

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: **09-O-12500**
)
EARL THOMAS DURHAM,) **DECISION**
)
Member No. 74349,)
)
A Member of the State Bar.)

I. Introduction

In this default disciplinary matter, respondent **Earl Thomas Durham** is found culpable, by clear and convincing evidence of engaging in unauthorized practice of law and engaging in acts of moral turpitude, involving dishonesty.

In light of respondent’s culpability in this proceeding, and after considering the aggravating and mitigating circumstances surrounding respondent’s misconduct, the court recommends, among other things, that respondent be suspended from the practice of law 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 60 days and will remain suspended until the State Bar Court grants a motion to terminate respondent’s suspension. (Rules Proc. of State Bar, rule 205.)¹

¹ Effective January 1, 2011, the Rules of Procedure of the State Bar of California were amended. The court, however, orders the application of the former Rules of Procedure in this

II. Pertinent Procedural History

On December 1, 2010, the State Bar of California, Office of the Chief Trial Counsel (State Bar) initiated this proceeding by filing and properly serving a Notice of Disciplinary Charges (NDC) on respondent by certified mail, return receipt requested, at his official membership records address (official address)² under Business and Professions Code section 6002.1, subdivision (a).³ Deputy Trial Counsel Hugh G. Radigan stated in his Declaration, which was made under penalty of perjury and attached to the State Bar's Notice of Motion and Motion for Entry of Default, that on December 6, 2010, the return receipt was received by the State Bar signed by Hans Larson.

On December 1, 2010, a telephonic conference was conducted between respondent and Deputy Trial Counsel Dianne Meyer (Meyer). The State Bar sent a courtesy copy of the NDC to respondent by regular first class mail to Camaron Sabalo 51, #212, Zona Dorado Mazatlan, Sinaloa Mexico 82110, which address respondent shared with Meyer during their December 1, 2010 teleconference. The NDC was not returned by the United States Postal Service.

Respondent did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

On the State Bar's motion, respondent's default was entered on March 2, 2011, and respondent was enrolled as an inactive member on March 5, 2011, under section 6007, subdivision (e). An order of entry of default was sent to respondent's official address in Mexico

hearing department matter based on its determination that injustice would otherwise result. (See Rules Proc. of State Bar (eff. January 1, 2011), Preface.) Therefore, all references to the Rules of Procedure in this decision are to the former rules of procedure, which were in effect prior to January 1, 2011, unless otherwise stated.

² From July 25, 2005 through January 5, 2011, respondent's official address was 6191 Rancho Mission Rd., Unit 112, San Diego, CA 92108. Effective January 6, 2011, respondent's official address was changed to 51 Camaron Sabalo No. 212, Zona Dorado, Mazatlan 82110 Sinaloa, Mexico.

³ References to section are to the California Business and Professions Code, unless otherwise noted.

by recorded delivery, return receipt requested. The return receipt was received by the State Bar on March 28, 2011.

Respondent did not participate in the disciplinary proceedings. This matter was submitted for decision on March 21, 2011, following the filing of the 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 28, 1977, and has since been a member of the State Bar of California.

B. Unauthorized Practice Of Law

On June 12, 2008, the California Supreme Court issued Supreme Court order S164208, suspending respondent from the practice of law for failure to pay State Bar membership dues. As a consequence of the order, respondent was not entitled to practice law effective July 1, 2008. To date, respondent remains suspended and not entitled to practice law pursuant to order S164208.

On or about June 18, 2008, Membership Billing Services of the State Bar of California mailed respondent a copy of order S164208 with a written notice that he would be suspended from the practice of law effective July 1, 2008, unless he paid all the outstanding current and accrued membership fees, penalties, and costs by June 30, 2008. Respondent, who received the notice, did not pay all the outstanding current and accrued membership fees, penalties, and costs by June 30, 2008.

