PUBLIC MATTER

THE STATE BAR COURT

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **BOBBY OREN WHEELER, JR.,** **Member No. 140726,** A Member of the State Bar.	**Case No. 02-J-14562-RAH** **DECISION**

INTRODUCTION

Respondent Bobby Oren Wheeler, Jr., received a formal reprimand from the Disciplinary Board of the Washington State Bar Association on September 13, 2002. As a result, the State Bar of California initiated the above-entitled proceeding pursuant to Bus. & Prof. Code § 6049.1(b) ("section" or "§") and rules 620 through 625, Rules Proc. of State Bar ("rule(s)").

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 Washington 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 in Washington; and (3) whether the Washington proceeding lacked fundamental constitutional protection. (Section 6049.1(b).)

Pursuant to section 6049.1(b), Respondent bears the burden of establishing that the conduct for which he was disciplined in Washington would not warrant the imposition of discipline in California and/or that the Washington proceedings lacked fundamental constitutional protection. Since Respondent did not participate in this proceeding, the Court focuses on the degree of discipline to be imposed.

The Office of the Chief Trial Counsel ("OCTC") was represented by Shari Sveningson.

For the reasons indicated below, the Court recommends, among other things, that Respondent be suspended for one year; that said suspension be stayed; and that he be actually suspended for 45 days and until he complies with rules 205.

SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges ("NDC") was filed on October 23, 2002, and was properly served on Respondent on that same date at his official membership records address and an alternate address by certified mail, return receipt requested, as provided in Business and Professions Code section 6002.1(c) ("official address"). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The United States Postal Service ("USPS") returned the NDCs to OCTC, one bearing the notation "Forward time expired. Return to sender" and the other "unclaimed."

Respondent did not file a responsive pleading. On December 13, 2002, a motion for entry of default was properly served on Respondent at his official address and at an alternate address by certified mail, return receipt requested. It advised him that, if he was found culpable, minimum discipline consisting of 90 days actual suspension would be sought. He did not respond to the motion

On October 30, 2002, a notice scheduling a status conference for December 12, 2002, was properly served at Respondent's official address. Respondent did not participate in the status conference. The status conference order filed on December 18, 2002, indicates that the Court would entertain the motion to enter Respondent's default, among other things. A copy of this order was properly served on Respondent at his official and alternate addresses.

On January 15, 2003, the Court entered Respondent's default and enrolled him inactive effective three days after service of the order. The order was properly served on him at his official address on that same date by certified mail, return receipt requested. It was returned unclaimed.

OCTC's other attempts to contact Respondent were fruitless.

The matter was submitted for decision without hearing on May 29, 2003, after OCTC

waived hearing, submitted a brief and provided copies of the applicable Washington ethics rules..

JURISDICTION

Respondent was admitted to the practice of law in California on June 7, 1989, and has been a member of the State Bar at all times since.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Business and Professions Code section 6049.1(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 conduct in this state.

The Court admits into evidence the certified record of the Washington disciplinary proceedings in *In re Bobby O. Wheeler*, case no. 02#00037, a copy of which was attached to the NDC as Exhibit 1. On its own motion, the Court judicially notices the applicable Washington ethics rules.

Respondent was admitted to the practice of law in Washington on December 2, 1996.

The record of the Washington proceeding conclusively establishes that Respondent received a formal reprimand from the Disciplinary Board of the Washington State Bar Association on September 13, 2002. Respondent stipulated in Washington to the reprimand on the basis of the following facts:

The Krueger Matter

Facts

In 1998, Owen W. Krueger hired Respondent to represent him in a proceeding to modify a California divorce and custody decree. Krueger sought to obtain custody of one of his daughters and a modification of child support payments. He retained Respondent because Respondent is admitted to practice law in Washington, where Krueger resides, and in California, where his former spouse resides.

The Kruegers reached a settlement on the custody and child support modification. He took custody of their teenage daughter and she agreed to pay child support and a percentage of

unreimbursed medical expenses.

