

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 08-O-10412-LMA
)	
DAVID GERARD MENDEZ,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 99953)	ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this contested, original disciplinary proceeding, the Office of the Chief Trial Counsel of the State Bar of California (“State Bar”) charges respondent **David Gerard Mendez** with three counts of professional misconduct stemming from a single client matter. The court finds, by clear and convincing evidence, that respondent is culpable on two of the three counts. For the reasons stated *post*, the court recommends that respondent be disbarred.

II. PERTINENT PROCEDURAL HISTORY

On June 15, 2009, the State Bar filed a notice of disciplinary charges (“NDC”) in Case No. 08-O-10412. On August 12, 2009, respondent filed an answer to the NDC.

An extensive Stipulation as to Facts and Admission of Documents was filed on December 9, 2009. That same day, the court held a one-day trial on this matter. After the filing of post-trial briefs,¹ the court took this matter under submission for decision on January 11, 2010.

The State Bar was represented by Deputy Trial Counsel Tammy Albertsen-Murray. Respondent represented himself.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Some of the court's findings of fact are based in large part on credibility determinations. After carefully observing respondent's testimony and considering, inter alia, respondent's demeanor while testifying; the manner in which he testified; the character of his testimony; his interest in the outcome in this proceeding; his capacity to perceive, recollect, and communicate the matters on which he testified; and after carefully reflecting on the record as a whole, the court finds that much, if not most, of respondent's testimony lacks credibility. (See, generally, Evid. Code, § 780; *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 736-737; see also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 498, fn. 7 [trial court is not bound to accept as true the sworn testimony of a witness even in the absence of evidence contradicting it].)

In contrast, the court found the testimony of the complaining witness, Nitin Patel to be credible.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 1, 1981, and has been a member of the State Bar of California since that time.

¹ The court grants the State Bar's motion for late filing of its post-trial brief.

B. Findings of Fact

On June 6, 2006, Robert Dov (“Dov”) filed a civil complaint against Ascot LLC (“Ascot Hotel”) in a matter entitled *Robert Dov v. Ascot, LLC*, San Francisco County Superior Court Case No. CUD-06-452913 (“*Dov v. Ascot*”). This cause of action centered on Dov’s allegation that the Ascot Hotel improperly barred his companion animal—a 16-year-old cat—from residing at the hotel. The causes of action set forth in Dov’s complaint included intentional, unlawful housing discrimination; violation of the Unruh Act; intentional infliction of emotional distress; negligent infliction of emotional distress; and unfair business practices.

On July 21, 2006, respondent was hired by Nitin Patel (“Patel”) to defend him and his company, Ascot Hotel, in *Dov v. Ascot*. That same day, Patel signed an attorney-client fee contract and paid respondent \$4,275.00 in advanced fees.

On August 11, 2006, respondent filed an answer to the complaint, as well as a cross-complaint against Dov. The cross complaint was ultimately resolved against Ascot Hotel by way of demurrer on October 10, 2006.

On September 1, 2006, Dov’s attorney, Michael Hall (“Hall”) served form interrogatories and a request for production of documents on respondent at 12 Gough Street, Suite 300, San Francisco, California 94103-1290 (“Gough Street address”). Respondent received these documents and was aware of their contents.

The responses to the form interrogatories and request for production of documents were due on or before October 6, 2006. Respondent failed to provide Hall with responses to these documents on or before October 6, 2006, or at anytime thereafter.

On October 11, 2006, Hall wrote and sent respondent a letter at the Gough Street address. In this letter, Hall advised respondent that the discovery was overdue. Respondent received this letter and failed to respond to Hall or otherwise address the discovery with Hall.

On October 17, 2006, Hall filed a motion to compel responses to discovery and for sanctions (“motion to compel”). The hearing on this motion was scheduled for November 13, 2006.

The motion to compel was served on respondent at the Gough Street address. Respondent received the motion to compel and was aware of its contents. Respondent, however, did not file a response to the motion to compel.

On November 13, 2006, the superior court ruled in Hall’s favor and granted the motion to compel. The court ordered Patel to serve responses to the form interrogatories and request for production of documents within 15 days of notice of the order. The court further ordered Patel to pay sanctions in the sum of \$655.00 to Hall within 30 days of notice of the order.

On November 13, 2006, notice of the superior court’s November 13, 2006 order was served on respondent at the Gough Street address. Respondent received this notice and was aware of its contents. Pursuant to the court’s order, respondent’s responses were due no later than December 4, 2006.

Respondent failed to send discovery responses to Hall on or before December 4, 2006. On December 7, 2006, Hall wrote and sent respondent a letter at the Gough Street Address. In this letter, Hall advised respondent that the discovery responses were due on December 4, 2006. Hall requested that respondent immediately serve his client’s responses. Respondent received Hall’s December 7, 2006 letter and was aware of its contents.

On December 13, 2006, and again on December 18, 2006, respondent notified Patel of the request for production of documents via email. Patel received the December 13, 2006 and December 18, 2006 emails from respondent.

