

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No. 09-O-13593-DFM
)	
BRIAN DAVID WIRSCHING,)	
)	
Member No. 189491,)	DECISION AND DISCIPLINE
)	ORDER
<u>A Member of the State Bar.</u>)	

INTRODUCTION

In the two-count Notice of Disciplinary Charges (NDC) filed in this matter, Respondent **Brian David Wirsching** (Respondent) is charged with willfully violating Business and Professions Code section 6068, subdivision (m) (failure to communicate)¹ and subdivision (j) (failure to update membership address.

The State Bar was represented by Deputy Trial Counsel Elina Kreditor. Respondent did not appear in person or by counsel and permitted his default to be entered in the proceeding. The court finds culpability on one count and imposes discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The NDC was filed in this matter on March 29, 2010. It was properly served on Respondent on that same date at his official membership records address (official address), by certified mail, return receipt requested, as provided in section 6002.1, subdivision (c). Service

¹ Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The copy served on Respondent was returned by the U.S. Postal Service bearing the stamp “Unable to Forward.” The envelope containing the copy of the Notice of Disciplinary Charges also contained a handwritten note “Not at this Addr-Return to Sender.”

Before the State Bar filed its motion for the entry of Respondent’s default, Deputy Trial Counsel Kreditor made efforts to communicate with Respondent by email and telephone to no avail. Respondent was no longer at the email address listed in his official membership records or at his membership records telephone number. However, an email was sent to an alternate email address for Respondent with no notice from the server that the email did not reach its recipient. Furthermore, a message requesting that Respondent return Ms. Kreditor’s call was left at an alternative telephone number for Respondent. Ms. Kreditor, however, did not receive any communication from Respondent.

On May 7, 2010, the State Bar filed its motion for the entry of Respondent’s default. That motion was properly served on Respondent at his official address.

Respondent’s default was entered on May 26, 2010. The court at that time concluded that Respondent was given sufficient notice of the pendency of this proceeding to satisfy the requirements of due process. (*Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.) A copy of the default order was properly served on Respondent on May 26, 2010, by certified mail, return receipt requested, addressed to Respondent at his official address.² Respondent was then enrolled as an inactive member under section 6007, subd. (e), effective May 29, 2010.

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² The copy of the default order served on Respondent was returned to the State Bar Court by the U.S. Postal Service bearing a sticker indicating that it was not deliverable as addressed and was unable to be forwarded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All factual allegations of the NDC are deemed admitted on entry of a respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).) Except as otherwise noted, the following facts and conclusions are based on the factual allegations of the NDC.

Jurisdiction

Respondent was admitted to the practice of law in the State of California on July 2, 1997, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

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On June 29, 2008, Mark and Angela Moses met with Respondent to discuss their options with respect to filing for bankruptcy. On June 30, 2008, Angela Moses again met with Respondent and employed him to file a Chapter 13 bankruptcy. On the same date, Angela Moses signed the bankruptcy petition prepared by Respondent and paid Respondent \$1774.00 toward the total agreed upon fee of \$4500.00. Later on that day, Mark and Angela Moses paid an additional \$1000.00 to Respondent toward the total agreed upon fee of \$4500.00.

On July 1, 2008, Respondent was enrolled on "not-entitled" status by the State Bar due to his failure to comply with Minimum Continuing Legal Education ("MCLE") requirements.³ Respondent has still not complied with the MCLE requirements and therefore continues to be on "not-entitled" status with the State Bar.

On July 1, 2008, Respondent filed the Moses' bankruptcy petition in United States Bankruptcy Court for the Central District of California ("Bankruptcy Court"), case no. 08-BK-19676.

³ Although the NDC filed in this matter refers to Mandatory Continuing Legal Education, the correct reference is to Minimum Continuing Legal Education.

On July 13, 2008, Respondent filed the Moses' Chapter 13 plan in case no. 08-BK19676.

On July 24, 2008, the Bankruptcy Court dismissed the Moses' bankruptcy petition pursuant to 11 U.S.C. § 521(i)(1) for failure to file information required under section 521(a)(2). Respondent did not advise Angela or Mark Moses that the bankruptcy petition was dismissed.