In 1999, Krueger again hired Respondent to enforce the settlement and to seek an increase in the child support payments because, he claimed, his former spouse was not paying her share of the medical expenses. Krueger also asked Respondent about the possibility of seeking post-majority support after his daughter became 18 years old. Respondent advised him that he could seek such support by filing a modification action in Washington ("Washington action.")

Before filing in Washington, Respondent had an attorney assisting him in conducting research on whether the California decree could be modified by a Washington court to include post-majority support. That attorney concluded that the California courts had exclusive jurisdiction to modify the California decree but that the Washington courts could obtain jurisdiction if all parties, including the former Mrs. Krueger who lived in California, consented to personal jurisdiction in Washington. Even assuming jurisdiction, it would be difficult to convince the Washington courts to grant such a modification since California did not recognize post-secondary support.

Krueger asserted that he was never informed of the assisting attorney's findings. Respondent averred that Krueger was informed but concedes that he may not have adequately conveyed the information to Krueger.

In late 1999, Respondent filed motions in Santa Ana County Superior Court and King County Superior Court seeking modification of the California decree.

In mid-February 1999, Robert P. Etienne, Mrs. Krueger's attorney, informed Respondent that California had exclusive jurisdiction over the California decree. The parties agreed to continue the Washington action to a later date.

On June 30, 2000, Respondent moved to reset the Washington action for trial and to shorten the time set for trial. Etienne again objected to the proceeding on jurisdictional grounds. Respondent averred that he offered to cooperate with Etienne in an effort to have all matters dismissed, including the Washington action.

On July 19, 2000, Etienne filed an ex-parte motion to temporarily enjoin the Washington action and for attorney fees and sanctions for having to defend the action. A hearing was

scheduled on September 7, 2000.

On August 2, 2000, a hearing was held on the underlying child support issues. The court ordered the parties to provide documentation regarding the disputed medical reimbursements within 15 days of the hearing.

Respondent did not file the documentation as ordered. He claims that he requested and received some, but not all, of the required documents from Krueger and that he did not sufficiently follow up with Krueger to obtain the papers.

During the August 2 hearing, Etienne moved to advance the hearing date on his motion to enjoin the Washington action. The court told him that he would have to file an ex parte motion to shorten time. He did so on August 4, 2000. Respondent received a copy of the motion.

Etienne sent Respondent a package of documents on August 11, 2000, in which the hearing date was set forth as August 23, 2000 at 1:30 p.m. Respondent avers that he never received this package.

Sometime between August 4 and 17, 2000, Respondent received a telephone call from the court on the Krueger matter. He claims that he tried to return the court's call but that he always got a busy signal.

On August 17, 2000, Respondent sent Etienne a letter stating that he would dismiss the Washington action if Etienne would withdraw the motions for injunctive relief and for sanctions. On the same date, Respondent left for California to work on an unrelated matter.

On August 18, 2000, Etienne served Respondent at his Seattle office with a letter stating that Respondent's offer had come too late and also with a memorandum in support of his motion for injunction and attorney fees. Respondent's secretary received the documents and she forwarded a copy of the memorandum to Krueger.

When he received the memorandum on August 22, Krueger asked Respondent's secretary when the hearing would be scheduled and whether Respondent had made plans to attend. The secretary promised to relay the message to Respondent. Respondent did not respond to Krueger's questions.

After leaving on August 17, 2000, Respondent made no further inquiries to ascertain

whether Etienne's motion to shorten time was granted and, if so, when the hearing would occur.

On August 23, 2000, the court held a hearing on Etienne's motion. Respondent did not appear. The court assessed sanctions totaling $10,222 against Krueger for costs and fees his former spouse had incurred in defending the Washington action.

On August 28, 2000, Respondent dismissed the Washington action.

