

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case Nos.: **08-O-11369-LMA** (08-O-12180)
)
BRIAN LEO DAY,)
) **DECISION**
)
Member No. 140451,)
)
)
A Member of the State Bar.)
_____)

In this default disciplinary matter, respondent **Brian Leo Day** is charged with multiple acts of professional misconduct in two matters, including (1) failing to perform services competently; (2) failing to communicate with clients; (3) failing to return client files; and (4) failing to cooperate with the State Bar.

The court finds by clear and convincing evidence that respondent is culpable of the alleged counts of misconduct. In view of respondent’s misconduct and the evidence in aggravation, the court recommends, among other things, that respondent be suspended from the practice of law in California for one year, that execution of that period of suspension be stayed, subject to the condition that respondent will be suspended for a minimum of six months and will remain suspended until the State Bar Court grants a motion to terminate his suspension (Rules Proc. of State Bar, rule 205).

II. Pertinent Procedural History

On June 1, 2009, the Office of Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a Notice of Disciplinary Charges (NDC) at his official membership records address.

On August 4, 2009, the State Bar sent a courtesy copy of the NDC to respondent at his official membership records address by regular first class mail. On that same date, a paralegal assisting the deputy trial counsel (DTC) assigned to this matter called a telephone number, which a computer search had generated as respondent's home number. The paralegal left a message on the voice mail at that number. In his message, the paralegal requested that respondent call the DTC assigned to this matter to discuss the NDC and the State Bar's motion for entry of default. No return telephone call was received.

On August 4, 2009, the assigned paralegal twice called respondent at respondent's State Bar official membership records telephone number. But, after the telephone calls were connected to respondent's official membership records telephone number, only a fast beeping sound was heard.

On August 4, 2009, the paralegal also attempted to send an email message about the NDC and the State Bar's motion for entry of default to respondent at his State Bar membership records email address. Respondent did not respond to the email. On that date the paralegal sent a facsimile to (714) 384-6451, which is the fax number listed in respondent's official State Bar membership records. The fax transmission failed. Finally, the paralegal attempted to access the internet website for respondent's law firm; but, received a message from Internet Explorer that read: "Unable to display webpage."

On August 4, 2009, the assigned DTC checked the 2009 Parker's Directory (Parker's). Parker's did not have any address for respondent. On August 5, 2009, the assigned DTC called directory assistance for the area which includes respondent's official membership records address and asked for all the telephone listings for respondent. Directory assistance did not have a listing for respondent.

Respondent did not file a response to the NDC.

On motion of the State Bar, respondent's default was entered on August 21, 2009. The order of entry of default was properly mailed to respondent's official membership records address. Respondent was enrolled as an inactive member under Business and Professions Code section 6007, subdivision (e), on August 24, 2009.

The matter was submitted for decision on October 5, 2009, following the filing of State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 6, 1989, and has since been a member of the State Bar of California.

B. The Waltman Matter (Case No. 08-O-11369)

On or about August 21, 2006, Darrell and Norma Waltman (the Waltmans) employed respondent of the law firm, Day/Eisenberg, to represent them in a construction defect case

against the builder of their home (the builder) and a failure to disclose property defects case against the real estate agents (the agents).¹

On or about July 28, 2007, attorney Mark Eisenberg wrote and mailed a letter to the Waltmans in which it was stated that the Day/Eisenberg law firm had dissolved and that their matter would continue to be handled by respondent. The Waltmans received the letter.

Respondent, however, did not file a claim with the builder or agents; nor did he file a lawsuit against the builder or agents on behalf of the Waltmans.

Between on or about the July 28, 2007 and in or about February of 2008, one of the Waltmans called respondent's office approximately two to three times a month to obtain a status report on their lawsuit. The Waltmans were unable to speak with respondent, but left messages on his telephone voice message system every time they called in which they identified themselves and provided their telephone number. In their messages, the Waltmans requested a status report. Although respondent received the messages, he did not provide the Waltmans with a status report or otherwise communicate with them during that time period.