On December 13, 2006, and again on December 18, 2006, respondent informed Hall that he was working on the discovery responses.

On December 26, 2006, Patel responded to the December 13, 2006 and December 18, 2006 emails and emailed a response to respondent entitled “Re: answers to discovery.” Patel provided respondent with two lists, one entitled, “Request for production of Documents (SET ONE)” and a second list entitled “Notice of Deposition and request for production of documents.”

On December 26, 2006, respondent spoke to Hall and advised that he would produce the discovery responses by noon on Friday, December 29, 2006.

On January 2, 2007, respondent sent an email to Hall advising that respondent was in the process of putting together discovery responses and would get the responses to Hall very shortly.

On January 3, 2007, Hall wrote and sent a letter to respondent at the Gough Street address. In his letter, Hall advised respondent that the discovery responses were 30 days overdue and that he would be filing a motion for issue and evidence sanctions.

On February 13, 2007, Hall filed a motion for issue and evidence sanctions—including terminating sanctions (“motion for sanctions”).² That same day, the motion for sanctions was served on respondent at the Gough Street address. Respondent received this motion and was aware of its contents.

Respondent failed to respond to the motion for sanctions. The hearing on the motion for sanctions was held on February 23, 2007. That same day, the superior court granted the motion for sanctions, and terminated the case, ordering that a judgment be entered in favor of Dov.

On February 26, 2007, respondent was served with notice of the superior court’s February 23, 2007 order at the Gough Street Address. Respondent received this notice and was aware of its contents.

² Hall originally filed a motion for issue and evidence sanctions on January 17, 2007; however, the superior court subsequently ordered this motion off calendar due to errors contained in the proof of service.

On May 22, 2007, the superior court entered a judgment of default against Ascot Hotel, in the sum of \$151,200.00, plus attorney's fees and costs of \$26,987.00 payable to Hall. Further, the court ordered that Dov was entitled to recover his costs pursuant to a memorandum of costs.

On June 8, 2007, Hall obtained a writ of execution against Ascot Hotel in the sum of \$178,895.00. On August 1, 2007, a notice of levy was delivered to Patel, by the sheriff, for an amount of \$181,167.50.

As of early June 2007, respondent had not advised Patel that the superior court had ordered Patel to pay over \$600.00 in sanctions on November 13, 2006. Nor had respondent advised Patel of Hall's February 13, 2007 motion for sanctions and the superior court's February 23, 2007 order granting the motion for sanctions, terminating the case, and ordering that a judgment be entered in favor of Dov.

On June 18, 2007, respondent copied, or forwarded an email to Patel, that respondent originally sent to attorney Richard Stratton ("Stratton") on June 15, 2007. In the email, respondent advised Stratton of the judgment against his client, and requested Stratton's assistance to set aside the judgment. Patel did not find out that the adverse judgment against Ascot Hotel was final (and not set aside) until the sheriff arrived with the notice of levy on August 1, 2007.

During the course of the litigation, Patel made numerous phone calls to respondent and left messages on respondent's cell phone, requesting the status of his case. Respondent received the cell phone messages and failed to respond or otherwise apprise Patel of the status of the case.

Respondent failed to abide by the superior court's November 13, 2006 order regarding the Motion to Compel.³ Respondent failed, on behalf of Patel, to serve responses to the form

³ At trial respondent testified that his failure to obey the superior court's order was part of a strategic scheme to prevent Patel from assuming any personal liability in the matter. The court found respondent's testimony on this issue to be inconsistent and disingenuous.

interrogatories and request for production of documents within 15 days of the notice of the order (by December 4, 2006).

Patel ultimately hired new counsel. As a result of Dov's judgment, the Ascot Hotel was forced into bankruptcy. In 2008, respondent paid Patel approximately \$11,000. This payment was a reimbursement for monies seized by the sheriff⁴ and paid to respondent as his retainer.

C. Conclusions of Law

1. Count One – Failure to Perform with Competence

Rules of Professional Conduct of the State Bar of California, rule 3-110(A)⁵ provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence. By failing to: (1) respond to Hall's form interrogatories and request for production of documents; (2) respond to the October 17, 2006 motion to compel; (3) abide by the superior court's November 13, 2006 order regarding the motion to compel; and (4) respond to the February 13, 2007 motion for sanctions; respondent recklessly and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

2. Count Two – Failure to Communicate

Business and Professions Code section 6068, subdivision (m),⁶ 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 timely inform Patel of: (1) the superior court's November 13, 2006 order regarding the motion to compel; (2) the February 13, 2007 motion for sanctions; and (3) the

⁴ The sheriff seized approximately \$4,000 from Patel.

⁵ All further references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

⁶ All further references to section(s) are to the Business and Professions Code, unless otherwise stated.

superior court's February 23, 2007 order granting Dov's motion for sanctions, terminating the case, and ordering that a judgment be entered in favor of Dov; respondent failed to keep his client reasonably informed of significant developments in a matter in which he agreed to perform legal services, in willful violation of section 6068, subdivision (m). And by failing to respond to Patel's numerous messages on his cell phone, respondent failed to respond promptly to reasonable status inquiries of a client in a matter in which respondent agreed to provide legal services, in willful violation of section 6068, subdivision (m).

