

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case Nos.: **13-O-10571 (13-O-10973;**
) **13-O-11389; 13-O-11609;**
) **13-O-11610; 13-O-11788;**
NICHOLAS ANTHONY NETTY, JR.,) **13-O-11842)-RAP**
)
) **DECISION AND ORDER OF**
) **INVOLUNTARY INACTIVE**
Member No. 69225,) **ENROLLMENT**
)
)
A Member of the State Bar.)

Respondent Nicholas Anthony Netty, Jr. (respondent) was charged with (1) failing to perform with competence (seven counts); (2) failing to refund unearned fees (seven counts); (3) moral turpitude (misappropriation) (six counts); (4) improperly withdrawing from employment (five counts); (5) failing to deposit client funds in a trust account (five counts); (6) failing to respond to client inquiries (four counts); (7) failing to release a client file (four counts); (8) moral turpitude (misrepresentation) (two counts); and (9) moral turpitude (issuing insufficient fund [NSF] checks). He failed to file a response to the notice of disciplinary charges (NDC), and his default was entered. The Office of the Chief Trial Counsel (State Bar) filed a petition for disbarment under rule 5.85 of the Rules of Procedure of the State Bar.¹

¹ Unless otherwise indicated, all references to rules are to the Rules of Procedure of the State Bar which were in effect prior to July 1, 2014. Among other amendments, the default rules were amended effective July 1, 2014. However, as respondent's default was entered prior to July

Rule 5.85 provides the procedure to follow when an attorney fails to participate in a disciplinary proceeding after receiving adequate notice and opportunity. The rule provides that, if an attorney's default is entered for failing to respond to the NDC and the attorney fails to have the default set aside or vacated within 180 days, the State Bar will file a petition requesting the court to recommend the attorney's disbarment.²

In the instant case, the court concludes that the requirements of rule 5.85 have been satisfied and, therefore, grants the petition and recommends that respondent be disbarred from the practice of law.

FINDINGS AND CONCLUSIONS

Respondent was admitted to practice law in this state on June 25, 1976, and has been a member since then.

Procedural Requirements Have Been Satisfied

On October 3, 2013, the State Bar filed and properly served the NDC on respondent by certified mail, return receipt requested, to his membership records address.³ The NDC notified respondent that his failure to participate in the proceeding would result in a disbarment recommendation. (Rule 5.41.) A signed return receipt for the NDC was not received by the State Bar.

Thereafter, a copy of the NDC was sent to respondent on November 1, 2013, by regular, first-class mail to a private mailing address located through an online search of respondent. The United States Postal Service did not return the NDC.

1, 2014, the rules which were in effect at the time respondent's default was entered are the operative rules in this matter.

² If the court determines that any due process requirements are not satisfied, including adequate notice to the attorney, it must deny the petition for disbarment and take other appropriate action to ensure that the matter is promptly resolved. (Rule 5.85(E)(2).)

³ An Early Neutral Evaluation Conference (ENEC) letter was sent to respondent at his membership records address on September 18, 2013.

Kim Kasreliovich, the deputy trial counsel assigned to this matter (DTC Kasreliovich), received a voicemail message from respondent on October 7, 2013, inquiring about an ENEC. DTC Kasreliovich returned respondent's call that same day and left respondent a voicemail message. Two days later, DTC Kasreliovich received a letter dated October 7, 2013, from respondent requesting an ENEC.

On October 17 and October 21, 2013, DTC Kasreliovich received letters from respondent regarding an unrelated matter.

On October 17, 2013, DTC Kasreliovich again left a voicemail message for respondent at his membership records telephone number.

Three notices to consumer which were sent to respondent in connection with the cases in this matter were returned to the State Bar as “Unclaimed.”⁴ The returned notices were received by DTC Kasreliovich on October 21 and 22, 2013.

