

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 07-O-14589-DFM
)	
ERIN H. HUMPHRIES,)	
)	DECISION
Member No. 110669,)	
)	
<u>A Member of the State Bar.</u>)	

INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, Deputy Trial Counsel Brandon K. Tady (DTC Tady) appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent **ERIN H. HUMPHRIES** did not appear in person or by counsel even though she has actual knowledge of this proceeding.

In the notice of disciplinary charges (NDC), the State Bar charges respondent with three counts of professional misconduct in a single client matter. As set forth *post*, the court finds that respondent is culpable on only two of the three counts and concludes that the appropriate level of discipline is a one-year stayed suspension and a thirty-day suspension that will continue until respondent makes and the State Bar Court grants a motion to terminate her suspension (Rules Proc. of State Bar, rule 205).¹

¹ The court rejects the State Bar's contention that respondent should also be placed on a one-year period of probation. In a default proceeding, it is inappropriate for the State Bar Court to recommend both a period of suspension *and* a period of probation. (Rules Proc. of State Bar, rule 205; *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 110.)

PERTINENT PROCEDURAL HISTORY

On January 27, 2009, the State Bar filed the NDC in this proceeding and properly served a copy of it on respondent by certified mail, return receipt requested, at her latest address shown on the official membership records of the State Bar of California (official address). (Bus. & Prof. Code, § 6002.1, subd. (c);² Rules Proc. of State Bar, rule 60(b).)

On January 29, 2009, the State Bar received, from the United States Postal Service (Postal Service), a return receipt (i.e., a green card) for the copy of the NDC that was served on respondent. That return receipt establishes that the copy of the NDC that was served on respondent was actually delivered to respondent's official address where it was signed for by B. Kardani.

Respondent's response to the NDC was due no later than February 23, 2009. (Rules Proc. of State Bar, rule 103(a); see also Rules Proc. of State Bar, rule 63 [computation of time].) Respondent failed to file a response. Accordingly, on April 13, 2009, the State Bar filed a motion for the entry of respondent's default and properly served a copy of that motion on respondent at her official address by certified mail, return receipt requested. Respondent, however, never filed a response to that motion or to the NDC.

The declarations of DTC Tady and State Bar paralegal Robert Melone (which are both exhibits to the State Bar's April 13, 2009, motion for entry of default) establish that, in addition to performing its minimum statutory duty to serve a copy of the NDC on respondent by mail to her official address, the State Bar undertook additional measures to insure that respondent has actual knowledge of this proceeding. Moreover, the second declaration of DTC Tady (which was filed on April 30, 2009) establishes that respondent has actual knowledge of this disciplinary proceeding and that she consciously chose not to appear and participate in the proceeding. In

² Unless otherwise noted, all further statutory references are to the Business and Professions Code.

sum, the court finds that respondent was given adequate notice of this proceeding. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108; see also *Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.)

Because all of the statutory and rule prerequisites were met and because respondent was given adequate notice of this proceeding, this court filed an order on May 4, 2009, in which it entered respondent's default and, as mandated by section 6007, subdivision (e)(1), ordered that she be involuntarily enrolled as an inactive member of the State Bar of California effective three days after service of the order by mail (i.e., May 7, 2009).

On June 23, 2009, the State Bar filed a waiver of default hearing and brief regarding culpability and discipline. And, on June 26, 2009, the court took the case under submission for decision without a hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on (1) the allegations contained in the NDC, which have been deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)) and (2) the facts in this court's official file in this matter (Rules Proc. of State Bar, rule 585).

Jurisdiction

The State Bar's official membership records, of which the court takes judicial notice, establish that respondent was admitted to the practice of law on December 12, 1983, and that she has been a member of the State Bar of California since that time.³

³ In the NDC, the State Bar incorrectly alleges that respondent was admitted to the practice of law on December 13, 1983.

Respondent's Suspension from the Practice of Law

Respondent failed to pay her annual State Bar membership fees for the year 2000. Thus, on August 17, 2001, the Supreme Court filed an order suspending respondent from the practice of law effective September 1, 2001, and until she pays all accrued fees, penalties, and costs. A copy of the Supreme Court's August 17, 2001, suspension order was properly served on respondent by mail. Respondent actually received that copy of the order. To date, respondent has not paid her annual membership fees for the year 2000. Respondent has been continuously suspended from practice since September 1, 2001.

Keller Client Matter

In about October 2007, Steven Keller contacted respondent to prepare and send to his wife, Doris, a letter asking her to sign certain documents regarding his pension plan. Steven's pension plan was one of the subjects in the *Marriage of Keller*, a civil proceeding then pending in the Orange County Superior Court. Doris was represented in that proceeding by Attorney Donald Bebereia.

