[2] The motion also contained a request that the court take judicial notice of all of respondent's official membership addresses. The court grants this request.

[3] Respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (e) was effective three days after the service of this order by mail.

[4] Exhibit 1 attached to the State Bar's February 24, 2009 motion for the entry of respondent's default is admitted into evidence.

B. The Anderson Matter - Case No. 07-O-13100

On or about February 5, 2006, respondent took over the representation of Patricia Anderson ("Anderson") in her ongoing workers' compensation matter, *Anderson v. Etiwanda School District*, POM 0287349. Anderson suffered from a carpal tunnel condition.

On or about February 23, 2006,[5] respondent advised James Bolson ("Bolson"), of the Law Offices of Serembe, Bakke and Seaman, which represented Etiwanda School District, of his representation. He sent two letters on that date to this firm. He requested all medical reports and records. He enclosed a demand for reimbursement of out-of-pocket expenses of Anderson related to treatment by her doctor, Dr. Goldman.

By letter written on or about May 1, 2006, directed to respondent at his official membership records address of 9618 Deep Creek Road, Suite A, Apple Valley, California 92308 ("official membership records address"), Stephen Serembe ("Serembe") requested that respondent contact him to discuss an Agreed Medical Evaluation ("AME"). Thereafter, on June 26, 2006, Serembe again wrote to respondent at his official membership records address. In this letter, Serembe advised that he objected to Dr. Goldman's opinions and treatment recommendations. Serembe offered to refer Anderson to an AME.

On or about September 6, 2006,[6] Anderson sent an email to respondent at the email address reflected in his State Bar membership records - hrifkinesq@yahoo.com ("membership records email address"). In this email, Anderson voiced her concerns regarding respondent's failure to return her telephone calls and answer her questions.

[5] The NDC mistakenly lists this date as February 23, 2007. This is clearly a typographical error and is not prejudicial to respondent.

[6] The NDC mistakenly lists this date as September 6, 2007. This is clearly a typographical error and is not prejudicial to respondent.

On or about September 11, 2006, Serembe wrote to respondent, at his official membership records address, enclosing a joint letter to the agreed medical examiner. Serembe requested that respondent execute the original and return it to Serembe's office.

On or about September 12, 2006, having received no response to her email regarding the status of her case, Anderson handwrote a letter, enclosing her previous email. She directed the letter to respondent's official membership records address. The letter was sent certified mail, return receipt requested. The letter was unclaimed after multiple attempts by the United States Postal Service to deliver it. On or about that same date, Anderson attempted to call respondent and left a message.

On or about September 15, 2006, respondent returned the proposed AME letter to Serembe. He also advised, in his letter transmitting the AME letter, that he had previously sent documentation for reimbursement of out-of-pocket expenses for Anderson and that she had not been reimbursed.

On or about September 18, 2006, Anderson sent another email to respondent at his membership records email address. She wrote, "[a]fter emailing you, calling you, and sending the return receipt letter to you - all with no response, I am hoping that all is okay? I hope you are not ill or Patty or your kids. I am concerned about my lack of communication for my case; but, more importantly I hope you are all okay. Please let me know." Anderson provided both her cell and home telephone numbers. There was no response.

On or about October 2, 2006, Anderson called respondent's office. Respondent answered the telephone. She inquired about the prescriptions that she had given respondent to turn in for reimbursement in February 2006. Respondent advised that he would get back to her in two hours. He did not.

On or about October 9, 2006, Bolson, on behalf of Serembe, responded to respondent's September 15, 2006 letter. Bolson enclosed a fully executed copy of the joint letter requesting an agreed medical examiner, who was V. Prabhu Dhalla, M.D. Bolson also advised that he would look into the out-of-pocket expense issue. He advised that the materials had previously been forwarded to their client with a recommendation that they be adjusted and paid as appropriate.

On or about November 27, 2006, Anderson sent an email to respondent at his membership records email address. In this email, Anderson complained that respondent was not responding to her telephonic messages or emails. Anderson further complained that, on the few occasions that respondent has answered the telephone, his promises to check on her question and call her back were not fulfilled.

