

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos.: 08-O-10363-RAP
)	(09-O-13416-RAP)
ERIC JON PROSSER,)	
)	
Member No. 185726,)	DECISION
)	
A Member of the State Bar.)	
_____)	

I. INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar) charges respondent **ERIC JON PROSSER**¹ with a total of six counts of professional misconduct. For the reasons set forth *post*, the court finds that respondent is culpable on five of the six counts and concludes that the appropriate level of discipline for the found misconduct is one year's stayed suspension together with a 60-day suspension continuing until respondent makes and the State Bar Court grants a motion to terminate the suspension (Rules Proc. of State Bar, rule 205).

The State Bar was represented by Deputy Trial Counsel Charles T. Calix. Respondent did not appear in person or by counsel.

¹ Respondent was admitted to the practice of law in California on December 16, 1996, and has been a member of the State Bar of California since that time. Even though he has no prior record of discipline, he has been suspended from the practice of law since July 1, 2009, for not paying his 2009 annual State Bar Membership Fees.

II. KEY PROCEDURAL HISTORY

The State Bar filed the notice of disciplinary charges (hereafter NDC) in this proceeding on March 12, 2010. And, on that same day, the State Bar properly served a copy of the NDC on respondent by certified mail, return receipt requested, at his latest address shown on the official membership records of the State Bar of California (hereafter official address) in accordance with Business and Professions Code section 6002.1, subdivision (c).² On March 12, 2010, the State Bar also mailed two additional copies of the NDC to respondent by certified mail, return receipt requested at alternative addresses for respondent. The United States Postal Service (hereafter Postal Service) did not return any of these three copies of the NDC to the State Bar as undeliverable or otherwise. However, the Postal Service also did not return a receipt (i.e., green card) for any of these three copies.

Regardless of whether respondent ever received one of the three copies of the NDC that the State Bar mailed to him on March 12, 2010, the State Bar's initial service on respondent on that date was complete at the time of the mailing. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108.) Moreover, the court finds that regardless of whether respondent has actual knowledge of this disciplinary proceeding, respondent was given adequate notice of this proceeding for purposes of due process. First, the State Bar fulfilled its statutory duty to serve a copy of the NDC on respondent at his official address by certified mail, return receipt requested (§ 6002.1, subd. (c)). Second, the State Bar undertook additional *significant* and

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

meaningful measures in an attempt to provide respondent with actual notice of this proceeding.³
(*Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.)

Respondent's response to the NDC was to have been filed no later than April 6, 2010. (Rules Proc. of State Bar, rule 103(a); see also Rules Proc. of State Bar, rule 63 [computation of time].) Respondent, however, did not file a response. And, on June 23, 2010, the State Bar filed a motion for the entry of respondent's default and properly served a copy of that motion on respondent by certified mail, return receipt requested, at his official address.⁴ Thereafter, respondent did not file a response to that motion or to the NDC, and the time in which he had to file each of those responses has run.

Because all of the statutory and rule prerequisites were met, this court filed an order on July 14, 2010, in which it entered respondent's default and, as mandated by section 6007, subdivision (e)(1), ordered that respondent be involuntary enrolled as an inactive member of the State Bar of California effective July 17, 2010.⁵

On August 4, 2010, the court took the matter under submission for decision without a hearing.

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³ Those measures are set forth in detail in DTC Calix's declaration attached to the State Bar's motion for entry of default filed on June 23, 2010, and in DTC Calix's supplemental declaration filed on July 9, 2010.

⁴ Commendably, the State Bar also mailed copies of its motion to respondent at four additional addresses that it had reason to believe might be respondent's current address.

⁵ Of course, an inactive member of the State Bar of California cannot lawfully practice law in this state. (§ 6126, subd. (b); see also § 6125.) Moreover, an attorney who has been enrolled inactive cannot lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Ibid.*; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under section 6088 and Rules of Procedure of the State Bar, rules 200(d)(1)(A) and 201(c), upon the entry of respondent's default, the factual allegations (but not the charges or conclusions) set forth in the NDC were deemed admitted and no further proof was required to establish the truth of those facts.⁶ Accordingly, the court adopts the facts alleged (but not the charges or the conclusions) in the NDC as its factual findings. Briefly, those factual findings establish the following charged disciplinary violations by clear and convincing evidence.

