FILED DECEMBER 18, 2008

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **SCOTT G. BAKER,** **Member No. 187710,** A Member of the State Bar.	)	Case No.: **07-O-13461-LMA** **DECISION**

I. Introduction

In this default disciplinary matter, respondent **Scott G. Baker** is found culpable, by clear and convincing evidence, of misconduct in a single client matter, including (1) failure to perform services competently; (2) failure to communicate; (3) improper withdrawal from employment; and (4) failure to update membership address.

In view of respondent's misconduct and the evidence in aggravation, the court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of suspension be stayed, and that he be actually suspended from the practice of law for one year and until he makes specified restitution and until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules Proc. of State Bar, rule 205.)

II. Pertinent Procedural History

On June 24, 2008, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing and properly serving a Notice of Disciplinary Charges (NDC) on respondent by certified mail, return receipt requested, at his official membership records address (official address) under Business and Professions Code section 6002.1, subdivision (a).[1] No return receipt was received by the State Bar.

Respondent did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

On August 1, 2008, the deputy trial counsel (DTC) assigned to this case performed a computer based search for respondent in both California and Arizona. Because respondent has a common name, there were too many search results to make an effort to contact each one. Although there were results that listed respondent's date of birth, there was no contact information with those results. On that same date, the DTC also conducted a search of the 2008 volume of the Parker Directory of California Attorneys, but found no address for respondent. He also searched the 2008 volume of the Daily Journal's Directory of Attorneys for California. Although he found a telephone number for a Scott G. Baker, upon telephoning the number he found it to be disconnected. The DTC found no new address for respondent of which the State Bar was not already aware. Additionally, on March 19, 2008, in another matter, the assigned DTC had attempted to contact respondent at an e-mail address listed on the State Bar's official web site. Although the DTC did not receive any information that the mail did not go through, he never received a response from respondent. As of August 18, 2008, the State Bar had had no contact with respondent.

[1] References to section are to the California Business and Professions Code, unless otherwise indicated.

On the State Bar's motion, respondent's default was entered on September 8, 2008, and respondent was enrolled as an inactive member on September 11, 2008, under section 6007, subdivision (e). An order of entry of default was sent to respondent's official address by certified mail, but was returned to the court as undeliverable.

Respondent did not participate in the disciplinary proceedings. This matter was submitted for decision on September 30, 2008, following the filing of the State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

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).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on March 24, 1997, and has since been a member of the State Bar of California.

B. The Parkerson Matter

On or about January 23, 2007, Joanne Dixon (Dixon), via her power of attorney on behalf of Pattonia, a.k.a. Pat Parkerson (Parkerson), hired respondent to prosecute a civil action against Summer Reed Johnson (Johnson) for conversion of Parkerson's property (the *Parkerson* matter). Dixon has a power of attorney for Parkerson, because Parkerson, who is in his seventies and suffers from Parkinson's disease, has difficulty writing. Dixon believed that Johnson's actions amounted to elder abuse. Both Dixon and Parkerson signed a fee agreement with respondent on January 23, 2007. The fee agreement called for an initial deposit of $1,900 and monthly billing at the rate of $200 per hour for the attorney and $60 an hour for a paralegal.

Dixon paid respondent the sum of $1,900 on or about January 23, 2007, and received a receipt from respondent. On or about February 6, 2007, respondent sent Dixon a bill in the amount of $1,800 for a total of eighteen and a half hours. Approximately eight hours was for preparing for and attending a hearing to obtain a restraining order against Johnson on behalf of Parkerson.[2] The rest of the billing was for matters related to the proposed civil action, including reviewing documents and preparing a complaint.

On or about February 9, 2007, Dixon paid respondent another $3,700. Respondent, however, never filed a complaint on behalf of Parkerson, nor did he take any further action on the *Parkerson* matter. After Dixon paid respondent the $3,700, respondent took no action to file or pursue Parkerson's civil suit against Johnson. Dixon repeatedly called respondent for information regarding the status of Parkerson's legal matter. Respondent, however, did not return Dixon's calls.

In or about March, 2007, respondent abandoned his law practice and vanished. He advised Jessica Elder, his formal paralegal, that he was moving to Mexico. Respondent, however, never advised Dixon or Parkerson that he had abandoned his law practice.

In or about August, 2007, the State Bar sought, and obtained, assumption of jurisdiction over respondent's law practice, in *State Bar v. Scott Baker*, Calaveras County Superior Court, case No. CV33906.

