

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 07-O-14109-LMA
)	
CHESTERFIELD SPAHR,)	DECISION
)	
Member No. 190173,)	
)	
<u>A Member of the State Bar.</u>)	

INTRODUCTION

In this default matter, respondent **Chesterfield Spahr** (respondent) is charged with four counts of misconduct in one client matter. The charged misconduct includes: (1) failure to perform legal services with competence; (2) committing acts of moral turpitude by repeatedly misrepresenting to his client the status of her case; (3) failure to properly respond to reasonable client status inquiries and failure to keep his client informed of significant developments in a matter in which respondent had agreed to provide legal services; and (4) failure to cooperate and participate in a disciplinary investigation. The court finds, by clear and convincing evidence, that respondent is culpable of all but one charged act of misconduct.

In view of respondent's misconduct, the aggravating circumstances, and the lack of any mitigating circumstances, 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 one year 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).)

PERTINENT PROCEDURAL HISTORY

This proceeding was initiated by the filing of a Notice of Disciplinary Charges (NDC) against respondent by the State Bar of California, Office of the Chief Trial Counsel (State Bar) on February 20, 2008.¹ The State Bar was represented in this matter by Deputy Trial Counsel Manuel Jimenez (DTC Jimenez).

A copy of the NDC was properly served upon respondent on February 15, 2008, by certified mail, return receipt requested, addressed to respondent at his official membership records address (official address). The NDC was not returned by the U.S. Postal Service.

On March 6, 2008, a Notice of Assignment and Notice of Initial Status Conference was filed in this matter, setting an in person status conference for April 7, 2008. A copy of the notice was properly served upon respondent by first-class mail, postage fully prepaid, on March 6, 2008, addressed to respondent at his official address. The copy of the notice was returned to the State Bar Court by the U.S. Postal Service bearing a sticker reflecting that respondent had moved and left no address. Thus, the U.S. Postal Service was unable to forward the notice.

On April 7, 2008, the court held a status conference in this matter. Respondent did not appear at the status conference either in person or through counsel. That same date, the court filed a Status Conference Order which set forth that the State Bar was to submit its Motion for Entry of Default within 10 days. A copy of said order was properly served on respondent by first-class mail, postage fully prepaid, on April 7, 2008, addressed to respondent at his official address. The copy of the order was returned to the State Bar Court by the U.S. Postal Service

¹ On January 9, 2008, a 20-day letter was mailed to respondent at his official membership records address. The 20-day letter was not returned by the postal service.

bearing a sticker reflecting that respondent had moved and left no address. Thus, the U.S. Postal Service was unable to forward the notice.

Efforts to contact respondent by telephone at the telephone number listed with his official address and at four other possible telephone numbers were to no avail. Furthermore, a search for respondent in the 2008 editions of Parker's Directory and the California Directory of Attorneys did not lead to the discovery of any contact information of which DTC Jimenez was not already aware.

As respondent did not file a response to the NDC as required by rule 103 of the Rules of Procedure of the State Bar of California (Rules of Procedure), on April 29, 2008, the State Bar filed a motion for the entry of respondent's default. The motion also contained a request that the court take judicial notice, pursuant to Evidence Code section 452, subdivision (h), of all of respondent's official membership addresses, the declaration of Manuel Jimenez and Exhibit 1.² A copy of the motion was properly served on respondent on April 29, 2008, by certified mail, return receipt requested, addressed to respondent at his official address.

When respondent failed to file a written response within 10 days after service of the motion for the entry of his default, on May 15, 2008, the court filed an Order of Entry of Default (Rule 200 – Failure to File Timely Response), Order Enrolling Inactive and Further Orders.³ A copy of said order was properly served upon respondent on May 15, 2008, by certified mail, return receipt requested, addressed to respondent at his official address. The return receipt bearing an illegible signature was returned to the State Bar Court by the U.S. Postal Service.

² The court grants the State Bar's request and takes judicial notice of all of respondent's official membership addresses.

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.

On June 10, 2008, the State Bar filed a brief on the issues of culpability and discipline. In its brief, the State Bar requested that the court grant a waiver of the hearing in this matter.

This matter was submitted for decision on June 4, 2008. However, on August 19, 2008, the court filed notice of its intent to take judicial notice of respondent's prior record of discipline in S165359 (State Bar Court case number 05-O-04590-LMA). Furthermore, the State Bar was ordered to file with the court within twenty days after service of this notice/order a certified copy of respondent's prior record of discipline and a further brief on the appropriate level of discipline in this matter in light of respondent's prior record of discipline and the application of standard 1.7(a) of the Standards for Attorney Sanctions for Professional Misconduct. The court also directed the clerk to vacate the submission date.