On or about February 15, 2008, the Waltmans wrote, mailed, and emailed a letter to respondent. In their February 15th letter, the Waltmans stated that respondent had abandoned them and their case as they had been unable to speak with respondent, despite having left several messages on his telephone voice message system. The letter terminated respondent's employment and requested that he release their file to them. Although respondent received the February 15, 2008 letter, he did not respond to it.

On or about February 8, 2008, the State Bar opened an investigation, case No. 08 O-11369, pursuant to a complaint (the Waltman complaint), filed by Norma Waltman (Waltman).

¹ The Waltmans employed respondent because their prior attorney, who had prepared the matter to the point that a lawsuit was ready to be filed, had developed a medical condition that prevented him from continuing to represent them.

On or about April 28 and June 4, 2008, a State Bar investigator wrote respondent regarding the investigation of the Waltman complaint. The investigator's letters requested that respondent respond in writing by May 12, 2008, and June 18, 2008, respectively, to specific allegations of misconduct being investigated by the State Bar. The letters were correctly addressed and properly mailed to respondent at his then current State Bar membership address. Respondent received the investigator's letters.

However, respondent did not provide a written or oral response to the investigator's letter, or otherwise cooperate with the investigation.

Count 1: Failure to Perform Competently (Rules Prof. Conduct, Rule 3-110(A))²

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

By failing to file a claim with the builder or real estate agents and/or by failing to file a lawsuit against the builder in the Waltmans' construction defects case or the real estate agents in the Waltmans' failure to disclose property defects case, respondent intentionally, recklessly and repeatedly failed to perform with competence in willful violation of rule 3-110(A).

Count 2: Failure to Communicate (Bus. & Prof. Code, § 6068, Subd. (m))³

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 communicate with the Waltmans in response to the messages that they left for him, requesting that he contact them and provide them with a status report between on or

² References to rules are to the Rules of Professional Conduct, unless otherwise indicated.

³ References to section(s) are to the provisions of the Business and Professions Code, unless otherwise indicated.

about July 28, 2007 and in or about February 2008, respondent willfully failed to respond promptly to reasonable status inquiries of a client in a matter in which he agreed to provide legal services, in willful violation of section 6068, subdivision (m).

Count 3: Failure to Return Client File (Rule 3-700(D)(1))

Rule 3-700(D)(1) requires an attorney whose employment has terminated to promptly release to a client, at the client's request, all the client's papers and property.

Respondent willfully violated rule 3-700(D)(1) by failing to return the client file to the Waltmans, despite having received the Waltmans' letter, dated February 15, 2008, wherein they terminated respondent's employment and requested that respondent release their file to them.

Count 4: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

Respondent failed to cooperate with the State Bar in willful violation of section 6068, subdivision (i), by failing to respond to the State Bar's April 28 and June 4, 2008 letters or otherwise cooperate in the investigation of the Waltman complaint.

C. The Schnitzer Matter (Case No. 08-O-12180)

On or about December 29, 2005, Mark S. Schnitzer, M.D. (Schnitzer), employed respondent to represent him in a breach of contract action. Schnitzer gave respondent the original documents to establish his claim for approximately \$25,000 to \$30,000 against Mark Czaykowski and his business, Physicians Management Solutions.

On or about October 20, 2006, respondent filed a complaint on behalf of Schnitzer in the Superior Court in the State of California for the County of Riverside (Superior Court), titled *Mark S. Schnitzer, MD., v. Mark Czaykowski dba Physicians Management Solutions*, case No. RIC459170 (*Schnitzer v. Czaykowski*).

On or about October 20, 2006, the Superior Court filed and served on respondent a notice of a case management conference (CMC) in *Schnitzer v. Czaykowski*, which was set for

June 27, 2007. The notice instructed respondent to file and serve notice of the CMC on all defendants. Respondent received the notice. Nonetheless, respondent did not file or serve notice of the CMC in *Schnitzer v. Czaykowski*.

