

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: **13-J-12285-RAH**
)
STEVEN BRUCE LEHAT) **DECISION AND ORDER**
)
Member No. 92798)
)
A Member of the State Bar.)

Introduction¹

On February 21, 2013, the United States Patent and Trademark Office (USPTO) issued a final disciplinary order (the February 21, 2013 order) based on a stipulated resolution between Steven Bruce Lehat (respondent) and the USPTO arising out of certain misconduct respondent committed in matters pending before that office. As a result of that discipline, respondent received a reprimand and was ordered to refund to his client \$4,200 in unearned legal fees. Respondent paid the ordered restitution.

The State Bar Court admitted into evidence a certified copy of the February 21, 2013 order. The court also admitted into evidence and judicially noticed the applicable provisions of the U.S. Code of Federal Regulations.

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.

Business and Professions Code section 6049.1, subdivision (a), provides, in pertinent part, that a certified copy of a final order by any court of record of any state of the United States, determining that a member of the State Bar committed professional misconduct in that jurisdiction, shall be conclusive evidence that the member is culpable of professional misconduct in this state. As a result, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated the above-entitled proceeding pursuant to Business and Professions Code section 6049.1, subdivision (b), and Rules of Procedure of the State Bar, rules 5.350-5.354.

The issues in this proceeding are limited to: (1) the degree of discipline to be imposed upon respondent in California; (2) whether, as a matter of law, respondent's culpability in the USPTO proceeding would not warrant the imposition of discipline in California under the laws or rules applicable in this State at the time of respondent's misconduct at the USPTO; and (3) whether the USPTO proceeding lacked fundamental constitutional protection. (Section 6049.1, subdivision (b).)

Pursuant to section 6049.1, subdivision (b), respondent bears the burden of establishing either: (1) that the conduct for which he was disciplined before the USPTO would not warrant the imposition of discipline in California; or (2) that the USPTO proceedings lacked fundamental constitutional protection. Respondent, however, did not establish either of these factors.

Consequently, the court orders, among other things, that respondent receive a public reproof.

Significant Procedural History

The State Bar initiated this proceeding by filing a notice of disciplinary charges (NDC) on June 19, 2013. The State Bar was represented by Deputy Trial Counsel Kelsey Blevings. Respondent was represented by Edward Lear. Trial commenced on November 1, 2013, and the matter was submitted for decision on that same day.

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. He was also admitted to the District of Columbia Bar on December 4, 2000. He practices in the area of corporate and business law as a sole practitioner. He is not now, and never has been authorized to appear before the United States Patent and Trademark Office in patent matters, but he is authorized to practice in trademark matters.

Background

In or about September 2011, Jose Zephyr (Zephyr) retained respondent regarding an invention he sought to market. Respondent agreed to represent him and entered into an agreement documenting their relationship.²

Respondent worked for Zephyr on a flat-fee basis. That is, he performed specific tasks for an agreed-upon fee. All of the work necessary to perform those tasks was included in the agreed-upon fee, including regular and email correspondence, telephone conferences, document preparation, and supervising other professionals he hired to assist the client. Because of this arrangement, respondent did not keep detailed time records.

Respondent was hired to organize Zephyr's new company and counsel him regarding his new business. In assisting Zephyr, respondent performed several tasks done commonly by an attorney representing an entrepreneur.

When Zephyr needed help with his patent, respondent hired Raymond Sun (Sun), an experienced attorney who practiced before the USPTO. Sun agreed to prepare the patent application paperwork for a fee of \$3,000, and respondent paid him that amount out of the

² Respondent had previously represented Zephyr in another patent project. The retainer agreement specifically provided that if respondent was subsequently retained on other matters, the substantive provisions of that retainer agreement would also apply to those matters.

\$5,000 flat-fee respondent received from Zephyr to perform activities related to the patent. Sun, however, was not a partner of, associate of, or shareholder with respondent; and Zephyr did not consent in writing to respondent's division of his legal fee with Sun.

Just after respondent started Zephyr's patent work, Zephyr terminated their relationship.³ Zephyr demanded a full refund of the \$5,000 paid to respondent. When advised of this by respondent, Sun, who had done some work on the case, returned to respondent \$2,200 of the \$3,000 he had received.

Respondent did not promptly return to Zephyr any portion of the \$5,000 he had received. Initially, respondent contended that because he had a flat-fee, he had earned the full amount upon being retained. When he realized that he did not enter into a true retainer arrangement, respondent then contended that he had earned the fee on the basis of *quantum meruit* using an imputed hourly rate of \$1,000.⁴ He supported this theory with time records created after the fact based on his review of the emails he had sent and the work he recalled performing.

Zephyr obtained a default money judgment against respondent for \$5,000. Respondent has since paid full restitution to Zephyr.

The USPTO Proceedings

Charges were brought against respondent by the USPTO Office of Enrollment and Discipline. Those charges included the following:

1. Failing to refund an unearned fee in violation of 37 C.F.R. § 10.40(a);

³ Zephyr retained counsel to send a letter on his behalf to respondent, terminating his services and requesting the return of the \$5,000.

