

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO**

In the Matter of)	Case No. 04-C-12004-JMR
)	
WAYNE WINROW,)	DECISION
)	
Member No. 153632,)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this disciplinary matter, Robin Brune appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Wayne Winrow did not appear in person or by counsel.

This proceeding arises out of respondent's misdemeanor conviction on August 27, 2004, of one count of engaging in the unauthorized practice of law pursuant to Business and Professions Code section 6126, subdivision (b). (*People v. Winrow*, Santa Clara County Superior Court case no. CC261899.)

After considering the evidence and the law, the court recommends, among other things, that respondent be suspended for two years, that said suspension be stayed, and that he be actually suspended for two years and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, and until the State Bar Court grants a motion to terminate respondent's actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California.

II. Pertinent Procedural History

By order filed March 13, 2006, the State Bar Court Review Department referred this disciplinary proceeding to the Hearing Department, pursuant to rule 951(a) of the California Rules of Court, for a hearing and decision regarding whether the facts and circumstances surrounding respondent's violation of Business and Professions Code section 6126,¹ subdivision (b), involved moral turpitude or other misconduct warranting discipline and, if so, for a recommendation as to the discipline that should be imposed.

On March 28, 2006, this court filed a Notice of Hearing on Conviction and caused it to be properly served upon respondent on the same date by certified mail, return receipt requested, at his official membership records address. He was simultaneously served with a notice of a status conference to be held on May 8, 2006. The court takes judicial notice of its records and finds that this correspondence was returned unclaimed and that other correspondence sent by regular or certified mail to his official address was not returned as undeliverable. (Evid. Code, § 452, subd. (d)(1).)

Respondent did not appear at the May 8 status conference. He was properly served with a status conference order at his official address by first-class mail, postage prepaid.

Respondent did not file a responsive pleading to the notice. On May 8, 2006, a motion for entry of default was filed and properly served on respondent at his official address by certified mail, return receipt requested. The motion advised him that minimum discipline including actual suspension for two years and until he complied with standard 1.4(c)(ii) would be sought if he was found culpable. Respondent did not respond to the motion.

On May 25, 2006, the court entered respondent's default and enrolled him inactive effective three days after service of the order. The order was filed and properly served on him at his official address on that same date by certified mail, return receipt requested. The return receipt shows that this correspondence was received by "Wayne Winrow" on June 2, 2006.

¹Unless otherwise noted, all further references to section are to the Business and Professions Code.

The matter was submitted for decision on July 7, 2006.

III. Findings of Fact and Conclusions of Law

Respondent's culpability is conclusively established by the record of his conviction. (Section 6101, subd. (a); *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on July 3, 1991, and has been a member of the State Bar at all times since.

B. Facts

In a previous disciplinary matter, respondent agreed to a level of discipline with the State Bar by way of stipulation. The Supreme Court accepted the recommended discipline in an order filed on August 21, 2001, in case number S098010. The stipulated discipline was for two years stayed suspension, with thirty months of probation, including an actual suspension of 75 days.

After the Supreme Court issued its order, respondent approached the State Bar to request a stay of the imposition of discipline due to his pressing trial schedule. Respondent and the State Bar ultimately filed a Joint Motion/Stipulation to Delay the Imposition of Disciplinary Suspension. Respondent signed this stipulation on September 5, 2001. The basis for the Joint Motion/Stipulation was respondent's outstanding case of *Salgado v. King*, a wrongful death case that respondent indicated would be too cumbersome to pass off to a new counsel at the eve of trial, which was set for October 15, 2001. The parties jointly requested that the suspension be delayed until November 15, 2001. Respondent did not mention any other conflicts that would create any problems with his suspension. However, at the time that respondent was negotiating for his extension, he was already representing Stan Muller in criminal proceedings and had appeared on Muller's behalf at the preliminary hearing. Respondent did not mention this case to the State Bar when he sought a delay of the imposition of his disciplinary suspension.

The Review Department accepted the Joint Motion/Stipulation and ordered the suspension delayed through November 15, 2001. This order was issued on September 12, 2001, and was properly served on respondent. Respondent's actual suspension commenced November 16, 2001.

On November 21, 2001, respondent appeared on behalf of his client, Stan Muller, in *People v. Muller* in Santa Clara Superior Court. Muller was charged with five counts of violating of California Penal Code section 288, subdivision (a) (child molestation). The matter was set for trial on December 3, 2001, a date that would fall during respondent's suspension period. Respondent requested a continuance due to discovery problems, which request was granted by the court. In addition to requesting a continuance, respondent discussed various discovery issues with the court and opposing counsel at the November 21st hearing. Respondent did not advise the court or opposing counsel of his suspension.