Even though respondent told Steven that she no longer practiced law and that she worked as a registered nurse, respondent agreed to prepare and send the requested letter to Doris for a \$50 fee. Steven paid respondent's \$50 fee. And, in October 2007, respondent sent Doris a letter stating that she represented Steven; asking Doris to sign certain documents regarding Steven's pension plan; and warning Doris that Steven had instructed respondent to commence legal action against Doris if Doris did not sign the documents. In October 2007, when respondent sent the letter to Doris, respondent was grossly negligent in not knowing that Doris was represented by Attorney Bebereia.⁴

⁴ In the NDC, the State Bar alleges that "Respondent knew, or was grossly negligent in not knowing, that [Doris] Keller was represented by attorney Bebereia." Even though that factual allegation is deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of

On October 31, 2007, Attorney Bebereia wrote respondent a letter demanding that she stop communicating with his client Doris and advising respondent that she was practicing law while suspended.

Count 1 – Unauthorized Practice of Law (§§ 6068, subd. (a), 6125, 6126)

In count 1, the State Bar charges that respondent willfully violated her duty, under section 6068, subdivision (a), to obey the laws of this state by violating sections 6125 and 6126, which proscribe the unauthorized practice of law in California.

In this state, it is well established that a suspended attorney engages in the unauthorized practice of law merely by holding himself or herself out as practicing or as entitled to practice law. (§ 6126, subd. (b); *Crawford v. State Bar* (1960) 54 Cal.2d 659, 666.) In fact, even an implied representation (as opposed to an express representation) of the entitlement to practice by a suspended attorney constitutes the unauthorized practice of law. (*In re Cadwell* (1975) 15 Cal.3d 762, 771, fn. 3.)

The record clearly establishes that respondent willfully violated her duty, under section 6068, subdivision (a), to obey the laws of this state because she engaged in the unauthorized practice of law in willful violation of sections 6125 and 6126, subdivision (b) by sending the October 2007 letter to Doris for Steven. When respondent sent that letter to Doris, respondent improperly (1) held herself out as practicing and as entitled to practice law and (2) practiced law.

State Bar, rule 200(d)(1)(A)), it *establishes* only the lesser of the allegations (i.e., that respondent was grossly negligent). (Cf. *Young v. State Bar* (1990) 50 Cal.3d 1204, 1216 [court must resolve all reasonable doubts in respondent's favor]; *In re Aquino* (1989) 49 Cal.3d 1122, 1130 [when equally reasonable inferences may be drawn from the facts, court must accept the inference that leads to a conclusion of innocence]; see also *In the Matter of Freydl* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 349, 359 [taking as established only the lesser of the charges in each count].)

Count 2 – Communicating with a Represented Party (Rule 2-100(A))

In count 2, the State Bar charges that respondent willfully violated rule 2-100(A) of the Rules of Professional Conduct of the State Bar of California. Rule 2-100(A) provides: “While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member *knows to be represented* by another lawyer in the matter, unless the member has the consent of the other lawyer.” (Italics added.)

Specifically, the State Bar charges that respondent willfully violated rule 2-100(A) by sending the October 2007 letter to Doris when respondent either knew or was grossly negligent in not knowing that Doris was represented by Attorney Bebereia. The State Bar cites no authority for its novel contention that an attorney violates rule 2-100(A) by communicating with a represented party when the attorney knew or was grossly negligent in not knowing that the party was represented. Such a knew or should have known “standard” is clearly inconsistent with rule 2-100’s plain language. Under rule 2-100’s plain language, an attorney is culpable of violating the rule *only* if the attorney contacts a represented party with *actual knowledge* that the party is represented by counsel. (Accord, *Snider v. Superior Court* (Quantum Productions, Inc.) (2003) 113 Cal.App.4th 1187, 1215-1216.) In that regard, there is no direct or circumstantial evidence in the record that establishes that respondent sent the October 2007 letter to Doris with actual knowledge that Doris was represented by Attorney Bebereia. In fact, as noted *ante*, the record establishes only that respondent was grossly negligent in not knowing that Doris was represented. Such a “grossly negligent in not knowing” level of knowledge simply will not and does not support a rule 2-100 violation. (*Id.* at p. 1214.) Accordingly, count 2 is dismissed with prejudice.

Count 3 – Moral Turpitude (§ 6106)

In count 3, the State Bar charges that respondent willfully violated section 6106, which proscribes acts involving moral turpitude, dishonesty, or corruption. In effect, in count 3, the State Bar charges that respondent's unauthorized practice of law, as found under count 1 *ante*, involved moral turpitude in violation of section 6106. The record clearly establishes such a charge. (*In re Cadwell, supra*, 15 Cal.3d at pp. 771-772.) If respondent did not know that her conduct in sending the October 2007 letter to Doris constituted the unauthorized practice of law and thus violated the Supreme Court's August 17, 2001, suspension order, then respondent, at the very least, displayed an indifferent disregard of her duty to comply with the Supreme Court's suspension order. (*Id.* at p. 772) Furthermore, respondent must have known that her October 2007 letter was misleading to Doris with respect to respondent's lack of entitlement to practice law. (*Ibid.*)

Finally, it is not duplicative to find that respondent's unauthorized practice of law violated both section 6068, subdivision (a) and section 6106. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 169.)

