PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed September 20, 2007

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **RICHARD M. OZOWSKI,** A Member of the State Bar.	)))))))	**04-C-10213** **OPINION ON REVIEW**

The State Bar seeks review of a hearing judge's disciplinary recommendation in this conviction referral matter involving a domestic dispute between respondent, Richard M. Ozowski, and his former girlfriend of many years. Respondent pled guilty to one count of misdemeanor trespass for his uninvited intrusion into his former girlfriend's residence, which resulted in a tumultuous confrontation. The testimony by respondent and his former girlfriend regarding what occurred during that encounter was dramatically divergent.

After a two-day trial, the hearing judge found that the facts and circumstances surrounding respondent's criminal conviction, while not involving moral turpitude, warranted discipline, and she recommended, inter alia, that respondent be publicly reproved with conditions lasting one year. Respondent did not seek review, but he argues here that we lack jurisdiction to consider this appeal because the State Bar failed to file a timely request for review. For the reasons discussed below, we agree with respondent's position.[1] Although we are loath to dismiss this case on jurisdictional grounds, we are compelled to do so because, despite its efforts, the

[1]On appeal, respondent asserts several other procedural and substantive claims, but in light of our decision to dismiss this matter for want of jurisdiction, we do not address the merits of those contentions.

State Bar's two requests for review filed in this matter were vacated by operation of law, thereby depriving us of jurisdiction to consider this appeal.

I. PROCEDURAL BACKGROUND

Respondent was admitted to practice law in California on May 8, 2002, and has no prior record of discipline in California.[2]

As the result of his uninvited entrance into his former girlfriend's residence on July 6, 2003, and the ensuing altercation, respondent pled nolo contendere to misdemeanor trespass under Penal Code section 602.5, subdivision (a) on December 18, 2003.[3] Respondent also was required to participate in a domestic violence program, which is a mandatory condition required of all convictions that involve a dating relationship.

The State Bar transmitted the record of conviction to this court on April 15, 2005, and we referred the matter to the Hearing Department to determine if the conviction involved moral turpitude or other misconduct warranting discipline. The trial was held on January 18 and 19, 2006, and the hearing judge filed her decision on April 11, 2006, recommending, inter alia, that respondent be publicly reproved.

After the decision of April 11, 2006, various post-trial procedural steps taken by the State Bar and respondent resulted in the hearing judge twice resetting the time within which the parties could request review.

On April 20, 2006, the State Bar filed its first request for review in the Review Department. On the same date, it filed a Notice of Motion and Motion to Amend the Decision and Correct Errors (Motion to Amend) in the Hearing Department, citing California Penal Code section 1054.7 and the California Style Manual sections 5:9, 5:12, and 6:18 as the bases for its

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[2]Respondent was admitted to the Texas State Bar prior to moving to California.

[3]As part of his plea, the court dismissed a misdemeanor charge of battery on a person with whom the defendant had a dating relationship (Pen. Code §§ 242 and 243, subd. (e)(1)) and a misdemeanor charge of false imprisonment (Pen. Code §§ 236-237).

request that the full names of Vicki D. and Dennis D. be omitted or changed to protect their privacy. The State Bar also asked the hearing judge to correct the name of the victim's husband, who was erroneously identified as Derrick instead of Dennis.

On April 27, 2006, the hearing judge issued an order granting the State Bar's Motion to Amend, in part, and vacating her April 11, 2006, decision. She directed that an amended decision be filed in which the names of the victim and her spouse were stricken and replaced with aliases. She also ordered that the time for filing a request for review be reset to the date of service of her order.

The State Bar filed a second request for review on May 4, 2006. But, on May 5, 2006, respondent filed a timely Opposition to the Motion to Amend (Opposition), in which he argued that the modifications requested by the State Bar would have the effect of wrongly characterizing him as a perpetrator of domestic violence. The hearing judge, acknowledging that respondent's Opposition was timely filed, considered his pleading and issued another order on May 18, 2006, declining to modify her April 27, 2006, decision. The hearing judge again re-set the time to file a request for review to begin on the date of service of the May 18th order. The State Bar did not file another request for review.

On June 22, 2007, we advised the parties, pursuant to rule 305(b),[4] to consider addressing the following issues at oral argument: 1) whether the State Bar's request for review, filed on May 4, 2006, was vacated by the order of the hearing judge dated May 18, 2006; and, 2) whether the State Bar's May 4, 2006, request for review was a nullity, thereby depriving the Review Department of jurisdiction to consider this matter.

