

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of) Case No.: **12-O-12062-RAH**
)
MICHAEL R. CARVER,) **DECISION**
)
Member No. 203925,)
)
A Member of the State Bar.)

Introduction¹

In this matter, the court finds respondent Michael R. Carver culpable of violating sections 6068, subdivision (a) and 6106, arising out of a single incident of the unauthorized practice of law (UPL).

Significant Procedural History

The Notice of Disciplinary Charges (NDC) in this matter was filed on October 31, 2013. Trial was commenced on May 23, 2014. Hugh G. Radigan of the Office of the Chief Trial Counsel represented the State Bar of California. Respondent represented himself.

The matter was initially submitted for decision on June 4, 2014. However, this submission date was vacated on August 8, 2014, due to the fact that there was a prior disciplinary matter pending in the review department, State Bar Court case no. 11-H-16868 (“the pending review matter”). On August 8, 2014, the court ordered that the parties brief the

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

applicability and interpretation of rule 5.106(E) of the Rules of Procedure of the State Bar of California (“rule 5.106(E)”) with respect to a pending appeal of a prior disciplinary matter.² Both parties filed briefs on this subject, and the case was again submitted for decision on September 25, 2014.

The court finds that rule 5.106(E) does not apply to the pending review matter, because there has been no final decision of the State Bar Court, and therefore, no recommendation to the Supreme Court within the meaning of rule 5.106(E). As such, this decision is written and filed without consideration of the pending review matter.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 6, 1999, and has been a member of the State Bar of California at all times since that date.

Facts

The NDC and the Amended NDCs in State Bar Court case no. 11-H-16868 were filed and served on November 29 and December 1, 2011, respectively.³ As set forth in more detail below, respondent became aware of one or both of these NDCs because an employee of a private mail box company he used signed for the certified mail which contained the NDC. Respondent became angry with the company for doing so, and changed his address to a U.S. Mail post office box on January 23, 2012. As such, respondent had actual notice that the NDC had been filed on or before January 23, 2012. He did not respond to the NDC.

² Rule 5.106(E) reads as follows: “A record of prior discipline is not made inadmissible by the fact that the discipline has been recommended but has not yet been imposed. If a record of prior discipline that is not yet final is admitted, the Court shall specify the disposition:

- (1) if the non-final prior discipline recommendation is adopted; and
- (2) if the non-final prior discipline recommendation is dismissed or modified.”

³ These documents were not in evidence, but the court takes judicial notice of them as part of its own files and records.

On February 2, 2012, respondent's default was entered in case no. 11-H-16868. As part of that order entering default, the hearing judge also ordered that respondent be enrolled as an inactive member of the State Bar (§ 6007, subdivision (e)). Respondent's inactive enrollment commenced February 18, 2012. Respondent was properly served with this order no later than February 15, 2012.

The Vann Matter

On March 1, 2012, during his inactive enrollment, respondent served a notice of limited scope representation upon the Department of Child Support Services, advising this agency of his intention to appear on behalf of Peter Vann at an upcoming hearing in *Faulkner-Vann v. Vann*, Orange County Superior Court, case no. 96D006469. On March 2, 2012, respondent appeared in Department L-52 of the Orange County Superior Court on behalf of his family law client, Peter Vann. At this initial appearance, respondent filed a declaration and an objection, both seeking to disqualify the sitting judicial officer, Commissioner Barry S. Michaelson, pursuant to Code of Civil Procedure Section 170.6. As a result of this motion to disqualify, the matter was transferred to Department L-51 of the same court, and later, to Department L-69, before the Hon. David Belz. At a hearing before Judge Belz on April 13, 2012, respondent was informed that he was suspended and could not appear in the matter. The minutes of the court indicate that respondent began to provide legal advice to his client, and the court admonished him not to do so.⁴ Respondent moved for a continuance, which was granted.

⁴ However, there was no clear and convincing evidence that respondent actually gave legal advice to his client during the hearing. In his testimony, Judge Belz clarified that he was not completely sure that such advice was being given. Rather, the transcript indicates that the court simply warned respondent that he should not give legal advice, and asked him to "step away from the counsel table and move away and out of this hearing." (Exhibit C, page 4.)

