

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case Nos.: **08-O-13945-RAH**
) 10-N-01857 (Cons.)
RANDALL KEMP RUPP)
) **DECISION**
Member No. 165774)
)
A Member of the State Bar.)

I. Introduction and Pertinent Procedural History

This default matter was submitted for decision on December 6, 2010. Respondent **Randall Kemp Rupp** is charged with eight counts of misconduct. At the time of submission, the Office of the Chief Trial Counsel of the State Bar of California (“Office of the Chief Trial Counsel”) was represented in this matter by Deputy Trial Counsel Larry DeSha (“DTC DeSha”). Respondent did not participate in these proceedings.

The Office of the Chief Trial Counsel filed a Notice of Disciplinary Charges (“NDC”) against respondent on June 3, 2010. On that same day, 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

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

As respondent did not file a response to the NDC, the Office of the Chief Trial Counsel filed and properly served a motion for entry of default.² Respondent subsequently failed to file a written response to the motion for entry of default, and, on August 19, 2010, the court issued an order of entry of default and involuntary inactive enrollment.³ A copy of said order was properly served on respondent at his membership records address. This copy was not subsequently returned to the court by the U.S. Postal Service as undeliverable or for any other reason.

The Office of the Chief Trial Counsel waived its right to a hearing, and this matter was submitted for decision on September 9, 2010. On November 15, 2010, however, the court issued an order vacating submission and requiring the Office of the Chief Trial Counsel to provide a certified copy of respondent's prior record of discipline. Upon its receipt, this matter was again submitted on December 6, 2010.

The court concludes that respondent was given sufficient notice of the pendency of this proceeding to 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 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).)

² Prior to filing the motion for entry of default, the Office of the Chief Trial Counsel contacted respondent by telephone. DTC DeSha advised respondent that his response to the NDC was overdue and needed to be filed promptly. Respondent replied, "What's the point? Go ahead and disbar me and have a nice life. F--- you!"

³ 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.

A. Jurisdiction

Respondent was admitted to the practice of law in California on September 20, 1993, and has been a member of the State Bar of California at all times since that date.

B. The Lee Matter (Case No. 08-O-13945)

1. Findings of Fact

On September 7, 2007, Elizabeth Lee (“Lee”) hired respondent to collect arrearages in child support of about \$13,000 plus attorney fees of \$2,000 and other expenses described in a court order issued on December 20, 2002, in Orange County Superior Court case no. 97P007599. They signed a fee agreement calling for an hourly rate of \$350, a minimum fee of \$1,750, and a deposit of \$3,500 for fees and costs. Lee paid the \$3,500 that day.

On October 18, 2007, respondent filed a suitable Order to Show Cause for modification of the child support order and determination of the arrearages owed. He paid the filing fee of \$40.00. The hearing was set for December 20, 2007, but was continued to March 3, 2008, at the request of opposing counsel.

On January 8, 2008, respondent sent Lee a letter notifying her of the new hearing date, and that she could appear by telephone. It was the last time Lee heard from respondent.

On March 3, 2008, respondent failed to appear in court. Lee appeared by telephone, but was not told by the judge or the clerk that respondent had not appeared. At the request of opposing counsel, the hearing was continued to May 12, 2008.

On or before May 7, 2008, respondent vacated his office and thereafter provided no new address to Lee, the court, opposing counsel, or the State Bar. On May 8, 2008, Lee learned that respondent had vacated his office.

On May 12, 2008, respondent failed to appear in court. The court removed him as Lee's counsel, and continued the hearing to July 10, 2008, to allow Lee time to find new counsel. Lee subsequently hired new counsel who completed her case.

By failing to appear at the hearing on May 12, 2008, and failing to contact Lee thereafter, respondent terminated his employment as of May 12, 2008. At no time during or after his employment did he provide Lee with an accounting of the time spent and fees earned in her case.

Due to the delays caused by respondent's abandonment of the case, the financial information respondent had filed with the court for Lee had to be updated and re-filed. This rendered respondent's services to Lee useless, and he did not earn any portion of the \$3,460.00 he collected for his advanced fee. Respondent, however, did not provide a refund to Lee.

On or about October 22, 2008, the Office of the Chief Trial Counsel opened an investigation, case no. 08-O-13945, pursuant to a complaint from Lee. On or about November 24, 2008, an investigator from the Office of the Chief Trial Counsel sent respondent a letter requesting that respondent send a written response to Lee's allegations by December 10, 2008. The letter was sent to respondent's State Bar membership records address and to another address (153 Camarillo Drive, Camarillo, CA 93010) where it was known that respondent was receiving mail. Respondent received the letter mailed to Camarillo, but did not reply.

On or about December 15, 2008, an investigator from the Office of the Chief Trial Counsel sent respondent a second letter repeating the request for a written response to Lee's allegations, and requesting that response by January 2, 2009. This letter was sent to the same two addresses as the earlier letter. Respondent received the letter mailed to Camarillo, but still did not reply. He has not otherwise cooperated in the Office of the Chief Trial Counsel's investigation.

