

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 09-O-17484-RAP (09-O-18823)
)	
CATHERINE MARY McCAULEY)	DECISION
)	
Member No. 150090)	
)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this disciplinary matter, Jessica A. Lienau appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Catherine Mary McCauley did not appear in person or by counsel.

After considering the evidence and the law, the court recommends, among other things, that respondent be actually suspended for 60 days and until she makes restitution and complies with former rule 205, Rules Proc. of State Bar.¹

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on November 15, 2010, and was properly served on respondent on that same date at her official membership records address, by

¹ Future references to the Rules of Procedure are to the Rules of Procedure in effect until December 31, 2010, unless otherwise specified.

certified mail, return receipt requested, as provided in Business and Professions Code section² 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) A courtesy copy was also sent to an alternate address by regular mail on that same date. Items sent to respondent's official address were returned as undeliverable. The copy sent to her regular address was not.

On December 8, 2010, copies of the NDC were again sent to respondent by regular mail at her official and alternate addresses.

On November 19, 2010, respondent was properly served at her official address with a notice advising her, among other things, that a status conference would be held on January 5, 2011. This correspondence was returned as undeliverable, bearing a sticker stating "Return to sender...Box closed. Unable to forward."

Respondent did not appear at the status conference. On January 5, 2011, she was properly served with a status conference order at her official and alternate addresses by first-class mail, postage prepaid. This correspondence was returned as undeliverable, bearing a sticker stating "Return to sender...Box closed. Unable to forward."

Respondent did not file a responsive pleading to the NDC. On January 5, 2011, a motion for entry of default, filed pursuant to the current Rules of Procedure of the State Bar, was filed and properly served on respondent at her official and alternate addresses by certified mail, return receipt requested, and also by regular mail. The items sent to respondent's official address were returned. The others were not. Respondent did not respond to the motion.

By order filed on January 31, 2011, the court denied the motion for entry of default because the current Rules of Procedure substantially changed the default procedures and remedies available pursuant to the former Rules of Procedure. This correspondence was returned

²Future references to section are to the Business and Professions Code.

as undeliverable, bearing a sticker stating “Return to sender. Not deliverable as addressed. Unable to forward.”

On February 7, 2011, a motion for entry of default was filed and properly served on respondent at her official address by certified mail, return receipt requested. A copy was also served at her alternate address by regular mail. The motion, filed pursuant to the former Rules of Procedure, advised her that minimum discipline of 30 days’ actual suspension and restitution would be sought if she was found culpable. Respondent did not respond to the motion.

On March 1, 2011, the court entered respondent’s default and enrolled her inactive effective three days after service of the order. The order was filed and properly served on her at her official address on that same date by certified mail, return receipt requested. This correspondence was returned as undeliverable, bearing a sticker stating “Return to sender. Not deliverable as addressed. Unable to forward.”

The State Bar’s and the court’s efforts to contact respondent were fruitless.³ The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, 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.)

The matter was submitted for decision without hearing after the State Bar filed a brief on March 3, 2011.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (§6088; rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

³ Respondent contacted the deputy trial counsel (DTC) once, one December 7, 2010, in response to an email to the DTC. Respondent indicated in her email that she had resigned from the State Bar.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 4, 1990, and has been a member of the State Bar at all times since.

B. Case no. 09-O-17484 (The Enns Matter)

1. Facts

On December 31, 2008, Mike Enns employed respondent to register a trademark for his company, Project Jet. On January 12, 2009, Enns paid respondent \$900 in advanced fees for her legal services.

On January 5, 2009, Enns and respondent exchanged emails. Thereafter, respondent ceased to communicate with Enns. During the period from the latter half of January 2009 to May 2009, Enns made telephone calls to respondent, each time leaving a message for her to return his call, and sent emails to respondent. Respondent received the telephone calls and emails but did not respond to them or otherwise communicate with Enns.

In May 2009, Enns contacted Donald Asperger, an attorney who had referred Enns to respondent. On May 19, 2009, Asperger sent an email to respondent on behalf of Enns and asked for respondent's current contact information. Respondent received the email but did not reply. Asperger tried to telephone respondent on Enns' behalf, but she had disconnected the two telephone numbers that Asperger had for her.

On June 22, 2009, Asperger wrote respondent a letter on Enns' behalf in which he stated that he was unsuccessful in telephoning and emailing her and asked her to call Asperger to

discuss returning Enns' client file and unearned fee deposit. Respondent received the letter but did not respond or otherwise communicate with Enns or Asperger.

Respondent did not register a trademark for Enns' company or provide any legal services to Enns.

By not performing legal services and not responding to status inquiries, respondent effectively withdrew from employment.

Respondent did not provide any services of value to Enns. She did not earn any part of the \$900 attorney fee Enns paid her. Respondent has not refunded any part of the fees she received from Enns.

