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JUL 07 2015

STATE BAR COURT
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LOS ANGELES

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No.: 13-O-12463; 14-O-01753
)	
THOMAS WILLIAM GILLEN,)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND ORDER OF
Member No. 152569,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

Introduction¹

In this disciplinary proceeding, Thomas William Gillen (“Respondent”), is charged with four counts of misconduct in two separate Notices of Disciplinary Charges (“NDC”). The charged misconduct in State Bar Hearing Court case number 13-O-12463 includes: (1) Count One –Failure to Supervise Attorney Who Resigned With Charges Pending; (2) Count Two—Moral Turpitude; (3) Failure to Obey a Court Order. The charged misconduct in State Bar Hearing Court case number 14-O-01753 is Failure to Refund Unearned Fees- Count One.

After consideration of the evidence, this court finds Respondent is culpable, by clear and convincing evidence, of willfully violating Business and Professions Code sections 6133 and 6106, and rule 3-700(D)(2) of the Rules of Professional Conduct. In light of Respondent’s misconduct and the evidence in aggravation and mitigation, the court recommends to the Supreme Court that Respondent be disbarred from the practice of law.

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.



Significant Procedural History

The Office of Chief Trial Counsel of the State Bar of California ("State Bar") initiated this proceeding by filing an NDC in case number 13-O-12463, on April 22, 2014. On May 30, 2014, Respondent filed a response to the NDC. On October 8, 2014, the State Bar filed an NDC in case number 14-O-01753. November 3, 2014, Respondent filed a response to the 14-O-1753 NDC. On November 24, 2014, the State Bar filed a motion for leave to file an amended NDC in case number 14-O-01753. This court granted that motion and the State Bar's First Amended NDC was filed in case number 14-O-01753 on December 16, 2014. Both cases were consolidated for the purpose of trial. The parties filed a partial stipulation as to facts, culpability and admission of documents on March 10, 2015.

Trial was held March 24-25, 2015. During trial, the court granted the State Bar's motion to dismiss Count Three in case number 13-O-12463 (Failure To Obey a Court Order). In addition, Respondent stipulated to culpability on Count One of case number 14-O-01753. (See Partial Stipulation As To Facts, Fact No. 12).²

The State Bar was represented by Senior Trial Counsel, Kimberly Anderson and Deputy Trial Counsel, Sue Hong. Respondent was represented by the Law Offices of Anthony Radogna. The court took this matter under submission following the filing of closing argument briefs on April 8, 2015.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 6, 1991, and has been a member of the State Bar of California at all times since that date. These findings of fact are based on the record, evidence admitted at trial, and facts set forth by the parties in their factual stipulation.

² Respondent stipulated that "[B]y failing to refund the \$400 in unearned fees to [Jose] Menacha at any time between the end of July 2013 and July 25, 2014, Respondent willfully failed to refund, promptly, upon termination of his employment, an unearned fee in violation of rule 3-700 (D)(2) of the Rules of Professional Conduct."

Case No. 13-O-12463

Facts

On June 23, 1994, Kenneth Hagen (“Hagen”), resigned from the State Bar of California with disciplinary charges pending. From that date on, he was not entitled to practice law in California. On September 22, 2003, Respondent reported to the State Bar his employment of Hagen, as required by Rules of Professional Conduct, rule 1-311. At all relevant times, Respondent knew Hagen was not entitled to practice law in California.

On September 10, 2012, Respondent filed a summons and complaint on behalf of plaintiffs in a case entitled *Steven T. Nguyen et al. v. Bank of America, N.A. et al.*, Santa Clara County Superior Court, case number 112CV231914 (“the *Nguyen* matter”). On behalf of defendants Bank of America, N. A., Reconstruct Co., N. A., and Mortgage Electronic Systems, Inc. (collectively “*Nguyen* Defendants”), opposing counsel, Sridavi Ganesan (“Ganesan”), filed a demurrer to the *Nguyen* complaint on October 13, 2012. The demurrer was not opposed and on November 27, 2012, the court sustained the demurrer with leave to amend within 10 days.

Respondent and opposing counsel, had a telephone conversation regarding the *Nguyen* matter on or about December 12, 2012. Ganesan had called Respondent to give him notice that she intended to appear *ex parte* on December 13, 2012, to seek an order for dismissal of the *Nguyen* action due to Plaintiffs’ failure to file the amended complaint, due December 7, 2012. During the December 12th conversation, Respondent advised Ms. Ganesan, a highly credible witness, that Respondent was in court and she should call Respondent’s office and ask to speak with Kenneth Hagen, “the attorney handling this matter.”

As requested, Ms. Ganesan called Mr. Hagen and left a message, again giving notice of the *ex parte* proceedings set for December 13, 2012. Hagen returned Ms. Ganesan’s call and

explained that he was preparing the first amended complaint for filing. Hagen requested that Ms. Ganesan hold off on the *ex parte* hearing. Ms. Ganesan agreed to do so.

