

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No.: 11-O-17408-RAP
)	
WILLIAM JOSEPH HAMILTON,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 92688,)	ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

Introduction¹

In this contested disciplinary matter, respondent William Joseph Hamilton, is charged, in a single-client matter, with violating rule 3-300 [avoiding interests adverse to a client]. Based on the evidence and the law, the court finds by clear and convincing evidence that respondent is culpable of the alleged misconduct. After thorough consideration of the aggravating and mitigating circumstances, the court recommends that respondent be disbarred from the practice of law.

Significant Procedural History

On April 19, 2012, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed an Notice of Disciplinary Charges (NDC) against respondent. Respondent filed a response to the NDC on May 15, 2012. The State Bar was represented by Senior Trial Counsel Kimberly G. Anderson. Respondent represented himself.

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.

Trial was held on August 21 and 22, 2012. The case 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 May 30, 1980, and has been a member of the State Bar of California at all times since that date.

Case No. 11-O-17408 – The Riker Matter

Facts

In January 2001, Karen Riker (Mrs. Riker) sought consultation from respondent involving potential representation in her case entitled *Riker v. Horwith*, Los Angeles Superior Court case no. BP057233. This case involved an on-going trust dispute (the trust dispute case).

Between January 13 and April 4, 2011, respondent provided Mrs. Riker with copies of retainer agreements, which were never signed by respondent or Mrs. Riker. Respondent and Mrs. Riker continued to discuss the terms of the retainer agreement, but no written retainer agreement was ever executed because the parties never reached a final agreement as to the terms of the agreement.

On January 31, 2011, respondent signed the substitution of attorney to substitute into the trust dispute case on behalf of Mrs. Riker.

On February 14, 2011, respondent and Mrs. Riker orally agreed that respondent would accept a painting owned by Mrs. Riker and her husband Thomas Riker (Mr. Riker) to perform legal services on the trust dispute case. On February 14, 2011, Mrs. Riker sent an e-mail to respondent asking him to select one of the paintings owned by the Rikers.

On February 15, 2011, respondent sent Mrs. Riker an e-mail stating that he would accept an Alex Dzigurski painting entitled “Pacific Sunset” (the painting) owned by the Rikers as it would be, “best as the retainer.”

On February 21, 2011, the Rikers delivered the painting to respondent and a brochure signed by Dzigurski, which respondent accepted in lieu of a cash retainer as advanced fees for the trust dispute case.

On February 21, 2011, the Rikers and respondent signed a written agreement (the agreement) regarding the painting. The agreement was prepared by Mrs. Riker. The agreement allowed the Rikers to have the opportunity to buy back the original oil painting and brochure for the same amount of the agreed value set forth in the agreement.² The agreement valued the painting at \$10,000. However, that part of the agreement was voided by the parties and the \$10,000 value was termed an approximate value. Respondent wrote on the agreement that the painting would be appraised.

Respondent did not advise the Rikers to have the agreement reviewed by independent counsel.

Respondent took the painting for an appraisal and was surprised to learn that its value was appraised between \$1,500 and \$2,000. On February 23, 2011, respondent sent Mrs. Riker an e-mail stating that the painting appraised at approximately \$1,500-\$2,000.

Respondent continued to work on the Riker matter but did not file anything with the court.

On May 17, 2011, Mrs. Riker met with respondent, terminated his services, and demanded that he return her painting. Mrs. Riker was not satisfied because she felt the case was not going anywhere and wanted to put the case aside.

² At trial in this matter, respondent termed the buy-back paragraph as only an accommodation to the Rikers.

Respondent informed Mrs. Riker that he had put between \$3,500 to \$4,500 worth of billable hours of work into her case and that he was going to keep the painting. Mrs. Riker contested whether she owed respondent that amount for his services.

