FILED FEBRUARY 25, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of	)	Case No.: **11-O-16028-PEM (Wolny); 11-O-16029-PEM (Miller)**
THADDEUS ZIGMUND WOLNY, Member No. 119113,	)	
RAYMOND ROY MILLER Member No. 144398	)	**DECISION**
Members of the State Bar.	)	

Introduction[1]

In this disciplinary proceeding, respondents **Thaddeus Zigmund Wolny** and **Raymond Roy Miller** are charged with maintaining an unjust action, committing acts of moral turpitude, seeking to mislead a judge and not obeying a court order. In addition, respondent Wolny is charged with not reporting a judicial sanction and not cooperating in the State Bar's investigation.

There is clear and convincing evidence that respondent Wolny is culpable of maintaining an unjust action, committing an act of moral turpitude, not reporting a judicial sanction and not cooperating in the State Bar's investigation.

There is clear and convincing evidence that respondent Miller is culpable of maintaining an unjust action and moral turpitude. Accordingly, the court recommends, among other things,

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

that respondent Wolny be placed on probation for two years on conditions, including 90 days' actual suspension, and that respondent Miller be placed on probation for two years including 30 days' actual suspension.

Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing Notices of Disciplinary Charges (NDCs) on June 12, 2012, to which responses were filed on July 23, 2012.

A five-day trial was held on November 13-16 and 20, 2012. The State Bar was represented by Erica L. M. Dennings and Heather Abelson. Respondents represented themselves. On November 28, 2012, following closing briefs, the court took this matter under submission.

Findings of Fact and Conclusions of Law

The following findings of fact are based on the parties' stipulations of facts and the evidence and testimony introduced at these proceedings.

A. Jurisdiction

Respondent Wolny was admitted to the practice of law in California on October 7, 1985, and has been a member of the State Bar of California at all times since that date.

Respondent Miller was admitted to the practice of law in California on December 12, 1989, and has been a member of the State Bar of California at all times since that date.

B. Findings of Fact

This case arises from respondents' overzealous advocacy on behalf of their client, Mark Gilles. Consequently, they maintained an unjust action, attempted to mislead the bankruptcy court with material omissions and disobeyed the court's sanction orders.

In 1989, Peterson and Erb, dba Comptech (Comptech), was incorporated for the purpose of providing racecar engines to Honda. Its founders were Doug Peterson, Don Erb, Kathy Milsap and Gail Peterson (Ms. Peterson).

In 2000, Comptech engines powered 11 of the 33 cars starting the Indianapolis 500, including the winning car. Comptech entered the automotive aftermarket in 1995, capitalizing on the success of Honda's NSX-powered Spice/Acura Camel Lights cars. The revenue from race engine building peaked at $2.4 million in 2001.

In 2003, a racing league changed its specifications and as a result Comptech lost its Honda racecar engine business, thereby losing nearly $700,000 in a 20-month period beginning in 2003. In an effort to reverse that trend, the company engaged Tangent Advisors Growth Fund, L.P., to turn the company around. Gilles, a principal in Tangent Advisors, became Comptech's CEO in March 2004.

Management Services Agreement with Gilles

In approximately August 2005, Comptech entered into a one-year management services agreement with Gilles wherein Gilles' LLC was appointed Comptech's CEO. The agreement provided that Gilles' LLC would be paid $12,000 per month. Gilles was also chairman of the board of Comptech. In 2005, he had invested $100,000 so that he had a 20% interest in Comptech. Gilles also had loaned Comptech $25,000.

Gilles' Termination

Peterson credibly testified that, by 2006, two members of Comptech's board of directors (BOD) in particular had such a toxic relationship with Gilles that Peterson could only characterize the board as completely dysfunctional. On May 10, 2006, the BOD voted to remove Gilles from all bank lending, transfer and check signing authority. On May 26, 2006, the BOD voted to terminate the management services agreement with Gilles on the grounds that Gilles did

not meet his fiduciary responsibilities as CEO. In so doing, the BOD, terminated further payment to Gilles.

In July 2006, Matt Dickstein, an attorney representing Gilles, sent a letter to the BOD demanding $306,454 for breach of contract, repayment of a promissory note and repurchase of Gilles' shares of Comptech stock. In August 2006, the BOD passed a unanimous resolution that Gilles' potential claims were disputed.

