

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No.: 11-O-16521-RAP
)	
CURTIS ALLEN WESTFALL,)	DECISION
)	
Member No. 128447,)	
)	
A Member of the State Bar.)	

Introduction¹

In this contested disciplinary proceeding, respondent **Curtis Allen Westfall**, is charged with four counts of misconduct in one client matter including: failing to perform legal services with competence; failing to inform a client of a significant development; improper withdrawal from employment; and failing to cooperate in a State Bar investigation. Respondent was represented by attorney James Ham. The Office of the Chief Trial Counsel of the State Bar of California (State Bar) was represented by Deputy Trial Counsel Ross Viselman.

Having considered the facts and the law, the court finds respondent culpable on all four counts, and recommends, among other things, that respondent be actually suspended from the practice of law for a minimum period of one year and until he shows proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and present learning and ability in the general law.

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

Significant Procedural History

The State Bar filed a Notice of Disciplinary Charges (NDC) on April 16, 2012. The respondent failed to file a response to the NDC.

On July 12, 2012, the court issued an order entering respondent's default and enrolling him inactive for his failure to file a timely response to the NDC. (Rules Proc. of State Bar, rules 5.80, et seq.) On January 14, 2013, the State Bar filed a petition for respondent's disbarment based on his failure to file a timely response and subsequent default. (Rules Proc. of State Bar, rule 5.85.) On January 15, 2013, respondent filed a motion to set aside his default. The State Bar filed a response in opposition on January 29, 2013.

On February 8, 2013, the court issued an order finding that respondent failed to show good cause to set aside his default, but, in the interests of justice, the State Bar's petition for respondent's disbarment was denied and the court permitted him to participate in a hearing to determine the appropriate degree of discipline in this matter. On February 22, 2013, the State Bar filed an objection to the hearing and requested that the court reconsider and grant the State Bar's petition for disbarment.

Over the State Bar's objection, a hearing in this matter was held on May 15, 2013. The matter was submitted for decision at the conclusion of trial.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 17, 1987, and has been a member of the State Bar of California at all times since that date.

Case No. 11-O-16521 – The Porco and D’Anniballe Matter

Findings of Fact

In or about June 2007, Robert Porco (Porco) and Tessie D’Anniballe (D’Anniballe) employed respondent to represent them in a personal injury claim arising from a cruise ship accident.

On July 12, 2007, respondent signed and filed a complaint on behalf of Porco and D’Anniballe in the Los Angeles Superior Court, entitled *Robert Porco and Tessie D’Anniballe v. Crown Princess, et al.* (the Porco action). On July 12, 2007, the superior court set a case management conference in the Porco action for December 7, 2007. Respondent received notice of the case management conference in the Porco action. Respondent, however, failed to appear for the conference.

Consequently, the superior court set an order to show cause hearing for January 15, 2008, and served a copy of the minute order on respondent. Respondent received the order.

Respondent failed to appear at the order to show cause hearing in the Porco action on January 15, 2008. At that time, the superior court dismissed the Porco action due to lack of prosecution. The superior court served notice of the dismissal upon respondent. Respondent received a copy of the minute order dismissing the Porco action. Respondent failed to inform Porco and D’Anniballe of the dismissal of the Porco action. Respondent also failed to move to vacate the dismissal or take any other action in the Porco action.

On July 20, 2011, the State Bar opened an investigation pursuant to complaints filed by Porco and D’Anniballe (the Porco investigation).

On August 31, 2011, State Bar investigator Denise Kattan wrote to respondent regarding the Porco investigation. On September 27, 2011, State Bar investigator Rose Ackerman wrote to respondent regarding the Porco investigation.

Both the August 31, 2011 and September 27, 2011 letters were placed in sealed envelopes correctly addressed to respondent at his official State Bar of California membership records address. The letters were properly mailed by first class mail, postage prepaid, by depositing them for collection with the United States Postal Service in the ordinary course of business on or about the date of each letter. The United States Postal Service did not return the investigators' letters as undeliverable or for any other reason. The court finds that respondent received both letters.

