FILED FEBRUARY 23, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **Robert Brett Nesin**, **Member No. 119368**, A Member of the State Bar.	)	**Case No. 05-O-01687-PEM** **Decision**

I. INTRODUCTION

In this default matter, respondent Robert Brett Nesin is found culpable, by clear and convincing evidence, of failing perform legal services competently and of failing to communicate in two separate client matters and of engaging in acts involving moral turpitude and dishonesty in one of those client matters.

In light of respondent's culpability in this proceeding, and after considering any and all aggravating and mitigating circumstances surrounding respondent's misconduct, the court recommends, among other things, that respondent be placed on two years' stayed suspension and on sixty days' actual suspension continuing until the State Bar Court grants a motion to terminate his actual suspension (Rules Proc. of State Bar, rule 205).

II. PERTINENT PROCEDURAL HISTORY

On September 20, 2005, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a notice of disciplinary charges (NDC). On that same day, in accordance with Business and Professions Code section 6002.1, subdivision (c),[1] properly served a copy of it on respondent by certified mail, return receipt requested, at his latest address

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

shown on the official membership records of the State Bar (official address). That service was deemed complete when mailed even if respondent did not receive it. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108.)

Thereafter, on September 30, 2005, the State Bar received, from the United States Postal Service, a return receipt for that copy of the NDC. That receipt establishes that the service copy of the NDC was actually delivered to respondent's official address September 27, 2005.[2] Respondent's response to the NDC was due no later than October 17, 2005. (Rules Proc. of State Bar, rule 103(a).) Respondent, however, never filed a response. Accordingly, on October 17, 2005, as a courtesy to respondent, a State Bar deputy trial counsel (DTC) telephoned respondent at the telephone number he maintained on the official membership records of the State Bar and left a voice message for respondent advising him of the impending default and asking respondent to return his call.

Then, on October 24, 2005, as a further courtesy to respondent, the DTC mailed another copy of the NDC to respondent at an alternative address that the DTC obtained after doing a search for respondent on Lexis.[3]

On October 24, 2005, the State Bar filed and properly served on respondent a motion for entry of default. Respondent failed to file a response to either that motion or the NDC. Accordingly, on November 8, 2005, the court filed an order entering respondent's default and, as mandated in section 6007, subdivision (e)(1), placing him on involuntary inactive enrollment. The Clerk of the State Bar Court properly served a copy of that order on respondent.

After the State Bar filed a request for waiver of default hearing and brief on culpability and discipline, the court took the matter under submission for decision on November 28, 2005, without a hearing.

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[2]The signature on the receipt is illegible.

[3]That alternative address is on West Yokuts Avenue in Stockton, California. (See the declaration of DTC Robin B. Brune that is attached to the State Bar's October 24, 2005, motion for entry of default.)

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The factual allegations in the NDC are deemed admitted by the entry of respondent's default. (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A).)

Jurisdiction

Respondent was admitted to the practice of law in California on December 10, 1985, and has been a member of the State Bar since that time.

Campos Client Matter

On March 5, 2004, Fidencio Campos (Campos) retained respondent to represent him in a personal injury case entitled *Campos v. Maryuk*, case number CVO16696, in the San Joaquin County Superior Court . At the same time Campos gave respondent a $2,500 cashier's check as a retainer fee to represent him.[4] Respondent did not prepare or execute a retainer agreement with Campos.

In August 2004, the parties reached a settlement for $7,500. And, on or about September 20, 2004, respondent and Campos executed a settlement agreement and release of claims. Thereafter, on September 23, 2004, INS Insurance, Inc. issued a $7,500 settlement draft payable to Campos and respondent. Respondent never informed Campos of his receipt of the settlement draft. Nor did respondent ever deposit the settlement draft into his client trust account. Nor did he otherwise cash the draft. The draft expired on March 23, 2005.

In late December 2004, Attorney Harold Miller, who was Campos's former attorney, sent respondent a letter claiming to have a $2,072.45 lien for professional services. In early May 2005, Attorney Miller wrote respondent requesting the status of the settlement and the payment of his lien. Respondent never responded to either of Miller's letters; nor did respondent ever pay Miller's lien.

Between December 2004 and April 2005, Campos made several telephone calls to respondent's office requesting the status and release of the settlement funds. And, in February 2005, Campos wrote to respondent requesting the release of the settlement funds for the payment of

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[4]Respondent cashed the cashier's check without ever depositing it into his client trust account.

medical and chiropractic bills that were associated with Campos's personal injuries in the case.

Respondent never returned any of Campos's telephone calls. Nor did respondent ever release any of the settlement funds as requested. Nor did respondent provide Campos with an accounting for the $2,500 retainer.