Both parties filed supplemental briefs on these issues.

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[4]Unless otherwise noted, all references herein to "rule" or rules" are to the Rules of Procedure of the State Bar.

II. DISCUSSION

At the outset, we note that we have the jurisdiction to determine our jurisdiction. (*In the Matter of Applicant B* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 731, 734.) We start with the most fundamental definition of jurisdiction, which is "the right to adjudicate" the cause. (*Harrington v. Superior Court* (1924) 194 Cal. 185, 188.) This basic jurisdictional principle is embedded in various provisions of the rules, which explicitly dictate when and under what circumstances we have jurisdiction to hear a matter.

Rule 301(e) sets forth the boundary line of this court's jurisdiction: "Except as expressly permitted by these rules, no action of a hearing judge shall be reviewable by the Review Department until after the entry of a decision or order by the hearing judge fully disposing of the entire proceeding."[5]

In the instant case, the State Bar filed its Motion to Amend in the Hearing Department on April 20, 2006, which had the effect of vacating its request for review filed on the same date in the Review Department. (Rule 301(d).)[6] The State Bar's request for review therefore was void *ab initio*. Under rule 301(d), this court was thus deprived of jurisdiction to hear the appeal of this matter, and the hearing judge retained jurisdiction to rule on the State Bar's post-trial motion. The hearing judge thus acted well within her discretion when, on April 27, 2006, she ruled that "[a]lthough the changes are insubstantial and do not affect the merits of the decision, the court considers the State Bar's request as a post-trial motion and is thereby governed by rule

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[5]Prior to 1989, intermediate review by the Review Department of the Hearing Department's decisions was automatic regardless of whether a timely request for review was or was not filed. (See former rule 450(b).) After 1989, with the creation of appointed State Bar Court judges pursuant to Business and Professions Code sections 6079.1 and 6085.65, intermediate review ceased to be automatic and instead required a timely request of a party.

[6]Rule 301(d) provides: "The filing of a post-trial motion as to a decision shall vacate any request for review of that decision filed under this rule."

221 of the Rules of Procedure of the State Bar. The time during which review may be sought in this matter will run from the date the order is served."[7]

Moreover, the State Bar's second request for review, filed in this court on May 4, 2006, was vacated under rule 221(b)(2), because it was filed prior to the hearing judge's final ruling on the Motion to Amend.[8] As it turned out, respondent interposed his timely Opposition to the Motion to Amend on May 5, 2006. Recognizing her error in making a premature ruling, the hearing judge issued a superseding order on May 18, 2006, in which she gave due consideration to respondent's Opposition, but nevertheless declined to further amend her earlier decision. The hearing judge also ordered that "[i]n light of respondent's timely opposition to the motion [to amend], the time during which review may be sought in this matter will run *from the date this order is served*." (Italics added.)

The hearing judge's two post-trial orders resetting the time to file a request for review were consistent, not only with rules 221(b)(2) and 301(d), which operated to vacate the State Bar's two requests for review, but with three other rules, all of which expressly provide that the time to file a request for review commences after the filing of the hearing judge's orders fully disposing of the matter. Thus, rule 221(b)(1) provides: "[t]he time to seek review *shall commence upon the service of the Hearing Department's ruling* on the post-trial motion . . . ."

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[7]The State Bar in its Motion to Amend incorrectly advised the hearing judge that "those amendments and corrections specifically identified herein [should not] otherwise disturb the timing for the filing of requests for review." Even though the April 27th and May 18th orders made no material changes to the hearing judge's April 11th decision, the judge had a duty to consider the merits of the State Bar's Motion to Amend, as well as respondent's timely Opposition, which raised substantive objections to the requested changes, before rendering a decision "fully disposing of the entire proceeding." (Rule 301(e).) Thus, rule 220(a), which provides "[c]orrections of typographical errors or insubstantial changes not affecting the merits shall not constitute a modified decision," is inapplicable since the Hearing Department did not modify its decision *on its own motion*, but rather rendered a decision after the State Bar filed its post-trial motion.

[8]Rule 221(b)(2) provides: "Any request for review filed prior to the Hearing Department's ruling on any post-trial motion shall be deemed vacated."