From July 31, 2007 until April 14, 2010, respondent's State Bar membership records address was 3049 Jeffrey Drive, Suite A, Costa Mesa, CA 92626. His membership records telephone number was (714) 542-2800. Respondent abandoned the premises at that address and the telephone was disconnected on or before May 7, 2008. He did not provide the U.S. Postal Service with a forwarding address.

2. Conclusions of Law

a. Count One - Rules of Professional Conduct, Rule 3-100(A)⁴ - [Failure to Perform]

Rule 3-110(A) provides that a member must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. By failing to appear at the hearings on March 3, 2008 and May 12, 2008, and by failing to notify the court and opposing counsel of his new address while counsel of record for Lee, respondent recklessly and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

b. Count Two - Rule 3-700(A)(2) - [Improper Withdrawal]

Rule 3-700(A)(2) provides that an attorney may not withdraw from employment until taking reasonable steps to avoid foreseeable prejudice to the client's rights. By terminating his employment on May 12, 2008; and failing to notify Lee, the court, and opposing counsel that he would not appear on that date; 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).

⁴ All further references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

c. Count Three - Business and Professions Code, Section 6068, Subdivision (m) [Failure to Communicate]⁵

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 vacating his office without informing Lee and without giving Lee an address where he could be reached, and by failing to notify Lee that he would not appear at the hearings on March 3, 2008 and May 12, 2008, respondent failed to keep Lee reasonably informed of significant developments in her case, in willful violation of section 6068, subdivision (m).⁶

d. Count Four - Rule 4-100(B)(3) - [Failure to Render Accounts]

Rule 4-100(B)(3) requires that an attorney maintain complete records and render appropriate accounts of all client funds in the attorney's possession. By not providing an accounting to Lee after termination of his employment, respondent failed to render appropriate accounts to a client regarding all funds coming into respondent's possession, in willful violation of rule 4-100(B)(3).

e. Count Five - Rule 3-700(D)(2) - [Failure to Refund Unearned Fee]

Rule 3-700(D)(2) requires an attorney whose employment has been terminated to promptly refund any part of a fee paid in advance that has not been earned. By failing to refund any part of the \$3,460.00 advanced fees paid by Lee, respondent failed to refund promptly any part of a fee paid in advance that has not been earned, in willful violation of rule 3-700(D)(2).

⁵ All further references to section(s) are to the Business and Professions Code, unless otherwise stated.

⁶ The court affords Count Three no additional weight in culpability since it relies on the same general facts and circumstances that established culpability in Counts One and Two.

f. Count Six - Section 6068, Subdivision (i) [Failure to Cooperate]

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney. By not providing a written response to the October 22, 2008 and December 15, 2008 letters, or otherwise cooperating in the investigation of the Office of the Chief Trial Counsel, respondent failed to cooperate in a disciplinary investigation, in willful violation of section 6068, subdivision (i).

g. Count Seven - Section 6068, Subdivision (j) [Failure to Update Membership Records 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;⁵ and in the event that a member's address or office telephone information change, the member must notify the membership records office of the State Bar within 30 days. By failing to maintain a current address and telephone number with the membership records office of the State Bar between May 7, 2008 and April 14, 2010, respondent willfully violated section 6068, subdivision (j).

C. The Rule 9.20 Matter (Case No. 10-N-01857)

1. Findings of Fact

On December 2, 2009, the California Supreme Court filed disciplinary order no. S176796 (the "9.20 Order"). The 9.20 Order required respondent to comply with California Rules of Court, rule 9.20, by performing the acts specified in subdivisions (a) and (c) within 30 and 40 days, respectively, after the effective date of the 9.20 Order. On or about December 2, 2009, the

⁵ If the member does not maintain an office, then they are required to list the address to be used for State Bar purposes.

Clerk of the Supreme Court of the State of California properly served upon respondent a copy of the 9.20 Order.

The 9.20 Order became effective on January 1, 2010, 30 days after the 9.20 Order was filed, and at all times thereafter remained in full force and effect. Thus, respondent was ordered to comply with subdivision (a) of Rule 9.20 no later than January 31, 2010, and was ordered to file a compliance declaration with the Clerk of the State Bar Court no later than February 10, 2010.

Respondent filed his compliance declaration 63 days late, on April 14, 2010.

2. Conclusions of Law

a. Count One - California Rules of Court, Rule 9.20, Subdivision (c)

California Rules of Court, rule 9.20, subdivision (c), requires, in part, that a member “file with the Clerk of the State Bar Court an affidavit showing that he or she has fully complied with those provisions of the order entered under this rule” within such time as the order may prescribe after the effective date of the member’s suspension. By filing his compliance declaration 63 days late in Supreme Court case no. S176796, respondent willfully violated California Rules of Court, rule 9.20, subdivision (c).

III. Mitigating and Aggravating Circumstances

A. Mitigation

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, std. 1.2(e).)⁷ No mitigating evidence was offered or received, and none can be gleaned from the record.