AGGRAVATING AND MITIGATING CIRCUMSTANCES

Aggravation

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)⁵

⁵ All further references to standards are to this source.

Failure to File a Response to the NDC

Respondent's failure to file a response to the NDC in the present proceeding, which allowed her default to be entered, is an aggravating circumstance. (See *Conroy v. State Bar* (1990) 51 Cal.3d 799, 805.) First, it indicates that respondent fails to appreciate the seriousness of the charges against her. (*Ibid.*) Second, it indicates that she “does not comprehend the duty as an officer of the court to participate in disciplinary proceedings. [Citation.]” (*In the Matter of Stansbury, supra*, 4 Cal. State Bar Ct. Rptr. at p. 109.)

Harm to Public and Administration of Justice

There is no evidence of any significant harm to the public or the administration of justice that is separate and apart from the harm to the public and administration of justice that is inherent in the unauthorized practice of law. Accordingly, no finding of aggravation based on harm to the public or the administration of justice is appropriate. (Cf. *In the Matter of Laden* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 678, 684; *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192, 203; see also *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 240 [the harm to the public and administration of justice that is inherent in the unauthorized practice of law limits lack of harm mitigation].)

Mitigation

The State Bar of California's official membership records, of which this court takes judicial notice, show that respondent has no prior record of discipline and that respondent was continuously an active member of the State Bar from her admission in December 1983 through September 1, 2001, when she was suspended for not paying her 2000 annual membership fees.⁶

⁶ Because of the importance that our Supreme Court places on the issue of whether or not an attorney has a prior record of discipline (e.g., *In re Mostman* (1989) 47 Cal.3d 725, 741), the State Bar Court has long judicially noticed the State Bar's official records in determining the presence or lack of a prior record of discipline.

Accordingly, notwithstanding the State Bar's representation to this court to the contrary, respondent is entitled to significant mitigation for her almost 18 years (from December 1983 to September 2001) of discipline-free practice. (Std 1.2(e)(i).)

DISCUSSION

Standard 1.3 provides that the primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.6(a) provides that, 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).) The most severe of the applicable sanctions in the present proceeding is found in standard 2.3, which applies to respondent's section 6106 violation. Standard 2.3 provides:

Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled 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.

The case of *In the Matter of Trousil*, *supra*, 1 Cal. State Bar Ct. Rptr. 229 is instructive on the issue of discipline in this proceeding. In *Trousil*, the attorney was placed on two years'

stayed suspension and two years' probation on conditions, including a thirty-day suspension for accepting employment from a client and appearing in bankruptcy court while suspended for nonpayment of his Bar dues. Moral turpitude was not found, but the attorney had *three* prior records of discipline. In addition, there was compelling mitigation, including mental impairment, in *Trousil*.

After carefully considering the found misconduct, the aggravating and mitigating circumstances, the standards, and case law, the court concludes that the appropriate level of discipline to recommend in this proceeding is a one-year stayed suspension and a thirty-day suspension that will continue until respondent makes and the State Bar Court grants a motion to terminate her suspension (Rules Proc. of State Bar, rule 205).

DISCIPLINE RECOMMENDATION

Suspension Recommended

It is hereby recommended that respondent **ERIN H. HUMPHRIES**, State Bar number 110669, be suspended from the practice of law in California for one year; that execution of that period of suspension be stayed subject to the following conditions; and that she be actually suspended from the practice of law for thirty days and until the following conditions are satisfied:

- A. The State Bar Court has granted a motion to terminate respondent's current actual suspension under rule 205 of the Rules of Procedure; and
- B. If respondent remains suspended for two years or more as a result of not satisfying the preceding condition, she has shown proof satisfactory to the State Bar Court of her rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii)

Future Probation

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

MPRE

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order in this matter or during the period of her suspension, whichever is longer, and to provide satisfactory proof of her passage to the State Bar's Office of Probation in Los Angeles within that same time period.. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

Conditional Rule 9.20 Obligation

The court further recommends that respondent be required 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 120 and 130 calendar days, respectively, after the effective date of the Supreme Court order in this proceeding in the event respondent remains actually suspended for 90 days after the effective date of that order.⁷

Costs

It is further recommended that costs be awarded to the State Bar in accordance with

⁷ In the event respondent is eventually required to comply with rule 9.20 because of the length of her actual suspension, she must file a rule 9.20(c) affidavit even if she has no clients on the date of the Supreme Court order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or a contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d); see also *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 296.)

section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment.

Dated: September 24, 2009.

DONALD F. MILES
Judge of the State Bar Court