On September 24, 2008, when respondent was not entitled to practice law, he filed the Appellant's Opening Brief on behalf of Hans Nansen (Nansen) in *Hans Nansen v. San Diego Superior Court*, San Diego County Superior Court, Appellate Division, case No. 37-2008-00200023-CL-PA-CTL (the appellate matter).⁴ In the brief, respondent identified himself as the attorney of record for Nansen and signed the brief as "Attorney for Appellant."

On April 17, 2009, when respondent was not entitled to practice law, he made an appearance at a hearing held in the appellate matter. He stated on the record that he was appearing on behalf of Nansen, and attempted to represent Nansen at the hearing.

Count 1: Unauthorized Practice of Law (Bus. & Prof. Code, §§ 6068, Subd. (a), 6125 and 6126)

Section 6068, subdivision (a), provides that an attorney has a duty to support the laws of the United States and of this state. Section 6125 prohibits the practice of law by anyone other than an active attorney and section 6126 prohibits holding oneself out as entitled to practice law by anyone other than an active attorney.

By clear and convincing evidence, respondent willfully violated sections 6068, subdivision (a), 6125, and 6126. While he was on suspension for failing to pay State Bar membership dues, respondent knew or should have known that he was not entitled to practice law effective since July 1, 2008. Yet, he held himself out as entitled to practice law by identifying himself as the attorney for Nansen in the Appellant's Opening Brief, by signing the brief as the attorney for the appellant, by filing that brief with the court on September 24, 2008,

⁴ In paragraph 5 of the NDC, it is stated that respondent filed the Appellant's Opening Brief on September 25, 2008. Thereafter, in paragraphs 7, 11, and 15 of the NDC, it is alleged that Appellant's Opening Brief was filed on September 24, 2008. As respondent was not entitled to practice law on September 24 or September 25, 2008, the error, which appears to be typographical, is harmless. The court will assume that September 24, 2008, is the date on which respondent filed Appellant's Opening Brief.

and by making an appearance at a hearing in the appellate matter on behalf of Nansen on April 17, 2009, and stating on the record that he was appearing on behalf of Nansen.

Count 2: Moral Turpitude (*Bus. & Prof. Code*, § 6106)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty, or corruption.

On June 12, 2008, the Supreme Court issued order S164208, suspending respondent from the practice of law for nonpayment of his State Bar membership dues. On June 18, 2008, Membership Billing Services mailed respondent a copy of order S164208 with written notice that he would be suspended from the practice of law effective July 1, 2008, unless he paid all the outstanding current and accrued membership fees, penalties, and costs by June 30, 2008. Respondent received the notice, but did not pay the membership fees, penalties, and costs. Thus, respondent knew or should have known that he was not entitled to practice law from July 1, 2008.

Nonetheless, on September 24, 2008, while suspended from the practice of law, respondent filed the Appellant's Opening Brief, wherein he had identified himself as the attorney for the appellant and had signed the brief as the attorney for the appellant; and on April 17, 2009, while still suspended from the practice of law, respondent made an appearance at a hearing in the appellate matter on behalf of Nansen, when he was not entitled to practice law.

By holding himself out as entitled to practice law when he knew or should have known that he was not so entitled and by practicing law when he knew or should have known that he was not entitled to practice law, respondent committed acts of dishonesty and moral turpitude in willful violation of section 6106.

Count 3: Failure to Obey Court Order (Bus. & Prof. Code, § 6103)

Section 6103 requires attorneys to obey court orders and provides that the willful disobedience or violation of such orders constitutes cause for disbarment or suspension.

Respondent was suspended from the practice of law in California for nonpayment of membership dues by order of the Supreme Court. Respondent's violation of Business and Professions Code sections 6068(a), 6125, and 6126 for holding himself out as entitled to practice law and practicing law while suspended necessarily encompassed a violation of Supreme Court order S164208, which removed him from practice. His engaging in the practice of law was a violation of the Supreme Court order suspending him and was therefore also a violation of section 6103. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563,575)

But, having found respondent culpable of violating section 6068(a), 6125, and 6126, the court will treat the issue of culpability under section 6103 as superfluous. (See *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 237.) A determination of "the appropriate discipline does not depend on whether multiple labels can be attached to the [same] misconduct." (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1059; see also *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 11.) Since respondent's misconduct underlying the culpability finding in Count One is the same as the misconduct underlying the charge in Count Three, the court treats that misconduct as a single violation for the purpose of determining discipline.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating evidence was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,⁵ std. 1.2(e).)

