

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of) Case No. **07-O-13332-LMA**
)
RICHARD L. HALE,)
) **DECISION**
)
Member No. 139773,)
)
)
A Member of the State Bar.)
_____)

I. Introduction

In this contested original disciplinary proceeding, respondent **Richard L. Hale** is charged with two counts of professional misconduct in one client matter. The court finds, by clear and convincing evidence, that respondent is culpable of both counts, which include: (1) failing to perform with competence; and (2) failing to respond to client inquiries.

In view of respondent’s misconduct, as well as the applicable aggravating and mitigating circumstances, the court recommends, among other things, that respondent be suspended from the practice of law for six months, that execution of the suspension be stayed, and that he be placed on probation for one year.

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 two-count Notice of Disciplinary Charges (NDC) on February 13, 2008. Respondent filed a response to the NDC on April 15, 2008.

Deputy Trial Counsel (DTC) Treva Stewart represented the State Bar. Respondent represented himself. Trial was held on September 23, 24, and December 2, 2008. Following receipt of closing briefs, the court took this case under submission for decision on January 19, 2009.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the evidence and testimony introduced at this proceeding. The testimony of the State Bar's complaining witness was credible.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 6, 1989, and since that time has been a member of the State Bar of California.

B. The Vanskike Matter

On December 9, 2005, Frank Vanskike (Vanskike) hired respondent to represent him in Vanskike's property damage matter "caused by the apparent negligence of Marilyn and James Calvey." Vanskike executed a retainer agreement and paid respondent a \$250 retainer as specified by the agreement. The agreement further specified that respondent's hourly rate was \$130. Pursuant to the retainer agreement respondent was to send Vanskike monthly statements.

On November 22, 2006, respondent filed suit on behalf of Vanskike in Superior Court, County of San Mateo, which case was entitled *Vanskike vs. Calvey*, case No. CJ459250. Respondent, however, never served the complaint on the defendants.

From January 23, 2006 through December 2006, respondent and Vanskike had sporadic, but ongoing contact. On several occasions, respondent took more than a month to respond to Vanskike's request for a status update on his case.

On February 12, 2006, Vanskike sent a letter to respondent, asking respondent for a time to get together to discuss his case against the Calveys and how to get them to be "on the hook" for the costs of repairing the damage to his backyard. Respondent received the February 12, 2006 letter from Vanskike. On February 14, 2006, respondent prepared a letter to the Calveys and "cc'd" Vanskike on that letter. On or about February 21, 2006, respondent advised Vanskike that the Calveys were denying responsibility for the damage.

On April 25, 2006, Vanskike again wrote to respondent, stating that his damages were in excess of \$1,000. In his letter, Vanskike also inquired if respondent should write to the Calveys to ask for payment for the total amount of the damages. Vanskike requested that respondent discuss this matter with him at respondent's earliest convenience. Respondent received the April 25th letter, but did not respond, set an appointment, or otherwise apprise Vanskike of the status of his case.

On May 19, 2006, respondent wrote to Vanskike and gave him an update on the status of his case.

In a June 19, 2006 letter to respondent from Vanskike, Vanskike asked respondent to address certain issues set forth in that letter. Vanskike also stated in his letter that he planned to be in Pacifica on or around June 28, 2006, and that if respondent thought it was necessary to get together the June 28th date would be a good time for a meeting. Respondent received the June 19, 2006 letter from Vanskike, but did not respond or otherwise apprise Vanskike of the status of his case until July 24, 2006, when respondent wrote to Vanskike.

On September 7, 2006 Vanskike again wrote to respondent. In his letter, Vanskike asked respondent for an update on respondent's strategy to win the case. Respondent wrote to Vanskike on September 14, 2006, advising Vanskike that the deadline to file a complaint against the Calveys was November 23, 2006.

On October 20 and on October 30, 2006, Vanskike telephoned respondent and left messages, requesting return calls regarding the status of his case. Respondent, who received the messages, did not return the calls or otherwise apprise Vanskike of the status of his case.

On October 31, 2006, Vanskike wrote a letter to respondent, inquiring about the status of his case. He wrote "Is it possible that you could bring me up to speed with what your strategy is such that we will prevail in this matter?" Respondent received the October 31, 2006 letter from Vanskike, but did not respond or otherwise apprise Vanskike of the status of his case.