On July 21, 2011, respondent sent Mrs. Riker a bill stating that he had performed \$9,447.75 in legal services for her between January 27 and March 14, 2011, for 33.5 hours of work at a rate of \$285 per hour. Respondent credited Mrs. Riker for \$1,750 for the painting, which he represented was verbally appraised at between \$1,500 and \$2,000. Respondent did not credit Mrs. Riker for the brochure which respondent agreed was valued at \$500. The bill stated Mrs. Riker owed him a balance due of \$7,697.75.

Sometime after Mrs. Riker filed a State Bar Complaint against respondent, he sent Mrs. Riker an adjusted bill indicating that the balance due was over \$11,000, less the value of the painting. Respondent never offered the Rikers fee arbitration or mediation of the dispute.

On May 1, 2012, respondent returned the painting and the brochure to the Rikers.

Conclusions

Count One: *(Rule 3-300 [Avoiding Interests Adverse to a Client])*

Rule 3-300 provides that an attorney must not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

- The transaction/acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a reasonably understandable manner;
- The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to do so; and
- The client thereafter consents in writing to the terms of the transaction/acquisition.

The present case involves an agreement to take an original oil painting in lieu of a cash retainer. The client drafted the written agreement. The agreement originally stated that the

agreed value of the painting was \$10,000. Upon signing the agreement, the document was modified to state that \$10,000 was the approximate value and that the painting would be appraised. The document was silent on whether the approximate or appraised value would be controlling.³ The document also gave the Rikers the right to “buy back [the painting] for the same amount of the agreed value set forth here in this document.” The parties, however, were not in agreement regarding the value of the painting.

The court finds that there is clear and convincing evidence that respondent willfully failed to avoid an interest adverse to his client, in violation of rule 3-300, by acquiring an ownership, security, or, at a minimum, possessory interest in the painting, adverse to the Rikers’ interests, without: (1) fully disclosing the transaction and its terms in writing in a reasonably understandable manner; and (2) advising the Rikers in writing that they may seek the advice of an independent lawyer of their choice and giving the Rikers a reasonable opportunity to seek that advice.

There is no authority to support respondent’s assertion that rule 3-300 is not applicable in situations where the client and attorney are bartering possessions for services. As demonstrated here, bartering possessions for services creates adverse interests between the attorney and client, especially when the parties are not in agreement regarding the value of the underlying possession. Furthermore, it is not clear that the present matter truly was a bartering situation. Respondent took possession of the painting, but agreed that the Rikers had the opportunity to buy it back. Consequently, it is reasonable to conclude that the painting was being used more as a security devise, than a bartering chip.

³ The agreement was also silent on the terms and conditions regarding the appraisal, such as how the appraiser(s) would be chosen, whether the appraisal(s) had to be in writing, and how many appraisals would be obtained.

Aggravation⁴

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

Respondent has a record of five prior disciplines.

On September 22, 1993, the California Supreme Court issued order no. S033790, suspending respondent from the practice of law for a period of two years, stayed, with three years' probation, including restitution. In two consolidated cases, respondent stipulated that he engaged in the unauthorized practice of law (two counts), accepted an illegal fee, and failed to cooperate in a State Bar investigation. In mitigation, respondent had no prior record of discipline and there was no client harm. No aggravating circumstances were involved.

On March 29, 1995, the California Supreme Court issued order no. S044471, suspending respondent from the practice of law for a period of three years, stayed, with four years' probation, including restitution. In three consolidated cases, respondent stipulated that he failed to respond to his client's reasonable status inquiries, failed to perform legal services with competence, failed to comply with court orders, improperly withdrew from his client's case without taking reasonable steps to avoid foreseeable prejudice, and secured his initial retainer by a deed of trust without advising his client in writing that he may seek the advice of an independent attorney. In aggravation, respondent had one prior record of discipline; committed multiple acts of misconduct; and harmed a client. In mitigation, respondent displayed candor and cooperation with the State Bar and was suffering from financial problems at the time of his misconduct.

On July 21, 1997, the California Supreme Court issued order no. S061289, suspending respondent from the practice of law for two years, stayed, with two years' probation and 60 days'

⁴ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

actual suspension, including restitution. In this matter, respondent was found culpable of failing to comply with all the terms of his disciplinary probation and issuing a check against insufficient funds. In aggravation, respondent had two prior records of discipline and displayed indifference toward the consequences of his misconduct.

