



**ORIGINAL**

**PUBLIC MATTER**

**FILED**

**JUN 30 2015**

**STATE BAR COURT  
CLERK'S OFFICE  
LOS ANGELES**

**STATE BAR COURT OF CALIFORNIA**

**HEARING DEPARTMENT - LOS ANGELES**

In the Matter of	)	Case No.: 14-O-00586-YDR
	)	
<b>BRENDA ELIZABETH VARGAS,</b>	)	<b>DECISION AND ORDER OF</b>
	)	<b>DISMISSAL</b>
	)	
<b>Member No. 153230</b>	)	
	)	
<u>A Member of the State Bar.</u>	)	

**Introduction**<sup>1</sup>

In this matter, Brenda Elizabeth Vargas (“Respondent”) was charged with two counts of misconduct stemming from a single client matter. After completion of trial, the Office of the Chief Trial Counsel of the State Bar of California (“State Bar”) filed a motion to dismiss Count One without prejudice due to insufficient evidence. The court subsequently issued an order dismissing Count One with prejudice.

As set forth in more detail below, the court finds the State Bar failed to establish by clear and convincing evidence the violations charged in Count Two. As such, this matter is dismissed with prejudice and Respondent is exonerated on all charges.

**Significant Procedural History**

The State Bar initiated this proceeding by filing a Notice of Disciplinary Charges (“NDC”) on August 29, 2014. Respondent filed a response to the NDC on September 19, 2014.

<sup>1</sup> 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.

Deputy Trial Counsel Timothy G. Byer represented the State Bar. Respondent was represented by James I. Ham, of Pansky, Markle, Ham, LLP. Trial commenced on March 13, 2015. On April 6, 2015, after completion of trial, the State Bar filed a motion to dismiss Count One without prejudice based on insufficient evidence. By order filed June 9, 2015, the court dismissed Count One with prejudice.

This matter was submitted for decision on April 8, 2015. Closing argument briefs were filed the same day.

### **Findings of Fact**

These findings of fact are based on the record and evidence admitted at trial. Respondent was admitted to the practice of law in California on June 11, 1991, and has been a member of the State Bar of California at all times since that date.

#### **Case No. 14-O-00586 – The Oscar Oviedo Matter**

##### **Facts**

In January 2013, Respondent was hired by Oscar Oviedo to represent him in connection with his two workers' compensation cases. The first case, Workers' Compensation case no. ADJ8834638, involved a cut on Mr. Oviedo's finger ("the finger injury"). The second case, Workers' Compensation case no. ADJ8834639, involved a subsequent and more serious injury to Mr. Oviedo's leg/foot ("the leg/foot injury").

At various times during the pendency of Mr. Oviedo's cases, Respondent and Mr. Oviedo's employer's defense counsel, Jeffrey Dorman, engaged in settlement negotiations. Prior to Mr. Oviedo's deposition on April 22, 2013, Mr. Dorman and Respondent discussed settling the workers' compensation cases. Respondent advised Mr. Oviedo that a settlement offer had been made in the amount of about \$8,500 to resolve both cases. Mr. Oviedo rejected the offer because he thought the two injuries warranted a higher settlement value. Mr. Oviedo suggested

“splitting” the two injuries, settling the finger injury for the amount of the initial offer and presenting a counteroffer. Respondent and Mr. Oviedo discussed countering with an offer of \$30,000 to resolve both cases.

Mr. Dorman, however, would not consider recommending to his client a split injury settlement in a case such as Mr. Oviedo's.<sup>2</sup> Mr. Oviedo's deposition proceeded as scheduled and the litigation of the cases continued.

Approximately one to three weeks after the deposition, Mr. Oviedo contacted Respondent and expressed an urgent desire to settle his case. When Respondent communicated Mr. Oviedo's desire to settle, Mr. Dorman advised Respondent that he would neither split the claims nor settle the two claims for more than \$8,000. Respondent communicated the \$8,000 offer to her client who emphasized that he wanted more money for both injuries.

At some point, Mr. Oviedo was incarcerated and later, while under house arrest, he asked Respondent to meet him at his home so he could sign settlement documents. Respondent met with Mr. Oviedo at his home on May 20, 2013. Mr. Oviedo maintains that during the meeting Respondent advised him that the documents resolving the matter for \$8,000 addressed the settlement of the finger injury, only. Respondent, on the other hand, contends she carefully explained to Mr. Oviedo in English and Spanish that given the nature of his injuries, the \$8,000 settlement was not unreasonable; however, since he wanted a higher settlement payment, she would try to negotiate a higher settlement but that further negotiation would require more time since defense counsel would not agree to settle the injuries separately. Respondent further contends that Mr. Oviedo stated that while he was reluctant to accept the \$8,000 for both