On November 7, 2006, Vanskike again wrote a letter to respondent, inquiring about the status of his case. Vanskike wrote that he thought it was down to the last two weeks to file a complaint. In the letter, Vanskike also wrote, "I would request you to make a 30 second phone call to me and let me know we're 'on track' with this complaint." Respondent, who received the November 7th letter from Vanskike, responded on November 9, 2006. He stated that he had been extraordinarily busy and that both his parents were seriously ill. However, he "assured" Vanskike that the "complaint [would] be filed and served timely."

On November 13, 2006, Vanskike telephoned respondent and left a message regarding his case. Respondent received the telephone message, but did not respond.

On December 19, 2006, respondent wrote to Vanskike. In his letter, respondent enclosed a copy of the form complaint that he had filed on November 22, 2006. Respondent also advised that he would be amending the complaint shortly to include a claim of fraud and a request for punitive damages. Respondent further advised that the court would be scheduling a status

conference in 90 to 120 days and that he would keep Vanskike informed of the date of the status conference. Respondent also wrote that a bill for his services would soon be forthcoming.

Respondent never sent Vanskike a bill for his services, nor did he advise Vanskike regarding a court status conference. Moreover, respondent never amended the complaint as he stated he would in his December 19th letter to Vanskike. Nor did he serve the complaint or do any discovery in the case.

Between December 20, 2006 and March 23, 2007, respondent did not communicate with Vanskike.

On March 23, 2007, Vanskike wrote to respondent regarding the status of his case. He asked about the court conference that respondent had previously stated would be scheduled and also asked to be informed about what was happening in the case. Respondent, who received the March 23rd letter did not respond, set an appointment, or provide Vanskike with an update regarding the status of his case.

On June 6, 2007, Vanskike called and left a message for respondent, requesting a return call. Respondent received the message, but did not return the call.

It was not until July 23, 2007 that respondent contacted Vanskike. Thus, from March 2007 to July 2007, respondent did not communicate with his client. In his July 23rd letter to Vanskike, respondent wrote that "there is nothing new to report at this time."

On October 29, 2007, Vanskike again wrote to respondent. The letter stated that Vanskike had informed respondent that he had contacted the State Bar to find out what to do to "get [his] suit moving." Vanskike wrote that pursuant to the State Bar's suggestion, he was writing respondent and requesting that respondent reply to the questions set forth in his letter.

On November 2, 2007, respondent wrote to Vanskike in response to the October 29, 2007 letter.

On June 28, 2008, respondent wrote to Vanskike to inform him that respondent was withdrawing as his counsel in Vanskike's property damage matter.

While he was employed as counsel for Vanskike, respondent was confronting personal difficulties. His mother was diagnosed with a terminal illness. As his parents lived in Arizona, respondent traveled between Arizona and California three to four times per year. When respondent went to Arizona in February 2007, his mother was severely debilitated. Thus, respondent spent 2007 caring for his mother, until she died in December 2007. Respondent's father was also seriously ill. Additionally, respondent was dealing with his son, who had substance abuse issues. Respondent testified that, as a result of all of his family problems, he sought counseling and was diagnosed with severe depression.

Count 1: Failure to Perform Competently (Rule 3-110(A))¹

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

By failing to file suit (i.e., file the complaint) on behalf of his client between December 9, 2005 and November 22, 2006, a period of over eleven months, and by never serving the November 22, 2006 complaint, respondent intentionally and recklessly failed to perform legal services with competence, in willful violation of rule 3-100(A).

Count 2: Failure to Communicate (Bus. & Prof. Code, § 6068, Subd. (m))

Business and Professions Code section 6068, subdivision (m),² 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.

¹ References to rule are to the Rules of Professional Conduct, unless otherwise noted.

² References to section are to the Business and Professions Code, unless otherwise noted.

By not responding to Vanskike's October 20 and 30, 2006 phone calls and by not responding to his March 23, 2007 letter and June 6, 2007 phone call until July 23, 2007, a period of four months, respondent failed to promptly respond to a client's reasonable status inquiries in a matter with regard to which he had agreed to provide legal services, in willful violation of section 6068, subdivision (m).

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).)³

Respondent's more than 15 years of discipline-free practice at the time of his misconduct in 2005 is a strong mitigating factor. "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.) "Thirteen years of practice without discipline is an appropriate factor in mitigation. (See *Schneider v. State Bar* (1987) 43 Cal.3d 784,798-799; *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant weight is given to more than ten years of practice prior to first act of misconduct].)" (*In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 350.)