⁵ All further references to standards are to this source.

However, respondent had no prior disciplinary record in his 31 years of practice at the time of his misconduct in 2008, which 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, including engaging in the unauthorized practice of law and committing acts of dishonesty. (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.)

The standards for respondent’s misconduct provide a broad range of sanctions ranging from suspension to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds. 1.6, 2.3, and 2.6.) While the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar recommends a 30-day actual suspension without citing any case law in support of its recommendation.

The court, however, finds several cases regarding the unauthorized practice of law that provide guidance in determining the appropriate level of discipline to be imposed. Among the cases which the court finds instructive are: *In the Matter of Trousil, supra*, 1 Cal.State Bar Ct.

Rptr. 229; *In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639; *Chasteen v. State Bar* (1985) 40 Cal.3d 586; *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585; and *Farnham v. State Bar* (1976) 17 Cal.3d 605. The level of discipline in these cases ranges from 30 days' to six months' actual suspension.

In *Mason*, the attorney made a court appearance and signed and served a trial brief while suspended by the Supreme Court for misconduct in a prior discipline. He did not inform either the court or opposing counsel that he was suspended from the practice of law. He was found culpable of moral turpitude in practicing law while suspended. As a result, he was actually suspended for 90 days with a three-year stayed suspension and three years probation.

In *Chasteen*, the attorney was found culpable of the unauthorized practice of law for over a year, deceit of clients, commingling, and failure to return fees. The bulk of his misconduct was attributable to his long history of alcoholism. In light of his prior record of discipline and mitigation, the Supreme Court imposed a two-month actual suspension and until he made restitution of \$275 to his client.

In *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 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 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. He defaulted in the disciplinary proceedings as well.

Finally, in *Farnham v. State Bar* (1976) 17 Cal.3d 605, the attorney not only engaged in the unauthorized practice of law while under actual suspension, but also abandoned two clients. The Supreme Court found that the attorney's actions "evidence a serious pattern of misconduct

whereby he willfully deceived his clients, avoided their efforts to communicate with him and eventually abandoned their causes.” (*Id.* at p. 612.) He also had a prior record of discipline for abandonment of clients’ interests in four separate matters and lacked insight into the impropriety of his actions. As a result, he was actually suspended for six months with a stayed suspension of two years upon conditions of probation. Here, respondent’s misconduct is not as extensive or egregious as that of the attorney in *Farnham*.

In this matter, the gravamen of respondent’s misconduct is his unauthorized practice of law during his administrative suspension. Respondent’s misconduct reflects a blatant disregard of professional responsibilities.

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 mitigating circumstances surrounding his misconduct.

In view of respondent’s misconduct, the case law, the standards, and the mitigating and aggravating circumstances, the court finds that a 60-day period of suspension, among other things, provides adequate protection for the courts, the public, and the legal profession.

VI. Recommendations

A. Discipline

Accordingly, the court hereby recommends that respondent **Earl Thomas Durham** 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 subject to the following conditions:

1. Respondent is suspended from the practice of law for a minimum of 60 days and will remain suspended until the following requirements are satisfied:
 - a. 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
 - b. If respondent remains suspended for two years or more as a result of not satisfying the preceding condition, 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).)
2. Respondent must comply with the conditions of probation, if any, 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's disciplinary order 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 suspension.

C. California Rules of Court, Rule 9.20

It is also recommended that it be ordered that if respondent remains actually suspended for 90 days or more, he 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 120 and 130 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 disbarment or suspension.⁶

D. 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: June 8, 2011.

RICHARD A. PLATEL
Judge of the State Bar Court

⁶ 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.)