

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of) Case No.: **07-O-14169-LMA**
)
WAYNE BUNCH)
) **DECISION**
)
Member No. 103093)
)
A Member of the State Bar.)

I. Introduction and Pertinent Procedural History

This default matter was submitted for decision on October 21, 2008. At the time of submission, the State Bar of California (“State Bar”) was represented in this matter by Deputy Trial Counsel Erica L. M. Dennings. Respondent Wayne Bunch (“respondent”) failed to participate in this matter either in-person or through counsel.

The State Bar filed a Notice of Disciplinary Charges (“NDC”) against respondent on July 29, 2008. That same day, a copy of the NDC was properly served on respondent in the manner set forth in rule 60 of the Rules of Procedure of the State Bar of California.¹

¹Unless otherwise indicated, all documents were properly served pursuant to the Rules of Procedure.

As respondent did not file a response to the NDC, on September 10, 2008, the State Bar filed and properly served on respondent a motion for the entry of respondent's default.²

When respondent failed to file a written response within ten days after service of the motion for the entry of his default, on September 29, 2008, the court filed an order of entry of default and involuntary inactive enrollment.³ A copy of said order was properly served on respondent at his membership records address; however, it was subsequently returned to the court by the U.S. Postal Service as undeliverable.

Thereafter, the State Bar waived the hearing in this matter, and this matter was submitted for decision.⁴

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 to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220 [126 S.Ct. 1708, 164 L.Ed.2d 415].)

II. Findings of Fact

A. Jurisdiction

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

²The motion also contained a request that the court take judicial notice of all of respondent's official membership addresses. The court grants this request.

³Respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (e) was effective three days after the service of this order by mail.

⁴Exhibits 1-2 attached to the State Bar's September 10, 2008 motion for the entry of respondent's default are admitted into evidence.

Respondent was admitted to the practice of law in California on June 10, 1982, and has been a member of the State Bar of California at all times since that date.

B. The Wegner Matter (Case No. 07-O-14169)

In December 2005, client Ted Wegner (“Wegner”)⁵ hired respondent to sue R&M Automotive for their failure to perform automotive repairs as agreed and failure to meet automotive repair fair practices. Wegner hired R&M Classic Cars to restore his 1957 Chevrolet Nomad automobile, and he believed that the workmanship was of poor quality.

Wegner paid respondent a total sum of \$3,900 for legal services in monthly increments commencing in December 2005, and concluding in December 2006. In addition, Wegner paid respondent \$300 for filing fees.

Wegner repeatedly requested a written fee agreement, but respondent failed to provide one. The parties originally agreed that respondent would receive a 30% contingency fee. Later, Wegner agreed to pay respondent \$175.00 per hour. Wegner did not receive any itemized bills in this matter.

On or about December 2, 2005, respondent filed suit, *Ted Wegner v. Rodney Marconi*, case no. CIV 451352, filed in Superior Court, County of San Mateo. This complaint was filed, signed by Wegner, and identified Wegner as representing himself. On or about April 11, 2006, respondent filed an Amended Complaint. In the amended complaint, respondent identified himself as counsel for Wegner.

On or about December 2, 2005,⁶ the court issued a Notice of Case Management Conference, set for April 12, 2006. Respondent appeared at the April 12, 2006 case management conference. The matter was continued to June 14, 2006, at nine a.m., and

⁵ In the NDC, the State Bar alternatively identifies Wegner as “Wenger.” This repeated typographical error is not prejudicial to respondent.

⁶ The NDC mistakenly lists this date as December 2, 2006. This minor typographical error is not prejudicial to respondent.

respondent was directed to serve the defendant before the next hearing. In addition, respondent was directed to file a case management statement. Respondent was present in court and aware of the June 14, 2006 continued case management conference.

On June 14, 2006, the court held the continued case management conference. Respondent failed to appear. Respondent failed to file a case management statement, or file a proof of service that the defendant had been served. The court set the matter for an Order to Show Cause (“OSC”) re: dismissal for failure to prosecute in a timely manner, for July 26, 2006, at nine a.m. The court clerk sent the notice of the OSC to respondent at 1618 Dolan Avenue, San Mateo, California, 94401⁷ (“the Dolan address”). This is the address that respondent identified on the amended complaint he filed on April 11, 2006. Respondent received the notice of the OSC and was aware of its contents.

On or about July 26, 2006, the court held the continued case management conference and OSC. Respondent appeared and advised the court that he had served the defendant. The court discharged the OSC and set the matter for a case management conference on September 20, 2006. Respondent was present in court and aware of the new case management conference date.

On or about August 17, 2006, the defendant, Rodney Marconi, represented by attorney Randall Witte (“Witte”), filed an Answer.