Personal stress factors, such as estrangement, illness, or death of a family member can constitute mitigating evidence. Such emotional difficulties may mitigate discipline. (Standard 1.2(e)(iv).) Respondent testified as to the stressors in his life that existed at the time of his misconduct. Respondent's mother was seriously ill during the time of his misconduct and eventually died. Respondent's father, who was diagnosed with a brain aneurysm, was also

³ All further references to standards are to this source.

seriously ill. Additionally, respondent was dealing with a son who had substance abuse issues. Respondent testified that as a result of these stress factors he sought counseling and was diagnosed with severe depression.

While no expert testimony was introduced to establish a causal connection between respondent's emotional difficulties, as called for by standard 1.2(e)(iv), the standards are guidelines, not inflexible mandates. While the lack of expert testimony may impact the weight of the evidence, it does not mean that the court must reject a respondent's testimony regarding illness or emotional difficulties in mitigation. (See, *In re Brown* (1995) 12 Cal.4th 205, 222 [some mitigation to effects of attorney's illness despite lack of expert testimony].) Lay testimony, regarding emotional problems or illness, has often been considered as mitigation. (See *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, 340-341.) Thus, the court finds respondent's emotional difficulties to be a mitigating circumstance. (Std. 1.2(e)(iv).)

B. Aggravation

Aggravating factors must be established clearly and convincingly by the State Bar. (Standard 1.2(b).)

The record establishes that there is one aggravating factor. (Standard 1.2(b).)

Respondent committed multiple acts of wrongdoing, which include failing to perform services and failing to communicate. (Standard 1.2(b)(ii).)

The court does not find that the State Bar has met its burden of showing by clear and convincing evidence the existence of any additional aggravating factors. The State Bar contended at the hearing in this matter that respondent caused significant harm to his client and demonstrated indifference toward rectification of or atonement for the consequences of his

misconduct. However, no clear and convincing evidence was introduced to show the existence of those alleged aggravating circumstances.

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.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) But the standards “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 been long-held that the court “is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are 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.) While the standards are entitled to great weight (*In re Silverton* (2005) 36 Cal.4th 81, 92), they do not provide for mandatory disciplinary outcomes. Although the standards were established as guidelines, “ultimately, the proper recommendation of discipline rest[s] on a balanced consideration of the unique factors in each case.” (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

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), and 2.6(a) apply in this matter.

Standard 2.4(b) provides that culpability of a member of willfully failing to perform services in an individual matter or matters, not demonstrating a pattern of misconduct, or culpability of a member of willfully failing to communicate with a client must result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6(a) provides for discipline ranging from suspension to disbarment for violations of sections 6068, subdivision (m), 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.

Respondent has been found culpable of two acts of misconduct in a single client matter, including failing to perform legal services and failing to promptly respond to client inquiries. Thus, the record establishes that respondent committed multiple acts of wrongdoing, an aggravating factor. A significant mitigating factor is respondent's nearly 15 years of discipline-free practice at the time of his misconduct. The court has also found respondent's emotional difficulties to be a mitigating circumstance.

Respondent requests that no actual suspension be imposed. The State Bar asked that a 90-day actual suspension be imposed at the time of the pretrial conference. However, the State Bar modified its recommendation in its closing brief, requesting that a 30-day actual suspension be ordered.

In support of its recommendation for a 30-day actual suspension the State Bar cites the following cases in its closing brief: *Van Sloten v. State Bar* (1989) 48 Cal.3d 921; *McMorris v. State Bar* (1981) 29 Cal.3d 961; and *King v. State Bar* (1990) 52 Cal.3d 307. Neither *McMorris* nor *King* is comparable to the present case. However, the court does find *Van Sloten* instructive.

In *McMorris*, the attorney was actually suspended for 180 after being found culpable of failing to perform services and failing to communicate. Unlike the instant matter, which involves a single client, *McMorris* involves misconduct as to three clients. The attorney in *McMorris* failed to perform the services for which he was retained and failed to communicate with each of his clients. He also failed to promptly return a fee to one client. (*McMorris v. State Bar, supra*, 29 Cal.3d at 98-99.) Moreover, *McMorris* had two prior records of misconduct. (*McMorris v. State Bar, supra*, 29 Cal.3d at pp. 98-100.) Thus, *McMorris* presented greater misconduct and far greater aggravation than the instant case.