Respondent failed to file a response to the NDC. On November 14, 2013, the State Bar filed and properly served a motion for entry of his default on respondent by certified mail, return receipt requested, to his membership records address. The motion complied with all the requirements for a default, including a supporting declaration of reasonable diligence by the State Bar deputy trial counsel declaring the additional steps taken to provide notice to respondent. (Rule 5.80.)⁵ The motion also notified respondent that if he did not timely move to set aside or vacate his default, the court would recommend his disbarment. Respondent did not file a response to the motion, and his default was entered on December 10, 2013. The order entering the default was properly served on respondent at his membership records address by

⁴ Declaration of Kim Kasreliovich attached to the State Bar's motion for the entry of respondent's default.

⁵ As set forth in the State Bar's petition for disbarment filed on June 12, 2014, the return receipt for the motion “was signed by Nicholas Netty on November 7, 2013”

certified mail, return receipt requested. The court also ordered respondent's involuntary inactive enrollment as a member of the State Bar under Business and Professions Code section 6007, subdivision (e), effective three days after service of the order. He has remained inactively enrolled since that time.

Respondent did not seek to have his default set aside or vacated. (Rule 5.83(C)(1) [attorney has 180 days to file motion to set aside default].) On June 12, 2014, the State Bar filed and properly served a petition for disbarment on respondent by certified mail, return receipt requested, and by regular, United States mail, to his membership records address. As required by rule 5.85(A), the State Bar reported in the petition that (1) DTC Kasreliovich received letters on February 7, March 6, April 14, and May 14, 2014, from respondent stating that respondent was collecting information to respond to the State Bar and that he was suffering from depression;⁶ (2) there are no other disciplinary matters pending against respondent, but non-public disciplinary matter(s) exist; (3) respondent does not have a prior record of discipline; and (4) the Client Security Fund has not made any payments resulting from respondent's conduct. Respondent did not respond to the petition for disbarment or move to set aside or vacate the default. The case was submitted for decision on July 8, 2014.

The Admitted Factual Allegations Warrant the Imposition of Discipline

Upon entry of a respondent's default, the factual allegations in the NDC are deemed admitted and no further proof is required to establish the truth of such facts. (Rule 5.82.) As set forth below in greater detail, the factual allegations in the NDC support the conclusion that respondent is culpable of the rule and statutory violations as charged, except as otherwise noted,

⁶ The letters do not acknowledge the pending default proceedings or state a specific case number. The letters contain letterhead with respondent's membership records address. DTC Kasreliovich attempted to reach respondent by telephone, but his telephone number, which had previously been used to contact respondent prior to the entry of his default, was no longer working.

and therefore violated a statute, rule or court order that would warrant the imposition of discipline. (Rule 5.85(E)(1)(d).)

1. Case Number 13-O-10571 (Kasichainula Matter)

Count One – the State Bar failed to prove that respondent willfully violated rule 3-110(A) of the State Bar Rules of Professional Conduct (failing to perform legal services with competence). The State Bar merely alleged in the NDC that respondent violated this rule “by performing no legal services *of value* on behalf of the client.” (Italics added.) This allegation is vague, ambiguous and arbitrary and does not establish, by clear and convincing evidence, that respondent intentionally, recklessly, or repeatedly failed to perform competent legal services. This count is therefore dismissed with prejudice.

Count Two – respondent willfully violated Business and Professions Code section⁷ 6068, subdivision (m) (failure to communicate) by failing to promptly respond to multiple telephonic and four electronic mail status inquires made by his client(s).

Count Three – the State Bar failed to prove by clear and convincing evidence that respondent willfully violated section 6106 (moral turpitude - misrepresentation). “Ordinarily, failure to keep a promise of future action is not by itself proof of dishonesty.” (*In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 694.) Without additional evidence, the court does not find clear and convincing evidence of misrepresentation in willful violation of section 6106. This count is therefore dismissed with prejudice.

Count Four - respondent willfully violated rule 3-700(D)(2) of the State Bar Rules of Professional Conduct (failing to refund unearned fees) by failing to promptly refund, upon his

⁷ All further references to section(s) refer to provisions of the Business and Professions Code.

termination of employment, any part of the \$2,565 advanced fee paid by his client which had not been earned.

Count Five – the State Bar failed to prove by clear and convincing evidence that respondent willfully violated rule 3-700(A)(2) of the State Bar Rules of Professional Conduct (improper withdrawal from employment), as the facts alleged in the NDC do not support such a violation. This count is therefore dismissed with prejudice.