The investigators' letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Porco investigation. Respondent did not respond to the investigators' letters or otherwise communicate with either investigator.

Conclusions of Law

Count One – Rule 3-110(A) [Failure to Perform Legal Services with Competence]

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. The court finds that there is clear and convincing evidence that respondent failed to perform legal services with competence, in willful violation of rule 3-110(A), by failing to appear at the case management conference, failing to appear at the order to show cause hearing, and failing to move to vacate the superior court's dismissal order in the Porco action.

Count Two – § 6068, subd. (m) [Failure to Communicate]

Section 6068, subdivision (m), provides that an attorney has a duty to promptly respond 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. The court finds that there is clear and convincing evidence that respondent failed to communicate

with a client, in willful violation of section 6068, subdivision (m), by failing to inform Porco and D'Anniballe that the Porco action had been dismissed by the superior court.

Count Three – Rule 3-700(A)(2) [Improper Withdrawal from Employment]

Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until the attorney has taken reasonable steps to avoid reasonably foreseeable prejudice to the client's rights, including giving due notice to the client, allowing time for the employment of other counsel, and complying with rule 3-700(D) and other applicable rules and laws. The court finds that there is clear and convincing evidence that respondent improperly withdrew from employment, in willful violation of rule 3-700(A)(2), by failing to make court-ordered appearances in the Porco action and performing no legal services for Porco and D'Anniballe after July 12, 2002, thereby effectively withdrawing from employment. However, since these same factors were relied on to establish culpability in Count One, the court does not assign any additional weight to Count Three.

Count Four – § 6068, subd. (i) [Failure to Cooperate]

Section 6068, subdivision (i), provides that an attorney has a duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney. The court finds that there is clear and convincing evidence that respondent failed to cooperate in a State Bar investigation, in willful violation of section 6068, subdivision (i), by failing to respond to two letters from State Bar investigators requesting that he respond in writing to allegations contained in the Porco investigation.

Aggravation²

Prior Record of Discipline (Std. 1.2(b)(i).)

Respondent has a record of two prior disciplinary actions.

On October 13, 2004, the State Bar Court Hearing Department issued an order of private reproof with one year of probation conditions against respondent pursuant to a stipulation re facts, conclusions of law, and disposition filed by the parties in State Bar Court case no. 03-O-04269. In this single-client matter, respondent stipulated to failing to perform legal services with competence. In mitigation, respondent had no prior record of discipline and displayed remorse. No aggravating factors were involved.

On November 2, 2011, pursuant to Supreme Court Order S195926, respondent was suspended from the practice of law for one year, execution of suspension was stayed, and he was placed on probation for two years. In this matter, respondent stipulated to misconduct in one client matter and one State Bar investigation. Respondent's misconduct included: failing to perform legal services with competence; failing to communicate; failing to promptly release a client file; failing to cooperate in a State Bar investigation (two counts); and commingling personal funds in his client trust account. In aggravation, respondent had a prior record of discipline, his misconduct included trust account violations, he caused significant harm to his client, and he committed multiple acts of misconduct. In mitigation, respondent cooperated in the State Bar proceeding by entering into a stipulation and paid restitution to his client for costs incurred in the underlying litigation due to respondent's failure to perform.

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)

Respondent's misconduct evidences multiple acts of misconduct.

² All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)

Respondent's misconduct harmed his clients, as Porco and D'Anniballe's civil matter was dismissed by the superior court.

Mitigation

Extreme Emotional/Physical Difficulties (Std. 1.2(e)(iv).)

From 2005 to 2012, respondent was dealing with extreme emotional and financial difficulties. Respondent was married in 1988, and has two children, a son born in 1990, and a daughter born in 1996. Unfortunately, respondent's marriage did not last and he moved out of the family residence in or about 2005.

