

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case Nos. 08-O-12347-PEM (09-O-10200)
)	
CLYDE OLIVER WEST,)	
)	DECISION; ORDER OF INVOLUNTARY
Member No. 51796,)	INACTIVE ENROLLMENT; AND
)	ORDER SEALING CERTAIN
A Member of the State Bar.)	DOCUMENT
_____)	

I. Introduction

In this default disciplinary matter, respondent **Clyde Oliver West** is charged with seven counts of professional misconduct in two client matters, including (1) failing to perform services competently; (2) failing to communicate with client; (3) improperly withdrawing from employment; (4) failing to return client file; and (5) failing to return unearned fees (\$2,500).

The court finds, by clear and convincing evidence, that respondent is culpable of the alleged counts of misconduct. In view of respondent’s serious misconduct and the evidence in aggravation, including two prior records of discipline, the court recommends that respondent be disbarred from the practice of law.

II. Pertinent Procedural History

On July 14, 2009, the Office of the 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. Respondent did not file a response.

Respondent's default was entered on September 17, 2009, and respondent was enrolled as an inactive member on September 20, 2009.

On October 9, 2009, the State Bar requested that certain documents attached to its brief be sealed, specifically State Bar exhibit 2 (Stipulation re Facts and Conclusions of Law) and State Bar exhibit 3 (Confidential Statement of Alternative Dispositions and Orders), until they are filed in case Nos. 06-O-15439 and 07-O-11299. The Stipulation need not be sealed because it is now filed and posted on the State Bar's website and is therefore public. But the Confidential Statement of Alternative Dispositions and Orders (Statement) must remain confidential.

Accordingly, the court orders that the Statement be sealed (State Bar exhibit 3 attached to the State Bar's Request for Waiver of Default Hearing; Brief on Culpability and Discipline filed October 9, 2009). (Rules Proc. of State Bar, rule 806.)

This matter was submitted for decision on October 13, 2009.

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).)

Respondent was admitted to the practice of law in California on January 5, 1972, and has since been a member of the State Bar of California.

A. The Espinoza Matter (Case No. 08-O-12347)

In or about June 6, 2005, Jesse Espinoza hired respondent to represent him in his ongoing product liability lawsuit, *Espinoza v. Cooper Tire*, case No. SCV 17158, filed in Placer County Superior Court on May 21, 2004 (Espinoza matter). On or about November 24, 2004, the case joined with Judicial Council Coordination Proceeding No. 4292, filed in Los Angeles County Superior Court, consolidating several cases against Cooper Tire.

On or about June 6, 2005 the parties executed a contingent fee agreement.

On or about June 9, 2005, respondent filed a substitution of attorney in the Espinoza matter.

On or about December 22, 2005, counsel for Cooper Tire propounded special interrogatories seeking plaintiff's contentions against Cooper Tire. Cooper Tire duly served respondent with the interrogatories which he received. The responses to the discovery were due on or before January 26, 2006. Respondent failed to timely respond to the interrogatories. Respondent finally responded on November 2, 2007 – only after the court had ordered him to do so.

On or about August 31, 2007, Cooper Tire filed a Motion to Compel Discovery Responses and Request for Sanctions Against Plaintiff and/or His Counsel of Record and served it upon respondent by mail. In its motion to compel discovery, Cooper Tire advised respondent that the hearing date for the motion was October 5, 2007. Respondent received the motion but he did not file any response or appear at the October 5 hearing. Respondent failed to advise Espinoza of the motion to compel. At the hearing, the court imposed sanctions of \$1,983 against respondent and his client for discovery violations.

On or about April 4, 2008, Cooper Tire filed a motion for summary judgment and served it on respondent via mail. In its motion, Cooper Tire advised respondent of the hearing date of

June 23, 2008. Respondent received the motion, but again, he did not file a response or appear at the June 23 hearing. Respondent also did not advise Espinoza of the hearing or the motion for summary judgment. On or about July 14, 2008, the Los Angeles Superior Court granted the motion for summary judgment.

Because Espinoza's cause of action was against Cooper Tire for a defective tire, respondent did not prepare any evidence on his client's behalf that the tire was defective. Respondent did not investigate or obtain an expert witness or other evidence regarding the damage to Espinoza's car tire.

On or between March and May 2008, Espinoza made approximately 20 phone calls to respondent, seeking the status of his case. Espinoza telephoned respondent on March 10; April 2, 8, 9, 15, 17, 22, 24, and 29; and May 5, 6, 8, and 9. As to each of these occasions, Espinoza left messages for respondent. Respondent received the messages. Yet, he failed to respond or otherwise apprise Espinoza of the status of his case.