On or about September 20, 2006, the court held the scheduled case management conference. Respondent appeared. The court set the matter for arbitration, and ordered the parties to complete arbitration within 120 days. Respondent was present in court and aware of the court's order. The court sent a notice of potential arbitrators directly to

⁷ Respondent’s membership records address is: 1618 Dolan Avenue, San Mateo, California, 94401. The NDC mistakenly lists the zip code as 94403. This minor typographical error is not prejudicial to respondent.

Wegner. On or about October 4, 2006, the court sent notice to Wegner that Cathleen Curl was appointed as the arbitrator. On October 10, 2006, the court also sent notice to Wegner of the scheduled arbitration of January 10, 2007. The matter was continued by agreement of the parties to January 16, 2007.

On or about November 16, 2006, Witte took the deposition of Wegner.

Respondent appeared on Wegner's behalf.

On or about November 27, 2006, Wegner met with respondent at respondent's law offices to discuss the upcoming arbitration. Respondent was aware of the arbitration dates. Wegner provided respondent with a list of questions to ask at the arbitration, but respondent told him it was too late.

On or about December 13, 2006, Wegner called respondent at (415) 724-8920 regarding the upcoming arbitration. Wegner left a message for respondent. Respondent received the message and failed to respond to Wegner.

On or about January 16, 2007, respondent failed to appear at the scheduled arbitration. Wegner appeared and represented himself. On or about January 16, 2007, the arbitrator denied Wegner's claim.

On or about February 14, 2007, Wegner filed his own notice, in pro per, that he objected to the findings of the arbitrator.

On or about January 25, 2007, Wegner met and retained attorney David Pirrone ("Pirrone") regarding his case. He initially retained Pirrone to obtain his file back from respondent, but later hired Pirrone to complete the legal matter.

On January 25, 2007, on Wegner's behalf, Pirrone wrote to respondent and advised respondent that Wegner had retained Pirrone. Pirrone requested the return of Wegner's file and requested that respondent sign and return an enclosed substitution of

attorney form. Pirrone sent the letter to respondent at the Dolan address, via United States mail, postage prepaid. This letter was not returned by the United States Post office as undeliverable.

Respondent received the January 25, 2007 letter from Pirrone and failed to respond. He did not return Wegner's file, nor did he sign and return the substitution of attorney. Pirrone also telephoned respondent at (415) 724-8920. However, the number was now listed as not in service.

By failing to respond to Wegner's telephone message of December 13, 2006, and by failing to appear at the arbitration of January 17, 2007, respondent constructively withdrew from representation of Wegner.

Respondent did not notify Wegner, or the court, of his withdrawal. Nor did respondent move to withdraw or seek the permission of the San Mateo Superior Court to withdraw from the *Ted Wegner v. Rodney Marconi* matter.

On or about August 21, 2006, respondent was suspended from the practice of law by way of Supreme Court Order No. S145330, for failure to pay his child support obligations. The suspension was effective from August 21, 2006 through October 2, 2006.

On or about July 28, 2006, Dina DiLoreto properly served a copy of Supreme Court Order No. S145330, filed July 26, 2006, via certified mail, postage prepaid, on respondent at the address maintained by the State Bar pursuant to Business and Professions Code, section 6002.1,⁸ which was the Dolan Avenue address. The Order advised that respondent was suspended, effective August 21, 2006, for arrears in payment of child support obligations.

⁸ All further references to section(s) are to the Business and Professions Code, unless otherwise stated.

Respondent signed a certified mail receipt for the notice on July 31, 2006.

Respondent received the notice and was aware of its contents.

On or about September 15, 2006,⁹ respondent paid his arrearage to the Department of Consumer Affairs, Family Support Unit, in Sacramento, California, and obtained a State Licensing Match System Release Form. On or about September 20, 2006, this form was received by the State Bar. However, the Supreme Court order of suspension was still effective.

On or about September 27, 2006, the State Bar notified the Supreme Court that respondent was no longer in arrears in child support and was eligible for reinstatement of his license to practice law.

On October 2, 2006, the Supreme Court issued Order No. S145330, terminating respondent's suspension.

Respondent did not advise the court, opposing counsel Witte, or Wegner of his suspension from the practice of law.

In the letter of January 25, 2007, that Pirrone wrote on Wegner's behalf, asking for the return of Wegner's file and requesting that respondent sign an enclosed substitution of attorney form, Pirrone also asked respondent to provide him with an itemization of respondent's expenses and the return of the unearned portion of his retainer fee. Pirrone advised that based upon respondent's failure to appear at the arbitration and failure to provide billing statements, "I can only assume that you will be returning ALL of Mr. Wegner's retainer less your out of pocket costs."

⁹ The NDC mistakenly lists this date as September 15, 2007. This minor typographical error is not prejudicial to respondent.