Respondent's Attempts to Evade Service

Respondent claims to have been unaware of the order of inactive enrollment. However, as noted above, he was properly served by certified mail at his official membership records address. (§ 6002.1, subd. (c) [service complete at the time of mailing if mailed to the official membership records address].)⁵ At trial, respondent argued that he was not served, because of the fact that he failed to sign for and pick up his mail from his official membership address – a post office box. His argument is misguided, and in addition, these attempts to avoid service represent a concerted effort on his part to subvert the statutory scheme set forth in the Business and Professions Code regarding the conduct of disciplinary proceedings. The law is clear that respondent may not simply “close his eyes” to pending disciplinary proceedings by claiming lack of *actual* service of notices from the State Bar. In *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186, the Supreme Court decided the issue that respondent relies on in his defense. There, the court noted as follows:

“Petitioner mistakenly assumes that actual notice is a necessary element of proper service in disciplinary proceedings. At a minimum, the State Bar may send all notices to show cause and hearing notices by certified mail to the most recent address shown on an attorney’s membership records. Such notices are deemed served at the time of mailing regardless of whether they are actually received by the attorney. . . . It is the attorney’s obligation to keep the State Bar informed of any address changes.”

(See also *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107; *Middleton v. State Bar* (1990) 51 Cal.3d 548, 558 [actual notice of disciplinary charges not necessary to effect service].)

But respondent did not just negligently fail to check his mail box. He actually terminated his relationship with a private mail box company because an employee signed for certified mail without respondent’s prior authorization. That piece of mail contained either the NDC or the

⁵ On May 23, 2014, respondent filed a Request for Judicial Notice of documents contained in the court’s file, arguing that the “returned” stamp on the envelopes of certified mail exculpates respondent. The status of the certified mail as “returned” does not negate a finding that the document was served, since service is complete when mailed. The request is denied, no good cause having been shown.

Amended NDC, or both, in State Bar Court case no. 11-H-16868. After becoming aware of the existence of the NDC in his matter, he did not respond to the notice, and he intentionally used the box to *avoid* being served. He then transferred his account to an official U.S. Mail post office box. Later, he went to this P.O. box and found two notices that he had received certified mail. He never signed for that mail, nor did he open any mail or otherwise seek to determine what was contained in the mail, despite the fact that he admitted that he used this box *exclusively* for State Bar matters and was aware of the filed NDCs in the case. In fact, what was contained in those mailings were the documents in exhibit B: a February 15, 2012 letter to Frederick K. Ohlrich, the clerk of the Supreme Court, advising him that respondent had been enrolled inactive; and an order entering respondent's default in case no. 11-H-16868.

Conclusions

Count One – § 6068, subd. (a) [Duty to Support All Laws]

Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and laws of the United States and California. By holding himself out as entitled to practice law and actually practicing law in *Faulkner-Vann v. Vann*, Orange County Superior Court, case no. 96D006469, respondent violated sections 6125 and 6126, and thereby willfully violated section 6068, subdivision (a).

Count Two – § 6106 [Moral Turpitude]

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. Respondent appeared in court with his client without disclosing his inactive status, or the likelihood of his inactive status that resulted from his failure to respond to the NDC. By holding himself out as entitled to practice law and actually practicing law in *Faulkner-Vann v. Vann*, Orange County Superior Court, case no. 96D006469, when respondent knew, or with gross negligence

reasonably should have known, that he was not entitled to do so, respondent committed an act of moral turpitude, dishonesty, or corruption in willful violation of section 6106.

Aggravation⁶

Prior Record of Discipline (Std. 1.5(a).)

Respondent received a public reproof in State Bar case no. 08-C-13987 for misconduct arising out of a conviction for violating Penal Code sections 12500(a) [driving without a valid license] and 148(a)(1) [resisting or obstructing an officer] resulting in a three-year probation, fines, and a requirement of community service. The State Bar Court did not find that the facts and circumstances surrounding these violations involved moral turpitude. He was given mitigation for having had no prior discipline.

Misconduct Surrounded/Followed by Bad Faith, Dishonesty, or Concealment (Std. 1.5(d).)

Respondent used private mail boxes and post office boxes in a manner which was designed to intentionally avoid service of notices of the proceedings pending against him. These actions are a serious aggravating factor.

Indifference Toward Rectification/Atonement (Std. 1.5(g).)

