FILED MAY 7, 2007

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **JAMES KENNETH HEDGES**, **Member No. 122394**, A Member of the State Bar.	)	**Case No. 05-O-04725-RAH** **DECISION**

I. INTRODUCTION

In this disciplinary matter, William F. Stralka appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent James Kenneth Hedges did not appear in person or by counsel.

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 60 days and until he complies with Rules of Proc. of State Bar,[1] rule 205.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on July 7, 2006, and was properly served on respondent on that same date at his official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section[2] 6002.1, subdivision (c) (official address). Respondent filed a response to the NDC on August 1, 2006.

Respondent appeared at a status conference held on August 31, 2006. At that time, a further status conference and a voluntary settlement conference were scheduled for November 2

[1]Future references to the Rules of Procedure are to this source.

[2]Future references to section are to the Business and Professions Code.

and October 15, 2006, respectively. These dates were memorialized in an order filed and properly served on September 6, 2006, on respondent at his official address by first-class mail, postage prepaid. Respondent did not appear at either the status or settlement conference.

At the November 2, 2006 status conference, the court ordered the parties to file their pretrial statements by January 31, 2007, and scheduled a pretrial conference and trial for February 14 and 26, 2007, respectively. These dates were memorialized in an order filed and properly served on November 15, 2006, on respondent at his official address by first-class mail, postage prepaid. Respondent did not appear at the pretrial conference or at the trial.

Although he received proper notice at his official address by first-class mail, postage prepaid, of a settlement conference to be conducted on January 22, 2007, respondent did not attend it.

Respondent did not file a pretrial statement. At the pretrial conference, respondent was precluded from offering documentary or testimonial evidence except for his own testimony at trial. This order was memorialized in an order filed and properly served on respondent on February 16, 2007, at his official address. The order also confirmed the trial date as February 26, 2007.

Since respondent did not appear at trial, his default was entered and he was enrolled 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 indicated that it was received by "V. Marquez" on February 28, 2007.

An order pursuant to trial was filed and properly served on respondent on February 26, 2007, making some nonsubstantive amendments to the NDC.

The State Bar's and the court's efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (April 26, 2006, No. 04-1477) 547 U.S. ___, 126 S.Ct. 1708, 164 L.Ed.2d 415, <http://www.supremecourtus.gov/opinions/05slipopinion.html>.) The court judicially notices its records pursuant to Evidence code section 452, subdivision (d)(1) which

indicate that none of the court's correspondence to respondent's official address was returned as undeliverable.

The matter was submitted for decision without hearing after the State Bar filed a brief on March 16, 2007.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (§6088; Rules of Procedure, rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 14, 1985, and has been a member of the State Bar at all times since.

B. Facts

On August 1, 2003, Marv Ruwin, president of Sweda Company, LLC, retained respondent to provide various legal services for patent and trademark matters for Sweda.

W. Gardnar O'Brien was the executive vice-president of Sweda. He was authorized to acts on Sweda's behalf in its attorney-client relationship with respondent.

Pursuant to the terms of their agreement, Sweda would pay respondent a $3,000 retainer fee for 30 hours of legal services per month. Unused hours would accumulate and be carried over to the next month. either Sweda or respondent could terminate the arrangement upon 30 days' notice to the other party.

Between approximately September 9, 2003 and February 18, 2005, inclusive, Sweda paid respondent approximately $57,000 as attorney's fees for the period commencing on August 1, 2003 and ending on February 28, 2005.

In September 2004, Sweda instructed respondent to apply for and obtain certain

additional patents, including patent numbers LC338, LC688, TM33, FM666, WB67, DF222 and CS99 (2004 patent applications).

In September 2004, Sweda also instructed respondent to renew a certain trademark.

On October 6, 2004, O'Brien asked respondent for the status of the 2004 patent applications. On that same date, respondent replied by email, confirming that he had received the information he needed to proceed with the applications.

On November 12, 2004, O'Brien asked respondent by email about the status of the 2004 patent applications and the trademark renewal. On December 1, 2004, respondent replied that he would meet with Sweda employees on about December 9, 2004 and that he would have the 2004 patent applications available for execution. Respondent did not meet with Sweda representatives or make the 2004 patent applications available for execution.