Respondent failed to respond to Pirrone's request, made on behalf of Wegner, for an accounting of all his expenses and fees. Respondent also failed to release Wegner's file, despite receiving Pirrone's request that he do so.

The parties had no written fee agreement. Wegner agreed to pay respondent \$175 per hour. However, respondent never provided Wegner with any billings indicating the time expended on the case.

Respondent appeared at a few court hearings, filed the complaint and the amended complaint, appeared at Wegner's deposition, and thereafter failed to perform.

On or about November 13, 2007, and again on November 29, 2007, State Bar Investigator Syed Majid wrote to respondent at his official membership records address, maintained by the State Bar pursuant to Business and Professions Code, section 6002.1 (the Dolan address). Investigator Majid wrote to respondent via United States mail, postage pre-paid. In each of his letters, Investigator Majid requested a response to the allegations of the Wegner complaint. The mail was not returned as undeliverable.

Respondent received the November 13, 2007 and November 29, 2007 letters, and failed to respond or otherwise respond to the State Bar investigation of this matter.

III. Conclusions of Law

A. Count One: Rules of Professional Conduct of the State Bar of California, Rule 3-110(A)¹⁰ [Failure to Perform with Competence]

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence.

Respondent recklessly and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A), by failing to appear at the June 14,

¹⁰ All further references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

2006 case management conference; by failing to file the case management statement; and by failing to appear at the arbitration in the *Ted Wegner v. Rodney Marconi* matter.

B. Count Two: Rule 3-700(A)(2) [Improper Withdrawal from Employment]

Rule 3-700(A)(2) provides that an attorney may not withdraw from employment until taking reasonable steps to avoid foreseeable prejudice to the client's rights.

By failing, upon termination of employment, to return Wegner's files, respond to Pirrone's request that he sign a substitution of counsel, and notify the court of his withdrawal, respondent withdrew from employment without taking reasonable steps to avoid foreseeable prejudice to his client's rights, in willful violation of rule 3-700(A)(2).

C. Count Three: Rule 3-700(A)(1) [Failure to Obtain Court Permission to Withdraw]

Rule 3-700(A)(1) states that if permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission. By failing to file a motion to withdraw or otherwise seek permission to withdraw from the court in the *Ted Wegner v. Rodney Marconi* matter, respondent failed to obtain the permission of a tribunal before withdrawing, in willful violation of rule 3-700(A)(1).

The misconduct in Count Three, however, is based on the same misconduct for which respondent has already been found culpable in Count Two, i.e. respondent's failure to notify the court of his intention to withdraw. The court finds these two counts duplicative, and therefore assigns no additional weight to Count Three.

D. Count Four: Section 6068, subdivision (a) [Failure to Comply with All Laws]

Section 6068, subdivision (a), provides that an attorney has a duty to support the laws of the United States and of this state. Section 6125 prohibits the practice of law by

anyone other than an active attorney and section 6126 prohibits holding oneself out as entitled to practice law by anyone other than an active attorney.

By appearing in court on September 20, 2006, on behalf of Wegner in the *Ted Wegner v. Rodney Marconi* matter, respondent held himself out as entitled to practice law and actually practiced law while he was not entitled, in willful violation of Business and Professions Code sections 6125 and 6126, and thereby failed to support the laws of the State of California in violation of Business and Professions Code section 6068, subdivision (a).

E. Count Five: Section 6106 [Engaging in the Unauthorized Practice of Law]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. The evidence before the court demonstrates that respondent's unauthorized practice of law on September 20, 2006, was, at a minimum, the result of gross negligence. Consequently, the court finds that respondent engaged in conduct involving moral turpitude, dishonesty or corruption in willful violation of section 6106. However, since the present misconduct was already relied upon to find respondent culpable in Count Four, the court assigns little additional weight to Count Five.

F. Count Six: Section 6068, Subdivision (m) [Failure to Communicate]

Section 6068, subdivision (m), provides that it is the duty of 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 failing to respond to Wegner's phone message of December 13, 2006; by failing to notify Wegner that he would not be appearing at the arbitration; and by failing to notify Wegner of his suspension; respondent failed, in a matter in which he agreed to

provide legal services, to respond promptly to reasonable status inquiries of a client and to keep his client reasonably informed of significant developments, in willful violation of section 6068, subdivision (m).

G. Count Seven: Rule 4-100(B)(3) [Failure to Render Accounts]

Rule 4-100(B)(3) requires that an attorney maintain complete records and render appropriate accounts of all client funds in the attorney's possession. By failing to account for Wegner's funds, despite Pirrone's request for an accounting on Wegner's behalf, respondent failed to render appropriate accounts to a client regarding all funds of the client coming into respondent's possession, in willful violation of rule 4-100(B)(3).