Despite being aware of the unequivocal law on the method of proper service of notices by the State Bar, respondent continued to assert his untenable position that he was not properly served with the pleadings in State Bar Court case no. 11-H-16868, resulting in the use of valuable court resources in trying this matter.

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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

Extreme Emotional Difficulties (Std. 1.6(d).)

Respondent's father was diagnosed with throat cancer in January or February 2012, and was ill during the entire year. He passed away in January 2013. Further, respondent's house was in foreclosure during 2012 and his bank did not allow him to pursue a loan modification, resulting in respondent having to file a lawsuit against the bank. These matters distracted respondent from his normal duties as an attorney. Respondent is entitled to substantial mitigation credit for these difficulties.

Good Character (Std. 1.6(f).)

Respondent presented written declarations and oral testimony from six character witnesses, who uniformly testified positively as to his honesty and good character. All of the witnesses were aware of the charges that were pending against respondent. While these witnesses did not represent a broad cross-section of the legal and general communities, they are entitled some weight in mitigation.

Discussion

Standard 1.1 provides that the primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.7 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances. 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.

Standard 2.7 applies in this matter, and it provides: “Disbarment or actual suspension is appropriate for an act of moral turpitude, dishonesty, fraud, corruption or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct and the extent to which the misconduct harmed or misled the victim and related to the member’s practice of law.” Respondent’s acts were serious, but did not significantly harm a client. They were, however, committed during his practice of law.

In addition, Standard 2.6(a) applies, and also provides that disbarment or suspension is appropriate for the unauthorized practice of law while a member is inactively enrolled as a result of a disciplinary proceeding.

Finally, Standard 1.8(a) applies, providing, in pertinent part, that where a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction.

“Attorneys are the officers of the Court, and answerable to it for the proper performance of their professional duties. They appear and participate in its proceedings only by the license of the Court.” (*Clark v. Willett* (1868) 35 Cal. 534, 539.) In fact, as officers of the court, attorneys have certain duties to the judicial system that override even those owed to their clients. (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403.) “The high degree of integrity, frankness and truthfulness required of [attorneys] as officers of the court cannot be underestimated. [Citation.]” (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 791.)

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.) There is no reason to deviate from the standards in this case.

Respondent has been found culpable of engaging in the unauthorized practice of law and committing acts of moral turpitude in one client matter. Aggravating factors include prior discipline and bad faith. In mitigation, the court has found extreme emotional difficulties and good character.

In *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, the respondent had three prior instances of discipline and in the matter before the court, was found culpable of one count of practicing law while suspended from practice, first for nonpayment of State Bar dues, and then as a result of a disciplinary matter. The court found that his UPL did not involve moral turpitude. In mitigation, the court recognized that his prior disciplinary matters involved misconduct which occurred before he was eventually diagnosed and adequately treated for a long-standing mental disorder. His third discipline, which was resolved after his diagnosis, resulted in a stipulation for no actual suspension. In the trial for the UPL matter, the hearing judge had recommended a three-month actual suspension, but the review department reduced that suspension to thirty days.

In the Matter of Johnston (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, involved an attorney who failed to perform or communicate with a client and improperly held himself out to a client as entitled to practice when he knew he was not. The attorney had no prior record of discipline. The review department found that he should receive 60 days’ actual suspension.

The misconduct in the present matter is somewhat more serious than either *Trousil* or *Johnston*. In *Trousil*, although there was a prior record of discipline (with its effect minimized by mental health issues) there was no finding of moral turpitude. In *Johnston*, the attorney had no prior record of discipline. In the present case, respondent has both a prior record and the court has found moral turpitude. In addition, the court has found bad faith in aggravation. As such, the discipline in this matter should be somewhat higher than either *Trousil* or *Johnston*.

Having considered the evidence, the standards and other relevant law, the court believes that a two-year suspension, stayed, a two-year probation, and a 90-day actual suspension, along with other conditions, is an adequate means of protecting the public from further wrongdoing by respondent. Accordingly, the court so recommends.

Recommendations

It is recommended that respondent Michael R. Carver, State Bar Number 203925, 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 two years subject to the following conditions:

1. Respondent is suspended from the practice of law for the first 90 days of probation.
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.
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. 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,

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.)

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.

5. 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.)
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.
7. 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.

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

Multistate Professional Responsibility Examination

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline 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.

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.

Dated: October _____, 2014

RICHARD A. HONN
Judge of the State Bar Court