(Italics added.) Rule 301(a)(1) states that the filing and service of a request for review must "be filed within thirty (30) days *after* service of the hearing judge's ruling on a post-trial motion . . . ." (Italics added.) Additionally, rule 301(d) provides that "[t]he time to request review after a post-trial motion *shall commence with the service of the hearing judge's ruling* on the motion." (Italics added.)

The State Bar apparently believed that it had perfected its right to appeal, having filed the two requests for review, but, unfortunately, it was in error. Since no timely request for review was filed in this court after service of the May 18th order, we are without jurisdiction to hear the matter. (Rule 301(a).)

In an effort to avoid this harsh result, the State Bar looks to the California Rules of Court and the Code of Civil Procedure (CCP) for relief. However, "State Bar disciplinary proceedings are of a nature of their own and are not governed by the rules of procedure governing criminal and civil litigation. [Citation.]" (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 171.) Indeed, the *sui generis* nature of these proceedings reinforces our conclusion that we are without jurisdiction to consider the State Bar's appeal. For example, the State Bar suggests that we consider the two requests for review as prematurely filed, citing to California Rules of Court, rule 8.104(e).[9] However, there are no analogous provisions in the Rules of Court to rules 221(b)(2) and 301(d), that would have the effect of vacating notices of appeal filed prior to a decision on a post-trial motion.

We also do not agree with the State Bar's suggested application of CCP section 916(a), which stays proceedings in the trial courts of record once a notice of appeal has been filed, since rules 221(b)(1) and 301(a) and (e) expressly preclude the filing of a request for review until *after*

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[9] California Rules of Court, rule 8.104(e) provides that a "notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment" and a "reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment."

the Hearing Department fully disposes of the proceeding and the hearing judge's final order has been served.

The State Bar further cites to *In re Jones* (1971) 5 Cal.3d 390, for support that the Supreme Court has not imposed a strict jurisdictional rule for appeals to the Supreme Court from State Bar disciplinary proceedings. In *In re Jones*, the court held that the 60-day period for a member to file a petition for review in the Supreme Court from a decision recommending disbarment or suspension is not jurisdictional. (*Id*. at p. 394.) The court cited to California Rules of Court, rule 45(e) (now rule 8.60(d)) for the proposition that it may grant relief to a party from default or for any failure to comply with the rules if good cause is shown, as well as for its inherent authority to reverse or modify a disciplinary recommendation even when no request for review has been filed. (*In re Jones*, *supra*, 5 Cal.3d at p. 394.) However, nothing in the *Jones* opinion addresses the issues presented here – i.e., the transfer of jurisdiction *inter se*, i.e., between the Hearing Department and the Review Department. Furthermore, the *Jones* opinion predates the 1989 creation of the State Bar Court pursuant to sections 6079.1 and 6086.65, as well as the rules governing the filing of a request for review (see fn. 5 *ante*), and accordingly the court did not consider the effect of the vacation of a request for review pursuant to rules 221(b)(2) and 301(d).

Without citation to authority, the State Bar further argues that its Motion to Amend was not a post-trial motion, suggesting that the only post-trial motions covered by rule 221 are those specified in rules 222 through 224.[10] But there is no language in rule 221 limiting its applicability to rules 222 through 224, nor is there any language indicating that those rules are intended to be an exclusive roster of post-trial motions. In fact, rules 222 through 224 set forth the *evidentiary grounds* on which a party may present one of the motions enumerated therein, whereas rule 221 delineates the *procedures* a party must follow when presenting *all* post-trial

[10]Rule 222 applies to motions to reopen the record, rule 223 concerns motions for a new trial and rule 224 governs motions for reconsideration.

motions to the court. We are at a loss to characterize the State Bar's post-trial effort to amend the hearing judge's decision as anything other than a post-trial motion, and we accordingly find that the hearing judge was well within her discretion to treat it as such.

Finally, the State Bar asks for relief on the grounds that it never received a copy of the May 18th order, and that it was misled by this court's clerk's office, which did not reject its pleadings filed after the requests for review. However, the record contains a copy of a Certificate of Service, certifying that on May 18, 2006, a copy of the order was served on the Deputy Trial Counsel "by interoffice mail through a facility regularly maintained by the State Bar of California." The State Bar averred in a declaration attached to its supplemental brief that the Deputy Trial Counsel did not have a copy of the May 18th order in her files, but it did not submit competent evidence establishing that service was not properly effectuated. Merely because the May 18th order did not reach the Deputy Trial Counsel's files does not controvert the fact established by the Certificate of Service that the service of the order was effectuated once it was deposited in the regular State Bar interoffice mail. (Rule 63(a);[11] see also *Caldwell v. Geldreich* (1955) 137 Cal.App.2d 78, 81.)