A. The Schmidt Client Matter (Case Number 08-O-10363-RAP)

In about May 2007, Lance Schmidt employed respondent to represent him in a civil case against Bluestone Realty. Schmidt paid respondent an advance fee of \$2,500. On about May 16, 2007, respondent filed a lawsuit against Bluestone for Schmidt.

On about July 9, 2007, respondent sent a letter to Schmidt informing him that Bluestone had not filed an answer to the complaint and that respondent would be requesting the entry of default.

On about July 10, 2007, respondent caused a default to be entered against Bluestone. And, on about October 9, 2007, respondent obtained a \$36,546.04 default judgment against Bluestone for Schmidt. Respondent, however, did not inform Schmidt of that judgment.

From July 2007 until about August 24, 2007, Schmidt repeatedly telephoned respondent's office, each time leaving a message to inquire into the status of his case. During that same time period, Schmidt also sent about five emails to respondent inquiring into the status of his case.

⁶ Notwithstanding the entry of respondent's default, "All reasonable doubts must [still] be resolved in [his] favor . . . , and if equally reasonable inferences may be drawn from a proven fact, the inference which leads to a conclusion of innocence rather than guilt [must] be accepted [by the court]. [Citation.]" (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 563.)

Respondent received those telephone messages and emails, but did not return Schmidt's calls or emails.

On about August 24, 2007, Schmidt sent a letter to respondent by certified mail directed to his office address asking respondent to contact him. Respondent received the letter, but did not respond to it.

On about October 3, 2007, Schmidt sent respondent another letter expressing his dissatisfaction and requesting that respondent contact him. Respondent received the letter, but did not respond to it.

On about February 20, 2008, a State Bar investigator mailed a letter to respondent at his official address informing him of a complaint against him by Schmidt and requesting that respondent provide a written response. Respondent received the letter, but did not provide a response to the State Bar.

On about March 17, 2008, a State Bar investigator mailed another letter to respondent at his official address. Enclosed with that March 17, 2008 letter was a copy of the State Bar's February 20, 2008 letter to respondent about the Schmidt complaint. Respondent received the State Bar's March 17, 2008 letter, but did not provide a response to the State Bar.

Finally, on about March 17, 2009, Schmidt sent respondent another letter expressing his dissatisfaction and requesting that respondent contact him. Respondent received the letter, but did not respond to it.

Count One – Failure to Communicate (§ 6068, subd. (m))

Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

By failing to inform Schmidt of the \$36,546.04 default judgment that respondent obtained against Bluestone on October 9, 2007, respondent failed to keep his client reasonably informed of significant developments in willful violation of section 6068, subdivision (m). In addition, by failing to respond to (1) Schmidt's numerous telephone messages and emails between July 2007 and about August 24, 2007, and (2) Schmidt's letters of August 24, 2007; October 3, 2007; and March 17, 2009; respondent failed to respond promptly to the reasonable status inquiries of a client in willful violation of section 6068, subdivision (m).

Count Two – Failure to Cooperate in Investigation (§ 6068, subd. (i))

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney. By failing to provide a written response to the allegations regarding respondent's conduct in the Schmidt matter or otherwise cooperating in the investigation of the Schmidt matter, respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i).

B. The Gaslamp Tavern Client Matter (Case Number 09-O-13416-RAP)

Beginning in about September 2007, respondent represented Gaslamp Tavern, L.L.C. (hereafter Gaslamp) with regard to a lease and other property issues.

In about October 2007, Gaslamp was named as a defendant in a lawsuit pending in the San Diego County Superior Court. And, on March 3, 2008, Dan Hurd, a managing owner of Gaslamp, employed respondent to represent Gaslamp in that lawsuit. Thereafter, respondent represented Gaslamp in that lawsuit and communicated with Hurd until about March 2009.