⁴ The \$1,000 per hour rate was not mentioned in the retainer agreement entered into by the parties. However, because his theory was that this was the reasonable value of his services, respondent did offer credible evidence that for similar work, \$1,000/hour was within the range of fees charged by other firms, albeit at the very top of that range.

2. Failing to promptly release to the client, at the request of the client, all of the client's funds or other properties upon termination of employment in violation of 37 C.F.R. § 10.112(a);
3. Charging an illegal or clearly excessive fee (\$1,000/hour) in violation of 37 C.F.R. § 10.36(a); and
4. Dividing fees with Sun, who was not a partner in or associate of respondent's law firm or law office, in violation of 37 C.F.R. § 10.37(a).

Conclusions of Law

Violations of the Rules Regulating Practitioners Appearing Before the USPTO

The USPTO found that respondent violated the above-noted provisions of the U.S. Code of Federal Regulations. The February 21, 2013 order sets forth the USPTO's findings and conclusions. Respondent was disciplined by receiving a public reprimand and was ordered to pay restitution of \$4,200 to Zephyr within 60 days.

Based on the evidence before this court, it has not been established that the USPTO proceedings lacked fundamental constitutional protection.

Violations of California Laws

The court finds, as a matter of law, that respondent's culpability in the USPTO proceeding would warrant the imposition of discipline in California under the laws or rules applicable in this State at the time of respondent's misconduct as described in the USPTO proceeding, as follows:

Rule 3-700(D)(2) [Failure to Return Unearned Fees]

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund any part of a fee paid in advance that has not been earned. Respondent failed to promptly refund unearned fees after he was terminated by Zephyr, in willful violation of rule 3-700(D)(2).

Rule 3-700(D)(1) [Failure to Return Client Papers/Property]

Rule 3-700(D)(1) requires an attorney, upon termination of employment, 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 pleadings, correspondence, exhibits, deposition transcripts, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

At trial, this charge was dismissed on the motion of respondent. The USPTO found that respondent violated 37 C.F.R. § 10.112(a) solely by his failure to pay promptly to Zephyr the \$4,200 in unearned fees. This is duplicative of the found misconduct under rule 3-700(D)(2), above. As such, the court reaffirms the ruling at trial that this charge is dismissed with prejudice.

Rule 4-200(A) [Illegal or Unconscionable Fee]

Rule 4-200(A) provides that an attorney must not charge, collect, or enter into an agreement for an illegal or unconscionable fee. In the February 21, 2013 order, respondent was found to have violated 37 C.F.R. § 10.36. This rule defines "clearly excessive" as follows:

"A fee is clearly excessive when, after a review of the facts, a practitioner of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."⁵

It has long been held in California that discipline is warranted if a fee is charged which is so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called. (*In re Goldstone* (1931) 214 Cal. 490, 499.) However, a fee that "seems high" or even one that is in fact high is not the same as an unconscionable fee.

(*Aronin v. State Bar* (1990) 52 Cal.3d 276, 285-286.) Unlike the USPTO's definition of "clearly

⁵ The rule then provides the factors that are to be considered as guides in determining the reasonableness of a fee. Many of these factors are similar, if not identical to those found in rule 4-200(B). However, the factors are to be used to determine whether a "clearly excessive fee" was charged, not an unconscionable fee.

excessive,” California does not measure unconscionability by whether the fee exceeds what would be a reasonable fee. In *Herrscher v. State Bar of California* (1935) 4 Cal.2d 399, 402, the Supreme Court clarified the high standard required for finding an unconscionable fee:

“We think the proper rule in such cases is that the mere fact that a fee is charged in excess of the reasonable value of the services rendered will not of itself warrant discipline of the attorney involved.”

The USPTO did not find that the fees respondent charged were unconscionable. Rather, the USPTO simply restated the rule that “a practitioner of ordinary prudence would be left with a definite and firm conviction” that the fee exceeded a reasonable fee. This finding does not support a conclusion in California that the fee was unconscionable within the meaning of rule 4-200(A), and, consequently, this charge is dismissed with prejudice.

Rule 2-200(A) [Financial Arrangements among Lawyers]

Rule 2-200(A) provides that an attorney must not divide a fee for legal services with a lawyer who is not a partner, associate, or shareholder with the attorney, unless the client has consented in writing after full written disclosure of the fee division and its terms, and the total fee charged is not increased solely because of the provision for the division of fees and is not unconscionable as defined in rule 4-200. By dividing his legal fee with Sun, without Zephyr’s written consent after a full disclosure had been made in writing, respondent violated rule 2-200(A).

Aggravation⁶

Multiple Acts/Pattern of Misconduct (Std. 1.5(b).)

Multiple acts of misconduct are an aggravating factor. Respondent committed multiple acts of misconduct in this single-client matter.

⁶ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Mitigation

No Prior Record (Std. 1.6(a).)