Plaintiffs filed a First Amended Complaint (“FAC”) on December 13, 2012. Defendants filed a demurrer to the FAC on January 15, 2013. Plaintiffs’ opposition was due February 5, 2013, however, Plaintiffs did not oppose the demurrer. The hearing on the demurrer went forward as set on February 19, 2013.

In the meantime, a discovery dispute was brewing between the *Nguyen* parties. Plaintiffs served Defendant Recontrust with a request for production of documents on December 21, 2012. On January 23, 2013, Ms. Ganesan requested and, Respondent granted, a two week extension of time for her to serve Defendant Recontrust’s responses.

However, notwithstanding the agreed extension of time to respond, on January 29, 2013, Hagen, on behalf of Plaintiffs, called Ms. Ganesan and left a voicemail message advising *Nguyen* Defendants Bank of America, Recon Trust Company and Mortgage Electric Systems (“Defendants”), of an ensuing motion to compel production of documents and responses if not produced immediately. Hagen stated that the responses were needed to respond to Defendants’ demurrer. Ms. Ganesan called Hagen and reminded Hagen that Respondent had granted Defendants a two week extension and that the responses were due and, would be served, February 8, 2013, as agreed. Hagen expressed anger and disgust and hung up the phone on Ms. Ganesan.

Ms. Ganesan immediately called Hagen back, and he stated he was rescinding the two week discovery extension granted by Respondent Gillen. Hagen again became irate and once again hung-up on Respondent when she reminded him that he was not actually the attorney of record in the *Nguyen* matter.

Defendants served their responses on February 8, 2013, but before serving the responses, Ms. Ganesan received a call from Hagen who was attempting to coordinate the scheduling of a hearing on Plaintiffs' motion to compel responses and documents. Although Ms. Ganesan advised Hagen the responses would be timely served that day, as agreed, Hagen insisted on setting a hearing date for Plaintiffs' motion to compel. Ms. Ganesan reluctantly agreed to a hearing on April 12, 2013. Hagen sent a confirming email to Ms. Ganesan on February 8, 2013.³ In her response to Hagen's email, Ms. Ganesan again advised Hagen that the motion to compel was premature and inquired as to whether Hagen was actually the primary attorney handling the case, as it seemed he was the person from Respondent's office with whom she had mostly dealt with in litigating the *Nguyen* case. Neither Mr. Hagen nor Respondent clarified Mr. Hagen's role on the *Nguyen* case or in any way addressed Ms. Ganesan's inquiry.

Nguyen Defendants received a copy of Plaintiffs' Motion To Compel Production of Documents and for Sanctions against Recontrust on February 15, 2013.⁴ The motion to compel was set to be heard April 12, 2013.

Hagen's role in the *Nguyen* litigation was questioned by others as well. During the pendency of the *Nguyen* litigation, Christopher Alexander was a law clerk for attorney Kirkman Hoffman at a law firm representing certain defendants in the *Nguyen* action. On several occasions, Alexander and Hoffman spoke with Hagen regarding legal strategy and a possible settlement of the claims asserted against Hoffman's client(s). In the dozen or so conversations during which Alexander spoke with Hagen over a two week period, Alexander observed that Hagen appeared to make legal decisions, including negotiation of a *lis pendens* issue with attorney Hoffman, without first conferring with Respondent.

³ Amie Schardt, a paralegal in Respondent's office, reviewed and sent all email on behalf of Respondent and Mr. Hagen. The February 8, 2013, email to Ms. Ganesan was signed "Regards, Ken Hagen", but was sent from Ms. Schardt's email address.

⁴ Plaintiffs did not meet and confer with counsel for Defendant Recon Trust after receiving the February 8th discovery responses or before filing the discovery motion, on February 15, 2013.

Meanwhile, on February 19, 2013, Defendants appeared at the demurrer hearing. Plaintiffs appeared but, Respondent, their counsel, did not appear. The court sustained the demurrer without leave to amend and dismissed the *Nguyen* action with prejudice. The same day, February 19, 2013, counsel for Defendants advised Respondent of the ruling and requested that Plaintiffs withdraw their motion to compel since there was no longer an operative complaint in the *Nguyen* matter. Plaintiffs did not respond to Defendants' request before the scheduled April 12, 2013, hearing on their motion to compel.

By order dated April 12, 2013, Judge Socrates P. Manoukian denied the *Nguyen* Plaintiffs motion to compel and granted Defendants' request for monetary discovery sanctions in the amount of \$2,543.⁵ Judge Manoukian's order also contained a "Notice To The State Bar", which requested a further investigation into non-attorney Hagen's extensive involvement in the litigation of the *Nguyen* matter.