In late July 2008, Angela Moses received notification from the Bankruptcy Court that the bankruptcy petition was dismissed. Angela Moses contacted Respondent. Respondent agreed to prepare a new bankruptcy petition ("second bankruptcy petition"). Angela Moses signed the second bankruptcy petition prepared by Respondent. She then paid Respondent an additional \$500 toward the total agreed upon fee.

On August 13, 2008, Respondent filed the second bankruptcy petition with the Bankruptcy Court. The second bankruptcy petition indicated that the petitioners were pro se. Respondent did not advise Angela or Mark Moses that Respondent listed the petitioners as pro se on the second bankruptcy petition.

In September 2008, Angela Moses received a copy of the second bankruptcy petition filed by Respondent on August 13, 2008. She noticed that the petition indicated that she was not represented by an attorney. Angela Moses emailed Respondent asking why he was not listed as the attorney on the petition. Respondent did not respond to this email. Angela Moses then called Respondent several times and left several messages asking for an explanation. Respondent failed to return her calls.

Angela Moses then searched the State Bar's website and learned that Respondent was ineligible to practice law. Angela Moses again called Respondent several times. Respondent did not return her calls.

On September 7, 2008, Angela Moses emailed Respondent asking him to refund \$2700 of the \$3000 she and Mark Moses paid in attorney's fees.

On September 10, 2008, Respondent sent a reply email to Angela Moses stating, in substance, that he would repay the funds owed.

On September 15, 2008, Angela and Mark Moses sent an email to Respondent asking, in substance, when Respondent would repay the \$2700 owed. Respondent did not reply to this email.

On September 19, 2008, Angela and Mark Moses sent an additional email to Respondent regarding the status of the refund. Respondent did not reply to this email and failed to communicate with Angela and Mark Moses in any manner. Respondent did not refund any money.

On October 23, 2009, the United States Bankruptcy Court for the Central District of California issued an Order suspending Respondent from the practice of law before the Bankruptcy Court of the Central District of California ("the Order"). The Order was entered on November 9, 2009.

On July 20, 2009, a State Bar of California (State Bar) investigator sent a letter to Respondent regarding the State Bar's investigation into the complaint filed by Angela and Mark Moses. The letter was sent to Respondent at his membership records address of 2329 Mayberry Street, Los Angeles, CA 90026 (the "membership records address"). The letter was mailed in a sealed envelope by first-class mail, postage prepaid, by depositing for collection by the USPS in the ordinary course of business. This letter was returned to the State Bar stamped "Return to Sender, Not Deliverable as Addressed, Unable to Forward."

On August 4, 2009, a State Bar investigator sent another letter to Respondent at his membership records address regarding the above described complaint filed by Angela and Mark Moses. The letter was mailed in a sealed envelope by first-class mail, postage prepaid, by depositing for collection by the USPS in the ordinary course of business. This letter was

returned to the State Bar stamped "Return to Sender, Not Deliverable as Addressed, Unable to Forward."

To date, Respondent did not notify Membership Records of the State Bar of California ("membership records") of his change of address, for State Bar purposes or purposes of the agency charged with attorney discipline.

Count 1 – Section 6068, Subd. (m) [Failure to Communicate]

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." By failing to advise his clients that the initial bankruptcy petition was dismissed; that the second petition listed Mark and Angela Moses as pro se; and by failing to respond to client calls and emails, Respondent failed to inform his clients of significant developments in their legal matter and failed to respond to his clients' reasonable status inquiries in willful violation of section 6068, subdivision (m). It makes no difference that respondent was not entitled to practice law which he failed to communicate with his clients. (See *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 575 [suspended attorney still has duty to communicate with client].)