On February 26, 2002, Judge Diane Northway, of the Santa Clara Superior Court, notified the State Bar of respondent's appearance in her courtroom while not licensed to practice law. Judge Northway stated that "[a]t no time did he advise me of the suspension." In a declaration respondent later filed with the superior court in connection with his client's motion to withdraw his plea, respondent admitted that he appeared in court in November 2001 on behalf of Muller while he was temporarily suspended from the practice of law. Muller acknowledged that respondent had told him of the suspension, but respondent told Muller that the suspension was for failure to pay State Bar membership fees.

As previously noted, respondent was ultimately prosecuted and convicted in a court trial of the unlicensed practice of law in violation of section 6126, subdivision (b). He was sentenced to three years of probation and a fine of \$1,000. The decision was affirmed on appeal on October 19, 2005. (*People v. Winrow*, Santa Clara County Superior Court, Appellate Division, case no. 1-05-AP-0000202.)

C. Conclusions of Law

The court finds that the facts and circumstances surrounding respondent's conviction for the unlicensed practice of law involved moral turpitude. Respondent was fully aware that he was actually suspended. Not only did he stipulate to the disposition of the disciplinary matter in question, but he stipulated with the State Bar to delay the commencement of the actual suspension until November 15, 2001, due to litigation in which he was engaged. Moreover, as more fully noted below, respondent was previously disciplined for engaging in the unauthorized practice of law.

IV. Aggravation and Mitigation

A. Aggravation

A prior record of discipline is an aggravating circumstance. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b)(i).²) Respondent has two prior disciplinary matters.

On August 21, 2001, in case number S098010 (State Bar Court case nos. 99-O-12264; 00-O-14511; 00-O-11063; 00-O-13811 (Cons.)), the Supreme Court ordered that respondent be suspended for two years and until he complied with standard 1.4(c)(ii), execution stayed, and that he be placed on probation for thirty months with conditions, including 75 days of actual suspension. In two client matters, respondent was culpable of violating Rules of Professional Conduct, rules 3-700(D)(1), 3-700(D)(2), 3-110(A), and section 6068, subdivision (m). Also, based on respondent's unauthorized practice of law in three matters, he was culpable of violating sections 6068, subdivision (a), 6125 and 6126; misconduct similar to that in the present case. The misconduct spanned from 1998 to 2000.

On June 27, 2006, in case number S142778 (State Bar Court case nos. 02-O-11244; 02-O-14970; 03-O-01102; 04-O-15652 (Cons.)), the Supreme Court ordered that respondent be suspended for one year, execution stayed, and that he be placed on probation for three years with conditions, including 120 days' actual suspension and until he satisfied restitution. Respondent stipulated to misconduct in three client matters, which misconduct occurred primarily from 2000 through 2004, including recklessly failing to pursue an appeal and failing to respond to reasonable status inquiries of his client in the first matter; recklessly failing to appear at three court-ordered status conferences in the second matter; and failing to respond to his client's repeated telephone calls in the third matter. This court recommended a higher level of discipline to the Supreme Court as a result of respondent's termination from the State Bar Court's Alternative Discipline Program. However, the court notes that the misconduct in the prior disciplinary matter occurred around the same time as the misconduct at hand. Accordingly, the aggravating effect of this prior discipline is diminished as it is not

²All further references to standards are to this source.

indicative of respondent's inability to conform to ethical norms and the court will consider the totality of the findings in both cases to ascertain what the discipline would have been had the matters been brought as one case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.)

In relevant part, standard 1.2(b)(iii) permits consideration as an aggravating circumstance whether respondent's misconduct was surrounded or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct. Respondent told his client that he was suspended from the practice of law for nonpayment of his State Bar membership fees rather than telling him the truth, that the suspension was disciplinary in nature. The client did not find out the truth until later and from another source. Further, respondent concealed relevant information to the judge when he requested a trial continuance without properly disclosing his approaching suspension.

Respondent's misconduct caused harm to the administration of justice. (Standard 1.2(b)(iv).) Muller entered a plea while he was represented by respondent, but later sought to have it set aside based upon ineffective assistance of counsel. One of the issues was respondent's failure to properly disclose his suspension to his client. The court granted Muller's motion. Although Muller ultimately entered into a second plea agreement, the delay in prosecuting the matter compromised the state's evidence and resulted in a lesser sentence. Respondent's misconduct resulted in a waste of judicial and state resources.

