PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

Filed September 27, 2011

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 09-O-11747 (09-O-11985)
	)	
JAMES WOODROW NELSEN,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 74830.	)	
	)	

James Woodrow Nelsen requests review of a hearing judge's recommendation that he be disbarred for misconduct in two client matters. In the first matter, the hearing judge found that Nelsen represented a party without any authority and sought to mislead the bankruptcy court by making false statements. In a separate matter, the court determined that Nelsen failed to promptly pay client funds and misappropriated over $17,000. Without directly challenging the judge's culpability findings, Nelsen suggests that the court lacked jurisdiction to hear the matter, challenges the fairness of the proceeding, and attacks the credibility of several trial witnesses. The Office of the Chief Trial Counsel of the State Bar (State Bar) asks us to affirm the hearing judge's disbarment recommendation.

After our independent review of the record (Cal. Rules of Court, rule 9.12), we find that Nelsen committed the misconduct found by the hearing judge. Nelsen's misconduct is also surrounded by dishonesty, and he lacks insight into and remorse for his wrongdoing. Finding no

merit to Nelsen's jurisdictional, procedural or substantive challenges on review, we adopt the hearing judge's decision as summarized below.

I. PROCEDURAL AND JURISDICTIONAL ISSUES

A. JURISDICTION

Nelsen appears to argue that the State Bar Court lacks jurisdiction to decide the disciplinary charges against him because criminal charges for the same alleged misconduct are pending against him. First, the nature of pending criminal charges and their relationship, if any, to the subject matter of this proceeding were not established at trial. Nelsen failed to make a motion to augment the record on review with such evidence. (See Rules Proc. of State Bar, former rule 306 (a), (d) & (e)[1] [Review Department shall only consider evidence that was part of record in Hearing Department, but any party may move to augment record by filing and serving separate pleading].)[2] And second, Nelsen fails to cite authority prohibiting the State Bar Court from deciding disciplinary charges against a member when a criminal case is pending. (Cf. *Feinstein v. State Bar* (1952) 39 Cal.2d 541, 542-543 [disciplinary proceedings for issuing and passing fictitious checks pending against attorney concurrently with criminal action of soliciting a client to commit grand theft].) We reject Nelsen's jurisdictional argument.

B. EVIDENTIARY SANCTION

At the beginning of trial, the hearing judge issued an evidentiary sanction precluding Nelsen from introducing evidence or testimony, except his own, in one of the two matters (the Edward Garza matter). The judge issued the sanction because Nelsen objected to the majority of

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[1] The Rules of Procedure of the State Bar were amended effective January 1, 2011. However, the former rules apply to this proceeding as the request for review was filed prior to the effective date. (Rules Proc. of State Bar (eff. Jan. 1, 2011), Preface, item 2.)

[2] On July 12, 2011, Nelsen filed a request for judicial notice that included, among other things, a partial copy of an unsigned plea agreement in *United States of America v. James Nelsen* for bankruptcy fraud and concealment of assets. Finding no good cause, the request is denied.

questions during his deposition without legal justification and refused to answer them based on a meritless claim of attorney-client privilege. Following the deposition, the judge granted the State Bar's motion to compel and ordered Nelsen to appear at a second deposition to answer questions without objecting on attorney-client privilege grounds. The judge advised Nelsen that the privilege did not apply since his former client, Edward Garza, was the complainant. Despite this order, Nelsen again improperly invoked the privilege at the second deposition. Thereafter, the judge ordered the evidentiary sanction in the Garza matter.

We review the trial court's sanction order for an abuse of discretion. (*In the Matter of Navarro* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 192, 198 [Supreme Court applies abuse of discretion standard for procedural motions in State Bar proceedings].) Sanction orders are "subject to reversal only for arbitrary, capricious or whimsical action." (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 228.) The hearing judge did not abuse her discretion by imposing evidentiary sanctions against Nelsen. She exercised her broad authority to preclude him from presenting evidence and testimony other than his own in the Garza matter after Nelsen ignored a court order to answer the deposition questions. Under these circumstances, the hearing judge did not err by issuing the evidentiary sanction since her order was not arbitrary, capricious or whimsical. (See Code Civ. Proc., § 2023.030, subd. (c) [court may prohibit party who disobeyed court order from introducing designated matters in evidence]; *Waicis v. Superior Court* (1990) 226 Cal.App.3d 283, 284-286 [no abuse of discretion to prohibit expert witness from testifying when witness uncooperative during deposition scheduling and walked out before it ended].)