On August 13, 1998, the California Supreme Court issued order no. S070823, suspending respondent from the practice of law for two years, stayed, with three years' probation, and 90 days actual suspension. In this matter, respondent was found culpable of failing to promptly refund any part of an unearned fee. In aggravation, respondent had three prior records of discipline and his misconduct harmed a client. In mitigation, respondent cooperated with the State Bar and participated in pro-bono activities.

On August 7, 2001, the California Supreme Court issued order no. S097714, suspending respondent from the practice of law for three years, stayed, with three years' probation, and 18 months actual suspension. In three consolidated matters, respondent stipulated that he engaged in the unauthorized practice of law and failed to comply with all the conditions of disciplinary probation (two counts). In aggravation, respondent had four prior records of discipline and his misconduct involved dishonesty. In mitigation, respondent displayed remorse, candor, and cooperation, and his misconduct did not result in client harm.

Indifference toward Rectification/Atonement (Std. 1.2(b)(v))

By failing to return the painting to the Rikers until nearly a year after he was terminated, respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct.

Mitigation

Cooperation With State Bar (Std. 1.2(e)(v))

At trial, respondent entered into a partial stipulation as to facts and admission of documents. Respondent's cooperation with the State Bar warrants consideration in mitigation.

Good Character Testimony (Std. 1.2(b)(vi))

Respondent presented the testimony of two witnesses who attested to his good character and honesty. Two witnesses, however, do not constitute a wide range of references. Accordingly, this factor is given limited weight.

Discussion

Standard 1.3 provides that the primary purposes of disciplinary proceedings “are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.”

Standard 1.6(b) provides, in pertinent part, that the specific sanction for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

Standard 1.7(b) provides that, if an attorney has two prior records of discipline, the degree of discipline in the current proceeding must be disbarment unless the most compelling mitigating circumstances clearly predominate.

Standard 1.7(b), however, has not been rigidly applied by the courts. The Supreme Court and Review Department have generally found disbarment to be appropriate under standard 1.7(b) when there is a repetition of offenses for which an attorney has previously been disciplined that demonstrate a pattern of misconduct. (*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, 842.)

The State Bar urges that respondent should be disbarred from the practice of law based on respondent's misconduct in this matter and his prior record of discipline. The court agrees.

Respondent has been previously disciplined on five separate occasions. Despite his extensive involvement with the disciplinary system, respondent continues to demonstrate an unwillingness or inability to conform his behavior to the ethical demands of the profession. (*Arden v. State Bar* (1987) 43 Cal.3d 713, 728.) Additionally, respondent has previously been disciplined for a violation of rule 3-300 when he secured an initial retainer by a deed of trust without advising his client in writing that he may seek the advice of an independent attorney. Consequently, respondent should have gleaned a heightened appreciation of the perils associated with acquiring an ownership or security interest adverse to his clients.

The court has grave concerns as to whether another round of disciplinary probation would adequately satisfy the interests of public protection. Respondent's past probations and suspensions were not able to prevent the present misconduct; and respondent's two prior failures to timely comply with the constraints of disciplinary probation give little assurance that he recognizes and appreciates the serious nature of disciplinary probation. These concerns, coupled with the lack of compelling mitigating circumstances, give the court little justification to recommend a level of discipline short of disbarment.

Therefore, having considered the nature and extent of the misconduct, the aggravating and mitigating circumstances, as well as the case law, the court finds that respondent's disbarment is necessary to protect the public, the courts, and the legal community; to maintain high professional standards; and to preserve public confidence in the legal profession.

Recommendations

It is recommended that respondent **William Joseph Hamilton**, State Bar Number 92688, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

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.

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.

Order of Involuntary Inactive Enrollment

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: September 28, 2012

RICHARD A. PLATEL
Judge of the State Bar Court