H. Count Eight: Rule 3-700(D)(1) [Failure to Release File]

Rule 3-700(D)(1) states that a member whose employment has terminated shall promptly release to the client, at the request of the client, all the client papers and property. By failing to release Wegner's file, after receiving the request from Pirrone and receiving the information that Pirrone had been retained by Wegner, respondent failed, upon termination of employment, to promptly return, at the request of the client, all papers and property, in willful violation of rule 3-700(D)(1). However, since the present misconduct was already relied upon to find respondent culpable in Count Two, the court assigns no additional weight to Count Eight.

I. Count Nine: Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

Rule 3-700(D)(2) requires an attorney whose employment has been terminated to promptly refund any part of a fee paid in advance that has not been earned. The State Bar alleges, in the form of a legal conclusion, that respondent's conduct in his representation of Wegner was preliminary and of nominal benefit to Wegner. The court does not agree. Respondent, at a minimum, filed a complaint and an amended complaint, and appeared at

a deposition on Wegner's behalf. The court lacks sufficient evidence to determine what, if any, portion of respondent's fee was not earned; however, it appears from the record that respondent has earned some legal fees.¹¹ Consequently, the State Bar has failed to prove, by clear and convincing evidence, that respondent failed to refund unearned fees. Count Nine is dismissed with prejudice.

J. Count 10: Section 6068, Subdivision (i) [Failure to Cooperate]

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney.

Respondent failed to cooperate in a disciplinary investigation, in willful violation of section 6068, subdivision (i), by failing to provide a response to any of the State Bar investigator's letters or to the allegations of the Wegner complaint.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factors were submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)¹² Respondent, however, has no prior record of discipline in 24 years of practice prior to engaging in his first act of misconduct in the current proceeding.¹³ Practicing law for 24 years before committing misconduct is entitled to considerable weight in mitigation. (See *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749.)

¹¹ The court's decision is in no way intended to preclude Wegner from bringing a claim for disputed funds in another forum.

¹² All further references to standard(s) are to this source.

¹³ Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of respondent's membership records.

B. Aggravation

Respondent committed multiple acts of misconduct by failing to perform with competence, failing to account, and failing to refund unearned fees. (Std. 1.2(b)(ii).)

Respondent's misconduct also resulted in significant harmed to his client and the administration of justice. (Std. 1.2(b)(iv).)

V. 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 imposing discipline.

In this case, the standards call for the imposition of a minimum sanction involving a three-month actual suspension. (Standard 2.2.) 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.) 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.)

The State Bar has requested that respondent be actually suspended for six months. In support of this recommendation, the State Bar cites *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83. In *Wyrick*, the attorney, who was suspended,

held himself out as entitled to practice law on multiple occasions in order to procure employment. The attorney's omissions and misrepresentations were found to constitute moral turpitude. In aggravation, the attorney had a prior record of discipline that was found to be remote in time and of minimal severity for the purposes of standard 1.7(a). Additionally, respondent harmed the administration of justice, undermined the public's confidence in the court system, and committed multiple breaches of his ethical duties. Little, if any, evidence was presented in mitigation. The Review Department recommended that the attorney be suspended from the practice of law for two years, stayed, with a two-year period of probation including a six-month actual suspension.

The present case is somewhat distinct from *Wyrick*. The central issue in the present case is respondent's abandonment of his client. While the present case involves a single instance of practicing law while suspended, said misconduct does not rise to the level of deception found in *Wyrick*.

The court instead finds *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, to be instructive. In *Johnston*, the attorney, who had no prior record of discipline in 12 years of practice, was actually suspended for 60 days for misconduct in a single client matter. The attorney failed to communicate with his client and failed to perform competently, which caused his client to lose her case. He also improperly held himself out as entitled to practice law by misleading his client into believing that he was still working on her case while he was on suspension for not paying his State Bar dues. He defaulted in the disciplinary proceeding as well.

The misconduct found in the present case is similar, but more egregious, than *Johnston*. Here, respondent has been found culpable of additional acts of misconduct including, but not limited to, failing to render accounts and failing to cooperate with a

State Bar investigation. Consequently, the court finds that the present case warrants a higher level of discipline than *Johnston*.

VI. Recommended Discipline

Accordingly, the court recommends that respondent **WAYNE BUNCH** be suspended from the practice of law for two years and until he has shown 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. It is further recommended that execution of the above suspension be stayed, and that respondent be actually suspended from the practice of law for 120 days and until the court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California.

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, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See Rules Proc. of State Bar, rule 205(b).)

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.

The court further recommends that respondent be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a)

and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.¹⁴

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 and provide proof of passage to the Office of Probation, within one year after the effective date of the discipline herein or during the period of his actual suspension, whichever is longer.

VII. 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: June _____, 2010

LUCY ARMENDARIZ
Judge of the State Bar Court

¹⁴ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)