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Nelsen was admitted to practice law in 1977 and has primarily worked on bankruptcy matters. In January 2010, the State Bar filed a Notice of Disciplinary Charges (NDC) involving two client matters. The evidence and testimony at trial provide clear and convincing evidence to

support the hearing judge's factual findings. With the addition of certain testimonial evidence in the record, we adopt and summarize those findings below.

III. THE BELLAH LLC MATTER COUNTS ONE (A) – ONE (C)

At all relevant times, Bellah LLC was registered as a California limited liability company with two members: James Ingram, and his daughter, Ruth Ingram. Bellah owned two assets: a commercial property located at 388 Blohm Avenue in Salinas, California, and a newspaper that operated out of the Blohm Avenue property, the Aromas Tri-County Newspaper. Ingram's wife ran the newspaper.

Shortly after Ingram's wife died in 2005, the newspaper ceased publication. Then sometime in 2006, Nelsen offered to purchase the newspaper. In December 2006, Ingram signed an agreement to sell the newspaper to Nelsen for $1,500 in cash plus Nelsen's agreement to hold Ingram harmless from all creditors' claims, including an outstanding printing bill. However, Nelsen admitted that he never paid Ingram or the newspaper's creditors. Indeed, Ingram paid the newspaper's overdue printing bill and always paid the property taxes on the Blohm Avenue property. Nelsen never finalized the purchase of the newspaper and never had any interest in Bellah.

After the purchase agreement was signed, Ingram did not hear from Nelsen again until December of 2008, when Nelsen filed a Chapter 7 bankruptcy petition on behalf of Bellah. Nelsen asserted that the newspaper was merely a "dba" of Bellah, and therefore, he owned Bellah by virtue of his purported purchase of the newspaper in 2006.[3] Nelsen listed the Blohm Avenue property as an asset of the bankruptcy estate, valuing it at $800,000 with $3,549 in

[3] Nelsen also testified that he owned Bellah because he filed the bankruptcy in lieu of making the $1,500 payment to Ingram. The hearing judge found Nelsen's testimony "incredible," as do we.

liabilities. Nelsen intended to utilize the bankruptcy proceeding as a means of obtaining Bellah's assets, including the Blohm Avenue property. Nelsen was not authorized to represent Bellah, Ingram or Ruth Ingram in any capacity.

During the bankruptcy proceeding, Nelsen filed various pleadings and documents on behalf of Bellah falsely asserting that he was Bellah's attorney, CEO and owner. On January 27, 2009, Ingram's bankruptcy attorney, Clark Miller, filed a motion to dismiss the bankruptcy petition, stating that Nelsen had no connection to Bellah and no authority to file the petition. Nelsen opposed the motion, falsely stating again that he represented Bellah and Ingram. The bankruptcy court granted Ingram's motion to dismiss on February 23, 2009.

The hearing judge correctly found Nelsen culpable of violating Business and Profession Code sections 6104[4] (appearing for a party without authority), 6068, subdivision (b) (failing to respect courts by seeking to mislead a judge by his false statements), and 6106 (moral turpitude based on acts of dishonesty during the bankruptcy proceeding). However, since the same misrepresentations support the violations of section 6068, subdivision (b), and section 6106, the hearing judge properly declined to apply additional weight to the section 6106 violation in recommending disbarment.

Nelsen does not directly challenge the culpability findings, but attacks the credibility of several witnesses who supported Ingram's testimony that he never sold the newspaper or Bellah to Nelsen. Nelsen argues that these witnesses (Clark Miller, Ingram's civil attorney who manages the Blohm Avenue property, and a long-time friend of Ingram's) were trying to steal the Blohm Avenue property from Ingram. First, we note that the hearing judge found the witnesses to be credible and Nelsen to be not credible. We give great weight to that

[4] Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

determination, which is fully supported by the record. (Rules Proc. of State Bar, rule 305(a).) Further, nothing in the record supports Nelsen's claim that Ingram's attorneys and friend were trying to steal the property. Rather, their testimony was consistent with Ingram's and supports the hearing judge's findings. We reject Nelsen's meritless arguments and affirm the hearing judge's culpability determinations.