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<sup>2</sup> According to Mr. Dorman, his client denied Mr. Oviedo's workers compensation claims because there were no medical records or reports that indicated an industrial related injury and the claims were not submitted until after Mr. Oviedo's termination. Under these facts, Mr. Dorman believed his client had an affirmative defense to the claims and was not willing to offer more to settle the injuries.

injuries, he needed the money so he would execute the settlement papers, even though it meant resolving both injuries.<sup>3</sup>

During the meeting at his home, Mr. Oviedo and Respondent called Respondent's law office and requested that two of Respondent's employees "witness" the signing of the Compromise and Release ("C&R"). The two employees, receptionist Digna Marcillo and legal assistant Evelyn Rodriguez, agreed to do so after Mr. Oviedo telephonically confirmed his identity and that he was signing the C&R. The C&R which Mr. Oviedo signed on May 20, 2013, provided that Mr. Oviedo agreed to settle both injuries for \$8,000.<sup>4</sup> It is undisputed that Ms. Marcillo and Ms. Rodriguez did not observe Mr. Oviedo's execution of the C&R; however, it is also undisputed that Mr. Oviedo's signature on the C&R was genuine.

During their meeting, Mr. Oviedo inquired as to when he could expect to receive the settlement funds. Within two weeks of the meeting, Respondent forwarded the settlement funds to Mr. Oviedo.

After leaving the meeting with Mr. Oviedo at his home, Respondent returned to her office with the C&R, which Ms. Marcillo and Ms. Rodriguez executed as "witnesses." The C&R was then forwarded to Mr. Dorman. Mr. Dorman signed the C&R and subsequently caused the C&R to be submitted to Judge Doyle for approval by "walk through."

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<sup>3</sup> Although Mr. Oviedo's wife, Cristina Escovedo, was home and heard Respondent and Mr. Oviedo discussing the settlement, she testified she was not paying close attention to the actual substance of the conversation. Leidi, one of Mr. Oviedo's daughters, testified she was also at home during Respondent's meeting with Mr. Oviedo and she heard her father repeatedly inquire as to whether the settlement was for his finger injury only. Leidi heard Respondent state that the settlement was for the finger injury only and that she would get back to Mr. Oviedo with a separate offer for his leg. Leidi's testimony, however, was given little weight or credibility due the likelihood of pressure stemming from her relationship with her father and strain in their relationship that would result from any potentially adverse testimony against him.

<sup>4</sup> The signature page of the C&R states, "By signing this agreement, applicant (employee) acknowledges that he/she has read and understands this agreement and has had any questions he/she may have had about this agreement answered to his/her satisfaction." (Exhibit 13, p. 8.)

## Conclusions

### *Count Two – § 6068, subd. (d) [Seeking to Mislead a Judge]*

Section 6068, subdivision (d), provides that an attorney has a duty to employ those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of law or fact. In Count Two, the State Bar charges that in willful violation of section 6068, subdivision (d), Respondent misled the Workers Compensation Appeals Board judge by knowingly filing on behalf of her client, Oscar Oviedo, a C&R which falsely stated: (1) Mr. Oviedo intended to settle both of his workers compensation cases; and (2) that two individuals had “witnessed” Oviedo’s signature on the C&R.

To violate section 6068, subdivision (d), an attorney must knowingly make a false, material statement of fact or law to a court, with the intent to mislead. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr 490, 497). It has not been established by clear and convincing evidence that Mr. Oviedo was ignorant of the fact that the C&R settled both workers’ compensation matters.<sup>5</sup> Therefore, this matter turns on the question of whether the State Bar proved by clear and convincing evidence that Respondent intended to mislead Judge Doyle by knowingly submitting a C&R which falsely stated that the two employees “witnessed” Mr. Oviedo’s execution of the C&R. Based on the record and applicable case law, the answer is “no.”

It is undisputed that Respondent caused the subject C&R to be executed by Mr. Oviedo and she had the C&R forwarded to opposing counsel for submission to Judge Doyle. It is also undisputed that Respondent’s two employees executed the C&R as “witnesses,” although neither employee was physically present when Mr. Oviedo executed the C&R. The State Bar alleges

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<sup>5</sup> The court found Respondent’s testimony credible regarding her May 20, 2013 meeting with Mr. Oviedo. Further, the C&R clearly indicated that it involved both the finger injury and the leg/foot injury.

that Respondent intended to mislead Judge Doyle in order to get settlement approval by having her employees sign as witnesses although they did not visually observe Mr. Oviedo's signature.

While this court holds the view that it is not a good practice, there is support for the attestation of a C&R by a witness who is not physically present when the applicant/employee executes the C&R. (See *Brightwell v. Industrial Accident Commission*, 30 Cal. Comp. Cases 127 (App. 4<sup>th</sup> Dist. 1965).) In *Brightwell*, the Industrial Accident Commission of the State of California<sup>6</sup> issued an abbreviated decision indicating that Labor Code section 5003 does not require that witnesses be present when the employee signs the compromise and release agreement. Labor Code section 5003 provides:

Every release or compromise agreement shall be in writing and duly executed, and the signature of the employee or other beneficiary shall be attested by two disinterested witnesses or acknowledged before a notary public.