Count 1: Rule 3-110(A) of the Rules of Professional Conduct[5] — Failure to Perform

The record establishes, by clear and convincing evidence, that respondent willfully violated rule 3-110(A), which provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. Respondent failed to deposit the settlement draft into his client trust account for so long that the draft expired. This, in turn, prevented respondent from complying with Campos's request to disburse the settlement proceeds. Without question, respondent's failure to competently provide these basic legal services was both reckless and repeated.

Count 2: Rule 4-100(A) — Failure to Deposit Funds into Trust Account

In count 2, the State Bar charges that respondent violated rule 4-100(A) because he failed to deposit the $2,500 cashier's check and the $7,500 settlement draft into his client trust account. Rule 4-100(A) requires that an attorney deposit all funds received for the benefit of his or her clients, including advances for costs and expenses, into a client trust account.

First, there is no clear and convincing evidence that the $2,500 was an advanced fee. Second, the NDC clearly refers to the $2,500 cashier's check as a "retainer fee" which "Campos paid to retain Respondent." Resolving all reasonable doubts in respondent's favor (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367), the court must presume that the $2,500 was a true retainer fee and not an advanced fee. A retainer fee is a fee paid for the purpose of ensuring the availability of the attorney. (See rule 3-700(D)(2).) As such, it is earned when it is received and should not be deposited into a trust account. Accordingly, respondent's failure to deposit the $2,500 retainer into his client trust

[5]Unless otherwise indicated, all further references to rules are to the Rules of Professional Conduct of the State Bar of California.

account cannot support a violation of rule 4-100(A).[6]

Moreover, as noted above, the court has relied on respondent's failure to deposit the $7,500 settlement draft as one of the bases for finding respondent culpable under rule 3-110(A). To rely on that same failure again to find culpability under rule 4-100(A) would be duplicative and inappropriate. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 536.) In sum, count 2 is dismissed with prejudice.

Count 3: Rule 4-100(B)(3) — Failure to Account

The State Bar has failed to establish, by clear and convincing evidence, that respondent willfully violated rule 4-100(B)(3) by failing to account "to Campos for the $2,500 that Campos paid to retain Respondent" and for "the [$7,500] settlement funds." Rule 4-100(B)(3) requires attorneys to maintain complete records of all client funds and to render appropriate accounts to the client regarding them.

As noted above, respondent "earned" the $2,500 retainer when it Campos paid it. Thus, he had no duty to account to Campos for it particularly in light of the fact that respondent performed legal services for the Campos – respondent settled the case. Furthermore, respondent never deposited the $7,500 settlement draft into his client trust account. Nor did respondent otherwise cash the draft. Thus, it is clear that respondent did not possess any funds or cash for which he had a duty to account.

In sum, count 3 is dismissed with prejudice.

Count 4: Rule 4-100(B)(4) — Failure to Pay Client Funds

In count 4, the State Bar charges that respondent violated rule 4-100(B)(4) because he failed to pay out the proceeds from the $7,500 settlement draft in accordance with Campos's request. Rule

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[6]What is more, even assuming, arguendo, that the $2,500 was not a retainer fee, but was an advanced fee, respondent's failure to deposit the cashier's check into his client trust account would still not support a rule 4-100(A) violation. "Legislative history" makes clear that rule 4-100 does not require that advanced fees be deposited into a trust account. (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2004) ¶ 9:107.2, pp. 9-14.1-9-14.2; accord *Read v. State Bar* (1991) 53 Cal.3d 394, 414 [where the Supreme Court omitted advanced fees from its holding that advanced payments for costs and expenses for work not yet done must be placed in a trust account].)

4-100(B)(4) requires that an attorney promptly pay or deliver, as requested by a client, the funds, securities, or other properties in the attorney's possession to which the client is entitled to receive.

As noted above, the court has relied on respondent's failure to pay out the proceeds of the settlement draft as one of the bases for finding respondent culpable under rule 3-110(A). To rely on that same failure again to find culpability under rule 4-100(B)(4) would be duplicative. (*In the Matter of Valinoti, supra*, 4 Cal. State Bar Ct. Rptr. at p. 536.) In sum, count 4 is dismissed with prejudice.

Count 5: Section 6068, Subdivision (m) — Failure to Communicate

The record establishes, by clear and convincing evidence, that respondent willfully violated section 6068, subdivision (m), which 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. Respondent willfully violated section 6068, subdivision (m) by failing to notify Campos of his receipt of the $7,500 settlement draft and by failing to respond to the telephone calls Campos made to him between in December 2004 and April 2005.[7]

Chan Client Matter

On or about August 18, 2004, Helen Chan (Chan) retained respondent to represent her in pursuing a breach of contract claim. At that time, Chan gave respondent a $500 check. Then, on or about, August 20, 2004, Chan gave respondent a $1,000 check.

