PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

Filed September 19, 2013

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 12-O-10716
	)	
RUSSELL ALAN ROBINSON,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 163937.	)	
	)	

THE COURT.[*]

This case presents a single issue: Did respondent Russell Alan Robinson violate Business and Professions Code section 6068, subdivision (i),[1] because he did not timely submit a written response to two letters of inquiry from a State Bar investigator? The hearing judge dismissed this matter, finding, inter alia, that the Office of the Chief Trial Counsel of the State Bar (State Bar) failed to prove that Robinson did not cooperate in these proceedings. The State Bar seeks review and asks us to reverse the hearing judge's dismissal and impose at least a one-year actual suspension.

We have independently reviewed the record (Cal. Rules of Court, rule 9.12), and considered the specific factual findings raised by the parties. (Rules Proc. of State Bar, rule 5.152(C).) Robinson admitted that he submitted an untimely written response to the investigator's letter. While we do not condone this tardiness, it is just one factor to consider in determining whether he committed professional misconduct and should be disciplined. Given

[*] Before Remke, P. J., Epstein, J., and Purcell, J.

[1] Section 6068, subdivision (i), provides that it is the duty of attorneys to cooperate and participate in disciplinary investigations and proceedings. All further references to sections are to the Business and Professions Code.

Robinson's overall cooperation with the State Bar and his personal circumstances at the time, we find that submitting his late written response does not establish a violation of section 6068, subdivision (i). Accordingly, we adopt the hearing judge's order of dismissal.

I. FACTUAL AND PROCEDURAL HISTORY

Robinson, who is an experienced civil rights litigator, was admitted to practice in April 1993.

The instant matter arose in August 2008. Robinson agreed to investigate possible civil rights claims by Bartley Backus against various governmental agencies and judges on the grounds that they selectively prosecuted him and improperly committed him to a state hospital. Backus paid Robinson a total of $6,000 in two installments of $4,000 and $2,000 each. Robinson conducted extensive document review and research, submitted approximately two dozen requests to various agencies under the Freedom of Information Act, and prepared a 12-page legal memorandum for the client. He concluded that the evidence was insufficient to pursue a viable civil rights claim in good faith, and informed Backus of his analysis. Backus filed a complaint with the State Bar claiming that Robinson had failed to perform competently, refund an unearned fee, and provide reasonable status updates.[2]

On February 6, 2012, State Bar investigator, Francoise Jacobs, wrote to Robinson informing him of Backus's complaint and requiring a written response to her letter no later than February 20, 2012. Robinson received the letter, but did not timely respond in writing. Instead, he called the investigator at the end of February to discuss the Backus complaint and two other

[2] The State Bar is not appealing the hearing judge's dismissal of the remaining counts of the Notice of Disciplinary Charges (NDC) related to the Backus matter: (1) failing to perform with competence, in violation of Rules of Professional Conduct, rule 3-110(A) (all further references to rules are to this source unless otherwise noted); (2) failing to return unearned fees, in violation of rule 3-700(D)(2); and (3) failing to respond to client inquiries, in violation of section 6068, subdivision (m). We adopt the hearing judge's dismissals, which are supported by the record.

contemporaneous complaints under investigation. He provided his responses to those two complaints, and the State Bar closed both matters.

Robinson testified that during a "very cursory" phone conversation with Jacobs, he discussed the merits of all three complaints. As to the Backus complaint, he informed Jacobs that he had spoken frequently with Backus and had periodically met with him to discuss the case. Robinson also told Jacobs that he had reviewed a large number of documents and had provided Backus with his extensive research. He did not present a comprehensive response during the phone conversation because he intended to give her this information in his written response. Robinson also advised Jacobs that he would be undergoing surgery in a couple of days, but when she asked if he needed additional time to prepare his written response, he said he did not.

Jacobs's testimony confirmed that she had a brief telephone conversation with Robinson, but she did not consider it "significant" enough to document and therefore could not remember the date of the call. She did remember that Robinson advised her that the Backus case had no merit, that he would be undergoing surgery in the near future, and that he declined her offer for an extension of time to provide his written response.

On March 6, 2012, Jacobs sent a second letter to Robinson, noting that she had not received his written response to the Backus complaint and advising him of a new deadline of March 26, 2012. Robinson received this letter, but again did not timely respond. He admits he "dropped the ball," in large measure because he uncovered evidence on March 8, 2012, that his wife might be romantically involved with another man. This resulted in emotional turmoil and involvement in couples' therapy. Even so, he sent a request to the State Bar Court on April 23,

2012, requesting an Early Neutral Evaluation Conference (ENEC).[3] Robinson provided his written statement about the Backus complaint to the State Bar on May 8 or 9, a day or two before he participated in the ENEC. In his written response, Robinson addressed in detail the scope of work he performed on behalf of Backus, the hours expended, and his communications with Backus, as well as the basis for not pursuing his civil rights claims. He also referenced numerous documents in support of his position. One week after Robinson participated in the ENEC, the State Bar filed the NDC on May 15, 2012, and eventually the matter proceeded to trial. After the case was submitted, the hearing judge dismissed the entire matter based on Robinson's "uncontroverted, very credible testimony" and the State Bar's "want of proof."

