

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case Nos. 09-O-13080-DFM
)	
PATRICIA JOAN ESCOBAR,)	
)	DECISION
Member No. 165758,)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this default matter, the State Bar of California, Office of the Chief Trial Counsel (State Bar), charged respondent Patricia Joan Escobar (respondent) with three counts of professional misconduct. The court finds, by clear and convincing evidence, that she is culpable of the alleged misconduct. Based on the present misconduct, and the mitigating and aggravating circumstances in this matter, the court recommends, among other things, that she be suspended from the practice of law for a minimum of 90 days.

II. Significant Procedural History

The Notice of Disciplinary Charges (NDC) was filed on November 30, 2010, and was properly served on respondent on that same date at her official membership records address (official address), by certified mail, return receipt requested, as provided in Business and

Professions Code section 6002.1, subdivision (c).¹ Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) This mailing was subsequently returned to the State Bar by the U.S. Postal Service stamped ““Refused.””²

On December 8, 2010, a Notice of Assignment and Notice of Initial Status Conference was filed in this matter, setting an in person status conference for January 10, 2011. A copy of the notice was properly served on respondent by first-class mail, postage fully prepaid, on December 8, 2010, addressed to respondent at her official address. The notice was subsequently returned to the State Bar Court as undeliverable and unable to be forwarded.

Respondent failed to participate in the January 10, 2011 status conference. On January 13, 2011, the court filed an order setting forth, among other things, the dates of the pretrial conference and trial. The order also set forth that respondent needed to file a written response to the NDC immediately to avoid the entry of default. A copy of the order was properly served on respondent by first-class mail, postage fully prepaid, on January 13, 2011, addressed to respondent at her official address. The order was subsequently returned to the State Bar Court as undeliverable and unable to be forwarded.

Respondent did not file a responsive pleading to the NDC. On January 28, 2011, the State Bar filed a motion for entry of default pursuant to the Rules of Procedure of the State Bar

¹ Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

² See the Declaration of Deputy Trial Counsel Cindy McCaughey (DTC McCaughey) attached to the State Bar’s motion for entry of respondent’s default. On December 1, 2010, a courtesy copy of the NDC was sent to respondent by regular, first-class mail to an address on Olin Drive in Chatworth, California. A courtesy copy of the NDC was also sent to respondent by regular, first-class mail to an address on Ehlers Drive in Chatsworth, California, on December 17, 2010. Both of these addresses were contained in respondent’s case file. Neither copy was returned by the U.S. Postal Service.

in effect prior to January 1, 2011.³ The motion was properly served on respondent at her official address by certified mail, return receipt requested.⁴ Copies of the motion were also served on respondent by mail to two other addresses in Chatsworth, California. The motion advised respondent that the State Bar would recommend a minimum actual suspension of 90 days if the court found respondent culpable of the alleged misconduct. Respondent did not file a response to the motion for entry of default.

On February 15, 2011, the court entered respondent's default and enrolled her inactive effective three days after service of the order. That same day, the order was filed and properly served on respondent at her official address by certified mail, return receipt requested. Copies of the order were also served on respondent at both Chatsworth, California addresses. No order was subsequently returned to the State Bar Court as undeliverable or for any other reason.

The State Bar waived the hearing in this matter and filed its brief on culpability and discipline on February 22, 2011. The court took this matter under submission on March 7, 2011.⁵

³ Effective January 1, 2011, the Rules of Procedure of the State Bar of California were amended. Based on the court's determination that injustice would otherwise result, the court applied the former Rules of Procedure in this proceeding. An earlier motion for entry of default based on the rules effective January 1, 2011, was denied by the court based on due process concerns.

⁴ Pursuant to Evidence Code section 452, subdivision (h), the court grants the State Bar's request that the court take judicial notice of respondent's official membership records address history.

⁵ The State Bar has not had any contact with respondent since August 14, 2008. Attempts to locate respondent by telephone were unsuccessful, as was an attempt to locate another address for respondent. When DTC McCaughey attempted to email respondent at the account listed on respondent's membership records, the email was returned as having failed (although an email sent on November 29, 2010, asking respondent to contact the State Bar to provide a current address was received). At least six Google searches between December 4, 2010, and January 10, 2011, did not reveal any contact information for respondent not previously known.