On September 11, 2000, Respondent recommended filing a motion on Krueger's behalf to set aside the California court's August 23, 2000, order. Respondent also told Krueger that he would order the transcript of the August 23 hearing promptly. He did not do so despite repeated reminders from Krueger. In December 2000, Krueger ordered them himself.

On February 20, 2001, Respondent filed a motion to set aside on Krueger's behalf.

In mid-March 2001, Krueger decided that he did not want to proceed with the motion to set aside because he was concerned that further sanctions would be assessed against him. The motion was taken off calendar. By that time, Etienne had filed a response to the motion.

In April 2001, Krueger expressed his frustrations to Respondent about the course of his representation and the sanctions that had been assessed against Krueger.

By letter dated April 16, 2001, Respondent agreed to pay Krueger $7500 towards the sanctions assessed and to make payment within 14 to 30 days. He also agreed to incur liability for any attorney fees and costs that could arise from the filing of the motion to set aside.

Respondent did not make the payment as promised. He later paid Krueger $3700 toward the sanctions.

In April 2001, Krueger retained another California lawyer, Suzanne Hunsinger. She represented Krueger at a September 19, 2001, hearing to determine whether additional attorney fees should be awarded to Mrs. Krueger for having to respond to the motion to set aside. At this hearing, the court awarded sanctions of $8061 against Respondent. Krueger paid Hunsinger $1261 to represent him at this hearing.

On the basis of these facts, Respondent stipulated to and was found culpable of violating the following Washington ethics rules:

(1) For filing an action for post-majority support in Washington that he knew to be without a basis in law: Washington Rules of Professional Conduct ("Washington RPC") 3.1 (frivolous claims);

(2) For not adequately communicating with Krueger regarding the action for post-majority support: Washington RPC 1.4(b) (communication);

(3) For not filing medical documents to support Krueger's claim; not taking steps to ascertain the date of the August 23 hearing; and not ordering the transcripts of the August 23, hearing: Washington RPC 1.3 (diligence).

Legal Conclusions

RPC 3-110(A) (Failing to Perform Competently)

California Rules of Professional Conduct ("RPC") 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently.

By not determining the date of the California hearing on sanctions; by not ordering the transcripts of that hearing; and by not filing medical documents to support Krueger's claim, Respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of RPC 3-110(A).

Section 6068(m) (Failure to Communicate)

Section 6068(m) requires an attorney to respond promptly 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.

By not adequately communicating with Krueger about the feasibility of the Washington action, Respondent did not keep Krueger reasonably informed of significant developments in wilful violation of section 6068(m).

RPC 3-200(B) (Frivolous Claims)

Rule 3-200(B) prohibits an attorney from seeking, accepting or continuing employment if the attorney knows or should know that the objective of such employment is to present a claim, or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification or reversal of such existing law.

By filing the Washington action for post-majority support when he knew it had no basis in law, Respondent presented a claim in litigation that was not warranted under existing law in wilful violation of RPC 3-200(B).[1/]

LEVEL OF DISCIPLINE

Factors in Mitigation

Since Respondent did not participate in these or the Washington proceedings, no mitigating evidence was presented and the Court could glean none other than his approximately 10 years of discipline-free practice in California prior to the commencement of the misconduct in late1999. (Standard 1.2(e)(i), Rules of Procedure of the State Bar of California, Title IV, Standards for Attorney Sanctions for Professional Misconduct ("standards").)

Factors in Aggravation

Respondent engaged in multiple acts of wrongdoing. (Standard 1.2(b)(ii).)

Respondent's misconduct caused significant harm. (Standard 1.2(b)(iv).) Krueger was subject to court-ordered sanctions had to retain other counsel in California and incur additional fees for doing so.

Respondent's lack of participation prior to the entry of default in this proceeding is an aggravating circumstance. (Standard 1.2(b)(vi).)