IV. THE GARZA MATTER
COUNTS TWO (A) – TWO (C)

In September 2005, Edward Garza agreed to pay Nelsen $2,500 to file a bankruptcy petition for him. Nelsen filed that petition in October 2005, and the court appointed Mohomed Poonja as the Chapter 7 trustee. Garza and his mother-in-law each had a one-half interest in her residence, which was part of the bankruptcy estate. Poonja filed an adversarial proceeding against Garza's mother-in-law seeking to sell the property. That proceeding did not directly involve Garza.

In November 2007, Garza signed a contingency fee agreement with Nelsen to represent him if he became a defendant in the adversarial proceeding. Nelsen was entitled to a fee only if Garza became involved in that controversy. Garza was never named as a defendant and never required Nelsen's representation regarding the forced sale of the property.

The bankruptcy court issued a judgment in favor of the trustee, and on July 9, 2008, it entered an order approving the sale of the residence. On the same day, Nelsen filed a notice of change of address in the bankruptcy court, falsely stating that Garza had relocated and listing his own address as Garza's address. Garza had not relocated, and he never gave Nelsen authorization to file a change of address. Nelsen then filed a notice to ensure that any funds distributed by the trustee would be sent to his office.

In August 2008, Poonja sent Nelsen a $17,425 check from the proceeds of the sale of the residence that was made payable to Garza in care of Nelsen. Nelsen directed his assistant to ask

Garza to come to the office to endorse the check. The assistant told Garza that the check had to be processed through Nelsen's trust account. Garza signed the check and Nelsen deposited it into his trust account on August 20, 2008. Between August 22 and August 29, 2008, Nelsen transferred $17,255.60 of Garza's funds into his business account. As of August 29, 2008, Nelsen had paid nothing to Garza and the balance in his trust account had fallen to $169.40.

After Poonja informed Garza that the $17,425 did not have to be placed in Nelsen's trust account, Garza sent Nelsen a letter asking for immediate payment of the $17,425. Nelsen never paid Garza and insists that Garza owes him $5,945 in attorney's fees.

We agree with the hearing judge's culpability determinations: (1) Nelsen failed to promptly pay Garza $17,425 held in trust for him even after Garza requested payment, in violation of rule 4-100(B)(4) of the Rules of Professional Conduct;[5] (2) Nelsen violated rule 4-100(A) by failing to maintain $17,255.60 in his trust account for Garza's benefit; and (3) Nelsen committed an act of moral turpitude in violation of section 6106 when he misappropriated those funds as his personal property.[6] (*Jackson v. State Bar* (1979) 25 Cal.3d 398, 403 [fact that attorney's trust account falls below amount due client supports finding of willful misappropriation]; *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020 [willful misappropriation of client funds sufficient to prove act of moral turpitude].) Nelsen's contention that Garza owed him $5,945 in attorney's fees has no merit because he never represented Garza in the adversarial proceeding contemplated by their contingency fee agreement.

[5] Unless otherwise noted, all further references to "rule(s)" are to the Rules of Professional Conduct.

[6] Although Nelsen violated both rule 4-100(A) and section 6106, for our discipline analysis, we assign no additional weight to the rule 4-100 (A) violation because the misconduct underlying the section 6106 violation supports the same or greater discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar. Ct. Rptr. 119, 127.)

V. AGGRAVATION AND MITIGATION

Guided by the Standards for Attorney Sanctions for Professional Misconduct,[7] we adopt the four aggravating factors the hearing judge found: significant harm to his former client Garza based on his failure to repay the $17,425 (std. 1.2(b)(iv)); misconduct surrounded by bad faith and overreaching based on his attempt to obtain the Blohm Avenue property as part of the bankruptcy proceeding (std. 1.2(b)(iii)); indifference toward rectification or atonement for the consequences of his misconduct based on his continued insistence he has done nothing wrong and his refusal to pay Garza (std 1.2(b)(v)); and lack of candor during the disciplinary proceedings based on his assertion, among others, that he owned and represented Bellah (std. 1.2(b)(vi)).