In or about December 2006, Anderson called respondent and blocked her caller identification. Respondent answered. He advised Anderson that he was going on vacation and that he would call her back. He did not.

On or about December 4, 2006, respondent sent a letter to Serembe making another request for the out-of-pocket expense reimbursement for Anderson. He advised that Anderson was in need of the money. He again enclosed the documentation.

In or about January 2007, Anderson had a medical emergency related to her injury and was hospitalized. Anderson asked a friend to contact respondent to advise him that she was in the hospital. On or about January 25, 2007, respondent wrote a letter to Serembe regarding the AME report of Dr. Dhalla, Anderson's hospitalization, and her reimbursement for out-of-pocket medical expenses, which he had requested previously. The letter was copied to Anderson.

Thereafter, Anderson again had difficulty in contacting respondent. On or about March 13, 2007, she wrote to respondent at his membership records email address. In part, she advised that she had called several times leaving a message for him to return her call and that he had not done so. She continued "[w]e have been through this several times. There are a multitude of questions, unresolved issues that are now over a year (RX and other receipts). My last 14 messages on your voicemail have indicated that I am receiving SUBSTANTIALLY less benefit from workmen's comp as of January's paycheck. . . I am in a dire financial situation. I do NOT believe that you are representing me as you should be doing. I have expressed to you again and again my concerns to no avail. I need you to respond to me, and not disappear from existence. Your lack of communication is not only unprofessional, but also rude. The letter I sent you in October of last year (2006), you apologized for the lack of communication and assured me a difference. I am sad to see that things are not changed. . ." She requested communication by March 16, 2007. She did not receive a response.

On or about March 20, 2007, Anderson wrote another email to respondent at his membership records email address. She advised that she had just received certified mail from the school district and that she needed to speak to him that day. She received no response.

On or about March 26, 2007, Serembe sent respondent a proposed joint letter to have Dr. Dhalla, re-evaluate Anderson on May 7, 2007. The letter was sent to respondent at his official membership records address.

On or about April 2, 2007, Anderson sent another email to respondent at his membership records email address. She advised, in part, "[y]ou need to be upfront with me. If you cannot be of service to me with this case, you need to excuse yourself from it

so that your lack of representation for me doesn't cause me any further undue harm. . . I have documented letters with return receipts, emails and phone calls. There has been daily phone calls to you over the last 3 ½ weeks. I have left a voice message daily informing you of the incorrect benefits being paid to me since December of 2006. You have had no message to me regarding this issue. I don't want a call only to tell me that you are going to find out and then you never call back. That is what you have been doing for over a year."

On or about May 2, 2007, Serembe's office sent a letter to Anderson copied to respondent advising her of the AME by Dr. V. Prabhu Dhalla.

Although respondent did not communicate with Anderson, on or about May 5, 2007, respondent sent a fax transmittal of the joint letter to Serembe. He advised in the memo, "[p]lease find the proposed AME letter signed. My apologies but I thought I had returned it long ago."

As of May 5, 2007, respondent took no further action with regard to Anderson's workers' compensation claim.

On or about June 30, 2007, Anderson sent another email to respondent at his membership records email address. She advised that if she did not hear from him by July 6, related to her concerns about her benefits from workers' compensation, she would file a complaint with the State Bar. She advised that a quick call to say he would look into it would not suffice, as this had been his response for two years.

Hearing nothing from respondent, Anderson complained to the State Bar on or about July 28, 2007. She filed a discharge of respondent as her attorney with the Workers' Compensation Appeals Board on or about July 31, 2007.

On or about September 11, 2007, an investigator for the State Bar wrote to respondent at his official membership records address regarding Anderson's complaint. The letter also advised respondent of his obligation to cooperate with the State Bar Investigation pursuant to Section 6068, subdivision (i), of the Business and Professions Code. The letter was placed in a sealed envelope, correctly addressed to respondent's official membership records address. The letter was properly mailed to respondent by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The letter was not returned to the State Bar as undeliverable or for any other reason. Respondent did not respond to the State Bar.