But when Espinoza called on March 17, 24, 28, and 31; April 2; and May 13, 2008, he did speak with respondent. As to each of these occasions, respondent failed to provide any substantive information to Espinoza regarding the status of his case. On March 17, 2008, respondent advised Espinoza that he would schedule a meeting for him, but failed to do so. On March 28, 2008, respondent advised Espinoza that he would call Espinoza in a few days, but then failed to do so. On March 31, 2008, respondent advised Espinoza that he would talk to Espinoza on the following Wednesday, but again, failed to do so. On April 2, 2008, respondent told Espinoza that he was waiting for a return call from another attorney, and he would get back to Espinoza, but failed to do so. On May 13, 2008, respondent told Espinoza that he would call Espinoza back the following morning with a date and time for a face-to-face meeting but then again, failed to do so.

On or about May 16, 2008, Espinoza sent respondent a letter via certified mail. In his letter, Espinoza described the 20 phone calls and again requested a status report of his case. Respondent declined to accept the certified mail.

On May 29, 2008, Espinoza appeared unannounced at respondent's law offices and spoke to respondent. Respondent advised him to come in on June 2, 2008, for a meeting. On June 2, 2008, a woman called Espinoza and cancelled the scheduled meeting. She advised him that respondent would call on the following Tuesday or Wednesday to reschedule the meeting. But respondent did not do so.

On or about June 20, 2008, Espinoza appeared at a meeting at respondent's office. Respondent returned the file to Espinoza. Before returning the file to Espinoza, respondent required that Espinoza sign a substitution of attorney. On the same day, respondent advised Espinoza that the matter was scheduled in Placer Superior Court for June 24, 2008, for trial setting.

On or about June 23, 2008, respondent filed the substitution of attorney with the Placer County Court, substituting Espinoza in pro per.

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

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

By failing to timely respond to discovery; by failing to respond to the motion to compel or appear at the hearing on the motion to compel, resulting in sanctions against himself and his client; by failing to respond to the motion for summary judgment or appear at its hearing; and by failing to investigate or obtain expert witness or other evidence as to the damage to the car tire, respondent failed to perform competently, in willful violation of rule 3-110(A).

¹ References to rules are to the current Rules of Professional Conduct.

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

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.

The State Bar alleges that by failing to respond to Espinoza's 20 phone inquiries between March 10, 2008, and May 13, 2008, with substantive information regarding his case, and by failing to accept Espinoza's May 16, 2008 letter, and by failing to meet with respondent regarding his case, respondent failed to respond to the reasonable status inquiries of a client in a matter in which he agreed to perform legal services, in willful violation of section 6068, subdivision (m).

During the three months, respondent spoke with Espinoza at least seven times, albeit dissatisfactory to Espinoza. Therefore, the court finds that there is no clear and convincing evidence that respondent failed to respond to his client's status inquiries in violation of section 6068, subdivision (m).

Count 3: Failure to Communicate (§ 6068, Subd. (m))

However, there is clear and convincing evidence that respondent failed to keep Espinoza reasonably informed in a matter in which he agreed to perform legal services by failing to advise Espinoza of the motion to compel and the motion for summary judgment, which were significant developments, in willful violation of section 6068, subdivision (m).

Count 4: Improper Withdrawal from Employment (Rule 3-700(A)(2))

Rule 3-700(A)(2) states: "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the

² References to sections are to the provisions of the Business and Professions Code.

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.”

When respondent filed the substitution of attorney on June 23, 2008, and withdrew from employment, he neither responded to the motion for summary judgment nor inform Espinoza of the pending motion and its hearing on June 23. Consequently, the motion for summary judgment was granted. Thus, respondent failed, upon termination of employment, to take reasonable steps to avoid reasonably foreseeable prejudice to his client, in willful violation of rule 3-700(A)(2).

B. The Fischer Matter (Case No. 09-O-10200)

On or about April 4, 2008, Dani Fischer hired respondent to assist her with a mortgage modification of a subprime loan. Fischer paid respondent \$2,500. The parties executed a Flat Fee Agreement. Respondent agreed to "represent client in this matter in negotiations to lower the monthly payments or interest rate on the now existing First and Second Mortgage."

Respondent took no action on behalf of Fischer for a mortgage modification between April 4 and July 31, 2008.

On or about July 31, 2008, Fischer wrote to respondent; respondent received the letter. In her letter, Fischer terminated respondent's services and requested a refund of her \$2,500 and the return of her entire file.

Respondent did not return Fischer's file to her.

On or about September 2, 2008, Fischer again wrote to respondent and respondent received her letter. She again requested the return of her \$2,500 and her file. Respondent did not respond.

Respondent did not earn the \$2,500 for he had performed no services on behalf of Fischer, and Fischer did not receive any value from respondent. He failed to refund Fischer her \$2,500 as she had requested in her July 31 and September 2, 2008 letters.

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

By failing to take action on behalf of Fischer's loan modification, respondent failed to perform competently, in willful violation of rule 3-110(A).

Count 6: Failure to Return Client File (Rule 3-700(D)(1))

By failing to return the client file to Fischer, respondent failed, upon termination of his services on July 31, 2008, to release promptly, to the client, at her request, all the client papers and property, in willful violation of rule 3-700(D)(1).