On or about December 11, 2006, respondent filed and served a request for entry of default against the defendants in *Schnitzer v. Czaykowski*. On or about December 11, 2006, the clerk of the court entered the default as requested.

On or about June 27, 2007, respondent did not appear for the CMC in *Schnitzer v. Czaykowski*. The court then issued an order to show cause re sanctions/dismissal (OSC) to respondent for the June 27th failure to appear. The OSC was set for July 27, 2007. Respondent received notice of the OSC.

On or about July 27, 2007, respondent appeared for the OSC in *Schnitzer v. Czaykowski*. The court dismissed the OSC and set the matter for an August 31, 2007 prove-up hearing. Respondent received notice of the prove-up hearing.

Respondent, however, did not appear for the August 31, 2007 prove-up hearing in *Schnitzer v. Czaykowski*. The court then issued an OSC re sanctions/dismissal to respondent for failure to appear at the prove-up hearing. The OSC was set for September 27, 2007. Respondent received notice of the OSC.

Respondent appeared for the September 27, 2007 OSC in *Schnitzer v. Czaykowski*. The court dismissed the OSC and set the matter for a prove-up hearing on February 1, 2008. Respondent received notice of the prove-up hearing.

On or about February 1, 2008, respondent appeared for the prove-up hearing in *Schnitzer v. Czaykowski*. The court ordered that the matter would be submitted once respondent filed a declaration from Schnitzer. Respondent received notice of the court's order that the matter would stand submitted once he filed a declaration from Schnitzer. Respondent, however,

did not contact Schnitzer to obtain a declaration; nor did he file a declaration for Schnitzer, or take any action thereafter in *Schnitzer v. Czaykowski*.

On or about February 28, 2008, the court ordered the matter reset on its trial calendar due to respondent's failure to submit a declaration from Schnitzer. The court also ordered a CMC for March 18, 2008.

Respondent did not appear for the March 18, 2008 CMC in *Schnitzer v. Czaykowski*. The court issued an OSC regarding sanctions/dismissal to respondent for failure to appear. The OSC was set for October 21, 2008.

Respondent, however, failed to appear for the October 21, 2008 OSC hearing regarding sanctions/dismissal; and the court dismissed the complaint in *Schnitzer v. Czaykowski*. Respondent, who received notice that the complaint had been dismissed, took no action to reinstate *Schnitzer v. Czaykowski*.

Between in or about January of 2008 and in or about May of 2008, Schnitzer called respondent's office once or twice a month and sent approximately two emails a month to obtain a status report on his lawsuit. Schnitzer was unable to speak with respondent. But, Schnitzer left messages on respondent's telephone voice message system every time he called in which he identified himself, provided his telephone number, and requested a status report.

In or about April and/or May of 2008, Schnitzer's messages and email requested that respondent release Schnitzer's file and original documents to Schnitzer, if respondent would not return the messages requesting a status report. Respondent received the messages and email. Respondent did not respond to Schnitzer's communications.

On or about May 19, 2008, the State Bar opened an investigation, case No. 08-O-12180, pursuant to a complaint (the Schnitzer complaint), filed by Schnitzer.

On or about July 23 and September 11, 2008, a State Bar investigator wrote to respondent regarding the investigation of the Schnitzer complaint. The investigator's letters requested that respondent respond in writing by August 5, 2008, and September 25, 2008, respectively, to specific allegations of misconduct being investigated by the State Bar. The letters were correctly addressed and properly mailed to respondent at his then current State Bar membership address. Respondent received the investigator's letters.

However, respondent did not provide a written or oral response to the investigator's letter, or otherwise cooperate with the investigation.