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

B. Aggravation

The court finds two factors in aggravation. (Std. 1.2(b).)

1. Prior Record of Discipline

Respondent's prior record of discipline is an aggravating circumstance. (Std. 1.2(b)(i).)

Respondent has one prior imposition of discipline.

On December 2, 2009, the California Supreme Court issued an order (S176796) suspending respondent from the practice of law for two years, stayed, with a minimum suspension of 90 days and until: (1) respondent made restitution; and (2) the State Bar Court granted a motion to terminate his suspension pursuant to rule 205 of the Rules of Procedure of the State Bar. In this default proceeding, respondent was found culpable, in two separate matters, of failing to perform legal services with competence, failing to communicate, improper withdrawal, failing to release a client file, failing to refund unearned fees, failing to render accounts, and failing to cooperate in a disciplinary investigation. In mitigation, respondent had no prior record of discipline. In aggravation, respondent committed multiple acts of misconduct and failed to participate in the proceedings.

2. Failure to Cooperate

Respondent's failure to participate in the present proceeding constitutes an additional factor in aggravation. (Std. 1.2(b)(vi).)

IV. 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.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed must be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 1.7(a), 2.4(b), 2.6, and 2.10 apply in this matter. The most severe sanction is found at standard 2.6 which recommends 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.

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.) 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.)

The Office of the Chief Trial Counsel urges that respondent be suspended for six months and until he makes restitution and the State Bar Court grants a motion to terminate his suspension pursuant to rule 205 of the Rules of Procedure of the State Bar. The Office of the Chief Trial Counsel did not cite any authority in support of its recommendation.

Disbarment is generally considered to be the appropriate sanction for a willful violation of rule 9.20 (formerly rule 955). (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) The imposition of disbarment in rule 9.20 matters, however, is not absolute. Over the years, the courts have weighed the facts and circumstances of each case individually. In various published decisions, the California Supreme Court and the Review Department of the State Bar Court have

found that, due to extenuating circumstances, an attorney's breach of rule 9.20 may warrant a discipline significantly less than disbarment. (See *Shapiro v. State Bar* (1990) 51 Cal.3d 251 [Rule 9.20 affidavit filed 146 days late; resulted in one year actual suspension]; *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192 [Rule 9.20 affidavit filed two weeks late; attorney had two prior disciplines; resulted in nine months' actual suspension]; and *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527 [Rule 9.20 affidavit filed two weeks late; attorney had two prior disciplines; resulted in 30 days' actual suspension].)

The court finds *Shapiro v. State Bar*, supra, 51 Cal.3d 251, to be instructive. In *Shapiro*, the attorney was found culpable of violating rule 9.20, by filing his compliance affidavit five months late, and client abandonment. In mitigation, the attorney: (1) was provided inadequate guidance from his probation monitor; (2) had no prior record of discipline;⁸ (3) was suffering from physical and psychological difficulties; and (4) presented good character evidence. No aggravating circumstances were identified. The Supreme Court ordered that the attorney be suspended for two years, stayed, that he be placed on two years' probation, with a one-year period of actual suspension.

While the circumstances of the present case are less egregious than *Shapiro*, this fact is offset by respondent's aggravation, lack of mitigation, and attitude toward discipline. Consequently, the court finds that the present level of discipline should not fall below that which was ordered in *Shapiro*.

V. Recommended Discipline

The court recommends that **Randall Kemp Rupp**, State Bar number 165774, be suspended from the practice of law in California for three years, execution of that period of suspension to be stayed subject to the following conditions:

⁸ It was determined that the attorney's three incidents of misconduct occurred within a fairly narrow timeframe.

1. Randall Kemp Rupp is suspended from the practice of law for a minimum of one year, and he will remain suspended until the following requirements are satisfied:
 - i. He makes restitution to Elizabeth Lee in the amount of \$3,460 plus 10% interest per annum from September 7, 2007 (or to the Client Security Fund to the extent of any payment from the fund to Elizabeth Lee, 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;⁹
 - ii. The State Bar Court grants a motion to terminate his suspension pursuant to rule 205 of the Rules of Procedure of the State Bar. Randall Kemp Rupp must comply with the conditions of probation, if any, imposed by the State Bar Court as a condition for terminating his suspension; and
 - ii. If he remains suspended for two years or more as a result of not satisfying the preceding conditions, 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 of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, std. 1.4(c)(ii).)

The court also recommends that Randall Kemp Rupp be ordered 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 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.¹⁰ Failure to do so may result in disbarment or suspension.

It is not recommended that respondent be ordered to pass the Multistate Professional Responsibility Examination as he was ordered to do so in Supreme Court matter S176796.

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⁹ Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

¹⁰ Respondent is required to file a rule 9.20(c) 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* (1988) 44 Cal.3d 337, 341.)

VI. Costs

It is recommended that costs be awarded to the Office of the Chief Trial Counsel 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: January _____, 2011

RICHARD A. HONN
Judge of the State Bar Court