In about March 2009, respondent ceased performing legal services for Gaslamp and ceased all communication with Hurd. Respondent did not inform Hurd that he was withdrawing from employment by Gaslamp. Nor did respondent file a motion to withdraw with the superior court.

From about March 2009 to June 2009, Hurd repeatedly attempted to contact respondent at his office by telephone, each time leaving a message inquiring into the status of his case. During that same time period, Hurd also sent respondent multiple emails inquiring into the status of his case. Respondent received Hurd's telephone messages and emails, but did not respond to them.

In about June 2009, Hurd hired Attorney Lawrence Kouns to take over the representation of Gaslamp in the superior court lawsuit. On about June 5, 2009, Attorney Kouns mailed respondent a letter on behalf of Gaslamp specifically requesting that respondent release the client's files. Kouns also faxed that letter to respondent. Respondent received the letter, but did not respond to it. Nor did respondent release any client files or papers belonging to Gaslamp to Gaslamp or Attorney Kouns.

On about October 22, 2009, and November 23, 2009, a State Bar investigator mailed, to respondent at his official address, letters requesting that respondent respond in writing to a complaint by Attorney Kouns concerning respondent's representation of Gaslamp. Both letters were returned "Moved Left No Address, Unable to Forward, Return to Sender." Respondent has provided no other address to be used for State Bar purposes.

It is clear that respondent changed his official address no later than July, 8, 2009. However, as of March 24, 2010, the date on which the State Bar filed the NDC in this proceeding, respondent still had not notified the State Bar's Membership Records Office of the change.

Count Three – Failure to Communicate (§ 6068, subd. (m))

By failing to respond to Hurd's numerous telephone messages and emails between March and June 2009, respondent failed to respond promptly to the reasonable status inquiries of a client in willful violation of section 6068, subdivision (m).

Count Four – Improper Withdrawal From Employment (Rule 3-700(A)(2))

In count four, the State Bar charges that respondent willfully violated rule 3-700(A)(2) of the State Bar Rules of Professional Conduct.⁷ That rule provides that an attorney “shall not withdraw from employment until the [attorney] 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.” The record establishes that respondent willfully violated rule 3-700(A)(2) when he ceased performing legal services for Gaslamp in about March 2009 without informing Hurd that he was withdrawing from employment, when he failed to file a motion to withdraw in the superior court, and when he violated rule 3-700(D)(1) by failing to release Gaslamp’s client file to Attorney Kouns or to Gaslamp in accordance with Attorney Kouns’s June 5, 2009 letter (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 280-281).

Count Five -- Failure to Release File (Rule 3-700(D)(1))

In count five, the State Bar charges respondent’s failure to release Gaslamp’s file as a separate violation of rule 3-700(D)(1). However, that failure is more appropriately charged and found to be a part of the rule 3-700(A)(2) violations found in count four *post*. (*In the Matter of Dahlz, supra*, 4 Cal. State Bar Ct. Rptr. at pp. 280-281.) Accordingly, count five is dismissed with prejudice.

Count Six -- Failure to Update Official Address (§ 6068, subd. (j))

In count six, the State Bar charges that respondent willfully violated section 6068, subdivision (j), which requires that attorneys “comply with the requirements of Section

⁷ Unless otherwise noted, all further references to rules are to these Rules of Professional Conduct.

6002.1.” Section 6002.1, subdivision (a)(1) mandates that each attorney maintain, on the official membership records of the State Bar of California, his or her current office address or, if the attorney does not have an office, an address to be used for State Bar purposes. In addition, section 6002.1, subdivision (a), mandates that each attorney notify the State Bar's membership records office of any changes of address within 30 days of the change.

The record clearly establishes the charged violation of section 6068, subdivision (j). No later than October 2009, respondent moved from his official address and did not notify the State Bar's membership records office of his move or of his new address and telephone number as required by section 6002.1.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Factors in Mitigation

Respondent does not have a prior record of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std 1.2(e)(i).)⁸ Respondent was admitted in December 1996 and did not engage in misconduct until about July 2007. Thus, he is entitled to mitigation for his more than nine years of discipline free practice. (*Ibid.*; *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [more than 10 years of discipline free practice is entitled to significant mitigation].)