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 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

Standard 1.6(b) 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

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[1/]In its closing brief, OCTC incorrectly identifies rule 3-300(B) as prohibiting presenting a claim or defense in litigation not warranted by existing law. (Closing brief, page 5, lines 12 - 13.)

disciplinary proceeding and different sanctions are prescribed by the standards for those acts, the sanction recommended shall be the most severe. 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.)

In this instance, the standards provide for the imposition of discipline ranging from reproval to disbarment. (Standards 2.4 (b); 2.6(a); and 2.10.) The most severe sanction is found at standard 2.6(a) which recommends suspension or disbarment for violations of sections 6067 and 6068, depending on the gravity of the offense or harm, if any to the victim, with due regard to the purposes of imposing discipline.

OCTC seeks actual suspension of 90 days and until Respondent complies with rule 205. Having considered the facts and the law, the Court recommends actual suspension of 45 days as sufficient for the protection of the public.

The Court considered the authorities cited by OCTC, including *Harris v. State Bar* (1990) 51 Cal.3d 1082, *Carter v. State Bar* (1988) 44 Cal.3d 1091, *Martin v. State Bar* (1978) 20 Cal.3d 717, *In the Matter of Trillo* (Review Dept.1990) 1 Cal. State Bar Ct. Rptr. 59 and found them substantially distinguishable from the instant matter.

For example, in *Harris v. State Bar* (1990) 51 Cal.3d 1082, the Court imposed a 90-day actual suspension for protracted inattention (four years) to a client's case, resulting in a large financial loss to the client's estate. In aggravation, the Court considered the attorney's lack of candor to her client and her lack of remorse and insight that her actions were wrong. In mitigation, the Court considered the absence of a prior record of discipline in approximately 10 years of practice and the attorney's illness with typhoid fever after the misconduct commenced. Respondent Harris participated in the proceedings. The instant case presents less misconduct and aggravating factors than *Harris*.

In *Wren v. State Bar* (1983) 34 Cal.3d 81, the attorney was suspended for two years, stayed, with two years of probation and 45 days of actual suspension for failing to perform in one client matter over a two-year period and for misrepresenting the status of the case to the client.

The attorney had no prior discipline in 22 years of practice and participated in the disciplinary proceeding but attempted to mislead the State Bar by giving false and misleading testimony. The present case is roughly comparable to *Wren*. It presents less aggravation and mitigation than *Wren* and Respondent did not participate in the disciplinary proceedings.

Having considered the evidence and the law, the Court feels that a 45-day actual suspension, among other things, is sufficient to protect the public. Since Respondent did not participate in these proceedings and his default was entered pursuant to rule 205, he will have to, at minimum, explain his lack of participation and commit to complying with probation conditions before he is allowed to practice law again.

DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that Respondent Bobby Oren Wheeler, Jr., be suspended from the practice of law for one year; that said suspension be stayed; and that he be actually suspended from the practice of law for 45 days and until the State Bar Court grants a motion to terminate Respondent's actual suspension at its conclusion or upon such later date ordered by the Court. (Rule 205(a), (c), Rules Proc. of State Bar.)

It is also recommended that he be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.

If Respondent remains actually suspended for two years or more, it is further recommended that Respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also, rule 205(b).)

If Respondent is actually suspended for 90 days or more, it is also recommended that Respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within 120 calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within 130 days of the effective date of the

order showing his compliance with said order.[2]

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners during the period of his actual suspension and furnish satisfactory proof of such to the Probation Unit within said period.

COSTS

The Court recommends that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10, and that those costs be payable in accordance with section 6140.7.

Dated: August 25, 2003

RICHARD A. HONN
Judge of the State Bar Court

[2]Failure to comply with CRC 955 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a CRC 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. 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 August 27, 2003, I deposited a true copy of the following document(s):

DECISION, filed August 27, 2003

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

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

BOBBY O WHEELER JR ESQ
9423 CALIFORNIA SW
SEATTLE, WA 98136

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

Shari Sveningson, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **August 27, 2003**.

Milagro del R. Salmeron
Case Administrator
State Bar Court