Count 2 – Section 6068, Subd. (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 which requires, in pertinent part, that attorneys maintain on the official membership records of the State Bar the attorney's current office address and telephone number, or if the attorney does not maintain an office, the address to be used for State Bar purposes. Section 6002.1 also requires an attorney to notify the State Bar's membership records office of any change in this information within 30 days of such change. To prove the alleged

violation of section 6068, subdivision (j), the State Bar alleges that two letters sent to Respondent's membership records address of 2329 Mayberry Street, Los Angeles, CA 90026 were returned to the State Bar by the U.S. Postal Service as undeliverable and unable to be forwarded. However, respondent's membership records address has never been 2329 Mayberry Street, Los Angeles, CA 90026. As such, the State Bar has failed to prove, by clear and convincing evidence, that respondent willfully violated section 6068, subdivision (j), and count two is dismissed with prejudice.⁴

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)⁵ The court finds the following aggravating factor:

Lack of Participation in Disciplinary Proceeding

Respondent's failure to participate in this disciplinary proceeding before the entry of his default is an aggravating factor. (Std. 1.2(b)(vi).)⁶

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The court finds mitigating factors as follows:

No Prior Discipline

Although Respondent did not appear in this action, the court takes judicial notice of the fact that he practiced law in California for 10 years prior to the commencement of the instant

⁴ This illustrates the importance of accurate pleading by the State Bar in a NDC. Had the NDC in this matter properly alleged respondent's correct membership records address, the court likely would have found respondent culpable of this count.

⁵ All further references to standard(s) or std. are to this source.

⁶ The State Bar contends that there are other aggravating circumstances in this matter. Each of these contentions has been considered by the court and rejected.

misconduct and has no prior record of discipline. Respondent's period of discipline-free practice is considered a mitigating circumstance. (Std. 1.2(e)(i).)

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 Silvertown* (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.)

The State Bar recommends a 90-day period of actual suspension in this matter. The cases cited by the State Bar in support of its discipline recommendation, however, involve more egregious misconduct than that found in the instant matter. Furthermore, the court found

Respondent culpable of only one of the violations charged in this matter. The court therefore rejects the State Bar's discipline recommendation.

In determining the discipline to impose in this matter, the court is guided by standard 2.4(b) which provides, in pertinent part, that "culpability of a member of wilfully failing to communicate with a client shall result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client." 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.

Respondent in this matter failed to inform his clients of significant developments in their legal matter and failed to respond to his clients' reasonable status inquiries over a period of nearly two months. Respondent had also practiced law for 10 years prior to the commencement of his misconduct. Thus, after considering the standards, the case law,⁷ the nature of Respondent's misconduct and its length of occurrence, and the aggravating and mitigating circumstances in this matter, the court finds that a public reproof is the appropriate discipline to impose in this matter. Nevertheless, Respondent's failure to appear in this proceeding has prevented this court from being able to assess what factors have caused the apparent change in Respondent's approach to the practice of law and his disregard for his professional duties. Accordingly, the court finds it appropriate to attach conditions to respondent's reproof to import to respondent his professional duties and obligations and to protect the public and the legal profession.

RECOMMENDED DISCIPLINE

Public Reproof

Accordingly, it is ordered the Respondent **Brian David Wirsching, State Bar No. 189491**, is hereby publicly reproofed. Pursuant to the provisions of rule 270(a) of the Rules of

⁷ The court found *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128 instructive.

Procedure of the State Bar of California (Rules of Procedure), the public reproof will be effective when this decision becomes final. Furthermore, pursuant to rule 9.19(a) of the California Rules of Court and rule 271 of the Rules of Procedure, the court finds that the interest of Respondent and the protection of the public will be served by the following specified conditions being attached to the public reproof imposed in this matter. Failure to comply with any condition(s) attached to this public reproof may constitute cause for a separate proceeding for willful breach of rule 1-110 of the Rules of Professional Conduct of the State Bar of California. Respondent is hereby ordered to comply with the following conditions attached to his public reproof for one year following the effective date of the public reproof.

Reproof Conditions

1. During the reproof period, respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California;
2. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California (Office of Probation), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;
3. Within thirty (30) days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the reproof period, respondent must promptly meet with the probation deputy as directed and upon request;
4. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period of reproof. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of reproof during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would

cover less than thirty (30) days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of reprobation and no later than the last day of the reprobation period;

5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with the reprobation conditions;
6. Within one (1) year of the effective date of the public reprobation imposed in this matter, Respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar's Ethics School and passage of the test given at the end of that session; and
7. Respondent is also ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the public reprobation and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

Costs

Costs are awarded to the State Bar in accordance with section 6086.10 and such costs are enforceable both as provided in section 6140.7 and as a money judgment.

Dated: September _____, 2010

DONALD F. MILES
Judge of the State Bar Court