2. Case Number 13-O-10973 (Rojas Matter)

Count Six - the State Bar failed to prove that respondent willfully violated rule 3-110(A) of the State Bar Rules of Professional Conduct. The State Bar merely alleged in the NDC that respondent violated this rule “by performing no legal services of value on behalf of the client.” This allegation is vague, ambiguous and arbitrary and does not establish, by clear and convincing evidence, that respondent intentionally, recklessly, or repeatedly failed to perform competent legal services. This count is therefore dismissed with prejudice.

Count Seven - respondent willfully violated section 6068, subdivision (m) by failing to promptly respond to 40 telephonic inquiries and one written status inquiry made by his client.

Count Eight - respondent willfully violated rule 3-700(D)(2) of the State Bar Rules of Professional Conduct by failing to promptly refund, upon his termination of employment, any part of the \$3,330 advanced fee paid by his clients which had not been earned.

Count Nine - the State Bar failed to prove by clear and convincing evidence that respondent willfully violated rule 3-700(A)(2) of the State Bar Rules of Professional Conduct, as the facts alleged in the NDC do not support such a violation. This count is therefore dismissed with prejudice.

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3. Case Number 13-O-11389 (Tileylioglu Matter)

Count Ten - the State Bar failed to prove that respondent willfully violated rule 3-110(A) of the State Bar Rules of Professional Conduct. The State Bar merely alleged in the NDC that respondent violated this rule “by performing no legal services of value on behalf of the client.” This allegation is vague, ambiguous and arbitrary and does not establish, by clear and convincing evidence, that respondent intentionally, recklessly, or repeatedly failed to perform competent legal services. This count is therefore dismissed with prejudice.

Count Eleven - respondent willfully violated section 6068, subdivision (m) by failing to promptly respond to multiple telephonic inquiries and five written status inquiries made by his client.

Count Twelve – respondent willfully violated rule 4-100(A) of the Rules of Professional Conduct (failure to maintain client funds in trust account) by failing to deposit advanced costs received on behalf of his client in a properly labeled client trust account.

Count Thirteen - respondent willfully violated rule 3-700(D)(2) of the State Bar Rules of Professional Conduct by failing to promptly refund, upon his termination of employment, any part of the \$1,000 advanced fee paid by his client which had not been earned.

Count Fourteen - respondent willfully violated rule 3-700(D)(1) of the State Bar Rules of Professional Conduct (failure to return client papers/property) by failing to promptly release, after termination of his employment, all client papers and property following his client’s request for the client’s file.

Count Fifteen - the State Bar failed to prove by clear and convincing evidence that respondent willfully violated rule 3-700(A)(2) of the State Bar Rules of Professional Conduct, as the facts alleged in the NDC do not support such a violation. This count is therefore dismissed with prejudice.

Count Sixteen – respondent willfully violated section 6106 (moral turpitude – misappropriation) by misappropriating for his own purposes \$2,875 in advanced costs he received on his client’s behalf.

4. Case Number 13-O-11609 (Sarang Matter)

Count Seventeen – the State Bar failed to prove that respondent willfully violated rule 3-110(A) of the State Bar Rules of Professional Conduct. The State Bar merely alleged in the NDC that respondent violated this rule “by performing no legal services of value on behalf of the client.” This allegation is vague, ambiguous and arbitrary and does not establish, by clear and convincing evidence, that respondent intentionally, recklessly, or repeatedly failed to perform competent legal services. This count is therefore dismissed with prejudice.

Count Eighteen – respondent willfully violated section 6106 (moral turpitude – misrepresentation) by making a false statement of a material fact to his client when he knew or was grossly negligent in not knowing that the statement was false.

Count Nineteen - respondent willfully violated rule 4-100(A) of the Rules of Professional Conduct by failing to deposit advanced costs received on behalf of his client in a properly labeled client trust account.

Count Twenty - respondent willfully violated rule 3-700(D)(2) of the State Bar Rules of Professional Conduct by failing to promptly refund, upon his termination of employment, any part of the \$1,915 advanced fee paid by his client which had not been earned.