On August 17, 2009, Enns made a complaint to the State Bar about respondent's conduct.

On November 18, 2009, a State Bar investigator mailed a letter to respondent at her official address asking respondent to respond in writing to specified allegations of misconduct under investigation by the State Bar raised by the complaint. The investigator's November 18, 2009, letter to respondent was returned in the mail indicating that the post office box was closed.

On January 7, 2010, respondent sent a letter to the State Bar indicating that she wished to resign as a member of the State Bar of California. Respondent's letter identified a new address.

On January 27, 2010, the investigator sent a letter to respondent regarding Enns' complaint which was mailed to the new address listed on respondent's January 7, 2010, letter. The letter requested that respondent respond in writing to specified allegations of misconduct under investigation by the State Bar. Respondent received the letter but did not provide a written response to Enns' complaint or otherwise participate in the State Bar's investigation.

2. Conclusions of Law

a. Count 1 - Section 6068, subd. (m) (Communication)

Section 6068, subdivision (m) requires 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 not responding to emails and telephone calls from Enns as well as email and a letter from Asperger on behalf of Enns, respondent did not respond promptly to reasonable status inquiries in wilful violation of section 6068, subdivision (m).

b. Count 2 - Rule of Professional Conduct,⁴ Rule 3-110(A) (Competence)

Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently.

By not registering Enns' trademark or providing any legal services for him, respondent intentionally, recklessly or repeatedly did not perform competently in willful violation of rule 3-110(A).

c. Count 3 - Rule of Professional Conduct 3-700(D)(2) (Unearned Fees)

Rule 3-700(D)(2) requires an attorney whose employment has terminated to promptly return any part of a fee paid in advance that has not been earned. This rule does not apply to true retainer fees paid solely for the purpose of ensuring the availability of an attorney to handle a matter.

Respondent did not return an advanced, unearned fee to Enns after effectively withdrawing from representing him in willful violation of rule 3-700(D)(2).

d. Count 4 - Section 6068, subd. (i) (Not Participating in Disciplinary Investigation)

Section 6068, subdivision (i) requires an attorney to participate and cooperate in any disciplinary investigation or other disciplinary or regulatory proceeding pending against him- or herself.

By not responding to the State Bar investigator's January 27, 2010, letter, respondent did

⁴ Future references to rule are to this source.

not participate in the investigation of the allegations of misconduct regarding the Enns case in willful violation of 6068, subdivision (i).

B. Case no. 09-O-18823 (The Koda Matter)

1. Facts

In 2001, Ross Koda employed respondent to provide legal services regarding trademark issues of Trademark Holding Company (THC), a California general partnership, and Koda Farm entities affiliated with THC. Between 2001 and 2008, respondent's legal services for THC and the Koda Farm entities included renewals of licensing agreements and preventing possible trademark infringements. Koda's sister, Robin Koda, also worked for the Koda Farm entities.

In December 2008, Robin Koda asked respondent to review trademark licensing agreements between Koda entities known as KFM and KFI and between KFM and THC. Respondent agreed to provide the legal services but thereafter did not complete the review and responded only sporadically to communications from her client.

On February 12, 2009, Koda sent respondent an email informing respondent that they could no longer miss renewals or alerts on possible trademark infringements so were looking for other legal counsel. Koda asked that respondent cooperate with timely transferring the client files. Shortly thereafter, respondent replied by email assuring him that she was fully available to provide legal services and asking Koda to reconsider employing subsequent counsel. On February 23, 2009, Koda replied that he would put the decision to employ other counsel on hold and looked forward to respondent getting their legal matters up to date.

On May 20 and 26, 2009, Koda emailed respondent requesting her latest versions of agreements between KFM and KFI and between KFM and THC. Respondent received the emails but did not reply or otherwise communicate with Koda.

In June 2009, Koda asked Donald Asperger, who was general counsel for THC and the other Koda entities, to contact respondent on Koda's behalf. Asperger tried to telephone respondent on Koda's behalf, but she had disconnected the two telephone numbers that Asperger had for her. Asperger also emailed respondent on Koda's behalf. Respondent received the email but did not reply.

On June 22, 2009, Asperger wrote respondent a letter on Koda's behalf asking her to contact Asperger to discuss return of the client files. Respondent received the letter but did not reply.

Respondent effectively withdrew from representation of Koda Farms without informing Koda. At no time did respondent release any client materials to Koda which he was entitled to receive as requested by Asperger on Koda's behalf in the June 22, 2009, letter.

On July 30, 2009, Asperger made a complaint to the State Bar on behalf of Koda about respondent's conduct.

On January 7, 2010, respondent sent a letter to the State Bar indicating that she wished to resign as a member of the State Bar of California. Respondent's letter provided a new address which was not the address she had previously reported to the State Bar.