Respondent's lack of cooperation with the State Bar during this proceeding is an aggravating circumstance. (Standard 1.2(b)(vi).) Respondent's failure to participate in the current proceeding shows that he does not appreciate the seriousness of the charges or comprehend the importance of participation. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507; *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 448.)

B. Mitigation

There are no mitigating circumstances.

V. Level of Discipline

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found 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, the sanction imposed shall be the most severe of the applicable sanctions. (Standard 1.6(a).)

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 Silvertown* (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.)

In the instant case, the discipline recommended by the standards is disbarment unless the most compelling mitigation clearly predominates, in which case, the discipline shall be no less than two years actual suspension prospective to any interim suspension imposed. (Standard 3.2.)

Standard 1.7(b) also applies. It provides that, if an attorney has two prior records of discipline, the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate. However, as previously stated, the court will consider the totality of the findings in this and the second prior disciplinary matter to ascertain what the discipline would have been had both matters been brought as one case since the misconduct in both cases was concurrent.

In the present case, respondent has been found culpable of engaging in the unauthorized practice of law based on a one-count misdemeanor conviction. His misconduct was found to constitute moral turpitude because he engaged in this behavior although he was fully aware of his

actual suspension. In a prior disciplinary case, he had also engaged in the unauthorized practice of law.

The State Bar recommends, among other things, two years' stayed suspension and an actual suspension for two years and until respondent complies with standard 1.4(c)(ii) and with rule 205 of the Rules of Procedure. After considering all of the facts and circumstances in this and the second prior instance of discipline, the court believes that a substantial increase in the level of discipline is warranted and agrees with the recommendation.

The court found *Morgan v. State Bar* (1990) 51 Cal.3d 598, instructive. In *Morgan*, the attorney was disbarred for engaging in the unauthorized practice of law and acquiring an adverse pecuniary interest in one client matter. While on disciplinary suspension, the attorney accepted partial payment of legal fees in a dissolution of marriage matter; assisted in the preparation of legal documents for filing; court documents showed him as attorney of record although another attorney signed them; associated another attorney to make a court appearance; and entered an appearance in the case by discussing its settlement and a continuance with opposing counsel. The attorney also entered into an open-ended credit transaction with the client without fully explaining it to her and without reducing it to writing. Knowing the client's financial situation, he offered to, but did not fully pay some delinquent credit card bills in exchange for being allowed to shop using her credit cards. After the bills were sent to collection and the client filed for Chapter 7 bankruptcy protection, the attorney paid the bills. In aggravation, it was found that the attorney had four prior instances of discipline,³ one of which was for the unauthorized practice of law; engaged in a pattern of misconduct; and demonstrated indifference to the court's disciplinary orders. Client harm was also noted. In mitigation, the attorney presented five character witnesses and evidence of community service or pro bono work. Moreover, the court found that the present violation for unauthorized practice of law was an isolated incident as there was no indication that the attorney undertook to represent anyone else during his suspension. *Morgan* presents substantially greater culpability and

³There were five prior instances of discipline but the Court treated them as four because the fourth and fifth cases should have been consolidated.

aggravation than the present case.

Respondent's misconduct and lack of participation in this matter raises concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. However, to disbar respondent would be excessive. Having considered the evidence and the law, the court believes that a two-year actual suspension to remain in effect until respondent complies with standard 1.4(c)(ii) and with rule 205 is adequate to protect the public. Thus, respondent will not be entitled to practice law until he establishes that he is willing and able to fully comply with his ethical responsibilities.

V. Discipline Recommendation

IT IS HEREBY RECOMMENDED that respondent Wayne Winrow be suspended from the practice of law for two years, that said suspension be stayed, and that he be actually suspended from the practice of law for two years and until he complies with standard 1.4(c)(ii) and until the State Bar Court grants a motion to terminate respondent's actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar.

It is also recommended that respondent 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.

It is also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing respondent's compliance with said order.

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination because he was ordered to do so by the Supreme Court in case numer S142778, filed June 27, 2006.

///

///

///

VI. Costs

It is recommended that costs be awarded to the State Bar in accordance with section 6086.10 and are enforceable both as provided in section 6140.7 and as a money judgment.

Dated: September 15, 2006

JOANN M. REMKE
Judge of the State Bar Court