During a telephone conversation with respondent in or around August 2004, after reviewing a draft of a complaint respondent had prepared, Chan told respondent to file the complaint in San Joaquin County Superior Court. Even though respondent told Chan that he would file the complaint immediately, he never did so.

In or around November 2004, Chan made two telephone calls to respondent's office and left messages asking about the status of her case. And, in or around January 2005, Chan again

[7]The court notes that the State Bar charges that respondent also violated section 6068, subdivision (m) by never informing Campos that the settlement draft expired. But there are no deemed factual allegations to support such a charge.

telephoned respondent's office and left messages asking about the status of her case. Respondent, however, never returned Chan's calls.

Respondent met with Chan at his office on or about January 14, 2005. Respondent lied and told her that he had filed the complaint. When Chan asked respondent for the case number, respondent told her that the paperwork was at his home and instructed her to return to his office on January 21, 2005, to obtain the number. Chan went to respondent's office on January 21, but respondent was not there. In January 2005, Chan went to the San Joaquin County Superior Court and learned that respondent had not filed the complaint.

In April 2005, Chan hired Attorney Mark Thiel to represent her. And, on or about May 2, 2005, respondent lied and told a State Bar investigator that he filed a complaint for Chan in the San Joaquin County Superior Court two weeks earlier. Thereafter, on or about May 27, 2005, respondent sent Chan a $2,500 check.

Count 6: Rule 3-110(A) — Failure to Perform

The record establishes, by clear and convincing evidence, that even though respondent met with Chan and drafted a complaint for her, he repeatedly and recklessly failed to perform legal services competently in willful violation of rule 3-110(A) when he failed to file the complaint for Chan from August 2004 through April 2005.

Count 7: Section 6068, Subdivision (m) — Failure to Communicate

The record establishes, by clear and convincing evidence, that respondent willfully violated section 6068, subdivision (m) by failing to respond to the telephone calls that Chan made to him in November 2004 and January 2005.

Count 8: Rule 3-700(D)(2) — Failure to Promptly Refund Unearned Fees

The State Bar failed to establish, by clear and convincing evidence, that respondent failed to promptly refund any unearned fees to Chan. There is no evidence as to when respondent's representation of Chan terminated. Presumably, it terminated in or about April 2005 when Chan employed Attorney Thiel. Respondent sent Chan a check for $2,500 ($1,000 more than she paid him) the very next month. Thus, there is no clear and convincing evidence of any improper delay. Count 8 is dismissed with prejudice.

Count 9: Section 6106 — Moral Turpitude

The record establishes, by clear and convincing evidence, that respondent willfully violated section 6106, which proscribes acts involving moral turpitude, dishonesty, or corruption. When respondent purposely misled Chan and the State Bar investigator by telling them that he had filed the complaint for Chan he committed acts involving both moral turpitude and dishonesty in willful violation of section 6106. (*Stevens v. State Bar* (1990) 51 Cal.3d 283, 289.)

IV. MITIGATING & AGGRAVATING CIRCUMSTANCES

As respondent's default was entered in this matter, respondent did not have an opportunity to introduce any mitigating evidence on his behalf. (Rule Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[8] Nonetheless, respondent's lack of a prior record of discipline in his almost 20 years of practice is a very strong mitigating circumstance. (Std. 1.2(e)(1).)

In aggravation, respondent's misconduct involved multiple acts of misconduct. (Std. 1.2(b)(ii).) In addition, respondent's failure to participate in this proceeding before the entry of his default is an aggravating circumstance. (Std. 1.2(b)(vi); *In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 223, 225.)

The State Bar asserts in its brief on culpability and discipline that respondent's misconduct caused significant harm to both Campos and Chan and that respondent's misconduct, in some unspecified manner, reflects indifference towards rectification. However, there is nothing in the record that even remotely supports the State Bar's assertions, much less the clear and convincing evidence required to establish aggravating circumstances (std. 1.2(b)). Moreover, in that same brief, the State Bar also asserts that respondent's misconduct somehow reflects a lack of candor and cooperation with the victims of his misconduct. But the record does not reflect any lack of candor and cooperation independent of that which establishes respondent's culpability for violating section 6106. And it would be duplicative and inappropriate to for the court to again find the same lack of candor and cooperation to be aggravation.

[8]All further references to standards are to this source.