On December 10, 2004, respondent sent O'Brien an email asking to meet on Monday, December 13, 2004, explaining that he needed the weekend to prepare the trademark renewal and to complete the 2004 patent applications. On December 13, respondent met with Sweda representatives about these matters.

Between September 2004 and March 2005, inclusive, Sweda paid respondent at least $4,760 for the 2004 patent applications filing fees and the trademark renewal fee.

On March 9, 2005, O'Brien sent respondent an email asking about the status of the 2004 patent applications and for advice on issues relating to a competitor. Respondent did not reply to the email and did not otherwise inform Sweda of the status of the 2004 patent applications.

On March 18, 2005, O'Brien sent respondent another email asking about the status of the 2004 patent applications. Respondent did not reply to the email and did not otherwise inform Sweda of the status of the 2004 patent applications.

On April 6, 2005, O'Brien sent respondent a letter terminating his services and their employment contract.

In April 2005, Sweda retained other counsel, Clement Cheng, to handle its patent and trademark matters.

Between approximately April and July 2005, Cheng repeatedly telephoned respondent and left messages asking for information about the 2004 patent applications, reminding respondent about the expiration date for filing them and asking for Sweda's files. Respondent could not be reached until about July 8, 2005.

On July 8, 2005, respondent led Cheng to believe that respondent had filed all or some of the 2004 patent applications prior to July 8, 2005. He also told Cheng that he would send him Sweda's patent application files. Respondent did not send these files to Cheng or to any other Sweda representative.

By informing Cheng that the 2004 patent applications were filed when they were not, respondent misrepresented the status of Sweda's matters to its new attorney.

In early August 2005, Cheng repeatedly called respondent and left messages asking about the files and the patent application numbers. Respondent did not return any of the calls.

On August 16, 2005, Cheng sent respondent a letter reminding him that they had had a telephone conversation during which respondent agreed to send the patent application files and to provide the patent application numbers. Cheng repeated his request for the files and the numbers. Although respondent received the letter, he did not answer it.

On November 23, 2005, Cheng sent respondent another letter asking for the patent application files and numbers. Although respondent received the letter, he did not answer it.

Respondent never provided the patent application files or any of the pertinent documents to Cheng, O'Brien or to any other Sweda representative.

After approximately November 2005, Cheng learned that respondent did not file any of the 2004 patent applications within the applicable statutory time period.

On October 31, 2005, the State Bar opened an investigation on case no. 05-O-04725 pursuant to O'Brien's complaint regarding allegations of misconduct in Sweda's matters. On November 16 and December 1, 2005, a State Bar investigator sent respondent a letter requesting that respondent answer in writing specific allegations of misconduct regarding the Sweda matters. Although he received the letters, respondent did not answer them or otherwise communicate with the investigator.

2. Conclusions of Law

a. Count 1 - Rule of Professional Conduct[3] 3-110(A) (Performance)

Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently.

By not filing the 2004 patent applications for Sweda, respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A).

b. Count 2 - Section 6068, subdivision (m) (Communication)

Section 6068, subdivision (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 responding to O'Brien's emails and to inform Sweda of the status of its matters, respondent did not respond promptly to his client's reasonable status inquiries in wilful violation of section 6068, subdivision (m).

c. Count 3 - Section 6106 (Moral Turpitude)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106 by misrepresenting the status of Sweda's matters to its new attorney. Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

d. Count 4 - Section 6068, subdivision (i) (Participation in Investigation)

Section 6068, subdivision (i) requires an attorney to participate and cooperate in any disciplinary investigation or other disciplinary or regulatory proceeding pending against him- or herself.

By not responding to the State Bar's letters of November 16 and December 1, 2005, respondent did not participate in the investigation of the allegations of misconduct regarding the

[3]Future references to rule are to this source.

Sweda matters in wilful violation of 6068, subdivision (i).

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct[4], std. 1.2(b).)

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed a client. (Std. 1.2(b)(iv).) Sweda had to retain other counsel to handle the work respondent did not do.

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) However, it warrants little weight in aggravation because this conduct closely parallels that used to find respondent culpable of violating section 6068, subdivision (i) and to enter his default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors other than nearly 20 years of discipline-free practice, a substantial consideration.

C. Discussion

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; std. 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

[4]Future references to standard or std. are to this source.

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. (Std. 1.6(a).)