During the course of the State Bar investigation, State Bar investigator Craig von Freymann, called Respondent's office and asked the receptionist to direct his call to Respondent. The receptionist forwarded the call to Hagen, who initially identified himself as Respondent. It was only later in the conversation that Hagen acknowledged that he was not the Respondent and identified himself as a legal assistant in Respondent's office.

Hagen died on November 16, 2014.

Conclusions

Count One – Bus. & Prof. Code section 6133 [Failure To Supervise Attorney Who Resigned With Charges Pending]

Section 6133 prohibits any attorney or law firm employing a resigned attorney from permitting that attorney to practice law or to hold himself or herself out as practicing law. In

⁵ Sanctions were awarded due to Plaintiffs failure to meet and confer with Defendants before filing the motion to compel and for failing to withdraw the motion to compel after Plaintiffs had notice of the dismissal of the *Nguyen* complaint with prejudice.

Count One, the State Bar charges that by permitting resigned attorney Hagen to take primary responsibility for handling the litigation of the *Nguyen* action without supervision and by telling opposing counsel, Ganesan to speak to Hagen, the attorney handling the *Nguyen* matter, Respondent willfully violated Business and Professions Code section 6133.

Respondent contends that he did not allow Hagen to exceed the boundaries set for him as a legal assistant⁶ and he did not characterize Hagen as “the attorney handling the [*Nguyen*] matter”. Rather, Respondent contends he referred to Hagen as the “person handling the [*Nguyen*] matter”. Not only is Respondent’s purported characterization not convincing, it is a distinction without a difference. Considering the nature and extent of Hagen’s negotiations with opposing counsel regarding discovery and substantive issues, Hagen was actively engaged in the practice of law and, under these facts, without adequate supervision by Respondent. Although there are several examples of Hagen practicing and/or holding himself out as practicing law, Hagen’s threat to rescind the 2 week discovery extension expressly granted to defense counsel Ganesan by Respondent speaks volumes.

The State Bar has met its burden of proving that Respondent willfully violated Business and Professions Code section 6133 and this court finds Respondent culpable on Count One.

Count Two—Bus. & Prof Code § 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. In Count Two, the State Bar charges Respondent knew Hagen was not an attorney entitled to practice law in

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⁶ Respondent also offers Kenneth Hagen’s declaration, dated June 13, 2013, as support for Respondent’s characterization of Hagen performing only those tasks appropriate for a “legal assistant”. However, this court accords Hagen’s declaration *no* weight as it was prepared in conjunction with Respondent’s response to the State Bar investigation, lacks factual information regarding the full scope of Mr. Hagen’s activities on the *Nguyen* matter and appears to be self-serving. Moreover, Hagen’s declaration lacks candor in that Hagen inaccurately characterized himself as a “retired” attorney rather than an attorney who resigned with charges pending.

California at all relevant times yet, he identified Hagen as “the attorney handling the [*Nguyen*] matter.”

Respondent stipulated that during and before the litigation of the *Nguyen* matter, he had actual knowledge that Hagen was not entitled to practice law in California. (See Stipulated Fact No. 1). Yet, Respondent allowed and even aided Hagen in practicing law. Even when Respondent knew or should have known that Hagen was engaging in the practice of law in the *Nguyen* matter, Respondent did not end Hagen’s involvement in that action.

The court finds Respondent culpable on Count Two.

Case No. 14-O-01753

Facts

On or about July 10, 2013, Respondent’s non-attorney employee Maria Mares (“Mares”) met with plaintiff Jose Menchaca (“Menchaca”). Respondent did not attend the meeting. At that meeting, Menchaca executed an agreement retaining Respondent to make a July 22, 2012 court appearance on behalf of Menchaca in a landlord-tenant dispute. Menchaca paid Mares \$400 for Respondent’s services. Subsequently, Menchaca terminated Respondent’s involvement on the landlord-tenant case before Respondent performed any legal services. Menchaca demanded a refund but Respondent did not pay Menchaca until July 25, 2014, almost a year after Menchaca’s request for the refund and after Menchaca complained to the State Bar.

Conclusions

Respondent stipulated that “[b]y failing to refund the \$400 in unearned fees to Menchaca at any time between the end of July 2013 and July 25, 2014, Respondent willfully failed to refund, promptly, upon termination of his employment, unearned fee in violation of rule 3-700(D)(2) of the Rules of Professional Conduct.” (See Partial Stipulation As To Facts, Culpability and Admission of Documents, Fact No. 12).

Accordingly, this court finds Respondent culpable on Count No. One.

Aggravation⁷

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. Of State Bar, Standards for Atty. Sanctions for Prof. Misconduct, std. 1.5) The court finds the following with regard to aggravating factors.

Prior Record of Discipline (Std. 1.5(a).)

In aggravation, Respondent has two records of prior discipline, discussed below.