Count 5: Failure to Perform Competently (Rule 3-110(A))

By repeatedly failing to appear at CMCs and other hearings set by the Superior Court, by failing to obtain and file the declaration of Schnitzer, so that the court would take *Schnitzer v. Czaykowski* under submission, by failing to appear for the October 21, 2008 OSC and permitting *Schnitzer v. Czaykowski* to be dismissed, and by taking no action to reinstate *Schnitzer v. Czaykowski* after it had been dismissed, respondent intentionally, recklessly and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A)

Counts 6 and 7: Failure to Communicate (Bus. & Prof. Code, § 6068, Subd. (m))

Respondent willfully violated section 6068, subdivision (m) by failing to respond to Schnitzer's numerous phone messages and emails, between in or about January 2008 and in or about May 2008, requesting that respondent provide Schnitzer with a status report on his lawsuit, and by failing to inform Schnitzer of the following significant events: (1) that Schnitzer needed to submit a declaration to obtain a judgment in *Schnitzer v. Czaykowski*; and (2) that the court dismissed *Schnitzer v. Czaykowski*.

Count 8: Failure to Return Client File (Rule 3-700(D)(1))

Respondent failed to promptly release to the client, upon termination of employment, at the request of the client, the client file and papers in willful violation of rule 3-700(D)(1) by failing to release Schnitzer's file and original documents to him upon receipt of Schnitzer's messages, sent in or about April and/or May 2008, requesting the return of his file and original documents.

Count 9: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

Respondent failed to cooperate with the State Bar in willful violation of section 6068, subdivision (i), by failing to respond to the State Bar's July 23 and September 11, 2008 letters or otherwise cooperate in the investigation of the Schnitzer complaint.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁴

Respondent was admitted to the practice of law in June 1989 and has no prior record of discipline. Respondent's 18 years of discipline-free practice at the time of his misconduct in 2007, is a strong mitigating factor. (Std. 1.2(e)(i).) "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.)

B. Aggravation

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

Respondent committed multiple acts of wrongdoing by failing to perform services competently, by failing to communicate with clients, by failing to return the client files to the

⁴ All further references to standards are to this source.

Waltmans and to Schnitzer, and by failing to cooperate with the State Bar regarding both the Waltman and the Schnitzer investigations. (Std. 1.2(b)(ii).)

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

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

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.) The standards provide a broad range of sanctions ranging from reproof to disbarment, depending upon the gravity of the offenses and the harm to the victim. Standards 2.4(b), 2.6, and 2.10 apply in this matter.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) As the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

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.

Standard 2.4(b) provides that culpability of a member's willful failure to perform services and willful failure to communicate with a client must result in reproof or suspension, depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

Standard 2.10 provides that culpability of other provisions of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client.

The State Bar urges that respondent be suspended for two years, stayed, and be actually suspended for one year. The State Bar cited several cases in support of its recommended level of discipline, including *Lister v. State Bar* (1990) 51 Cal.3d 1117 and *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631. In both *Lister* and *Bach*, the attorneys were actually suspended from the practice of law for nine months.

In *Lister*, the attorney abandoned three clients. The abandonments were accompanied by a failure to return the client's file and cooperate with successor counsel in one matter, by incompetent tax advice in a second matter, and by failure to communicate and to return an unearned fee in the third matter. One of the clients was harmed. *Lister* also failed to cooperate with the State Bar's investigation, but did participate in the State Bar proceedings after the filing of the notice to show cause. The Supreme Court ordered that *Lister* be suspended for three years, stayed the execution of that suspension, placed him on probation for three years, and ordered him actually suspended for nine months.

In *Bach*, the attorney abandoned two clients and had been previously disciplined (including 30 days actual suspension) for a third abandonment occurring at roughly the same time. The attorney also failed to return the unearned portion of an advance fee and failed to cooperate with the State Bar investigation. In aggravation, the attorney committed multiple acts of misconduct, caused harm to his clients, and evidenced a lack of understanding of his professional obligations and a desire to avoid responsibility for his actions. His prior disciplinary record also was an aggravating factor. In mitigation he engaged in some pro bono work and practiced without discipline for approximately 20 years prior to his first misconduct. The review department recommended that the attorney be suspended for two years, that execution of that suspension be stayed, that he be placed on probation for two years, and that he be actually suspended for nine months.