On September 9, 2008, the State Bar filed a second request for wavier of the hearing in this matter and a brief on the issues of culpability and discipline. On September 19, 2008, the State Bar filed a supplement to its request for waiver of the hearing and brief on the issues of culpability and discipline. This matter was thereafter submitted for decision on September 22, 2008.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent was admitted to the practice of law in the State of California on November 26, 1997, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

Counts One Through Four

On or about March 8, 2005, client Shelly Lal (Lal) hired respondent to pursue a wrongful death action on behalf of herself and her minor son, against the California Highway Patrol, for

the wrongful death of her husband, who was shot and killed by highway patrol officers during a roadside stop. Lal executed a retainer agreement for a contingency fee.

On or about December 20, 2005, respondent filed suit on behalf of Lal, entitled *Shelly Lal, individually and in her representative capacity on behalf of the Estate of Kamal Lal, decedent, and in her representative capacity as Guardian ad. Litem of Sagar Lal, a minor v. State of California-California Highway Patrol, C.H.P. Officer Frank Newman, C.H.P. Officer Matthew Otterby, et al.*, Case No. 05-447852, filed in Superior Court, County of San Francisco.

On or about August 23, 2006, the defendants successfully removed the matter to the United States District Court in the Northern District of California (District Court) now identified as case number c 06-05158 PH.

On or about October 18, 2006, Lal consented to the withdrawal of co-counsel, Mark Webb, and the prosecution of the claim by respondent. The Affidavit of Shelly Lal and Consent for Mark L. Webb to Withdraw was filed in the federal case. The court granted Webb's motion to withdraw on or about November 15, 2006. In his request to withdraw, Webb cited to irreconcilable differences with his co-counsel, respondent, and indicated that respondent would continue the representation of Lal.

On or about November 30, 2006, the District Court held a case management conference. Respondent attended and appeared on behalf of Lal. The District Court ordered respondent to submit documentation regarding Lal's guardian ad litem. The District Court further ordered that initial disclosures should be submitted within two weeks, and that the parties should meet and confer within thirty days. The District Court set a further case management conference for January 18, 2007, at 2:30 p.m. The parties were ordered to submit case management conference statements by January 11, 2007. Respondent was present in court and aware of the District Court's orders.

Respondent did not file the case management conference statement as ordered by the District Court on November 30, 2006. Respondent did not file the guardian ad litem status as also requested by the District Court on November 30, 2006.

In December 2006, Lal spoke with respondent requesting a status of her case. Respondent advised Lal that he had a conference call with Judge Hamilton who asked that they try to settle the case.

On January 18, 2007, the District Court held the follow up case management conference. Respondent failed to appear. On or about January 19, 2007, the District Court issued an Order to Show Cause (OSC) against respondent for failing to appear. The matter was continued to February 1, 2007, at 2:30 p.m.

On or about January 19, 2007, the court clerk sent a copy of the OSC to respondent, and he received it. The January 19, 2007 OSC stated, "If plaintiff fails to appear her complaint will be dismissed."

On or about February 1, 2007, the District Court held the OSC. Respondent failed to appear. The District Court dismissed Lal's case.

Respondent did not advise Lal of the January 19, 2007⁴ OSC or of the dismissal of her case.

In or about March 2007, Lal again called respondent and asked for the status of her case. Respondent told Lal that the opposing side needed time for discovery, because when Lal's husband died, he had a fractured knee, and the defense wanted time to investigate this matter. In fact, at the time that respondent made these representations to Lal, the case had already been dismissed by the District Court.

⁴ Although the NDC alleges this date at January 18, 2007, this appears to be a typographical error.

In or about June 2007, Lal again inquired about the status of her case. Respondent informed Lal that he was in the process of filing pre-trial motions. In fact, at the time respondent made these representations to Lal, the case had already been dismissed by the District Court.

In or about September 2007, Lal again inquired about the status of her case. Respondent told Lal that she would have to go in for depositions in approximately November 2007. In fact, at the time that respondent made these representations to Lal, the case had already been dismissed by the District Court.

In or about October 2007, Lal consulted with another attorney, Wynn Herron (Herron). Herron advised Lal that the federal suit had been dismissed. On or about October 2007, Lal called respondent and advised him of Herron's statement that the case had been dismissed. Respondent advised Lal that he had filed other papers in state court. In fact, subsequent to the dismissal of the federal suit, respondent did not file anything additional in state court.

On or about October 12, 2007, Lal made a complaint to the State Bar.

On or about November 15, 2007, State Bar Investigator Willis Shalita wrote a letter to respondent at his official membership records address maintained by the State Bar pursuant to section 6002.1 of the Business and Professions Code. This address is 214 Grant Ave., Suite 301, San Francisco, California 94108. Investigator Shalita sent his letter via United States mail, postage prepaid. In his letter, Investigator Shalita described Lal's complaint and requested that respondent respond to the complaint by November 30, 2007.