[2] Attached to the NDC as Exhibit 1 is "a true and correct copy" of the February 6, 2007 bill for $1,800 that respondent sent to Dixon. In paragraph five of the NDC it is stated that respondent spent "[a]pproximately seven hours . . . preparing for, and attending, a hearing on a restraining order between Parkerson and Johnson." The bill, however, indicates that respondent spent 8.05 hours preparing for and attending the hearing on the restraining order against Johnson. Paragraph 20 of the NDC states that $1,610 of the fees received by respondent were allocated for 8.05 hours relating to the restraining order. Thus, the court finds that respondent spent 8.05 hours on the restraining order issue, and not "approximately seven hours," as stated in paragraph five of the NDC.

Respondent abandoned the case and left without providing any contact information to Dixon or Parkerson. Aside from preparing for and attending the hearing on the restraining order, the additional services respondent performed on the *Parkerson* matter were preliminary in nature, and provided no benefit to Parkerson. Respondent never filed a complaint on Parkerson's behalf, and thus the fees respondent charged were not earned.

Respondent, failed, upon termination of his services, to refund to Dixon the $1,900 plus $3,700 that she paid him, minus the $1,610 for the allocation of 8.05 hours spent on the restraining order. Thus, respondent failed to refund $3,990 in unearned fees. Moreover, respondent did not return the client file to Dixon or Parkerson.

C. Respondent's Official Address

On or about November 7, 2007, State Bar Investigator John Matney (Matney) sent respondent a letter regarding the Dixon/Parkerson complaint. Matney sent the letter via United States mail, postage pre-paid, to respondent at his official membership records address, i.e., P.O. Box 1441, San Andreas, California 95249, which is the address maintained by the State Bar pursuant to Business and Professions Code, section 6002.1. Matney's letter was returned by the postal authorities with the stamped notation, "Return to Sender. Box Closed. Unable to Forward." After closing his post office box, respondent failed to update his membership records address with the State Bar.

Count 1: Failure to Perform Competently (Rules Prof. Conduct, Rule 3-110(A))[3]

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

[3] References to rule are to the current Rules of Professional Conduct, unless otherwise indicated.

By failing to file a complaint on behalf of Parkerson or pursue Parkerson's civil suit against Johnson, respondent recklessly and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

Count 2: Failure to Communicate (Bus. & Prof. Code, § 6068, subd. (m))[4]

Section 6068, subdivision (m), provides 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 not responding to Dixon's repeated calls seeking information regarding the status of Parkerson's legal matter, respondent failed to respond promptly to reasonable status inquires of a client and by failing to inform Dixon and Parkerson that he had abandoned his law practice, respondent failed to keep a client informed of a significant development in a matter in which respondent had agreed to provide legal services, in willful violation of section 6068, subdivision (m).

Counts 3 and 4: Improper Withdrawal from Employment (Rule 3-700(A)(2) and Failure to Return Unearned Fees (Rule 3-700(D)(2)

The State Bar proved by clear and convincing evidence that respondent willfully violated rule 3-700(A)(2), as alleged in count 4. Rule 3-700(A)(2) states: "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."

[4] All references to section (§) are to the Business and Professions Code, unless otherwise indicated.

By abandoning his legal practice without notice to Dixon and/or Parkerson, respondent effectively withdrew from representation of Parkerson and did not inform Parkerson and/or Dixon that he was withdrawing from employment. He further failed to return the client file and the unearned fees amounting to $3,990. Thus, respondent willfully failed to take steps to avoid reasonable foreseeable prejudice to his client, in willful violation of rule 3-700(A)(2).

However, as the court has already found respondent culpable of willfully violating rule 3-700(A)(2), the court declines to find respondent also culpable of willfully violating rule 3-700(D)(2), as alleged in count 3. Rule 3-700(D)(2) requires an attorney, upon termination of employment to promptly return unearned fees.

The rule prohibiting prejudicial withdrawal from employment, rule 3-700(A)(2), is more comprehensive than rule 3-700(D)(2). (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 280.) The rule prohibiting prejudicial withdrawal mandates compliance with the rule requiring return of unearned fees. Thus, an attorney's failure to promptly return fees may be a portion of the conduct disciplinable as a violation of the rule prohibiting prejudicial withdrawal. (*Ibid.*)

Because respondent's failure to return unearned fees is encompassed in respondent's improper withdrawal from employment, the court rejects a separate finding of culpability under rule 3-700(D)(2). The court, therefore, dismisses count 3 with prejudice.

Count 5: Failure to Update Membership Address (Bus. & Prof. Code, § 6068, subd. (j))

Section 6068(j), states that a member must comply with the requirement of section 6002.1, which provides that respondent must maintain on the official membership records of the State Bar a current address and telephone number to be used for State Bar purposes.

By clear and convincing evidence, respondent willfully violated section 6068(j), when he failed to maintain a current official membership address and did not provide the State Bar with an alternative address to be used for State Bar purposes. As a result the letter sent to his official address from the State Bar was returned with a stamped notation "Return to Sender. Box Closed. Unable to Forward."