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. (Former Rules Proc. of State Bar, rule 200(d)(1)(A).)

Respondent was admitted to the practice of law in California on September 15, 1993, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

A. Case No. 09-O-13080 - The Way Matter

Facts

On October 14, 2005, Randy Way, Sr. (Way) employed respondent to represent him in a marital dissolution proceeding for an hourly fee. At that time, Way paid respondent \$3,000 in advanced fees for her legal services.

On August 15, 2007, respondent received an additional \$5,000 in advanced attorney fees for representation of Way. Respondent received funds which had been held in the trust account of the opposing counsel and which had originated from the sale of the family residence. In total, respondent received \$8,000 in advanced fees to represent Way.

In December 2007, the parties reconciled. On December 11, 2007, Way contacted respondent by telephone and informed her that since the parties had reconciled, respondent's services would no longer be needed. At that time, Way requested an accounting of the time respondent spent on the case and also requested the return of his file.

Respondent did not send Way an accounting for the advanced fees or release the client file to Way.

On April 4, 2008, Way mailed a letter to respondent requesting a final billing invoice and a return of all remaining funds. The letter was sent by certified mail, return receipt requested, to respondent's office address. The letter was delivered and a signed receipt was returned to Way. Respondent did not provide to Way an accounting or refund of any of the fees.

On August 14, 2008, respondent sent Way a copy of the Stipulation and Order that had been filed in the dissolution proceeding in March 2006. Respondent did not provide in her letter to Way an accounting or refund of any of the fees. On September 8, 2008, the court dismissed the marital dissolution case.

On October 13, 2009, Way again mailed a letter to respondent demanding that respondent provide a billing statement and return his file. The letter was sent by certified mail, return receipt requested, to respondent's official membership records address. The letter was delivered and a signed receipt was returned to Way. Respondent did not provide Way with an accounting for the advanced fees, release his client file, or otherwise respond to Way's letter.

On March 1, 2009, Way sent a facsimile to respondent again demanding an accounting, the return of any remaining funds and the return of his client file. Respondent did not provide Way with an accounting for the advanced fees, did not release the client file to Way or otherwise inform him how he could receive his file, or otherwise respond to Way's letter.

On May 7, 2009, Way submitted a complaint to the State Bar about respondent's conduct.

On August 26 and September 23, 2009, a State Bar investigator mailed a letter to respondent at her official membership records address regarding the complaint by Way. The letters requested that respondent respond in writing to specified allegations of misconduct under investigation by the State Bar raised by Way's complaint. Respondent received the letters.

Respondent did not provide the State Bar with a written response to Way's complaint or otherwise participate in the State Bar's investigation.

On October 7 and October 22, 2009, a State Bar investigator telephoned respondent at her office and left messages regarding respondent's failure to contact the State Bar. Although the investigator requested that respondent contact the State Bar regarding the pending investigation, respondent did not return the investigator's telephone calls or otherwise respond to the State Bar.

Conclusions of Law

1. Count One – (Rules Prof. Conduct, rule 4-100(B)(3)⁶ [Failure to Render Accounts of Client Funds])

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 Way for the \$8,000 in advanced fees, respondent failed to render appropriate accounts to a client regarding all funds of a client coming into respondent's possession.⁷

2. Count Two – (Rule 3-700(D)(1) [Failure to Release File])

Rule 3-700(D)(1) states that a member whose employment has terminated shall promptly release to the client, at the request of the client, all the client papers and property. By not releasing the client file to Way or informing him how he could receive his file, respondent failed to promptly release to the client, upon termination of employment, at the client's request, all the client papers and property.

⁶ Unless otherwise indicated, all further references to rules refer to the State Bar Rules of Professional Conduct.

⁷ Although paragraph 2 of the NDC refers to rule 4-100(A), this is in error. A review of the NDC makes clear that respondent is charged in count one with failing to render appropriate accounts to a client, a willful violation of rule 4-100(B)(3). The reference to rule 4-100(A) is clearly in error, and the court finds that the NDC properly placed respondent on notice of the charges against her.