Standards 2.3, 2.4(b) and 2.6(a) apply in this matter. The most severe sanction is found at standard 2.3 which recommends actual suspension or disbarment for culpability of an act of moral turpitude, fraud, intentional dishonesty or of concealment of a material fact from a court, client or other person, depending on the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the attorney's acts within the practice of law.

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.)

Respondent has been found culpable, in one client matter, of not performing, communicating or participating in the State Bar's investigation of misconduct as well as committing an act of moral turpitude. Aggravating factors in this default proceeding include multiple acts of misconduct and client harm. The sole, but significant, mitigating factor is nearly 20 years of discipline free practice.

The State Bar recommends three years' stayed suspension and probation[5] with one year of actual suspension. The court disagrees.

In support of its recommendation, the State Bar cited *In the Matter of Peterson* (1990) 1 Cal. State Bar Ct. Rptr. 73 in its closing brief and *In the Matter of Trillo* (Review Dept.1990) 1 Cal. State Bar Ct. Rptr. 59 in its pretrial statement. Neither of these cases is comparable to the present case.

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[5]Probation is not permissible in default cases. (Rule 205(a), (g).)

In *Peterson*, a defaulting attorney received a three-year stayed suspension with one-year actual suspension for misconduct involving three clients. The attorney failed to perform and improperly withdrew in each matter and failed to cooperate with the State Bar investigations. Although the attorney had no prior record of discipline, this was not considered a mitigating factor since the attorney practiced only six years before his misconduct commenced. In aggravation, the matter involved client harm, multiple acts of wrongdoing, indifference toward rectification, and a lack of candor and cooperation. *Peterson* presented greater misconduct and less mitigation than the instant case.

In *Trillo*, the attorney was hired to represent two clients in a civil matter and a wage claim for one of the clients against the same parties. The attorney performed no services with regard to the civil matter and, after getting a judgment in the labor claim, did not pursue the matter further despite being requested to do so. The attorney also misrepresented to the clients that he was a partner in the law firm and he misappropriated approximately $2,500 in unearned fees and costs. The attorney practiced for 14 years without prior discipline. In aggravation, there were multiple acts of misconduct, client harm and acting in bad faith toward his clients. Attorney Trillo defaulted in the disciplinary proceeding. The Review Department recommended that the attorney be suspended from the practice for three years, stayed, on conditions of a three-year probation with actual suspension for the first year and until he restored the $2,500 of unearned fees and costs to his clients. *Trillo* presented greater misconduct and aggravation and less mitigation than the instant case.

In decisions of the Supreme Court and State Bar Court involving abandonment of a client's case, where, as here, the attorney has no prior record of discipline, the discipline ranges from no actual to 90 days' actual suspension. In *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, the attorney, with five years of practice, failed to perform services for a client, but without causing substantial harm. The court imposed no actual suspension. In *Layton v. State Bar* (1990) 50 Cal.3d 889, involving an attorney with 30 years of practice without prior discipline, the Supreme Court imposed 30 days' actual suspension. The attorney, acting as attorney for a trust and an estate for which he was also the executor, failed through neglect and inattention to fulfill

important and material requirements of his office as executor for over five years, which ultimately resulted in his removal from office by the probate court. 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. In *Harris v. State Bar* (1990) 51 Cal.3d 1082, the court imposed a 90-day actual suspension for protracted inattention to a client's case, resulting in a large financial loss to the client's estate. Aggravating factors included lack of candor to her client and lack of remorse and insight. In mitigation, she had approximately 10 years of practice with no prior discipline. Also, her illness with typhoid fever after the misconduct commenced was considered. The attorney participated in the proceedings.

The court finds the present case to be comparable to *Wren* but believes that 60 days' actual suspension is merited as respondent did not participate in the State Bar's investigation of the misconduct, a factor not present in *Wren*.

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. No explanation has been offered that might persuade the court otherwise and the court can glean none. Having considered the evidence and the law, the court believes that a 60-day actual suspension to remain in effect until he complies with rule 205 of the Rules of Procedure, among other things, is adequate to protect the public and proportionate to the misconduct found and the court so recommends.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent JAMES KENNETH HEDGES 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 60 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 of 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 the period of actual suspension reaches or exceeds two years, 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).)

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 State Bar Office of Probation within said period.

VI. 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: May ___, 2007

RICHARD A. HONN
Judge of the State Bar Court