Count Twenty-One - respondent willfully violated rule 3-700(D)(1) of the State Bar Rules of Professional Conduct by failing to promptly release, after termination of his employment, all client papers and property following his client’s request for the client’s file.

Count Twenty-Two – respondent willfully violated section 6106 by misappropriating for his own purposes \$580 in advanced costs he received on his client’s behalf.

5. Case Number 13-O-11610 (Cabrera Matter)

Count Twenty-Three - the State Bar failed to prove that respondent willfully violated rule 3-110(A) of the State Bar Rules of Professional Conduct. The State Bar merely alleged in the NDC that respondent violated this rule “by performing no legal services of value on behalf of the client.” This allegation is vague, ambiguous and arbitrary and does not establish, by clear and convincing evidence, that respondent intentionally, recklessly, or repeatedly failed to perform competent legal services. This count is therefore dismissed with prejudice.

Count Twenty-Four - respondent willfully violated rule 4-100(A) of the Rules of Professional Conduct by failing to deposit advanced costs received on behalf of his client in a properly labeled client trust account.

Count Twenty-Five – respondent willfully violated section 6106 by misappropriating for his own purposes \$2,325 in advanced costs he received on his client’s behalf.

Count Twenty-Six - respondent willfully violated rule 3-700(D)(2) of the State Bar Rules of Professional Conduct by failing to promptly refund, upon his termination of employment, any part of the \$1,300 advanced fee paid by his client which had not been earned.

Count Twenty-Seven - the State Bar failed to prove by clear and convincing evidence that respondent willfully violated rule 3-700(A)(2) of the State Bar Rules of Professional Conduct, as the facts alleged in the NDC do not support such a violation. This count is therefore dismissed with prejudice.

6. Case Number 13-O-11788 (Saiid Matter)

Count Twenty-Eight - the State Bar failed to prove that respondent willfully violated rule 3-110(A) of the State Bar Rules of Professional Conduct. The State Bar merely alleged in the NDC that respondent violated this rule “by performing no legal services of value on behalf of the client.” This allegation is vague, ambiguous and arbitrary and does not establish, by clear and

convincing evidence, that respondent intentionally, recklessly, or repeatedly failed to perform competent legal services. This count is therefore dismissed with prejudice.

Count Twenty-Nine - respondent willfully violated Business and Professions Code section 6068, subdivision (m) by failing to promptly respond to at least four written status inquiries made by his client.

Count Thirty - respondent willfully violated rule 4-100(A) of the Rules of Professional Conduct by failing to deposit advanced costs received on behalf of his client in a properly labeled client trust account.

Count Thirty-One - respondent willfully violated rule 3-700(D)(2) of the State Bar Rules of Professional Conduct by failing to promptly refund, upon his termination of employment, any part of the \$1,235 advanced fee paid by his client which had not been earned.

Count Thirty-Two - respondent willfully violated rule 3-700(D)(1) of the State Bar Rules of Professional Conduct by failing to promptly release, after termination of his employment, all client papers and property following his client's request for the client's file.

Count Thirty-Three - the State Bar failed to prove by clear and convincing evidence that respondent willfully violated rule 3-700(A)(2) of the State Bar Rules of Professional Conduct, as the facts alleged in the NDC do not support such a violation. This count is therefore dismissed with prejudice.

Count Thirty-Four – respondent willfully violated section 6106 by misappropriating for his own purposes \$580 in advanced costs he received on his client's behalf.

Count Thirty-Five – respondent willfully violated section 6106 by misappropriating for his own purposes \$1,070 in advanced costs he received on his client's behalf.

7. Case Number 13-O-11842 (Luvianos/Mendez Matter)

Count Thirty-Six - the State Bar failed to prove that respondent willfully violated rule

3-110(A) of the State Bar Rules of Professional Conduct. The State Bar merely alleged in the NDC that respondent violated this rule “by performing no legal services of value on behalf of the client.” This allegation is vague, ambiguous and arbitrary and does not establish, by clear and convincing evidence, that respondent intentionally, recklessly, or repeatedly failed to perform competent legal services. This count is therefore dismissed with prejudice.