IV. Mitigating and Aggravating Circumstances

A. Mitigation

As respondent's default was entered in this matter, no mitigating circumstances were proven. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[5]

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent has a prior record of discipline.[6] (Std. 1.2(b)(i).) On November 23, 2008, respondent was suspended for one year, execution of the suspension stayed, and he was actually suspended for 30 days and until he pays specified restitution and until he complies with rule 205

[5] All further references to standards are to this source.

[6] The State Bar submitted an unauthenticated copy of the decision in State Bar Court case No. 07-O-12155, which decision was filed on June 6, 2008, more than three months before the State Bar filed its brief on culpability and discipline. Given that the State Bar failed to submit an authenticated copy of that decision as required by rule 216 of the Rules of Procedure of the State Bar, the court will take judicial notice of that decision pursuant to Evidence Code section 452. The court, however, cautions that the better practice is that the State Bar submit "an authenticated copy of all charges, stipulations findings and decisions (whether or not final) reflecting or recommending imposition of discipline on a party who is presently the subject of a State Bar Court proceeding." (Rules Proc. of State Bar, rule 216.)

of the Rules of Procedure of the State Bar for failure to return unearned fees in a single client matter. (Supreme Court case No. S166101, State Bar Court case No. 07-O-12155.)[7]

Respondent committed multiple acts of wrongdoing. (Std 1.2(b)(ii).) He failed to perform services competently, failed to communicate with his client, improperly withdrew from employment, and failed to update his official membership address.

Respondent's failure to return unearned fees of $3,990 to Dixon and/or Parkerson demonstrates indifference toward rectification of or atonement for the consequences of his misconduct. (Std.1.2(b)(v).) Moreover, respondent has yet to return the client file or update his official membership records address.

Respondent's failure to participate in this disciplinary matter before the entry of his default is also a serious aggravating factor. (Std. 1.2(b)(vi).)

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.)

Respondent's misconduct involved one client matter. The standards provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds. 1.6, 1.7, 2.4, 2.6 and 2.10.)

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.) It has long been held that the court

[7] The court takes judicial notice of Supreme Court case No. S166101, which was filed on October 24, 2008, effective November 23, 2008, which occurred after this matter had been submitted. (Rules Proc. of State Bar, rule 216(a); Evid. Code § 452.)

"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 consideration peculiar to the offense." (*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.)

In this matter, respondent has been found culpable of violating: (1) rule 3-110(A) (failure to perform legal services competently); (2) Business and Professions Code section 6068(m) (failure to communicate with a client); (3) rule 3-700(A)(2) (improper withdrawal from employment, encompassing a failure to return the client file and unearned fees); and (4) Business and Professions Code section 6068(j) (failure to update official membership address). In aggravation respondent has a prior record of discipline, has engaged in multiple acts of wrongdoing, has demonstrated indifference toward rectification or atonement, and failed to participate in this disciplinary proceeding prior to the entry of his default.

Prior discipline is always a proper factor in aggravation. As part of the rationale for considering a prior record is that it is indicative of a recidivist attorney's inability to conform to ethical norms, the aggravating force of prior discipline is diminished when the current misconduct has occurred during the same time period as the misconduct in the prior matter. In such circumstance, it is appropriate to consider what the discipline would have been if all the charged misconduct during the time period had been brought as one case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal.State Bar Ct. Rptr. 602, 618-619.)

In the prior matter for which respondent was disciplined, as in the current matter, respondent's misconduct involved one client. Respondent was found culpable of failing to return an unearned fee. The incident in the prior matter occurred in March 2007. Thus, it is apparent that the misconduct in the current matter, which occurred from January through March 2007, was

contemporaneous with the misconduct in the prior case. (Supreme Court case No. S166101, State Bar Court case No. 07-O-12155.) Accordingly, the court will consider the totality of the findings in the two cases to determine what the discipline would have been if all the charged misconduct in this period had been brought in one case. (*In the Matter of Sklar, supra,* 2 Cal.State Bar Ct. Rptr. 602, 619.)

In the prior matter for which respondent was disciplined he was found culpable of failing to return an unearned fee to his client. The court took judicial notice of respondent's lack of a prior record in ten years of practice prior to the commencement of the misconduct; it cited *In the Matter of Kauffman* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 213, noting that the lack of a disciplinary record in ten years of practice merited mitigating credit. In aggravation, respondent failed to participate in the disciplinary hearing prior to the entry of his default.

In the current disciplinary matter respondent is found culpable of failing to perform services competently, failing to communicate with a client, improperly withdrawing from employment, and failing to update his membership address. The aggravating circumstances are as stated, *ante*.