The State Bar argues that Labor Code section 5003 is not relevant in that Respondent is charged in Count Two with violation of section 6068, subdivision (d), for attempting to mislead the judge by false statement(s) of fact or law. However, Labor Code section 5003 and *Brightwell's* interpretation of it are both relevant because they directly address the issue of whether a C&R attested under similar circumstances is a properly "witnessed" C&R.<sup>7</sup>

The bottom line here is that Respondent neither made a "false statement of fact or law" nor misled Judge Doyle by having two of her employees who were not physically present attest

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<sup>6</sup> The Industrial Accident Commission of the State of California is the predecessor to the current Workers Compensation Appeals Board.

<sup>7</sup> The State Bar contends that *Marchese v. Home Depot*, 37 CWCR 282 (2009) applies because it "addressed a Compromise and Release form which was identical, in the relevant respect, to the one at issue in this case." (State Bar Court Closing Argument Brief, p. 15.) Yet, *Marchese* is distinguishable because it seems to turn on that fact that there, unlike here, the applicant attorney had witnesses falsely sign and backdate the C&R settlement document, a fact the Workers Compensation Appeals Board found to be significant.

Also, since the California Court of Appeal denied the writ of review in *Brightwell*, this court considers *Brightwell* to be more persuasive than *Marchese*, an *en banc* Workers' Compensation Appeals Board decision.

to Mr. Oviedo's execution of the C&R. Moreover, while the State Bar introduced evidence that Respondent caused and intended that the "witnessed" C&R would be *submitted* to Judge Doyle to finalize Mr. Oviedo's settlement, the State Bar offered no evidence to support its contention that Respondent *intended* to mislead the Workers Compensation Appeals Board judge by allowing her employees to "witness" the C&R though not physically present at the time of Mr. Oviedo's execution of the C&R. To the contrary, it is undisputed that Respondent intended to confirm Mr. Oviedo as the C&R signer by calling her employees to "witness" Mr. Oviedo's telephonic confirmation that he was signing the C&R. Whether mistaken or not, Respondent considered the telephonic "witnessing" of the C&R to be proper. As such, the State Bar did not prove by clear and convincing evidence that Respondent intended to mislead the Workers' Compensation judge.

For the reasons set forth above, the court finds that the record in this proceeding fails to establish by clear and convincing evidence that Respondent is culpable of the conduct charged in Count Two of the NDC. Accordingly, Count Two is dismissed with prejudice.

#### **Order of Dismissal**

This court orders that the Notice of Disciplinary Charges in this proceeding is **DISMISSED WITH PREJUDICE** for want of clear and convincing evidence. Because Respondent **BRENDA ELIZABETH VARGAS** has been **EXONERATED** of all charges following a judicial determination on the merits, she may, upon finality of this decision and order, file a motion seeking reimbursement for costs as authorized by Business and Professions Code section 6086.10, subdivision (d). (Rules Proc. of State Bar, rule 5.131.)

Dated: June 30, 2015



YVETTE D. ROLAND  
Judge of the State Bar Court

**CERTIFICATE OF SERVICE**

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on June 30, 2015, I deposited a true copy of the following document(s):

**DECISION AND ORDER OF DISMISSAL**

in a sealed envelope for collection and mailing on that date as follows:

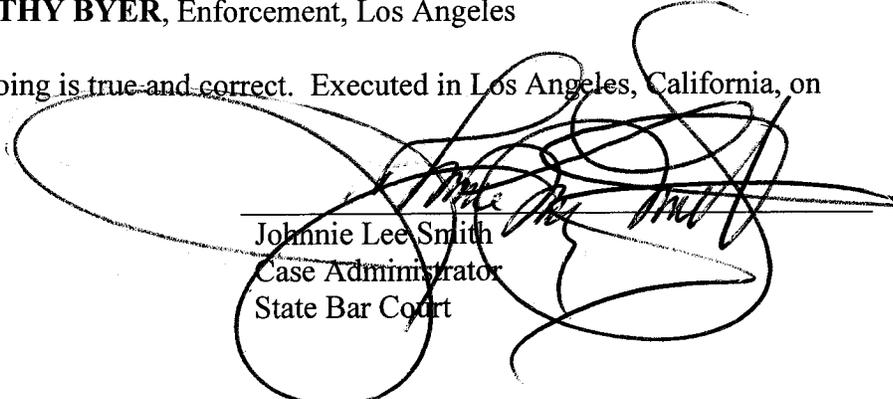
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**JAMES IRWIN HAM  
PANSKY MARKLE HAM LLP  
1010 SYCAMORE AVE UNIT 308  
SOUTH PASADENA, CA 91030**

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

**TIMOTHY BYER**, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on June 30, 2015.

  
Johnnie Lee Smith  
Case Administrator  
State Bar Court