In *King*, the Supreme Court suspended the attorney for four years, stayed the execution of the suspension, and placed the attorney on probation subject to certain conditions, including that the attorney be placed on suspension for the first 30 days of his suspension. The attorney among other things failed to competently perform services for two clients and failed to return client files. In aggravation, the attorney caused serious financial harm to one client and showed indifference and lack of insight. In mitigation, the attorney had no prior record of discipline in 14 years of practice. Another mitigating factor was respondent's display of candor and cooperation. As acknowledged by the State Bar, in contrast to the circumstances in *King*, this case involves only one client matter. Moreover, there is no clear and convincing evidence in the instant matter that respondent's client suffered any substantial harm. *King* presented greater misconduct and greater aggravation than the instant case.

In decisions of the Supreme Court and the State Bar Court involving abandonment of a client's case where, as here, the attorney has no prior record of discipline, the discipline ranges from no actual suspension to 90 days' actual suspension.

In *Van Sloten*, the attorney, with five years of practice, failed to perform services for a client, failed to communicate, and failed to withdraw from his client's case after ceasing to do

any work for her in a divorce proceeding. The Supreme Court ordered, among other things, that the attorney be suspended from the practice of law for six months, that that execution of the order of suspension be stayed on the condition that the attorney be placed on probation for one year. No actual suspension was imposed. (*Van Sloten v. State Bar*, *supra*, 48 Cal.3d at p. 934.)

The State Bar contends that the conduct of the respondent herein is worse than that of the attorney in *Van Sloten*. In its closing brief, the State Bar argues that the attorney in *Van Sloten* was unable to finalize the dissolution as a result of the non-cooperation of the opposing party, whereas respondent in the instant matter failed to take any action to prosecute the lawsuit. (State Bar's Closing Brief, 8:23-25.) However, the Supreme Court specifically rejected attorney Van Sloten's attempt "to justify his inaction on the basis of the parties' failure to cooperate." (*Van Sloten v. State Bar*, *supra*, 48 Cal.3d at p. 931.) Rather, the court upheld the lower court's findings that the attorney failed to use reasonable diligence in performing the legal service for which he was employed, did not withdraw from the case, and failed to communicate with his client. (*Ibid.*) *Van Sloten* presented similar misconduct and aggravation as the instant case, but less mitigation.

The court also finds guidance in *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267; and *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476.

In *In the Matter of Kennon*, the attorney, who had no prior record of discipline, was actually suspended for 30 days with a two-year stayed suspension and a two-year probation for his abandonment of two clients and failure to return unearned fees of \$2,000 to one client. *Kennon*, which in contrast to the instant case involved two clients rather than a single client, presented more serious and extensive misconduct than the instant case.

In *In the Matter of Lilley*, the attorney, who defaulted, was actually suspended for 30 days for one client abandonment, failure to cooperate in a State Bar investigation, and failure to submit a change of address. In aggravation, the court found that the attorney caused harm both to his client and to a third party. In mitigation the attorney had no prior record of discipline in 13 years of practice. Lilley presented more serious and extensive misconduct than the instant case.

Thus, the instant case merits less discipline than *Kennon* and *Lilley*.

In recommending discipline, the “paramount concern is protection of the public, the courts and the integrity of the legal profession.” (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.)

Therefore, balancing all relevant factors, respondent’s misconduct, the case law, the standards, and the mitigating and the aggravating evidence, the court finds that suspending respondent for six months, staying the execution of the suspension, and placing respondent on probation for one year, subject to conditions would be appropriate to protect the public and to preserve public confidence in the profession.

VI. Recommended Discipline

Accordingly, the court recommends that respondent **Richard Hale** be suspended from the practice of law for six months, that execution of the suspension be stayed and that respondent be placed on probation for one year on the following conditions:

1. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct;
2. 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;

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. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request;
5. 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;
6. Within one year of the effective date of the Supreme Court's final disciplinary order in this proceeding, 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, 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 Requirement (MCLE), and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201);

6. The period of probation must commence on the effective date of the order of the Supreme Court imposing discipline in this matter; 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 six months that is stayed, will be satisfied and that suspension will be terminated.

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 of the effective date of the Supreme Court's final disciplinary order in this proceeding. Failure to pass the MPRE within the specified time results in actual suspension by the State Bar Court Review Department, without further hearing, until respondent provides the required proof of passage of the MPRE.

VII. Costs

It is further 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

LUCY ARMENDARIZ
Judge of the State Bar Court