Respondent does not have a prior record of discipline. Accordingly, he is entitled to highly significant mitigation for his more than 30 years of discipline-free practice prior to the onset of the present misconduct. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [more than 20 years of practice with an unblemished record is highly significant mitigation].)

Good Character (Std. 1.6(f).)

Respondent presented evidence from two lawyers who spoke very highly of respondent's honesty, integrity, and good character. Both knew respondent well and were aware of the nature of the charges against him. However, since respondent did not present a wide range of references in the legal and general communities, the testimony of his two character witnesses is not entitled to weight in mitigation. (See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [attorney not entitled to mitigation for good character based on testimony of two witnesses].)

Community and Volunteer Activities

Respondent has been very active in his temple and related charities and he regularly teaches Jewish Law and the Torah to members of the congregation. Respondent also acts as a mentor to undergraduate and graduate students at the Marshall School of Business at the University of Southern California, the Carl Lindner School of Business at the University of Cincinnati, and the Dingman Center at the University of Maryland. He is on the Board of Directors for Head Start at USC. He also works with the Knights of Goodness, teaching at-risk children how to swim and respect their parents.

Respondent has also testified before former State Bar President Jon Streeter's task force formed to help new attorneys better deal with the business of law. Respondent suggested course modifications in law schools to better prepare their students.

Respondent's extensive community and volunteer activities warrant some consideration in mitigation. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [service to the community is a mitigating factor entitled to considerable weight].)

Remorse/Recognition of Wrongdoing (Std. 1.6(g).)

Respondent expressed remorse at trial for not properly handling the Zephyr matter. He noted that these disciplinary proceedings have represented a "black scar" on him that he sincerely regrets. He has since changed his retainer agreement to correct the deficiencies addressed by the USPTO and the State Bar.

Discussion

The primary purposes of attorney 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 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

Standard 1.7 provides that the appropriate sanction for the misconduct must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding and different sanctions are prescribed by the standards for those acts, the sanction recommended shall be the most severe.

Standard 2.15 applies in the present proceeding. This standard states that reproof or suspension (not to exceed three years) is appropriate for a violation of the Business and Professions Code or Rules of Professional Conduct not specified in the standards.

The standards, however, are only 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.” (*Id.* at p. 251.)

The State Bar sought discipline including a six-month period of suspension and compliance with rule 9.20 of the California Rules of Court.⁷ Respondent, on the other hand, sought a private reproof.

The court found additional guidance in *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, and *In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668. In *Hanson*, the attorney who had practiced law for about 23 years was publicly reproofed for failing, in a single-client matter, to promptly return an unearned legal fee and to take steps to avoid foreseeable prejudice to his client. No mitigating circumstances were found. In aggravation, the attorney’s prior private reproof was determined to be remote in time and therefore garnished little weight.

In *Lindmark*, the attorney was publicly reproofed for failing to promptly return an unearned fee. Similar to the present matter, the attorney initially took the position that his fee was non-refundable. In mitigation, the attorney had practiced law for eight years with no prior record of discipline and demonstrated good character. In aggravation, the attorney impeded his former client’s efforts to obtain the unearned fee, even after a final judgment in the client’s favor.

The court finds that the present case is similar to *Hanson* and *Lindmark*. While the present case involves an additional count of dividing a legal fee with another attorney without client consent, this factor is offset by respondent’s many years of discipline-free practice. In

⁷ The State Bar’s recommendation was based, at least in part, on standard 2.3, which advocates actual suspension of at least six months for charging or collecting an unconscionable fee. However, as noted above, the court did not find respondent culpable on that charge.

addition, respondent's attitude and demeanor assures the court that the present misconduct was aberrational, and not likely to be repeated.

Therefore, having considered the parties' contentions, the facts, the relevant case law, and the mitigating and aggravating factors, the court determined that, among other things, a public reproof is the appropriate level of discipline to protect the public and preserve public confidence in the profession.

Order

It is ordered that respondent **Steven Bruce Lehat**, State Bar Number 92798, is publicly reproofed. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, 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 5.128 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 the public reproof may constitute cause for a separate proceeding for willful breach of rule 1-110 of the State Bar Rules of Professional Conduct. Respondent is ordered to comply with the following conditions attached to his public reproof for one year following the effective date of the public reproof:

1. During the one-year period in which these conditions are in effect, respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions attached to his public reproof.
2. 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.
3. 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 attached to his public reproof. Upon

the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period in which these conditions are in effect, respondent must promptly meet with the probation deputy as directed and upon request.

4. During the period in which these conditions are in effect, 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 period in which these conditions are in effect. 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 conditions attached to his reprobation 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 the reprobation 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 period in which these conditions are in effect and no later than the last day of that period.
5. 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 the conditions attached to this reprobation.
6. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

Multi-State Professional Responsibility Examination

It is further ordered that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the public reprobation imposed in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

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Costs

It is ordered 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: February _____, 2014

RICHARD A. HONN
Judge of the State Bar Court