B. Factors in Aggravation

1. Multiple Acts

Respondent's misconduct in this consolidated proceeding involves multiple acts of misconduct. (Std. 1.2(b)(ii).)

⁸ All further references to standards are to this source.

2. Failure to File a Response to the NDC

Respondent's failure to file a response to the NDC in this proceeding, which allowed his default to be entered, is an aggravating circumstance. (Std. 1.2(b)(vi).)

V. DISCUSSION ON DISCIPLINE

In determining the appropriate level of discipline, the 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 for guidance. (*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, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for respondent's misconduct is found in standard 2.6, which applies to respondent's violations of section 6068. Standard 2.6 provides that a violation of section 6068 “shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3.” And standard 1.3 provides:

The primary purposes of disciplinary proceedings conducted by the State Bar of California and of sanctions imposed upon a finding or acknowledgment of a member's professional misconduct are 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. Rehabilitation of a member is a permissible object of a sanction imposed upon the member but only if the imposition of rehabilitative sanctions is consistent with the above-stated primary purposes of sanctions for professional misconduct.

Of course, the generalized language of standard 2.6 provides little, if any, guidance to the court.

(*In re Morse* (1995) 11 Cal.4th 184, 206.)

This court finds that *Franklin v. State Bar* (1986) 41 Cal.3d 700 is instructive on the appropriate level of discipline. In that case, the attorney, who did not default, was placed on one year's stayed suspension and one year's probation conditions, which included forty-five days' actual suspension. In two client matters, the attorney was found culpable of not performing the services for which he had been retained or of not communicating with his clients about their cases and repeatedly refusing to respond to client inquiries as well as not cooperating with a new attorney. In aggravation, the attorney misled the disciplinary hearing panel, and one of the clients suffered significant harm. In mitigation, the court found no prior instances of discipline in about five years of practice.

This court also finds that *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831 is instructive on discipline. In that case, the attorney, like respondent, defaulted. The attorney was placed on eighteen months' stayed suspension and two years' probation on conditions, which included a ninety-day suspension. In two client matters, the attorney failed to perform, to return client files, to participate in the State Bar's disciplinary investigation, and to obey a discovery order. In aggravation, there was significant client harm. There was no mitigation.

On balance, the court finds that the appropriate discipline for the found misconduct in the present proceeding is one year's stayed suspension together with a minimum suspension of sixty days that will continue until respondent makes and the State Bar Court grants a motion to terminate the suspension (Rules Proc. of State Bar, rule 205)..

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent **ERIC JON PROSSER** be suspended from the practice of law in the State of California for one year and that execution of the one-year suspension be stayed on the condition that he be suspended from the practice of law in this state

for at least sixty days and until he makes and the State Bar Court grants a motion, under Rules of Procedure of the State Bar, rule 205, to terminate his suspension.

Moreover, if Prosser's suspension in this matter continues for two years or more as a result of his failure to satisfy the preceding rule 205 condition, the court recommends that he remain suspended until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

The court also recommends that Prosser be ordered to comply with the conditions of probation, if any, hereafter imposed on him by the State Bar Court as a condition for terminating his suspension. (Rules Proc. of State Bar, rule 205(g).)

VII. MPRE

The court further recommends that Eric Jon Prosser be ordered to take and pass the Multistate Professional Responsibility Examination (hereafter MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone (319) 337-1287) within one year after the effective date of the Supreme Court order in this matter or during the period of his suspension, whichever is longer, and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same time period. Failure to pass the MPRE within the specified time results in actual suspension until passage without further hearing. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; but see Cal. Rules of Court, rule 9.10(b); Rules Proc. of State Bar, rule 321(a)(1)&(3).)

VIII. RULE 9.20

The court also recommends that, if Eric Jon Prosser remains suspended for 90 days or more, he 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 matter.

IX. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and that the costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: November 1, 2010.

RICHARD A. PLATEL
Judge of the State Bar Court