In its brief on culpability and discipline, the State Bar acknowledges that respondent was "subject to other disciplinary litigation, resulting in a decision in case number 07-O-12155. . . for misconduct that occurred prior to or contemporaneously with the misconduct in the instant case." The State Bar then urges in the section of its brief on culpability and discipline at page seven that respondent "be suspended from the practice of law for 2 years and until he makes restitution of $3,990.00."[8] Although the State Bar cites case law that indicates that a period of actual

[8] In the first paragraph of its brief on culpability and discipline, the State Bar recommends that "respondent be suspended from the practice of law 1 year, stayed, 2 years probation, with an actual suspension of 90 days, and compliance with rule of court 9.20, and

suspension is appropriate in the instant matter, it, fails to cite any case law that supports a two-year actual suspension.

The court, however, finds guidance as to the discipline that should be imposed in *Lester v. State Bar* (1976) 17 Cal.3d 547, *Segal v. State Bar* (1988) 44 Cal.3d 1077, *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074, and *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, in which cases the level of discipline ranges from six months to two years actual suspension.

In *Lester*, the Supreme Court actually suspended an attorney for six months for failing to perform services in four matters, failing to refund any portion of advanced fees, failing to communicate with clients and with misrepresentation. Aggravation included his lack of candor before the State Bar and general lack of insight into the wrongfulness of his actions.

In *Segal*, the attorney was actually suspended for one year for his misconduct in four matters, including failure to perform services, failure to return unearned fees, failure to communicate promptly and issuance of two bad checks. He also had a prior record of discipline involving bad checks.

The Supreme Court in *Bledsoe* imposed a two-year actual suspension on an attorney who had abandoned four clients, failed to return unearned fees, failed to communicate with three clients, made misrepresentations to a client regarding her case status, and failed to cooperate with the State Bar. The attorney had also defaulted in the disciplinary proceeding.

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until he makes restitution." However, in a default proceeding, "the appropriate time to consider imposing probation and its attendant conditions is when the attorney seeks relief from the actual suspension that may be imposed following his or her default in a disciplinary proceeding." *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal.State Bar Ct. Rptr. 103, 110.) Thus, the State Bar's request for a two-year probation is inappropriate. Moreover, the State Bar's two conflicting disciplinary requests are not helpful to the court in determining the appropriate level of discipline to be imposed in this matter.

In *In the Matter of Johnston*, *supra*, 3 Cal. State Bar Ct. Rptr. 585, the attorney, who had no prior record of discipline in 12 years of practice, was actually suspended for 60 days for misconduct in a single client matter. The attorney failed to communicate with his client and failed to perform competently which caused the client to lose her case. He also improperly held himself out as entitled to practice law by misleading his client into believing that he was still working on her case while he was on suspension for not paying his State Bar dues. He defaulted in the disciplinary proceedings a well.

In this matter, the gravamen of respondent's misconduct is his failure to perform services in one client matter and his improper withdrawal from employment which encompassed a failure to pay unearned fees of $3,990 and to return the client file. Respondent's abandonment of his client's cause reflects a blatant disregard of professional and ethical responsibilities.

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.)

Failing to appear and participate in the hearing shows that respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) His failure to participate in this proceeding leaves the court without information about the underlying cause of respondent's misconduct or mitigating circumstances surrounding his misconduct. Thus, balancing all relevant factors—respondent's misconduct, the case law, the standards, and the aggravating evidence, placing respondent on an actual suspension for one year

and until payment of specified restitution[9] would be appropriate to protect the public and to preserve public confidence in the profession.

VI. Recommended Discipline

Accordingly, the court hereby recommends that respondent **Scott G. Baker** be suspended from the practice of law for two years, that said suspension be stayed, and that respondent be actually suspended from the practice of law for one year and until he files and the State Bar Court grants a motion to terminate his actual suspension (Rules Proc. of State Bar, rule 205) and until he makes restitution to Joanne Dixon in the amount of $3,990 plus 10% interest per annum from March 1, 2007 (or to the Client Security Fund to the extent of any payment from the fund to Joanne Dixon, 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, subdivisions (c) and (d).

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

It is also recommended that if respondent is actually suspended for two years or more, he must remain actually suspended until he 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). (Rules Proc. of State Bar, rule 205.)

[9] It has long been held that ""[r]estitution is fundamental to the goal of rehabilitation." (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1094.) Restitution is a method of protecting the public and rehabilitating errant attorneys because it forces an attorney to confront the harm caused by his misconduct in real, concrete terms. (*Id*. at p. 1093.)

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Exam, as he was ordered to do so in connection with the previous disciplinary case. (Supreme Court case No. S166101, State Bar Court case No. 07-O-12155.)

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter. Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.[10]

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: January _____, 2009

LUCY ARMENDARIZ
Judge of the State Bar Court

[10] 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.)