Between August 2006 and February 2007, Comptech had trouble meeting its financial obligations. The obstacles to obtaining cash were, according to the BOD, due to issues with Gilles' claims. It was clear from the BOD minutes of August 2006 that a very serious issue was Gilles' on-going unwillingness to negotiate his issues with the company.

In February 2007, the BOD discussed the voluntary liquidation of Comptech and voted 4-1 for its organized liquidation. As a result of those discussions, Peterson sent out a letter telling all Comptech creditors that it was in the process of liquidation; that Comptech fully expected the liquidation to exceed the amount required to pay off the bank; and the surplus would be allocated to its unsecured creditors on a pro rata basis.

On April 27, 2007, Gilles wrote a letter to the BOD essentially stating that he disagreed with the liquidation because the BOD had not been presented with a plan of liquidation; that it was probable that unsecured creditors would not be paid in full; and that there would likely be nothing coming to the shareholders.

On April 30, 2007, Gilles resigned from the BOD.

Gilles' Resignation from the Board

Prior to his resignation from the BOD, Gilles had talked to respondents regarding his legal situation with Comptech. It appears that, as early as April 2007, Gilles was preparing to file a petition for involuntary bankruptcy against Comptech because, by April 19, 2007, Gilles

employed respondents and their law firm, The Law Offices of Wolny and Miller, to represent him regarding his dispute with Comptech.[2] The retainer agreement specifically references that respondents were hired to file an involuntary bankruptcy case under 11 U.S.C § 303 for either a Chapter 7 or Chapter 11 case against Comptech and to seek to obtain an order for relief under such chapter from the U.S. Bankruptcy Court in the Eastern District of California. To file an involuntary bankruptcy petition regarding a company the size of Comptech, 11 U.S.C. § 303 required at least three petitioning creditors.

During a May 15, 2007, Comptech shareholder's meeting, a majority of the shareholders voted to wind up and dissolve Comptech and to make payoffs, as instructed by the company's counsel, Richard Thurn.[3] Per Thurn's instructions, the priority was to pay debts in this order: 1) the non-shareholder unsecured creditors; 2) shareholder unsecured creditors; 3) shareholder's notes; and, finally, 4) equity partners.

Gilles hired respondents to force Comptech into involuntary bankruptcy because of his fear that under a voluntary dissolution process, he would not be paid what was owed to him. Respondents filed the involuntary bankruptcy petition for the purpose of getting Gilles paid.

Letter to Trade Creditors

Respondents found three petitioning creditors and devised a plan to convince them to join Gilles in forcing Comptech's involuntary bankruptcy.

On May 16, 2007, respondent Wolny wrote letters to three trade creditors of Comptech: Greg Wambold of Gear Head Tool and Manufacturing, Jim Middlebrook of Paxton Automotive

[2] Dickstein referred Gilles to Miller. Respondent Miller had no prior experience with involuntary bankruptcy so he asked respondent Wolny to take the lead in the case.

[3] Thurn was corporate counsel for Comptech on an as-needed basis. He was a general business practitioner and was unfamiliar with bankruptcy law. He was not clear on what he advised Comptech to do and it appears to this court that he relied on respondent Wolny for some legal advice.

and Bill Webster of Webster Industries. The letters were virtually identical and referenced a telephonic discussion with each of them. The letters essentially stated that it was doubtful that Comptech would have sufficient cash to pay their claims in full upon liquidation and purported to know the reason why it was doubtful. Furthermore, the letters stated that the only way unsecured creditors such as them could preserve their rights and obtain a guaranteed pro-rata distribution for each unsecured creditor (without a preference to insiders) was to petition for the appointment of a trustee in an involuntary Chapter 7 case. The letter finished by stating that all of Miller and Wolny's legal fees were paid by Gilles and there would be no legal fee charged for joining the petition. When this letter was written, respondent Wolny was aware that that the company was conducting an auction scheduled for May 22, 2007, as he made reference to it.