Supreme Court Order No. 120268

Respondent's first record of discipline involved misconduct that took place in 2004-2005 when Respondent violated rules 4-100(A), 4-100(B)(4) and 3-110(A) of the Rules of Professional Conduct by failing to supervise his non-attorney employees. Respondent failed to advise a client of his August 2000 receipt of a settlement check paid as reimbursement for his client's rental car expense. Respondent's employees deposited the check into Respondent's personal account instead of his client trust account and Respondent "lost track" of the reimbursement funds. Respondent didn't realize that the funds had been mishandled until after he was contacted by the State Bar.

As a result of his grossly negligent conduct and willful violations of the Rules of Professional Conduct, Respondent received a one year stayed suspension and two years probation,

Supreme Court Order No. S151374

Significantly, Respondent's second record of discipline for misconduct in 2004-2005, involved the failure to supervise Hagen who had previously resigned with charges pending.

⁷ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Respondent violated Business and Professions Code sections 6133 and 6108 and rule 1-311 of the Rules of Professional Conduct by allowing Hagen on multiple occasions to hold himself out as an attorney. Respondent also falsely identified Hagen as a “retired” attorney in communications with other counsel. As a result of his above-referenced willful violations of the Business and Professions Code and the Rules of Professional Conduct, Respondent was suspended from the practice of law in California for two years stayed, two years probation and an actual suspension of 30 days, effective February 22, 2005.

Multiple Acts of Misconduct (Std. 1.5(b).)

Respondent has been found culpable on three counts of misconduct in the instant proceeding. The existence of multiple acts of misconduct is an aggravating circumstance.

Mitigation

It is Respondent’s burden to prove mitigating circumstances by clear and convincing evidence. (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr 302, 311; (std. 1.6)). The court finds that Respondent has only met his burden of proof with respect to the one mitigating factor discussed below.

Candor/Cooperation to Victims/State Bar (Std. 1.6(e).)

Respondent entered into a partial stipulation as to facts and/or admission of documents. Respondent’s cooperation with the State Bar warrants some consideration in mitigation.

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. 1.1.)

In determining the level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d. 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628). Second, the court looks to decisional law. (*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 State Bar requested that Respondent be disbarred. Respondent, on the other hand, argued that the appropriate level of discipline in this matter should be 90 days actual suspension, with 2 years stayed suspension.

In this case, the standards call for the imposition of a sanction ranging from actual suspension to disbarment. (Standards 2.7 and 1.8(b).) Standard 2.7 provides that disbarment or actual suspension is appropriate when a member has committed an act of moral turpitude. The degree of discipline under standard 2.7 depends on the magnitude of the misconduct. Standard 1.8(b) states that when an attorney has two prior records of discipline, disbarment is appropriate in the following circumstances, unless the most compelling mitigation circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct: (1) actual suspension was ordered in any one of the prior disciplinary matters; (2) the prior disciplinary matters coupled with the current record of discipline demonstrate a pattern of misconduct; or (3) the prior disciplinary matters coupled with the current record of discipline demonstrate the member's unwillingness or inability to conform to ethical responsibilities.

Here, Respondent's repeated failure, or unwillingness, to properly supervise a resigned attorney and members of Respondent's staff, Respondent's acts of moral turpitude and his failure to promptly refund an unearned fee, warrant disbarment. Disbarment is also appropriate where, as here, there is very little, actually, no compelling mitigation that would justify a contrary result.

Recommendations

The court recommends that Respondent Thomas William Gillen, State Bar Number 152569, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

California Rules of Court, Rule 9.20

It is recommended that the Supreme Court order Respondent to comply with California Rules of Court, rule 9.20, subdivisions (a) and (c), within 30 and 40 days, respectively, after the effective date of its order imposing discipline in this matter.⁸

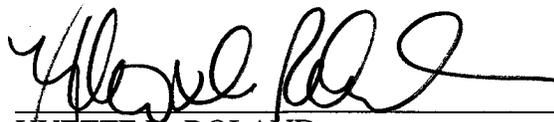
Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and such costs are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order of Involuntary Inactive Enrollment

Respondent Thomas William Gillen is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: July 7, 2015



YVETTE D. ROLAND
Judge of the State Bar Court

⁸ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on July 7, 2015, I deposited a true copy of the following document(s):

DECISION INCLUDING DISBARMENT RECOMMENDATION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

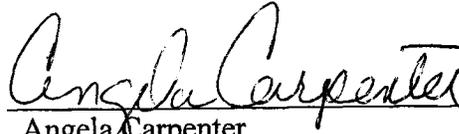
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

ANTHONY P. RADOGNA
LAW OFFICES OF ANTHONY RADOGNA
1 PARK PLZ STE 600
IRVINE, CA 92614

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

KIMBERLY ANDERSON, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on July 7, 2015.



Angela Carpenter
Case Administrator
State Bar Court