Count Thirty-Seven - respondent willfully violated rule 3-700(D)(1) of the State Bar Rules of Professional Conduct by failing to promptly release, after termination of his employment, all client papers and property following his client’s request for the client’s file.

Count Thirty-Eight - respondent willfully violated rule 3-700(D)(2) of the State Bar Rules of Professional Conduct by failing to promptly refund, upon his termination of employment, any part of the \$2,365 advanced fee paid by his client which had not been earned.

Count Thirty-Nine - respondent willfully violated rule 4-100(A) of the Rules of Professional Conduct by failing to deposit advanced costs received on behalf of his client in a properly labeled client trust account.

Count Forty – respondent willfully violated section 6106 by misappropriating for his own purposes \$380 in advanced costs he received on his client’s behalf.

Count Forty-One – respondent willfully violated section 6106 (moral turpitude – issuing NSF checks) by issuing a check drawn on his general operating account and a check drawn on his personal checking account when he knew or was grossly negligent in not knowing there were insufficient funds in the accounts⁸ to pay these checks.

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⁸ Although the NDC refers to the client trust account, it is clear from the NDC that this is an error and should have referred to respondent’s general operating account and his personal checking account.

Disbarment is Recommended

Based on the above, the court concludes that the requirements of rule 5.85(E) have been satisfied, and respondent's disbarment is recommended. In particular:

(1) the NDC was properly served on respondent under rule 5.25;

(2) reasonable diligence was used to notify respondent of the proceedings prior to the entry of his default, as the State Bar (a) filed and properly served the NDC on respondent by certified mail, return receipt requested, to his membership records address; (b) sent a copy of the NDC to respondent by regular, first-class mail to a private mailing address located through an online search; and (c) left respondent two voicemail messages;

(3) the default was properly entered under rule 5.80; and

(4) the factual allegations in the NDC deemed admitted by the entry of the default support a finding that respondent violated a statute, rule or court order that would warrant the imposition of discipline.

Despite adequate notice and opportunity, respondent failed to participate in this disciplinary proceeding. As set forth in the Rules of Procedure of the State Bar, the court recommends disbarment.

RECOMMENDATION

Disbarment

The court recommends that respondent Nicholas Anthony Netty, Jr. be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys.

Restitution

The court also recommends that respondent be ordered to make restitution to the following payees:

- (1) Venkata Subrahmanyam Kasichainula in the amount of \$2,565 plus 10 percent interest per year from January 17, 2012;
- (2) Cindy and Reynaldo Rojas in the amount of \$3,330 plus 10 percent interest per year from May 15, 2013;
- (3) Salih Tileylioglu in the amount of:
 - (a) \$1,000 plus 10 percent interest per year from May 7, 2013; and
 - (b) \$2,875 plus 10 percent interest per year from October 23, 2012;
- (4) Prabjot Sarang in the amount of:
 - (a) \$1,915 plus 10 percent interest per year from May 31, 2012; and
 - (b) \$580 plus 10 percent interest per year from June 13, 2011;
- (5) Cruz and Teodora Cabrera in the amount of:
 - (a) \$2,325 plus 10 percent interest per year from December 3, 2012; and
 - (b) \$1,300 plus 10 percent interest per year from February 11, 2013;
- (6) Bashir Saiid in the amount of:
 - (a) \$1,235 plus 10 percent interest per year from May 10, 2013;
 - (b) \$580 plus 10 percent interest per year from March 30, 2011; and
 - (c) \$1,070 plus 10 percent interest per year from December 20, 2011;
- (7) Marisol Luvianos and Jorge Mendez in the amount of:
 - (a) \$2,365 plus 10 percent interest per year from May 7, 2013; and
 - (b) \$380 plus 10 percent interest per year from April 11, 2012.

Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

California Rules of Court, Rule 9.20

The court also recommends that respondent be ordered to comply with the requirements of California Rules of Court, rule 9.20, 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.

Costs

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that Nicholas Anthony Netty, Jr., State Bar number 69225, be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after the service of this decision and order. (Rule 5.111(D).)

Dated: October 2, 2014

RICHARD A. PLATEL
Judge of the State Bar Court