On or about September 24, 2007, an investigator for the State Bar visited respondent's official membership records address. The investigator left her card with a man who identified himself as Gary Rifkin, respondent's brother. She requested that respondent contact her. He did not.

On or about December 7, 2007, an investigator for the State Bar wrote to respondent at his official membership records address regarding her efforts to contact him. She enclosed a copy of her prior letter related to Anderson's complaint. The investigator reminded respondent of his obligation to cooperate with the State Bar pursuant to section 6068, subdivision (i), of the Business and Professions Code. The letter was placed in a sealed envelope, correctly addressed to respondent's membership records address. The letter was properly mailed to respondent by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The letter was not returned to the State Bar as undeliverable or for any other reason. Respondent did not respond.

III. Conclusions of Law

A. Count One: Business and Professions Code Section 6068, Subdivision (m)[7] [Failing to Respond to Client Inquiries]

Section 6068, subdivision (m), provides that it is the duty of 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 failing to respond promptly to reasonable status inquiries of his client, Anderson, respondent failed, in a matter in which he agreed to provide legal services, to respond promptly to reasonable status inquiries of a client, in willful violation of section 6068, subdivision (m).

B. Count Two: Rules of Professional Conduct of the State Bar of California, Rule 3-110(A)[8] [Failure to Perform with Competence]

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence.

Respondent recklessly failed to perform legal services with competence, in willful violation of rule 3-110(A), by failing to take any further action with regard to Anderson's claim after on or about May 5, 2007. However, because the court relied upon much of this same misconduct to establish Counts One and Three (as noted below), the court assigns little additional weight to Count Two in determining the appropriate discipline. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 149.)

C. Count Three: Rule 3-700(A)(2) [Improper Withdrawal from Employment]

Rule 3-700(A)(2) provides that an attorney may not withdraw from employment

[7] All further references to section(s) are to the Business and Professions Code, unless otherwise stated.

[8] All further references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

until taking reasonable steps to avoid foreseeable prejudice to the client's rights. By failing to communicate with Anderson and failing to take any further action on her behalf after on or about May 5, 2007, respondent withdrew from employment without taking reasonable steps to avoid foreseeable prejudice to his client's rights, in willful violation of rule 3-700(A)(2).

D. Count Four: Section 6068, Subdivision (i) [Failure to Cooperate]

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney. Respondent failed to cooperate in a disciplinary investigation, in willful violation of section 6068, subdivision (i), by failing to provide a response to any of the State Bar investigator's letters or to the allegations of the Anderson complaint.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factors were submitted into evidence and none can be gleaned from the record. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[9]

B. Aggravation

The court finds three factors in aggravation. (Std. 1.2(b).)

1. Prior Record of Discipline

Respondent has been disciplined twice in the past. (Std. 1.2(b)(i).)

On February 14, 1991, the California Supreme Court issued an order (S017538) suspending respondent from the practice of law for 90 days, stayed, with a one-year probationary period including a 30 day actual suspension. This discipline stemmed from respondent's

[9] All further references to standard(s) are to this source.

misconduct in a single client matter. Said misconduct included failing to perform legal services competently, failing to take reasonable steps to avoid foreseeable prejudice, and making false representations to the client. In mitigation, respondent had no prior record of discipline, and was candid and cooperative with the State Bar. No aggravating circumstances were identified.

On December 10, 2008, the California Supreme Court issued an order (S167430) suspending respondent from the practice of law for one year, stayed, with a six-month actual suspension and until the State Bar Court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California ("Rules of Procedure"). This discipline stemmed from respondent's misconduct in another single client matter. Said misconduct included failing to perform legal services competently, failing to respond to his client's reasonable status inquires, and failing to cooperate in a State Bar investigation. In aggravation, respondent had a prior record of discipline, he committed multiple acts of misconduct, and he failed to participate in the State Bar Court proceedings. No mitigating circumstances were found.