Involuntary Bankruptcy Petition Filed and Trade Creditors Requests for Withdrawal

On May 21, 2007, respondents filed the involuntary bankruptcy petition on behalf of Gilles and the three trade creditors Wambold, Webster and Middlebrook, while negotiating with Comptech over Gilles' compensation. Respondent Miller signed the involuntary petition. Almost immediately after the petition was filed, the three creditors notified respondents that they wished to withdraw from the petition because Peterson had assured them that they would be paid. In fact, it is clear that, by May 25, 2007, Wambold, Webster and Middlebrook had received checks for full payment for their services and had cashed them by May 29, 2007. Although respondents told the creditors that they would file their withdrawals, they did not do so nor did they inform them that they were holding the withdrawals.

On May 30, 2007, respondent Wolny sent Thurn an email stating that there was no objection to Comptech's paying its creditors because it had been represented that all creditors would be paid in full, including those that filed the involuntary petition. The email further stated

that "the response period for the involuntary bankruptcy does not end until June 18, 2007, and no order for relief can be entered before this time."

On June 4, 2007, respondent Wolny emailed Thurn stating that upon payment of $56,566.93 to Gilles, Gilles would sign a mutual release with the corporation, and any of its officers, directors or shareholders who wished to execute one. This amount included both the $52,174 claim of Gilles' LLC listed on the involuntary petition, as well as Gilles' $4,392.93 claim.

On June 12, 2007, respondent Wolny emailed Thurn a final version of a settlement agreement and asked him to have his client sign off on it. The settlement agreement stated that, in exchange for mutual releases between the signing parties, Gilles' claims would be paid in full. It further stated that "upon payment of the general unsecured claims, the petitioning creditors will file such documents with the United States Bankruptcy Court indicating that they will withdraw as petitioning creditors in the involuntary bankruptcy petition, thereby making the involuntary bankruptcy moot."

Order for Relief Filed and Negotiations with Gilles

Because respondents did not file the three creditors' withdrawals as instructed before the court ordered relief against Comptech, Comptech was forced into bankruptcy.

On June 19, 2007, the court issued an order for relief against Comptech because there was not a response to the petition. As a result, Comptech was forced into bankruptcy and the court appointed a trustee.[4] When the court issued the order, respondents knew that the three trade creditors had instructed them to withdraw from the petition and that only one of the

[4] The entry of the order for relief was mandated by section 303(h) of Bankruptcy Rule 1013.

required three creditors remained. After the order was entered, respondents did not immediately inform the court that three of the creditors wished to withdraw from the petition.

Thereafter, respondent Wolny told Comptech's general counsel a deal for Gilles could still be had despite Comptech's bankruptcy and that, if Comptech reached a deal with Gilles, he would file a motion to dismiss the bankruptcy petition. So, between June 19, when the order for relief was filed, and June 29, 2007, respondent Wolny negotiated a deal for Gilles with Comptech.

Motion to Amend Filed and BOD Settles Gilles' Claims

On June 29, 2007, the BOD voted to accept a settlement that required Comptech to pay Gilles his disputed claim in exchange for the dismissal of the bankruptcy petition. On that same date, respondents filed a motion to amend asking the court to set aside the order for relief based upon "new evidence" that, after the filing of the bankruptcy petition, Comptech obtained funds by selling its assets. The motion to amend did not disclose to the court the terms of the settlement agreement with Gilles or that the three creditors had requested the withdrawal of their participation almost three weeks earlier. If the court had granted the motion, it would have resulted in a dismissal of the entire bankruptcy case.

Respondents never had the intention of pursuing an involuntary bankruptcy petition. They knew at least as soon as the auction took place that Comptech was going to be able to pay all of its trade creditors. Respondent's only concern was that their client, Gilles, be paid. The true purpose of the petition was to coerce Comptech into paying Gilles' disputed claims.

Opposition to the Motion to Amend

On July 17, 2007, Frederick J. Lucksinger, the trustee, filed an opposition to the motion to amend. The trustee was represented by the law firm of Hughes and Pritchard, LLP (Hughes).

The trustee argued that Comptech had not provided an explanation for its not filing the

withdrawals prior to the court's issuing the order of relief and also that it did not notify the court when the creditors were paid in full. On July 31, 2007, at a hearing on the motion to alter or amend order for relief, the court denied the motion without prejudice to a motion to dismiss. On August 2, 2007, the court entered such an order.

