

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of) Case No.: 08-O-12050-LMA
)
KAREN HAMILTON,)
) DECISION
Member No. 71093,)
)
A Member of the State Bar.)
_____)

I. Introduction and Pertinent Procedural History

This default matter was submitted for decision on January 20, 2009. At the time of submission, the State Bar of California, Office of the Chief Trial Counsel (State Bar), was represented in this matter by Deputy Trial Counsel Treva Stewart (DTC Stewart). Respondent Karen Hamilton (respondent) failed to participate in this matter either in-person or through counsel.

The State Bar filed a Notice of Disciplinary Charges (NDC) against respondent on October 17, 2008. On November 5, 2008, a copy of the NDC was properly served on respondent in the manner set forth in rule 60 of the Rules of Procedure of the State Bar of California (Rules of Procedure).¹ A courtesy copy of the NDC was also served on respondent by certified mail,

¹ Unless otherwise indicated, all documents were properly served pursuant to the Rules of Procedure.

return receipt requested, addressed to respondent in care of the UPS Store, 201 A. McRay Street #262, Hollister, CA 95023 (the A. McRay address).²

As respondent did not file a response to the NDC, on December 11, 2008, the State Bar filed and properly served on respondent a motion for the entry of respondent's default.³

When respondent failed to file a written response within ten days after service of the motion for the entry of her default, on December 30, 2008, the court filed an order of entry of default and involuntary inactive enrollment.⁴ A copy of the order was properly served on respondent that same day. A copy was also served on respondent via first-class mail to respondent at the A. McRay address. Neither copy was returned to the court by the U.S. Postal Service as undeliverable or for any other reason.

Thereafter, the State Bar requested the hearing in this matter be waived, and this matter was submitted for decision.⁵

Efforts by the State Bar to contact and locate respondent were fruitless.⁶ The court concludes that respondent was given sufficient notice of the pendency of this proceeding to

² A copy of the NDC had previously been served on respondent on October 17, 2008, by regular mail, addressed to respondent at both the official membership records address maintained by respondent pursuant to Business and Professions Code section 6002.1, subdivision (a) and at the A. McRay address.

³ The motion also contained a request that the court take judicial notice of all of respondent's official membership addresses. The court grants this request.

⁴ Respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (e), was effective three days after the service of this order by mail.

⁵ Exhibits 1-2 attached to the State Bar's December 11, 2008 motion for the entry of respondent's default are admitted into evidence.

⁶ On or about December 5, 2008, DTC Stewart received an unsigned letter dated November 29, 2008, from a Paul Hamilton who identified himself as respondent's son. The letter noted that respondent currently has no business or residence address in California and that she has stayed in British Columbia off and on since last May. Enclosed with the letter were both envelopes containing the NDCs. Mr. Hamilton noted that he has been unable to deliver the enclosed letters to his mother and had no idea when he might be able to get them to her. He noted that he occasionally checks her mailbox (presumably the box at the UPS store) but has been unable to forward anything.

satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220 [126 S.Ct. 1708, 164 L.Ed.2d 415].)

II. Findings of Fact

A. Jurisdiction

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).) All violations have been proven by clear and convincing evidence.

Respondent was admitted to the practice of law in the State of California on December 22, 1976, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

B. The Mendez Matter (Case No. 08-O-12050)

On or about September 19, 2007, client Ginger Mendez (Mendez) hired respondent to initiate divorce proceedings on her behalf.

On or about September 19, 2007, the parties executed a written fee agreement. The fee agreement called for a retainer deposit of \$3,000.00, to be credited towards initial fees and costs. Five hundred dollars was stated to be a "true retainer" and non-refundable. Respondent's fees were to be billed at an hourly rate of \$275.00 per hour.

On or about September 19, 2007, Mendez paid respondent the sum of \$3,000.00 pursuant to the fee agreement.

On or about November 5, 2007, Mendez met with respondent at respondent's office to discuss the divorce proceedings.

Thereafter, respondent took no action on behalf of Mendez. Respondent did not file suit for divorce on behalf of Mendez.

On or between November 2007 and February 2008, Mendez made repeated efforts to contact respondent to ascertain the status of her divorce case. Mendez telephoned respondent on at least six occasions and left messages for respondent. Respondent received the messages and failed to return the call or otherwise apprise Mendez of the status of her case.