The separation from his two children caused respondent to suffer from stress and anxiety. When his children were born, respondent made a vow to himself that he would never leave them. Respondent suffered from severe guilt and shame due to his broken vow. At times, both his son and daughter were in therapy, causing respondent to feel more guilt and shame.

In addition, during the period from 2005 to 2008, respondent was suffering financial difficulties in attempting to support his spouse and two children, as well as his independent living expenses. At times, respondent was forced to borrow money from friends to meet his monthly expenses. Respondent was also not taking care of himself physically during this time period.

In 2008, respondent relocated into a better living arrangement and, as a whole, began to function at a higher level. In 2011, however, respondent and his daughter had a major confrontation. Respondent had no contact with his daughter for an extended period of time, which caused the feelings of shame and guilt to reappear. It was during this period that respondent failed to communicate with the State Bar investigators or file a response to the NDC.

Richard Sandor, M.D. (Dr. Sandor) testified on behalf of respondent. Dr. Sandor believes, based on what respondent told him during their discussions, that respondent suffered from major depression beginning in 2005. Dr. Sandor testified that during this time period respondent needed anti-depression medication and therapy. Dr. Sandor described respondent's depression between 2005 and 2008, as severe, but varying, as respondent would sometimes feel better.

During the time of his misconduct in this matter, respondent was dealing with feelings of being unable to function and not being able to think clearly enough to protect himself from these overwhelming feelings. Due to his depression, respondent was employing childhood defense mechanisms, such as avoidance—as illustrated by his failure to respond to the State Bar investigators' letters.³

During his periods of depression, respondent would blame others for his problems and not take responsibility for his mistakes. This is another example of respondent's childhood defense mechanisms. Respondent could still function, but his depression impaired his cognitive and professional ability, as well as his motivation.

The court finds that, at the time of his misconduct, respondent was suffering from extreme emotional difficulties which expert testimony determined to be directly responsible for the misconduct. Consequently, respondent's extreme emotional difficulties warrant significant consideration in mitigation.

Community Service

Respondent earned his undergraduate degree from the University of Southern California. Respondent serves as a mentor to undergraduate students who are members of respondent's

³ As noted above, although respondent was functioning well in 2011, a problem with his daughter brought back all the feelings of the shame and guilt, causing him to ignore the investigators' letters, and eventually leading to his default in this matter.

fraternity. Respondent also presided over approximately 250 matters as a mediator/settlement officer for the Los Angeles Superior Court.

Such evidence is entitled to some weight in mitigation, although the weight of the evidence is limited because respondent's testimony was the only evidence on the subject, and therefore the extent of respondent's service is unclear. (See *In the Matter of Bach*, (Review Dept. 1991) 1 Cal. Stat Bar Ct. Rptr. 631, 647-648; *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158 & fn. 22.)

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.

In this case, the standards provide for the imposition of a minimum sanction ranging from suspension to disbarment. (Standards 2.4(b), 2.6, and 2.10.) Standard 2.4(b) states that, "culpability of a member of wilfully failing to perform services in an individual matter or matters not demonstrating a pattern of misconduct or culpability of a member of 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." Standard 2.6 provides that culpability of a member of a violation of section 6068 shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim. And standard 2.10 provides that culpability of a

member of a violation of rule 3-700 shall result in reproof or suspension according to the gravity of the offense or the harm, if any, to the victim.

Due to respondent's prior record of discipline, the court also looks to standard 1.7(b) for guidance. Standard 1.7(b) provides that when an attorney has two prior records of discipline, "the degree of discipline imposed in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate."

The standards, however, are guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards. [Citation.]" (*Id.* at p. 251.) While the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar argues that respondent should be disbarred. Respondent, on the other hand, urges the court to recommend a suspension consisting of the period of respondent's inactive enrollment in this matter.