Count 7: Failure to Return Unearned Fees (Rule 3-700(D)(2))

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund unearned fees.

By failing to refund Fischer's \$2,500, respondent failed to refund promptly a fee paid in advance that has not been earned in willful violation of rule 3-700(D)(2).

IV. Mitigating and Aggravating Circumstances

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,³ stds. 1.2(e) and (b).)

A. Mitigation

No mitigation was submitted into evidence. (Std. 1.2(e).)

B. Aggravation

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

Respondent has two prior records of discipline. (Std. 1.2(b)(i).)

1. On June 15, 2002, the California Supreme Court suspended respondent from the practice of law for three years, that execution of the suspension be stayed, and

³ Future references to standard(s) or std. are to this source.

placed him on probation for three years with an actual suspension of six months and until he makes restitution. Respondent's misconduct involved three client matters. (Supreme Court case No. S104859.)

2. On November 2, 2009, the State Bar Court filed a decision, recommending to the Supreme Court that respondent be suspended from the practice of law for two years, stayed, and placed on probation for three years with one year actual suspension. Respondent's misconduct involved two client matters. He was terminated from the Alternative Discipline Program.⁴ (State Bar Court case Nos. 06-O-15439 and 07-O-11299.)

Respondent committed multiple acts of wrongdoing by failing to return unearned fees, failing to perform services, failing to communicate with his client, improperly withdrawing from employment and failing to return client file. (Std. 1.2(b)(ii).)

Respondent's misconduct harmed significantly his clients. (Std. 1.2(b)(iv).) Fischer was deprived of her funds and the summary judgment in the Espinoza matter was granted without the client's knowledge.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) Respondent took no action to rectify the summary judgment. He had not yet reimbursed his client of the unearned fee of \$2,500.

Respondent's failure to cooperate with the State Bar before the entry of his default, including filing an answer to the NDC, 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

⁴ ADP is the State Bar Court's program for respondents with substance abuse or mental health issues.

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 1.7(b), 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 1.7(b) provides that if the member has a record of two prior impositions of discipline, the degree of discipline in the current proceeding should be disbarment unless the most compelling mitigating circumstances clearly predominate. Here, there is no mitigation.

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 disbarment, citing *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646 in support of its recommendation.

In *Rose*, the attorney committed professional misconduct or was actually suspended as a result of that misconduct, including client abandonments, probation violations and failure to file timely the affidavit required by rule 955 of the Rules of Court, during 18 of the 26 years of his practice. As a result, the Review Department found that he had ample opportunity to conform his conduct to the ethical requirements of the profession, but has repeatedly failed or refused to do so in his 26 years of practice and that, therefore, disbarment was appropriate.

The court agrees that the *Rose* case involved facts and considerations similar to those present here and that the recommended discipline is appropriate in the instant matter.

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.) An attorney’s failure to accept responsibility for actions which are wrong or to understand that wrongfulness is considered an aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100-1101.) The court is seriously concerned about the possibility of similar misconduct recurring. Respondent has offered no indication that this will not happen again. Instead of

cooperating with the State Bar or rectifying his misconduct, respondent defaulted in this disciplinary proceeding.

Therefore, based on respondent's misconduct, the serious aggravating circumstances, in particular, his two prior disciplinary records, and the lack of any mitigating factors, the court recommends disbarment.

VI. Recommendations

A. Discipline

Accordingly, the court recommends that respondent **Clyde Oliver West** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

B. Restitution

It is also recommended that respondent make restitution to the following:

- 1. Dani Fischer** in the amount of \$2,500 plus 10% interest per annum from July 31, 2008 (or to the Client Security Fund to the extent of any payment from the fund to Dani Fischer, plus interest and costs, in accordance with Business and Professions Code section 6140.5).

Respondent must furnish satisfactory proof of payment thereof to the State Bar's Office of Probation. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

C. California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.⁵

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.

VII. Order of Involuntary Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after this order is filed.

VIII. Order Sealing Certain Document

The Confidential Statement of Alternative Dispositions and Orders (State Bar exhibit 3 attached to the State Bar's Request for Waiver of Default Hearing; Brief on Culpability and Discipline filed October 9, 2009) is absolutely confidential and is not to be disclosed to the public absent an express written waiver by the respondent.

In light of the foregoing,

IT IS HEREBY ORDERED that, pursuant to rules 23 and 806, the Confidential Statement of Alternative Dispositions and Orders is to remain confidential and sealed.

IT IS FURTHER ORDERED that the protected and sealed material will only be disclosed to: (1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the

⁵Respondent 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.)

State Bar Court and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their official duties. Protected material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosure.

All persons to whom protected material is disclosed will be given a copy of this order sealing the document by the person making the disclosure.

IT IS SO ORDERED.

Dated: January _____, 2010

PAT McELROY
Judge of the State Bar Court