Motion for Sanctions

On February 17, 2009, Hughes filed a motion for sanctions against respondents pursuant to rule 9011 of the Federal Rules of Bankruptcy Procedure (rule 9011), which was heard on October 28 and 29, 2009. Significantly, after the hearing, the court ordered the parties to mediation because it believed that the only solution that would comport with fairness and justice would be a mediated one. Unfortunately, mediation failed.

Sanctions Granted

On December 15, 2009, the court stated its findings orally on the record in respondent Miller's presence. In a December 17, 2009 supplemental memorandum, the court found that the rule 9011 sanctions were primarily attributable to respondent Wolny. It also entered judgment against respondents and ordered them to pay sanctions as follows:

(1) Respondent Wolny was ordered to pay $30,000 in sanctions to the trustee;

(2) Respondent Miller was ordered to pay $10,000 in sanctions to the trustee; and

(3) The Law Firm of Wolny and Miller was ordered to pay $40,000.

The total amount recovered by the trustee was not to exceed $40,000.

The court also ordered respondent Wolny to pay the court clerk $3,750 and respondent Miller to pay $1,250. Their firm was ordered to pay $5,000. The total amount recovered was not to exceed $5,000.

In the December 17, 2009, supplemental memorandum, the court, upon further reflection, stated that it was appropriate to allocate individual liability because the violation of rule 9011 was primarily attributable to respondent Wolny.

The court denied Hughes' request for attorneys fees of $100,000 for handling the motion, as deterrence, not compensation, is the principal goal of sanctions under the Bankruptcy Code.

On December 21, 2009, the court properly served respondent Wolny and respondent Miller with a copy of the judgment. As of December 21, 2009, they had actual knowledge of the judgment.

On March 16, 2010, the court issued an order permitting respondents to make monthly installment payments of $250 to the court clerk.

Between March and July 2010, respondent Miller paid the court clerk $1,250 in $250 increments. Respondent Miller paid the judgment in full to the court clerk.

Respondent Wolny paid $2,750.50 to the court clerk and owes a remaining $1,000.

On January 12, 2011, the court issued an order permitting respondent Miller to make monthly installment payments of $250 to the trustee, ending June 30, 2012. Between October 2010 and June 2011, respondent Miller paid the trustee $2,250 in $250 increments. He still owes the trustee[5] $7,750.

Respondent Wolny has made no payments toward the $30,000 he owes the trustee/Hughes.

Neither respondent has completed paying the sanctions because they do not have the money to do so.

The Law Firm of Wolny and Miller made no payments to the court clerk or the trustee.

[5] The trustee sold its rights to the judgment to Hughes. The sale was approved by the bankruptcy court's order filed February 22, 2012 in the *Peterson and Erb, Inc*. matter.

On September 2, 2011, the State Bar opened an investigation in this matter. On November 22, 2011, a State Bar investigator sent a letter to respondent Wolny asking him to respond in writing to specified allegations of misconduct being investigated by the State Bar in this matter. Although he received the letter, he never provided a written response to the allegations of misconduct in this matter nor did he otherwise cooperate with the State Bar investigation.

Conclusions

Count 1 - (§ 6068, subd. (c) [Attorney's Duty to Counsel/Maintain Only Legal or Just Actions or Defenses])

Section 6068, subdivision (c), provides that an attorney has a duty to counsel or maintain those proceedings, actions, or defenses only as appear to the attorney legal or just, except the defense of a person charged with a public offense.

By filing the bankruptcy petition for an improper purpose and by continuing to maintain it after the three trade creditors indicated they wanted to withdraw from the petition, respondent Wolny and respondent Miller failed to counsel or maintain such action, proceedings, or defenses only as appear to them legal or just.

Count 2 - (§ 6106 [Moral Turpitude])

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

This charge is duplicative of counts 1 and 3. It is generally inappropriate to find redundant charged allegations. The appropriate level of discipline for an act of misconduct does not depend on how many rules of professional conduct or statutes proscribe the misconduct. "There is 'little, if any, purpose served by duplicative allegations of misconduct.'" (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) Accordingly, this charge is dismissed with prejudice.