In the instant matter, the court finds respondent's misconduct to be less serious than the misconduct of the attorneys in either *Lister* or *Bach*. In the instant matter, respondent abandoned two clients; while in *Lister* the attorney abandoned three clients. In *Bach*, the attorney abandoned two clients, as did respondent herein. But, the attorney in *Bach* had a prior record of discipline in which he abandoned a third client. And, the attorneys in both *Lister* and *Bach* failed to return unearned advance fees that had been paid to them. Like the attorneys in *Bach* and *Lister*, respondent, herein, failed to return client files and failed to cooperate with the State Bar.

In addition to the cases cited by the State Bar, the court finds the following cases to be instructive in determining the appropriate discipline in this matter: *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690; *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831; and *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585.

In *Aulakh*, the attorney was given a one-year stayed suspension and three-year probation, including 45 days actual suspension and restitution of \$3,000, for his misconduct in a single client matter. The attorney was culpable of failure to perform services competently, improper withdrawal from employment while the client was incarcerated, failure to render an accounting of unearned fees, and failure to return unearned fees. The attorney had no prior record of discipline in 20 years. But, in aggravation the attorney was found to have caused significant harm to his client by leaving her stranded in jail and was found to have been very uncooperative during the disciplinary process.

Greenwood involved two client matters. The attorney was found culpable of two serious instances of reckless failure to perform legal services, improper withdrawal from employment in one matter, failure to communicate, failure to maintain the respect due to the courts, failure to obey a court order, failure to return a client file, and failure to cooperate with State Bar investigations. The court determined that the attorney's misconduct warranted a discipline recommendation of 18-months stayed suspension, a two-year probation, and a 90-day actual suspension. Like respondent, herein, the attorney had defaulted in the disciplinary proceedings.

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

In recommending discipline, the “paramount concern is protection of the public, the courts and the integrity of the legal profession.” (Snyder v. State Bar (1990) 49 Cal.3d 1302.) Failing to appear and participate in the hearing shows that respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (Conroy v. State Bar (1991) 53 Cal.3d 495, 507-508.) Respondent’s failure to participate in this proceeding leaves the court without information about the underlying cause of his misconduct or of any mitigating circumstances surrounding his misconduct.

Instead of cooperating with the State Bar or rectifying his misconduct, respondent defaulted in this disciplinary proceeding. Therefore, balancing all relevant factors – respondent’s misconduct, the standards, the case law, the aggravating evidence and his lack of a prior record of discipline in 18 years of practice, the court concludes that placing respondent on a suspension for a minimum of six months would be appropriate to protect the public and to preserve public confidence in the profession.

VI. Recommendations

A. Discipline

Accordingly, the court hereby recommends that respondent **Brian Leo Day** be suspended from the practice of law in California for one year, that execution of that period of suspension be stayed, and that respondent be suspended from the practice of law for a minimum of six months and he remain suspended until the following requirements are satisfied:

1. The State Bar Court grants a motion to terminate respondent’s suspension pursuant to rule 205 of the Rules of Procedure of the State Bar; and
2. If respondent remains suspended for two years or more as a result of not satisfying the preceding requirement, he must also provide proof to the State Bar

Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

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

B. Multistate Professional Responsibility Exam

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 imposing discipline in this matter or during the period of his suspension, whichever is longer, and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

C. California Rules of Court, Rule 9.20

Respondent must also 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 imposing discipline in this matter. Willful failure to do so may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.⁵

⁵ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

D. Costs

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

Dated: December _____, 2009

LUCY ARMENDARIZ
Judge of the State Bar Court