Respondent received Investigator Shalita's letter. He failed to answer the letter or otherwise respond to the allegations of the Lal complaint.

Count One – Rule 3-110(A) of the Rules of Professional Conduct

The State Bar proved by clear and convincing evidence that respondent willfully violated rule 3-110(A) of the Rules of Professional Conduct.⁵ Rule 3-110(A) provides that “[a] member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” By failing to: (1) file the case management conference statement as ordered on November 30, 2006; (2) submit the information on the guardian ad litem status as requested by the court on November 30, 2006; (3) appear at the case management conference on January 18, 2007; and (4) appear at the hearing on the OSC on February 1, 2007, resulting in the dismissal of the Lal case, respondent repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).⁶

Count Two – Section 6106 of the Business and Professions Code

The State Bar proved by clear and convincing evidence that respondent violated section 6106. Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. By making misrepresentations to Lal regarding the status of her case in March, June, September and October 2007, respondent engaged in acts of dishonesty or moral turpitude in violation of section 6106.

Count Three – Section 6068, Subdivision (m)

The State Bar proved by clear and convincing evidence that respondent violated section 6068, subdivision (m) of the Business and Professions Code.⁷ Section 6068, subdivision (m), provides that it is an attorney’s duty “[t]o respond promptly to reasonable status inquiries of

⁵ Unless otherwise indicated, all further references to rule(s) refer to the Rules of Professional Conduct of the State Bar of California.

⁶ The court does not base culpability on respondent’s failure to respond to the District Court’s January 19, 2007 OSC, as there is no evidence that respondent, in fact, had to respond to the OSC.

⁷ Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

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 advise Lal of the January 19, 2007 OSC and the dismissal of her case, respondent failed to keep his client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in violation of section 6068, subdivision (m).

The court, however, declines to find that respondent violated section 6068, subdivision (m), by failing to properly respond to the reasonable status inquiries of his client by failing to give Lal accurate information during her March, June, September and October 2007 inquiries regarding the status of her case. Section 6068, subdivision (m) requires an attorney to respond promptly to a client’s reasonable status inquiries. The rule does not provide that the response to the client’s inquiries be accurate. In this matter, there is no evidence that respondent did not promptly respond to Lal’s status inquiries. Rather, the evidence shows that respondent made misrepresentations to Lal in response to Lal’s status inquiries. These misrepresentations form the basis for the culpability finding in count two. Thus, the court declines to find that respondent violated section 6068, subdivision (m), by failing to properly respond to Lal’s reasonable status inquiries.

Count Four – Section 6068, Subdivision (i)

The State Bar proved by clear and convincing evidence that respondent violated section 6068, subdivision (i). Section 6068, subdivision (i) requires an attorney to cooperate with and participate in a State Bar disciplinary investigation or proceeding. Respondent violated section 6068, subdivision (i) by failing to respond to Investigator Shalita’s November 15, 2007 letter or otherwise respond to Lal’s complaint.

MITIGATING/AGGRAVATING CIRCUMSTANCES

As respondent's default was entered in this matter, respondent failed to introduce any mitigating evidence on his behalf and none can be gleaned from the record.

In aggravation, respondent has a prior record of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b)(i).)⁸ On September 23, 2008, the Supreme Court issued an order in S165359 (State Bar Court case number 05-O-04590) suspending respondent from the practice of law for two years, staying execution of the suspension, and actually suspending respondent from the practice of law for 90 days and until the State Bar Court grants a motion to terminate respondent's actual suspension pursuant to rule 205 of the Rules of Procedure. In this prior disciplinary matter, in which respondent's default was also entered, respondent was found culpable of violating section 6103 for failing to obey orders of the superior court; section 6068, subdivision (b) for failing to file and serve an opposition to plaintiff's post-judgment motion as respondent was ordered to do; section 6068, subdivision (b) for failing to appear at the hearing on the OSC; and section 6068, subdivision (i) by failing to respond to letters from a State Bar investigator, failing to meet with the State Bar investigator as scheduled, and failing to send documents to the State Bar investigator as he said he would do. In mitigation, minimal weight was given to respondent's lack of a prior record of discipline because he had only been in practice a short period of time. In aggravation, respondent engaged in multiple acts of misconduct, and respondent's failure to participate in the disciplinary proceeding prior to the entry of his default was a further aggravating circumstance.

As a further aggravating circumstance in this current proceeding, the court notes that respondent engaged in multiple acts of misconduct in this matter. (Standard 1.2(b)(ii).)