Count 3 - (§ 6106 [Moral Turpitude—Misrepresentations/Concealment])

Respondents made misrepresentations to the three trade creditors by: (1) claiming that Comptech's officers and directors were likely to pay themselves before they paid the trade creditors, when, in fact, Comptech had already prepared a plan that called for the trade creditors to be paid in full before making any payments to insiders; (2) claiming that the purpose of the involuntary petition was to guarantee a pro-rata distribution from Comptech for the unsecured creditors without a preference for insiders; and (3) stating that they would file the creditors' notices of withdrawal upon receipt, when, in fact, they intended to hold them as leverage to force Comptech to pay Gilles' disputed claims. Respondents concealed from the three trade creditors that the true purpose of their petition was to force Comptech to pay Gilles' disputed claims.

Respondents concealed from the bankruptcy court and the trustee that a settlement agreement required Comptech to pay Gilles' disputed claims in exchange for the dismissal of the involuntary bankruptcy petition. In so doing, respondents misrepresented to the court that the purpose of the motion to amend was to present "new evidence," when the true purpose was to obtain a dismissal so that Gilles would be paid pursuant to the settlement agreement.

Respondents also misrepresented to the court that the notices of withdrawals were recently obtained when, in fact, they were obtained approximately three weeks before respondents filed them and approximately one week before the court entered the order for relief.

By making misrepresentations to and concealing the true facts from the three trade creditors, the court and the trustee, respondents committed acts involving moral turpitude, dishonesty and corruption in willful violation of section 6106.

Count 4 – (§ 6068, subd. (d) [Attorney's Duty to Employ Means Consistent with Truth])

Section 6068, subdivision (d), provides that an attorney has a duty to employ those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of law or fact.

This charge is duplicative of counts 1 and 3 and, therefore, is dismissed with prejudice.

Count 5 - (§ 6103 [Failure to Obey a Court Order])

Section 6103 provides, in relevant part, that a willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which an attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment.

There is not clear and convincing evidence that respondent Wolny sought to be relieved from paying, in whole or in part, sanctions owed to the trustee because of an inability to pay or that respondent Miller sought to do so after June 2011 when he stopped paying the sanctions. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868, fn. 4) Accordingly, respondents willfully disobeyed or violated an order of the court requiring them to do or forbear an act connected with or in the course of respondents' profession which they ought in good faith to do or forbear.

Count 6 - (§ 6068, subd. (o)(3) [Failure to Report Sanctions])

Section 6068, subdivision (o)(3), provides that within 30 days of knowledge, an attorney has a duty to report, in writing, to the State Bar the imposition of judicial sanctions against the attorney of $1,000 or more which are not imposed for failure to make discovery.

Respondent Wolny admits that he did not report the judicial sanctions to the State Bar as required. He knew about the sanctions. Accordingly, he willfully violated section 6068, subdivision (o)(3).

Count 7 - (§ 6068, subd. (i) [Failure to Cooperate])

Section 6068, subdivision (i), provides that an attorney has a duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney.

By not responding to the State Bar's November 22, 2011, letter, respondent did not cooperate or participate in any disciplinary investigation pending against him in willful violation of section 6068, subdivision (i).

Aggravation[6] as to Respondent Miller

Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)

The involuntary petition multiplied the proceedings. Since Comptech had sufficient funds to pay all of the trade creditors, filing the bankruptcy created additional, unnecessary proceedings which added to the court's calendar. This harmed the public and the administration of justice. Moreover, the filing of the involuntary petition delayed payment to the debtors other than the three petitioning debtors. Once the order of relief was filed, Comptech belonged to the trustee in bankruptcy and it could not pay all of its creditors in as timely a fashion.

Mitigation as to Respondent Miller

No Prior Record (Std. 1.2(e)(i).)

Respondent Miller does not have a prior record of discipline in 17-1/2 years of practice prior to the commencement of the misconduct, which is a significant mitigating factor. "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.)

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[6] All references to standards (std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Remorse/Recognition of Wrongdoing (Std. 1.2(e)(vii).)

Respondent Miller has expressed remorse. Further, he has paid the sanctions to the bankruptcy court clerk and made payments toward the $10,000 owed to the trustee/Hughes until he could not afford to do so. Finally, Miller has tried to negotiate a payment schedule with Hughes, but Hughes has refused all offers of a payment schedule, despite the fact that Miller lost his job after the firm was dissolved.