Moreover, the fact that the State Bar did not receive a clerk's notice of rejection of its pleadings is not grounds for relief pursuant to any rule; any notice of rejection is merely a courtesy function of the clerk's office. More importantly, because we were divested of jurisdiction once the requests for review were vacated, we are powerless "to relieve against mistake, inadvertence, accident, or misfortune." (*Stuart Whitman, Inc. v. Cataldo* (1986) 180 Cal.App.3d 1109, 1113, citing *Estate of Hanley* (1943) 23 Cal.2d 120, 123; see also *Maynard v. Brandon* (2005) 36 Cal.4th 364, 372-373.)

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[11]Rule 63(a) states: "When service is made by United States mail or State Bar inter-office mail, by the Court or by a party, the provisions of Code of Civil Procedure section 1013(a) apply." CCP section 1013, subdivision (a) provides that service of the May 18th order was effectuated when it was deposited in the mail. (*McKeon v. Sambrano* (1927) 200 Cal. 739, 741.)

We acknowledge the public policy in favor of resolving "doubtful" cases so that parties may maintain their remedial rights of appeal. (See *Koehn v. State Board of Equalization* (1958) 50 Cal.2d 432, 435.) But this is not a doubtful case, since it involves the application of no less than five rules and two orders of the hearing judge, all of which clearly required the State Bar to file its request for review after service of the May 18, 2006, order. We find no ambiguity in the language of rule 221(b)(2) and rule 301(d), which operated to vacate the requests for review. The usual and ordinary meaning of "vacate" is to "nullify or cancel; make void; invalidate." (Black's Law Dict. (8th ed. 2004); *People v. Trevino* (2001) 26 Cal.4th 237, 241 [we look to the usual and ordinary meaning of the statute to determine its intent].) In the absence of ambiguity or conflicting legislation,[12] we are satisfied as to the meaning and intent of these rules (*In re Derrick B.* (2006) 39 Cal.4th 535, 539), which are intended to preclude the Hearing Department and the Review Department from simultaneously adjudicating cases pending in the State Bar Court. It is "axiomatic that jurisdiction vests in only one court at a time." (*In the Matter of Kirwan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630, 635.) If we were to disregard rule 221 and rule 301, we would invite incongruent decisions and duplication of effort by the Hearing Department and the Review Department.[13] Additionally, to ignore the rules would allow the parties to seek this court's review of the very decisions they are asking the Hearing Department

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[12]Compare *In re MacKenzie* (Review Dept. 2007) _ Cal. State Bar Ct. Rptr. __, __, wherein we construed the clear language of a procedural rule as not being jurisdictional in order to harmonize the rule with the Business and Professions Code. Here, there is no such conflict with section 6086.65 of the Business and Professions Code or with California Rules of Court, rule 9.12, both of which contemplate that this court shall independently review decisions, orders, or rulings by a hearing judge once the court has fully disposed of an entire proceeding.

[13]The State Bar argues that the Hearing and Review Departments comprise a unitary court, and as such, the rules transferring a matter between the two departments are not jurisdictional. The express language of the rules belies this interpretation. (See Bus. & Prof. Code, §§ 6086.5, 6086.65; rules 300, 301, 305; see also *In the Matter of Kirwan, supra*, 3 Cal. State Bar Ct. Rptr. at p. 635.)

to modify. This is not only jurisdictionally nonsensical, it flies in the face of the proper administration of justice.

III. CONCLUSION

Rules 221 and 301 deprive us of jurisdiction to hear this matter and, accordingly, we are without authority to ameliorate the procedural lapses of the State Bar. We therefore conclude that the decision of the hearing judge recommending, inter alia, that respondent be publicly reproved is the final decision of the State Bar Court and this appeal is dismissed forthwith.

EPSTEIN, J.

We concur:

WATAI, Acting P. J.

STOVITZ, J.*

*Retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge

Case No. 04-C-120213

In the Matter of

RICHARD M. OZOWSKI

Hearing Judge

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