The Supreme Court and Review Department have not historically applied standard 1.7(b) in a rigid fashion. Instead, the courts have weighed the individual facts of each case, including whether or not the instant misconduct represents a repetition of offenses for which the attorney has previously been disciplined. (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 977.) When such repetition has been found, the courts are more inclined to find disbarment to be the appropriate sanction. (See *Morgan v. State Bar* (1990) 51 Cal.3d 598, 607; *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841; *In the Matter of Thomson, supra*, 4 Cal. State Bar Ct. Rptr. at p. 977.)

While the present matter involves a repetition of prior offenses, the court takes into consideration the timing and limited scope of respondent's prior discipline. Although the present

case marks respondent's third discipline, the court gives diminished weight to respondent's prior discipline due to the fact that much of the present misconduct occurred in the same time period as respondent's second discipline. (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171.) The court therefore considers the totality of the findings in respondent's present and second discipline to determine what the discipline would have been had all the charged misconduct in this period been brought as one case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.)

In determining the appropriate level of discipline, the court is guided by *Conroy v. State Bar* (1991) 53 Cal.3d 495. In *Conroy*, the attorney, who had been twice disciplined in the past,⁴ was found culpable of misconduct in a single client matter. Said misconduct included failing to perform, failing to communicate, improper withdrawal, making misrepresentations to the client, and failing to cooperate with the State Bar. In aggravation, the Supreme Court noted the attorney's prior record of discipline and his failure to cooperate in the State Bar Court proceedings. No mitigating circumstances were found. The Supreme Court ordered that respondent be suspended from the practice of law for five years, stayed, with five years' probation including a one-year period of actual suspension.

While the facts and circumstances involved in the present case do not involve a misrepresentation, the court is concerned by respondent's failure to participate throughout most of the proceedings and the fact that the present matter involves a repetition of similar misconduct found in his first discipline. Accordingly, the court finds that a period of actual suspension similar to *Conroy* is warranted.

⁴ The attorney's prior disciplines resulted in a private reproof and a 60-day actual suspension. His second discipline involved his failure to comply with probationary conditions attached to his first discipline.

Having considered the parties' contentions, as well as the facts, standards, relevant law, mitigation, and aggravation, the court determined that, among other things, a one-year period of actual suspension and until satisfactory proof of respondent's rehabilitation, fitness to practice, and present learning and ability in the general law⁵ is the appropriate level of discipline to protect the public and preserve public confidence in the profession.⁶

Recommendations

It is recommended that respondent **Curtis Allen Westfall**, State Bar Number 128447, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that respondent be placed on probation⁷ for a period of three years subject to the following conditions:

1. Respondent Curtis Allen Westfall is suspended from the practice of law for a minimum of the first year of probation, and he will remain suspended until the following requirement is satisfied:
 - i. Respondent must 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 provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.

⁵ Considering respondent's medical history and the fact that he will not have practiced law for over two years, the court finds that a standard 1.4(c)(ii) proceeding is necessary to achieve the purposes of public protection.

⁶ The court notes that respondent has been inactive enrolled since July 15, 2012, as a result of his default in the present matter. Respondent requested that this period of inactive enrollment be credited toward any period of actual suspension recommended by the court. While there is precedent for crediting periods of interim suspension in conviction matters, the court is not aware of any authority extending such credits to periods of inactive enrollment in default matters. Unlike a conviction matter where the interim suspension is based on the underlying misconduct, here respondent's inactive enrollment was based on his failure to participate in the proceedings. Accordingly, the court declines to recommend that respondent receive credit for his period of inactive enrollment.

⁷ The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.
4. Within 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 period of probation, respondent must promptly meet with the probation deputy as directed and upon request.
5. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.
6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

Multistate Professional Responsibility Examination and Ethics School

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination or complete the State Bar's Ethics School, as he was recently ordered to do so, on November 2, 2011, by the Supreme Court in case no. S195926.

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: August 2, 2013

RICHARD A. PLATEL
Judge of the State Bar Court