⁸ Pursuant to Evidence Code section 452(d), the court takes judicial notice of its records which reflect that the Supreme Court issued a disciplinary order as to respondent on September 23, 2008, in S165359 (State Bar Court case number 05-O-04590).

Respondent's misconduct also significantly harmed his client, Shelly Lal. (Standard 1.2(b)(iv).) Respondent's misconduct led to the dismissal of Lal's case.

Respondent's failure to participate in this disciplinary proceeding prior to the entry of his default is a further aggravating circumstance. (Standard 1.2(b)(vi).)⁹

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 set 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."

For guidance in determining the appropriate discipline recommendation, the court first looks to the standards. (*In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) In this case, the standards provide for the imposition of sanctions ranging from reproof to disbarment. (Standards 2.3, 2.4(b), and 2.6(a).) In addition, standard 1.6(a) states, in pertinent part, "If two or more acts of professional misconduct are found or acknowledged in a single disciplinary proceeding, and different sanctions are prescribed by these standards for said acts, the sanction imposed shall be the more or most severe of the different applicable sanctions." In this case, the most severe sanction is set forth in standard 2.3 which provides that offenses involving moral turpitude, fraud, dishonesty or concealment must "result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled

⁹ In its second request for waiver of the default hearing and brief on the issues of culpability and discipline, the State Bar contends that in aggravation, respondent's misconduct caused significant harm because it led to two bench warrants being issued against respondent's client, and that respondent's failure to refund any unearned fees demonstrates indifference toward rectification of or atonement for the consequences of his misconduct. However, there is no evidence whatsoever that any bench warrants were issued against respondent's client or that respondent's client paid respondent any fees, as the retainer agreement called for a contingency fee.

and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law.”

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.

Furthermore, standard 1.7(a) provides that if a member is found culpable of misconduct in any proceeding and the member has a record of one prior imposition of discipline, the degree of discipline imposed in the current proceeding must be greater than that imposed in the prior proceeding unless the prior discipline was remote in time and the offense was minimal in severity.

The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) “[E]ach case must be resolved on its own particular facts and not by application of rigid standards.” (*Id.* at p. 251.) Nevertheless, while the standards are not binding, they are entitled to significant weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.) The Supreme Court will reject a recommendation consistent with the standards only when the court entertains “grave doubts as to its propriety.” (*In re Naney* (1990) 51 Cal.3d 186, 190.) Even though the standards are merely guidelines for the imposition of discipline, there is “no reason to depart from them in the absence of a compelling reason to do so. ([Citation].)” (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

In this matter, respondent has been found culpable of repeatedly failing to perform legal services with competence; making misrepresentations to his client regarding the status of her case on several occasions in 2007; failing to keep his client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services; and failing to cooperate with and participate in a State Bar disciplinary investigation or proceeding. In

addition, there are several aggravating circumstances in this matter, including respondent's noteworthy prior record of discipline which included a 90-day period of actual suspension. There were no mitigating circumstances in this matter. Of particular concern to this court is respondent's failure to participate in this disciplinary proceeding. Respondent's failure to participate in this proceeding leaves the court without any understanding as to the underlying cause or causes for respondent's misconduct or from learning of any mitigating circumstances which would justify this court's departure from the discipline recommended by the standards.

The State Bar recommends that respondent be suspended from the practice of law for three years, that execution of the suspension be stayed, and that respondent be actually suspended for two years and until he demonstrates to the State Bar Court his rehabilitation, present fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), makes restitution,¹⁰ and complies with rule 9.20 of the California Rules of Court. However, the court finds the State Bar's recommended discipline excessive. The case law cited by the State Bar in its second request for waiver of default hearing and brief on the issues of culpability and discipline in support of its discipline recommendation is clearly distinguishable from the present matter.

In determining the discipline to recommend in this matter, the court is guided by the standards set forth above, as well as the following cases: *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73; *In the Matter of Trillo* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 59; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631; *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366; and *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459.

¹⁰ There is no evidence that respondent's client paid respondent any fees, as the retainer agreement called for a contingency fee. Thus, the court will not recommend any restitution in this matter.

Therefore, after considering the standards and case law noted above, the court finds that the appropriate discipline in this matter includes a period of stayed suspension and a lengthy period of actual suspension which will continue until the State Bar Court grants a motion to terminate respondent's actual suspension.

RECOMMENDED DISCIPLINE

The court hereby recommends that respondent **CHESTERFIELD A. SPAHR** 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 one year 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 he has shown proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. (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 not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners as respondent was ordered on September 23, 2008, to take this examination in connection with his prior disciplinary matter.

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and that he perform the acts specified in subdivisions (a) and (c) of rule 9.20 within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

COSTS

The court recommends 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