Good Faith (Std. 1.2(e)(ii).)

Respondent Miller had no previous experience in involuntary bankruptcy. Accordingly, he engaged respondent Wolny and relied on his expertise in this area. This court believes his testimony that he did not see the downside of not filing the withdrawals with the court as soon as he received them. He relied on respondent Wolny's advice about not filing the withdrawals during the gap period. Both Christopher and Gregory Hughes testified that that they felt respondent Miller was an honest man. Gregory Hughes testified that he thought respondent Miller just had no idea of what he was getting into when he filed the involuntary bankruptcy petition and was careless, rather than malfeasant.

Aggravation as to Respondent Wolny

Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)

The involuntary petition multiplied the proceedings. Since Comptech had sufficient funds to pay all the trade creditors, filing the bankruptcy created additional, unnecessary proceedings which added to the court's calendar. This harmed the public and the administration of justice. Moreover, the filing of the involuntary petition delayed payment to the debtors other than the three petitioning debtors. Once the order of relief was filed, Comptech belonged to the trustee in bankruptcy and it could not pay all of its creditors in as timely a fashion.

Mitigation as to Respondent Wolny

No Prior Record (Std. 1.2(e)(i).)

Respondent Wolny does not have a prior record of discipline in over 21-1/2 years of practice prior to the commencement of the misconduct, which is a significant mitigating factor.

Remorse/Recognition of Wrongdoing (Std. 1.2(e)(vii).)

Respondent Wolny expressed remorse at trial and acknowledged his wrongdoing. He has no money to pay the sanctions ordered. He was evicted from his office. He would pay the sanctions if he could.

Extreme Emotional/Physical Difficulties (Std. 1.2(e)(iv).)

Respondent Wolny had a heart attack and a stroke in 2009.[7] He underwent extensive coronary artery bypass graft surgery and had complications post-surgery, including deep vein thromboses, myocardial infarction and transient ischemic attack. He had residual issues such as difficulty in focusing and speaking and impairment of cognitive functions. He has been unable to work due to health issues.

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. If two or more acts of professional misconduct are found in a single

[7] His many health issues may have contributed to his failure to respond to the State Bar investigator's inquiry.

disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).) Discipline is progressive. However, the standards do not require a prior record of discipline as a prerequisite for imposing any appropriate sanction, including disbarment. (Std. 1.7(c).)

Standards 2.3 and 2.6 apply in this matter. The most severe sanction is prescribed by standard 2.3 which suggests actual suspension or disbarment for culpability 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, 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 attorney's acts within the practice of law.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

This case involves not counseling or maintaining actions as appear to the attorneys to be legal or just, committing acts of moral turpitude, disobeying a court order and, as to respondent Wolny, nor cooperating in a State Bar investigation and not reporting sanctions to the State Bar. In aggravation, the court found harm as to both respondents. Both respondents had no prior disciplinary records, a significant mitigating factor, and were remorseful. Respondent Miller was found to have acted in good faith and respondent Wolny had emotional or physical difficulties.

The State Bar recommends discipline for respondent Miller of two years' stayed suspension and two years' probation on conditions including actual suspension for six months and until respondent makes restitution. As to respondent Wolny, the State Bar recommends discipline of two years' stayed suspension and two years' probation on conditions including actual suspension for one year and until respondent makes restitution. Respondents seek dismissal with prejudice. In the alternative, respondent Wolney seeks discipline ranging between an admonition or private reproval or 60 days' actual suspension.

The court found instructive *In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774. In that case, respondents were found culpable of section 6106 for engaging in overzealous advocacy which, as in the instant matter, compromised their ethical obligations to the courts and the legal system. Mitigating factors for Maloney were no prior discipline in 31 years of practice[8], good character and pro bono work. For Virsik, the court considered good character and pro bono work in mitigation. In aggravation for both respondents, the court considered uncharged misconduct (misrepresentations), lack of candor, harm to the administration of justice, multiple acts of misconduct, pattern of disrespect for professional norms, lack of insight and actual conflict of interests. In addition, Maloney was found culpable of overreaching. This precedent is comparable to the instant case in the nature of the misconduct, although it presents lesser misconduct, but greater aggravation.