II. NO CULPABILITY FOR FAILURE TO COOPERATE

The State Bar alleged in the NDC that Robinson violated section 6068, subdivision (i), because he did not cooperate in the investigation of this matter "[b]y not providing a *written* response to the investigator's letters." (Italics added.) The hearing judge found that Robinson was not culpable as charged because his telephonic conversation with the investigator at the end of February, 2012 "was reasonably contemporaneous with the investigator's letter and is sufficient to establish cooperation in the disciplinary investigation."

On appeal, the State Bar argues that Robinson's telephone call was essentially too little, too late, and that nothing short of a timely, substantive written response would satisfy the duty to cooperate. We reject this constricted assessment of Robinson's cooperation. Rather, we view the record holistically, and in so doing, we find Robinson's overall efforts to cooperate were sufficient to satisfy section 6068, subdivision (i), for the following reasons.

[3] We take judicial notice of Robinson's ENEC request, which is in the court's records. (Rules Proc. of State Bar, rule 5.156(B).) Prior to the filing of formal charges, the State Bar will notify the member of the right to request an ENEC. Each party may submit documents and information to support its position. At the ENEC, a judge will provide an evaluation of the allegations and the potential for discipline. The parties may resolve the matter without formal charges being filed. (Rules Proc. of State Bar, rule 5.30.)

As the hearing judge correctly noted in her decision, section 6068, subdivision (i), does not require a written response. Robinson responded by telephone within three weeks after the investigator sent her inquiry, and the substance of this call, although brief, was sufficient to alert the investigator that he intended to cooperate. Robinson did not seek to delay or avoid providing the requested information, declining the extension of time to submit his written response offered by the investigator. Moreover, at trial, Robinson provided a specific and credible explanation for his delayed written submission due to unanticipated marital problems. We also note that Robinson sought to resolve the Backus matter in April 2011 without the necessity of the filing of formal charges by requesting and subsequently participating in an ENEC. Further, he responded satisfactorily to two other concurrent investigations with the same investigator with the result that those matters were closed without further action. Under these circumstances, Robinson "should be accorded the benefit of the doubt in assuming cooperation . . . ." (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 684.)

We acknowledge that Robinson's response was clearly untimely. But we do not find his late written submission, standing alone, constitutes professional misconduct in violation of section 6068, subdivision (i). We find that the totality of Robinson's involvement in the investigation of this matter prior to the filing of the NDC "could be reasonably expected to constitute contemporaneous cooperation with the State Bar's inquiry." (*In the Matter of Hindin, supra*, 3 Cal. State Bar Ct. Rptr. at p. 685.)

We reject the State Bar's argument that Robinson admitted his culpability. We do not consider his testimony that he submitted an untimely written response to be an admission that he violated section 6068, subdivision (i). More importantly, Robinson's testimony "does not relieve this court of the obligation to determine that there is a factual record sufficient to support a determination of culpability." (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 403, 410; see also *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 471 [court obligated to independently consider legal effect of stipulated factual matters]; *Conroy v. State Bar* (1991) 53 Cal.3d 495, 502, fn. 5 [evidence adduced at trial controls over deemed admissions in default proceeding].) Indeed, the hearing judge, who found Robinson's testimony to be "very credible" deemed that testimony sufficient to establish his defense to the charges. We give great deference to this credibility determination because the judge "was in a position to evaluate conflicting statements after observing the demeanor of the witnesses . . . ." (*Resner v. State Bar* (1967) 67 Cal.2d 799, 807.)

Not every instance of noncooperation is a disciplinable offense. After all, this is not a case where an attorney intentionally ignored the investigator's inquiries. (See, e.g., *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 643-644 [attorney who deliberately refrained from responding to six letters from investigator violated § 6068, subd. (i)].) Nor is this a case with an absence of credible evidence to explain the attorney's lack of timely response to an investigator's letters. (*Bach v. State Bar* (1991) 52 Cal.3d 1201, 1208 [violation of § 6068, subd. (i), due to absence of credible account explaining failure to respond to State Bar]; *In the Matter of Reiss* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 206, 213 [attorney did not credibly explain failure to provide written response].) This also is not a case where an attorney refused to participate in the proceedings. (*In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73, 79 [violation of § 6068, subd. (i), due to failure to respond to four letters from investigator and for nonappearance at disciplinary hearing]; see also *Conroy v. State Bar*, *supra*, 53 Cal.3d at p. 507 [attorney's repeated refusal to participate in State Bar proceedings evidence of "contemptuous attitude"].)

The State Bar's burden of proof in these proceedings is a weighty one in that clear and convincing evidence can leave "no substantial doubt" and must be "sufficiently strong to

command the unhesitating assent of every reasonable mind." (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.) When we balance the overall evidence of Robinson's involvement in these proceedings against the State Bar's showing of noncooperation, which is comprised solely of a lengthy delay in submitting the written response, we agree with the hearing judge that the State Bar did not establish clearly and convincingly that Robinson violated section 6068, subdivision (i).

We accordingly adopt the hearing judge's order of dismissal. (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 176-177 [hearing judge properly dismissed failure to cooperate charge even though attorney did not answer State Bar investigator letters where attorney gave unrebutted testimony he discussed all matters with State Bar attorney].)

III. ORDER

Since we have found Robinson not culpable of all charges, we do not address the parties' issues involving aggravation and mitigation, and order this case dismissed with prejudice. Robinson may move for reimbursement of costs in accordance with section 6086.10, subdivision (d), and rule 5.131 of the Rules of Procedure of the State Bar.