In or about February 2008, Mendez hired attorney Peter Spurzem to complete her divorce.

On or about March 2, 2008, Mendez wrote to respondent at her law offices at 339 7th Street, Hollister, California 95023. In her letter, Mendez terminated respondent's services. Mendez requested a full refund of the \$3,000.00. Mendez also requested that respondent forward her file to attorney Peter Spurzem.

Respondent received Mendez's letter of March 2, 2008. Respondent forwarded Mendez's file to attorney Peter Spurzem. Attorney Spurzem confirmed that the file he received from respondent contained a copy of the client-attorney fee agreement and four pages of notes.

Any work prepared by respondent on behalf of Mendez was preliminary in nature and provided no benefit to Mendez. Respondent did not complete the tasks for the divorce. She did not earn the \$2,500 that she was supposed to bill at her hourly rate. Respondent did not earn the \$2,500 that Mendez gave to her on or about September 19, 2007. Respondent failed to return the \$2,500 to Mendez.

On or about February 20, 2008, attorney Spurzem filed suit on behalf of Mendez, *Ginger Mendez v. John Mendez*, case no. FL08-00078, filed in Superior Court, County of San Benito. Attorney Spurzem continued to represent Mendez throughout her divorce proceedings.

On or about June 9, 2008, State Bar Investigator Syed Majid (Majid) spoke to respondent regarding the Mendez complaint.

Respondent advised Majid that she had closed down her practice due to illness and no longer received mail at her official membership records address of 339 7th Street, #M, Hollister, California 95023. Respondent advised Majid that she was receiving mail at a UPS store at 201 A. McRay Street, #262, Hollister, California, 95023.

Investigator Majid requested that respondent update her official membership records address to reflect her true address.

To date, respondent has failed to update her membership records address to the McRay address or to some other address where she would, in fact, receive the mail.

III. Conclusions of Law

A. Count One: Rules of Professional Conduct of the State Bar of California, Rule 3-110(A)⁷ [Failure to Perform with Competence]

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence. Respondent willfully violated rule 3-110(A) by failing to take action on Mendez's divorce from November 5, 2007 until March 2, 2008, when respondent's services were terminated.

B. Count Two: Section 6068, Subdivision (m), of the Business and Professions Code⁸ [Failure to Respond to Client Inquiries]

Section 6068, subdivision (m), provides that it is an attorney's duty "[t]o 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." Respondent violated section 6068, subdivision (m), by failing to respond to the telephone calls made by Mendez between November 2007 and February 2008.

⁷ All further references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

⁸ All further references to section(s) are to the Business and Professions Code, unless otherwise stated.

C. Count Three: Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund unearned fees. According to the factual allegations of the NDC, the fee agreement called for a retainer deposit of \$3,000.00, to be credited towards initial fees and costs; however, \$500 of this was a “true retainer” and non-refundable. The NDC alleged, in pertinent part, that respondent did not set aside the time nor complete the tasks for the divorce, and that respondent did not earn the initial \$500 of her fee agreement. However, there is no evidence that the \$500 was not a “true retainer.” A “true retainer” is earned upon receipt. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164.) Thus, even though respondent’s work on Mendez’s matter was merely preliminary and provided no benefit to Mendez, only \$2,500 should have been returned to Mendez as unearned fees upon respondent’s termination. As such, the court finds that respondent willfully violated rule 3-700(D)(2) by failing to return \$2,500 in unearned fees to Mendez.

D. Count Four: Section 6068, Subdivision (j) [Failure to Update Membership Address]

Section 6068, subdivision (j), provides that it is the duty of an attorney to comply with the requirements of section 6002.1. Section 6002.1 requires that members maintain, on the official membership records of the State Bar, their current office address and telephone number,⁹ and in the event that a member’s address or office telephone information changes, the member must notify the membership records office of the State Bar within 30 days. Respondent willfully violated section 6068, subdivision (j), by failing to update her membership records address after vacating the 7th Street address, which violates of the requirements of section 6002.1.