3. Count Three - (Bus. & Prof. Code, § 6068, subd. (i))⁸ [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 the State Bar with a written response to Way's complaint or otherwise participating in the State Bar's investigation, respondent failed to cooperate and participate in a disciplinary investigation pending against her in violation of section 6068, subdivision (i).

IV. Aggravation and Mitigation

A. Aggravation⁹

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)

The court finds in aggravation the following:

1. Multiple Acts (Std. 1.2(b)(ii))

Respondent has been found culpable of three counts of misconduct in the present proceeding. The existence of multiple acts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

2. Lack of Cooperation (Std. 1.2(b)(vi))

Respondent's failure to participate in this disciplinary proceeding before the entry of her default is an aggravating factor. (Std. 1.2(b)(vi).) However, its weight in aggravation is limited because the conduct relied on for this aggravating factor closely equals the misconduct relied on to find respondent culpable of violating section 6068, subdivision (i) and for the entry of her default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

⁸ Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

⁹ All further references to standards (std.) are to the Rules of Procedure of the State Bar, tit. IV, Standards for Attorney Sanctions for Professional Misconduct.

B. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).)

The court finds in mitigation the following:

1. No Prior Record (Std. 1.2(e)(i))

As respondent's default was entered in this matter, respondent failed to introduce any mitigating evidence on her behalf. However, pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of respondent's official membership records maintained by the State Bar of California, which reflect that she was admitted to the practice of law in the State of California on September 15, 1993, and has no prior record of discipline. Respondent's practice of law for more than 15 years is a substantial mitigating circumstance.

V. Discussion

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." [Citations.] (*In the Matter of Van*

Sickle (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

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. Furthermore, 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.

Standards 2.2(b), 2.6 and 2.10, among others, apply in this matter. The most severe sanction is found at standard 2.6 which provides for “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” Standard 2.2(b), however, is also instructive. Standard 2.2(b) provides that respondent’s violation of rule 4-100(B)(3) “shall result in at least a three month actual suspension . . . irrespective of mitigating circumstances.”

In addition to the standards, the court’s discipline recommendation in this matter is also guided by the case law. In particular, the court found the following cases instructive: *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585 [60 day actual suspension for misconduct in a single client matter involving failing to perform competently, failing to

communicate, misleading client, improperly holding out as entitled to practice law while suspended for failing to pay dues, and failing to cooperate in State Bar investigation; harm to client; failed to file response to NDC; no prior record of discipline in 12 years of practice] and *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690 [one-year stayed suspension and three years' probation, including 45 days actual suspension and restitution for misconduct in a single client matter involving failure to perform, improper withdrawal and failure to account for or refund unearned fees; harm to client; uncooperative during the disciplinary process; no prior record of discipline].

Accordingly, after considering respondent's misconduct, the aggravating and mitigating circumstances in this matter, the standards and the relevant case law, the court recommends the discipline set forth more fully below.

VI. Recommendations

Accordingly, the court recommends that respondent Patricia Joan Escobar, State Bar Number 165758, be suspended from the practice of law in California for one year, and that execution of that period of suspension be stayed, subject to the following conditions:

1. Respondent is suspended from the practice of law for a minimum of 90 days, and she will remain suspended until the following requirements are satisfied:
 - a. The State Bar Court grants a motion to terminate her suspension pursuant to former 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 requirement, she must also provide proof to the State Bar Court of her rehabilitation, fitness to practice and learning and ability in the general law before her suspension

will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)¹⁰

2. Respondent must comply with the conditions of probation, if any, imposed by the State Bar Court as a condition for terminating her suspension.

A. Multistate Professional Responsibility Examination

Respondent must also take and pass the Multistate Professional Responsibility Examination within one year after the effective date of this order, or during the period of her 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. (Cal. Rules of Court, rule 9.10(b).)

B. California Rules of Court, Rule 9.20

The court further recommends that respondent be ordered to 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 in this matter.¹¹

C. Costs

The court recommends that costs be awarded to the State Bar in accordance with

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¹⁰ The court is not recommending that respondent remain suspended until she pays restitution in this matter, as respondent was not charged with failing to return unearned fees.

¹¹ Respondent is required to file a rule 9.20(c) affidavit even if she 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.) In addition to being punished as a crime or a contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

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: May _____, 2011

DONALD F. MILES
Judge of the State Bar Court