V. DISCUSSION

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) As the review department noted more than 14 years ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not do so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

The first step in applying the analysis is to note that, under standard 1.6(a), when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for respondent 's misconduct is found in standard 2.3, which provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon 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 member's acts within the practice of law." Even though respondent does not have prior record of discipline, there is no compelling reason not to recommend a period of actual suspension. This is particularly true because respondent not only lied to both Chan and a State Bar investigator about filing the complaint, he failed to perform and to communicate in two separate client matters. Furthermore, the facts that respondent first lied about filing the complaint to Chan in January 2005 and then lied about the same thing again to the investigator almost four months later in early May 2005 suggest that respondent's

lies were not just aberrational instances. (See *Mosesian v. State Bar* (1972) 8 Cal.3d 60, 65.)

The State Bar asserts that the appropriate level of discipline to recommend is two years' stayed suspension and ninety days' actual suspension continuing until respondent makes restitution to Campos in the sum of $2,500 plus interest and to Chan in the sum of $1,500 plus interest. The court disagrees.

In *Olguin v. State Bar* (1980) 28 Cal.3d 195, 197-200, the attorney was placed on eighteen months' stayed suspension, eighteen months' probation, and six months' actual suspension after presenting fabricated documents for his defense and after stipulating that he failed to use reasonable diligence in prosecuting a client matter resulting in the action being dismissed and that he lied to a State Bar investigator about that client matter with the intent to avoid culpability. However, the attorney in *Olguin* also had a prior record of discipline based on his federal conviction for false claim of citizenship. (*Id*. at p. 201.)

In *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 589, also a default case, the attorney was found culpable in a single client matter of failing to perform competently, failing to communicate with the client, and lying to the client about the status of the case, and failing to cooperate with the State Bar's investigation of the client's complaints. In that case, the Supreme Court adopted the review department's recommended one year's stayed suspension and sixty days' actual suspension. However, in *Johnston* the attorney's misconduct was aggravated because there was significant client harm – there the client lost her cause of action because the attorney did not serve the complaint within three years and bring the case to trial within five years as required by the Code of Civil Procedure. (*Ibid.*) There is no such significant harm in the present case. Even though respondent allowed the $7,500 settlement draft in the Campos client matter to expire, all the client presumably had to do was request a replacement draft from the insurance company. There is nothing in the record that even remotely suggests that respondent's failure to cash the settlement draft before it expired voided the settlement agreement or somehow otherwise relieved the insurance company of its obligation to pay Campos $7,500. Even though respondent failed to perform any substantial legal services for eight or nine months in the Chan client matter, there is no evidence of any harm to Chan. A delay of eight or nine months alone, does

not rise to the level of significant client harm. (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 283.) Finally, the attorney in *Johnston* had only 12 years of discipline free practice, while respondent has almost 20 years.

On whole, the court concludes that the appropriate level of discipline to recommend in the present case is two years' stayed suspension and sixty days' actual suspension continuing until respondent makes and the State Bar Court grants a motion, under rule 205 of the Rules of Procedure of the State Bar, to terminate the actual suspension.

The court rejects as meritless the State Bar's assertions that respondent should be required to make restitution to both Campos and Chan. First, based on the record before the court, respondent earned the $2,500 retainer fee when Campos paid it to him. Second, the record clearly establishes that respondent not only returned the $1,500 in fees Chan paid him, but also that respondent paid Chan an additional $1,000.

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent Robert Brett Nesin be suspended from the practice of law in the State of California for two years, that execution of the two-year suspension be stayed, and that respondent be actually suspended from the practice of law for sixty days and until:

(1) the State Bar Court grants a motion, under rule 205 of the Rules of Procedure of the State Bar, to terminate his actual suspension; and

(2) if he remains actually suspended for two or more years, 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 in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

Further, in accordance with rule 205(g) of the Rules of Procedure of the State Bar, the court recommends 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 recommends that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar

Examiners (MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, telephone number (319) 337-1287) within the greater of one year after the effective date of the Supreme Court order in this matter or the period of his actual suspension and to provide satisfactory proof of his passage to the State Bar's Office of Probation in Los Angeles within that same time period. Failure to pass the MPRE within the specified time results in actual suspension by the review department without a hearing until passage. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; but see also Cal. Rules of Court, rule 951(b); Rules Proc. of State Bar, rules 320, 321(a)(1)& (3).)

Further, the court recommends that, if the period of his actual suspension in this proceeding extends for 90 or more days, respondent be ordered to comply with California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[9]

VII. COSTS

It is further 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: February 23, 2006.

PAT McELROY
Judge of the State Bar Court

[9]Respondent is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) Moreover, an attorney's failure to comply with rule 955 almost always results in disbarment unless there are compelling mitigating circumstances. (See, e.g, *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 296.)