3. Count Three – Failure to Obey Court Order

Section 6103 provides that “[a] wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.”

The State Bar alleges that respondent willfully violated section 6103 by failing to abide by the superior court's November 13, 2006 order. The court, however, has already relied on this same misconduct as a basis for finding culpability in Count One. Because the misconduct alleged in Count Three mirrors that of Count One, the court finds it to be duplicative, and, therefore, dismisses Count Three with prejudice.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std 1.2(e).)⁷ The instant matter involves one factor in mitigation.

⁷ All further references to standard(s) are to this source.

Respondent entered into an extensive stipulation as to facts and admission of documents with the State Bar. (Std.1.2(e)(v).) Respondent's cooperation with the State Bar constitutes some consideration in mitigation.

B. Aggravation

It is the State Bar's burden to establish aggravating circumstances by clear and convincing evidence. (Std 1.2(b).) The court finds three factors in aggravation.

1. Prior Record of Discipline

Respondent's prior record of discipline is an aggravating circumstance. (Std. 1.2(b)(i).) Respondent has been previously disciplined on three occasions.

On April 18, 1984, the California Supreme Court issued an order (4739) suspending respondent from the practice of law for two years, stayed, with a two-year period of probation, and an actual suspension of 30 days. This discipline resulted from respondent's deceptive conduct in a dispute involving the title of an automobile. Respondent's stipulated misconduct included employing means inconsistent with the truth, committing acts involving dishonesty and moral turpitude, and violating his oath and duties as an attorney. In mitigation, respondent was inexperienced and had only been admitted to the State Bar for a few months when the misconduct occurred. No aggravating factors were identified.

On July 8, 2004, the California Supreme Court issued an order (S124113) suspending respondent from the practice of law for one year, stayed, with a one-year period of probation. This discipline stemmed from a single-client matter in which respondent was found culpable of failing to maintain client funds in trust, failing to account, and failing to cooperate in a State Bar investigation. In aggravation, respondent had a prior record of discipline. No mitigating factors were found.

On October 7, 2004, the California Supreme Court issued an (S126512) suspending respondent from the practice of law for one year, stayed, with a one-year probationary period, and an actual suspension of 30 days. In this matter, respondent failed to refund unearned fees, failed to account, and failed to communicate in two client matters. In aggravation, respondent had two prior instances of discipline. No mitigating factors were found.

2. Significant Harm

The court also finds in aggravation that respondent's misconduct caused significant harm to his client. (Std. 1.2(b)(iv).) As a result of respondent's misconduct, the sheriff served a notice of levy on Patel and seized approximately \$4,000. In addition, the issuance of the default judgment caused the Ascot Hotel to file bankruptcy. The significant harm that respondent caused Patel warrants consideration in aggravation. However, the weight of this aggravation is somewhat diminished by respondent's \$11,000 reimbursement to Patel in 2008.

3. Lack of Insight

At trial, respondent demonstrated a lack of insight into his wrongdoing. (See *In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 830.) Respondent's claim that he intentionally disobeyed the superior court's order to gain a strategic advantage demonstrates a lack of understanding of his duties and obligations as an attorney.

V. 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 sets 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."

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 1.7(b). Standard 1.7(b) provides that, if a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of two prior impositions of discipline, the degree of discipline in the current proceeding must be disbarment unless the most compelling mitigating circumstances clearly predominate.

Standard 1.7(b), however, has not been rigidly applied by the courts. The Supreme Court and Review Department have generally found disbarment to be appropriate under standard 1.7(b) when there is a repetition of offenses for which an attorney has previously been disciplined that demonstrate a pattern of misconduct. (*Morgan v. State Bar* (1990) 51 Cal.3d 598, 607; *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 842.)

Here, respondent has been previously disciplined three times; yet, the present matter reflects a continuing inability to fully appreciate the duties he owes to his clients. Moreover, the lack of compelling mitigating circumstances involved in the present matter and respondent's stated indifference regarding the superior court's order give the court little justification to recommend a level of discipline short of disbarment.

Therefore, having considered the nature and extent of the misconduct, the aggravating and mitigating circumstances, as well as the case law, the court finds that respondent's disbarment is necessary to protect the public, the courts, and the legal community; to maintain high professional standards; and to preserve public confidence in the legal profession.

VI. RECOMMENDED DISCIPLINE

The court recommends that respondent David Gerard Mendez, State Bar Number 99953, be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

It is also recommended that respondent be ordered to comply with rule 9.20 of the California Rules of Court and 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.⁸

VII. ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of California effective three days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 220(c).)

VIII. COSTS

It is 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: March _____, 2010

LUCY ARMENDARIZ
Judge of the State Bar Court

⁸ Respondent is required to file a rule 9.20 affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1998) 44 Cal.3d 337, 341.)