2. Multiple Acts of Wrongdoing

Respondent committed multiple acts of wrongdoing, including failing to respond to his client's reasonable status inquires, improperly withdrawing from representation, and failing to cooperate in a State Bar investigation. (Std. 1.2(b)(ii).)

3. Significant Harm

Respondent's misconduct also resulted in significant harm to his client. (Std. 1.2(b)(iv).) The evidence demonstrates that respondent's failure to perform greatly delayed Anderson's cause of action. In addition, respondent's failure to respond to Anderson's reasonable status inquiries, despite her repeated requests, caused Anderson to experience undue stress and concern.

V. Discussion

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "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."

In addition, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards call for the imposition of a minimum sanction ranging from suspension to disbarment. (Standards 2.6 and 1.7(b).) Standard 2.6 pertains to cases involving a violation of section 6068. It states that culpability of a member of a violation of section 6068 "shall 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."

Due to respondent's prior record of discipline, the court also looks to standard 1.7(b) for guidance. Standard 1.7(b) provides that when an attorney has two prior records of discipline, "the degree of discipline imposed in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate."

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender."

(*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges that respondent be, at a minimum, suspended for two years and until he provides proof to the satisfaction of the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the law pursuant to standard 1.4(c)(ii). The court agrees.

The court finds *Conroy v. State Bar* (1991) 53 Cal.3d 495, to be instructive. In *Conroy*, the attorney, who had been twice disciplined in the past,[10] was found culpable of misconduct in a single client matter. Said misconduct included failing to perform, failing to communicate, improper withdrawal, making misrepresentations to the client, and failing to cooperate with the State Bar. In aggravation, the Supreme Court noted the attorney's prior record of discipline and his failure to cooperate in the State Bar Court proceedings. No mitigating circumstances were found. The Supreme Court ordered that respondent be suspended from the practice of law for five years, stayed, with five years' probation including a one-year actual suspension.

Although it does not involve a finding of moral turpitude, the court finds that the present matter warrants greater discipline than *Conroy*. This determination is based substantially on respondent's prior record of discipline. In contrast to *Conroy*, respondent's prior disciplines involved more extensive misconduct and resulted in significantly longer periods of actual suspension. What is of greater concern to the court is that each of respondent's three disciplines involve the same nature of misconduct. Respondent's unwillingness or inability to modify his conduct, despite repeated disciplines, gives the court little assurance that the public is safe from future harm.

[10] The attorney's prior disciplines resulted in a private reproval and a 60-day actual suspension. His second discipline involved his failure to comply with probationary conditions attached to his first discipline.

That being said, the court finds that a recommendation of disbarment is not warranted under these circumstances considering that respondent's first prior was remote in time to his second and third. In addition, the present misconduct is not so inherently serious as to suggest the need to permanently remove him from the roster of attorneys. The court finds that a two-year actual suspension, and until respondent provides proof of his rehabilitation, present fitness to practice, and present learning and ability in the law, adequately satisfies the primary purposes of disciplinary proceedings and sanctions. (Std. 1.3.)

VI. Recommended Discipline

Accordingly, the court recommends that respondent **Howard Lawrence Rifkin** be suspended from the practice of law in California for four years, that execution of that period of suspension be stayed subject to the following conditions:

1. He be suspended from the practice of law for a minimum of two years, and remain suspended until the following requirements are satisfied:
    i. The State Bar Court grants a motion to terminate his suspension pursuant to rule 205 of the Rules of Procedure of the State Bar. Howard Lawrence Rifkin must comply with the conditions of probation, if any, imposed by the State Bar Court as a condition for terminating his suspension.
    ii. He must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

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.[11]

It is not recommended that respondent be ordered to successfully pass the Multistate Professional Responsibility Examination as he was ordered to do so in Supreme Court matter S167430.

VII. 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: June _____, 2009

RICHARD A. HONN
Judge of the State Bar Court

[11] 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.)