⁹ If the member does not maintain an office, then they are required to list the address to be used for State Bar purposes.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

As respondent's default was entered in this matter, respondent failed to introduce any mitigating evidence on her behalf. Nevertheless, the court takes judicial notice of respondent's membership records pursuant to Evidence Code section 452, subdivision (h), which reflects that respondent has no prior record of discipline and practiced law for nearly 31 years prior to engaging in her first act of misconduct in the current proceeding. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e)(i) (standard).) An unblemished discipline record for nearly 31 years is entitled to considerable weight in mitigation. (*In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749.)

B. Aggravation

In aggravation, the court notes that respondent engaged in multiple acts of misconduct in this matter. (Standard 1.2(b)(ii).)

Respondent spoke to a State Bar Investigator regarding the Mendez complaint. She was therefore aware of the State Bar's investigation of this matter, and the State Bar Investigator requested that respondent update her official membership records address. Her failure to do so reflects her indifference toward rectification of or atonement for the consequences of her misconduct (standard 1.2(b)(v)) and reflects a lack of cooperation with the State Bar during its disciplinary investigation (standard 1.2(b)(vi)).

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 purpose 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.”

In addition, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards provide for the imposition of sanctions ranging from reproof to disbarment. (Standards 2.4(b), 2.6, and 2.10.) In addition, standard 1.6(a) states, in pertinent part, “If two or more acts of professional misconduct are found or acknowledged in a single disciplinary proceeding, and different sanctions are prescribed by these standards for said acts, the sanction imposed shall be the more or most severe of the different applicable sanctions.” In this case, the most severe sanction is set forth in standard 2.6, which provides for suspension or disbarment for a violation of section 6068, depending on the harm, if any, to the victim and the gravity of the offense.

The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) “[E]ach case must be resolved on its own particular facts and not by application of rigid standards.” (*Id.* at p. 251.) Nevertheless, while the standards are not binding, they are entitled to significant weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.) The Supreme Court will reject a recommendation consistent with the standards only when the court entertains “grave doubts as to its propriety.” (*In re Naney* (1989) 51 Cal.3d 186, 190.) Even though the standards are merely guidelines for the imposition of discipline, there is “no reason to depart from them in the absence of a compelling reason to do so. ([Citation].)” (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar recommends that respondent be suspended from the practice of law for two years; that execution of such suspension be stayed; and that respondent be actually suspended for

90 days and ordered to refund unearned fees. The court, however, does not concur with the State Bar's discipline recommendation. In particular, the court finds the period of actual suspension recommended by the State Bar to be excessive, given that respondent's misconduct involved only one client, involved no acts of moral turpitude, and she had practiced law for nearly 31 years prior to any act of misconduct. Nevertheless, the court finds that a period of actual suspension is appropriate, as respondent was aware of the State Bar investigation in this matter, yet failed to update her membership records address to an address where she could be reached so as to be able to fully participate in this matter.

Accordingly, after considering the misconduct found in this matter, the aggravating and mitigating circumstances, the applicable standards, and the following cases: *Layton v. State Bar* (1990) 50 Cal.3d 889; *Van Sloten v. State Bar* (1989) 48 Cal.3d 921; *Wren v. State Bar* (1983) 34 Cal.3d 81; and *Calvert v. State Bar* (1991) 54 Cal.3d 765, the court recommends to the Supreme Court the imposition of the following discipline.

VI. Recommended Discipline

The court recommends that respondent Karen Hamilton be suspended from the practice of law for one year; that execution of such suspension be stayed; and that respondent be actually suspended from the practice of law for 30 days and until: (1) respondent makes restitution to Ginger Mendez in the amount of \$2,500 plus 10% interest per annum from September 19, 2007 (or to the Client Security Fund to the extent of any payment from the fund to Ginger Mendez, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation;¹⁰ and (2) the State Bar Court grants a motion to terminate respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Rules Proc. of State Bar, rule 205(a)-(c).)

¹⁰ Any restitution owned to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d).

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until 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). (See also, Rules Proc. of State Bar, rule 205(b).)

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

It is also recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners within one year after the effective date of the discipline imposed herein or during the period of her actual suspension, whichever is later, and furnish satisfactory proof of such to the State Bar's Office of Probation within said period.

VII. 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: April _____, 2009

LUCY ARMENDARIZ
Judge of the State Bar Court