On February 1, 2009, a State Bar investigator mailed a letter to respondent regarding Asperger's complaint which requested that respondent respond in writing to specified allegations of misconduct under investigation by the State Bar raised by the complaint. The investigator's letter was mailed to respondent at her address of record with the State Bar and a copy was mailed to the new address listed on respondent's January 7, 2010, letter. Thereafter, the letter addressed to respondent at the membership address was returned in the mail indicating that the post office box was closed. Respondent received the copy of the letter mailed to the new address on

respondent's January 7, 2010, letter but did not provide a written response to Asperger's complaint or otherwise participate in the State Bar's investigation.

2. Conclusions of Law

a. Count 5 - Section 6068, subd. (m) (Communication)

By not responding to emails from Koda and an email and letter from Asperger on Koda's behalf, respondent did not respond promptly to Koda's reasonable status inquiries in willful violation of section 6068, subdivision (m).

b. Count 6 – Rule 3-110(A) (Competence)

By not completing the review of trademark licensing agreements between KFM and KFI and between KFM and THC, and not performing other legal services for which she was employed, respondent intentionally, recklessly and repeatedly failed to perform legal services with competence.

c. Count 7 - Rule 3-700(D)(1) (Not Returning Client Papers or Property)

Rule 3-700(D)(1) requires an attorney whose employment has been terminated to promptly release to the client, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. This includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

By withdrawing from employment without releasing all client materials to Koda as requested, respondent willfully violated rule 3-700(D)(1).

d. Count 8 - Section 6068, subd. (i) (Not Participating in Disciplinary Investigation)

By not responding to the State Bar's February 1, 2010, letter, respondent did not participate in the investigation of the allegations of misconduct regarding the Koda matter in willful violation of 6068, subdivision (i).

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct⁵, std. 1.2(b).)

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) However, it warrants little weight in aggravation because this conduct closely parallels that used to find respondent culpable of violating section 6068, subdivision (i) and to enter his default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors other than blemish-free practice for over 18 years when the misconduct commenced in December 2008.

C. 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

⁵ Future references to standard or std. are to this source.

imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.4(b), 2.6(a) and 2.10 apply in this matter. The most severe sanction is found at standard 2.6(a) which recommends suspension or disbarment for violations of sections 6067 and 6068, depending on the gravity of the offense or harm, if any to the victim, with due regard to the purposes of imposing discipline.

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.) Although 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.)

Respondent has been found culpable, in two client matters, of violating section 6068, subdivisions (i) and (m) and rule 3-100(A) (two counts each) and rules 3-700(D)(1) and (2) (one count each). In aggravation, the court found multiple acts of misconduct and lack of participation in the disciplinary proceedings (effect discounted as previously explained). In mitigation, the court found 18 years of blemish-free practice, a significant mitigating factor.

The State Bar recommends actual suspension for 30 days and until respondent complies with former rule 205 and makes restitution.

Because respondent did not participate in these proceedings, the court recommends actual suspension for 60 days and until respondent complies with former rule 205 and makes restitution. This falls within the ambit of the standards and case law. (Std. 2.6(a); *Hartford v. State Bar* (1990) 50 Cal.3d 1139 [30 days’ actual suspension for not performing in two client

matters, among other things. Respondent participated in proceedings. No prior discipline; cooperation with State Bar; emotional difficulties/physical disabilities; good faith and rehabilitation.])

Respondent's misconduct and lack of participation in this matter raises concerns about her ability or willingness to comply with her ethical responsibilities to the public and to the State Bar. No explanation has been offered that might persuade the court otherwise and the court can glean none. Having considered the evidence and the law, the court believes that a 60-day actual suspension to remain in effect until she makes restitution and until she complies with former rule 205, among other things, is adequate to protect the public and proportionate to the misconduct found and the court so recommends.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent Catherine Mary McCauley be suspended from the practice of law for one year; that said suspension be stayed; and that she be actually suspended from the practice of law for 60 days and until she makes restitution to Mike Enns in the amount of \$900.00 plus 10% interest per annum from January 12, 2009 (or to the Client Security Fund to the extent of any payment from the fund to Mike Enns, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnish satisfactory proof 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, subdivision (c) and (d); and until the State Bar Court grants a motion to terminate respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Former Rule 205(a), (c), Rules Proc. of State Bar.)

It is also recommended that she be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating her actual

suspension.

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until she has shown proof satisfactory to the State Bar Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also, former rule 205(b).)

If respondent remains actually suspended for 90 days or more, 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 120 and 130 days, respectively, of the effective date of its order imposing discipline in this matter. Willful failure to do so may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.⁶

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners within one year from the effective date of the Supreme Court's order or during the period of her actual 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).)

VI. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business

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.)

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 10, 2011.

RICHARD A. PLATEL
Judge of the State Bar Court