We also adopt the one mitigating factor that the hearing judge found – no prior record of discipline since admission to practice in 1977. (Std. 1.2(e)(i) ["absence of any prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious"].) While such a lengthy period of discipline-free practice would normally be considered strong mitigation, the weight given to this factor is significantly reduced due to the seriousness of the misconduct.

VI. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession. To determine the proper discipline, the Supreme Court has instructed that we follow the standards "whenever possible" (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11) because they " ' "promote the consistent and uniform application of disciplinary measures." ' [Citation.]" (*In re Silverton* (2005) 36 Cal.4th 81, 91.) The most severe and

[7]Unless otherwise noted, all further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

relevant sanction applicable to Nelsen's misconduct is standard 2.2(a),[8] which calls for disbarring an attorney who misappropriates trust funds unless the amount involved is insignificantly small or the most compelling mitigating circumstances clearly predominate. Neither exception applies here. Nelsen misappropriated $17,425, which is not an insignificant amount, and he has failed to establish the most compelling mitigating circumstances. Thus, we find no reason to deviate from the applicable disbarment standard.

In addition to the standards, case law guides our disciplinary analysis. Our review of similar cases involving dishonest acts of misrepresentation and misappropriation of funds further reveals that disbarment is appropriate. (*Chang v. State Bar* (1989) 49 Cal.3d 114 [attorney disbarred where he misappropriated $7,000, made misrepresentations to client, had no mitigating factors but significant aggravation that included lack of candor]; *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390 [attorney disbarred where she appeared in court without authorization, made false representations to court, misappropriated client funds, had one mitigating circumstance with aggravation that included dishonesty, significant harm to clients, indifference to rectifying misconduct and lack of candor during disciplinary trial].)

We conclude that Nelsen should be disbarred. His misconduct was egregious and consisted of many improper acts, most of which manifested dishonesty. He deliberately made false statements orally and in writing to mislead the bankruptcy judge, including that he was authorized to represent Ingram and Bellah during court proceedings. He violated " ' "the fundamental rule of [legal] ethics—that of common honesty—without which the profession is worse than valueless in the place it holds in the administration of justice" [citation].' " (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 60.) He also misappropriated over $17,000 from Garza and has

[8] Standard 2.3 is also applicable and proposes disbarring or suspending an attorney who engages in acts of moral turpitude, fraud, or dishonesty, depending upon the circumstances.

failed to make restitution. To protect the public, the courts and the legal profession, disbarment is the appropriate sanction for such misconduct that is surrounded by substantial aggravation and a lack of compelling mitigation.

VII. RECOMMENDATION

We recommend that James Woodrow Nelsen be disbarred from the practice of law in California and his name stricken from the roll of attorneys.

We also recommend that Nelsen make restitution to Edward Garza in the amount of $17,425 plus 10% interest per annum from August 20, 2008 (or to the Client Security Fund to the extent of any payment from the fund, plus interest and costs, in accordance with section 6140.5), and furnish satisfactory proof thereof to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in section 6140.5, subdivisions (c) and (d).

VIII. RULE 9.20

We further recommend that Nelsen be required to comply with the provisions of rule 9.20 of the California Rules of Court and to perform the acts specified in subdivision (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's order in this case.

IX. COSTS

We further recommend that costs be awarded to the State Bar pursuant to section 6086.10 and that such costs are enforceable both as provided in section 6140.7 and as a money judgment.

X. ORDER OF INACTIVE ENROLLMENT

Due to the disbarment recommendation, the hearing judge ordered that Nelsen be involuntarily enrolled as an inactive member of the State Bar as required by section 6007,

subdivision (c)(4). That order became effective on November 19, 2010. Nelsen will remain on involuntary inactive enrollment pending the final disposition of this proceeding.

REMKE, P. J.

WE CONCUR:

PURCELL, J.

EPSTEIN, J.