The court agrees that respondents' serious misconduct warrants actual suspension. To varying degrees, they each engaged in dishonest attempts to prosecute an action to obtain a recovery for their client, regardless of the adverse effect on the bankruptcy court, Comptech, the three trade creditors, the public and the legal profession. "While an attorney is expected to be a forceful advocate for a client's legitimate causes [citations] ... the role played by attorneys in the

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[8] His associate, Virsik, had only been admitted to practice for less than three years at the time of the misconduct, so there was no mitigative effect.

honest administration of justice is more critical than ever ... Attorneys, by adherence to their high fiduciary duties and the truth, can sharply reduce or eliminate clashes and ease the way to dispute settlement." (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 473.) Respondents' actions were contrary to those principles in this single matter. Respondent Wolny was retained because of his experience, which respondent Miller did not have. He also took the lead in lining up the three trade creditors to bring the involuntary bankruptcy and other acts in this scheme. Moreover, he did not report the sanctions to the State Bar and did not cooperate in the State Bar's disciplinary investigations. Accordingly, greater discipline is merited for him than for respondent Miller, who was not as responsible for the misconduct.

Having considered the facts and law, the court recommends, among other things, actual suspension of 90 days for respondent Wolny and 30 days of actual suspension for respondent Miller as sufficient to protect the public in this instance. Both respondents are long-time practitioners who have no prior disciplinary record, a significant mitigating factor. Both have expressed remorse for their actions. Accordingly, the court believes that the misconduct in this single instance is not a portent of future malfeasance.

Recommendations

Discipline Recommendation as to Respondent Miller

It is recommended that respondent **Raymond Roy Miller**, State Bar Number 144398, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that respondent be placed on probation[9] for a period of two years subject to the following conditions:

1. Respondent **Raymond Roy Miller** is suspended from the practice of law for the first 30 days of probation.

[9] The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct and all of the conditions of respondent's probation.

3. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

5. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10 and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

7. It is recommended that during the period of probation, respondent Miller must pay the $7,750 balance owed in sanctions to the trustee or its successor in interest pursuant to the Judgment and Supplemental Memorandum re Motion for Sanctions filed on December 17, 2009, in *In re Peterson and Erb, Inc., dba Comptech*, United States Bankruptcy Court, Eastern District of California, case no. 07-23766-C-7, and furnish satisfactory proof to the State Bar's Office of Probation in Los Angeles with quarterly reports as any payments are made but, in no case later than the date the final report is due pursuant to paragraph 5, above.

8. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE)

requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

At the expiration of the probation period, if respondent Miller has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Discipline Recommendation as to Respondent Wolny

It is recommended that respondent **Thaddeus Zigmund Wolny**, State Bar Number 119113, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that respondent be placed on probation[10] for a period of two years subject to the following conditions:

9. Respondent **Thaddeus Zigmund Wolny** is suspended from the practice of law for the first 90 days of probation.

10. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct and all of the conditions of respondent's probation.

11. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

12. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

13. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10 and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of

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[10] The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

14. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

15. It is recommended that during the period of probation, respondent Wolny must pay the $1,000 balance owed in sanctions to the Treasury of the United States and the $30,000 in sanctions to the trustee or its successor in interest pursuant to the Judgment and Supplemental Memorandum re Motion for Sanctions filed on December 17, 2009, in *In re Peterson and Erb, Inc., dba Comptech*, United States Bankruptcy Court, Eastern District of California, case no. 07-23766-C-7, and furnish satisfactory proof to the State Bar's Office of Probation in Los Angeles with quarterly reports as any payments are made but, in no case later than the date the final report is due pursuant to paragraph 13, above.

16. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

At the expiration of the probation period, if respondent Wolny has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

California Rules of Court, Rule 9.20 as to Respondent Wolny only

It is further recommended that respondent Thaddeus Zigmund Wolny be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

Multistate Professional Responsibility Examination as to Each Respondent

It is recommended that respondent Wolny and respondent Miller each be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after

the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

Costs as to Each Respondent

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 as to each respondent Wolny and respondent Miller.

Dated: March _____, 2013

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Pat McElroy
Judge of the State Bar Court