PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

FILED MARCH 25, 2011

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 06-O-13829
	)	
NICHOLAS R. DEBIASE,	)	OPINION
	)	
A Member of the State Bar, No. 143368.	)	
	)	

I. STATEMENT OF THE CASE

A hearing judge recommended that Nicholas R. DeBiase, an attorney for over 20 years without discipline, serve a 30-day actual suspension subject to two years' probation for two acts of misconduct. The hearing judge found DeBiase culpable of: (1) moral turpitude by sending two letters on behalf of his company that identified himself as an attorney while his license was on inactive status; and (2) failing to update his State Bar membership records. Finding six factors in mitigation and none in aggravation, the hearing judge applied standard 2.3,[1] which calls for actual suspension or disbarment for conduct involving moral turpitude.

DeBiase seeks review, disputing that the Office of the Chief Trial Counsel for the State Bar (State Bar) proved moral turpitude, but admitting that he inadvertently failed to update his membership records from 2003 to 2006, after he moved his office. He requests that the case be

[1] Unless otherwise noted, all references to "standard(s)" are to the Rules of Procedure of the State Bar of California, title IV, Standards for Attorney Sanctions for Professional Misconduct.

dismissed or, at most, an admonishment be imposed. In response, the State Bar supports the hearing judge's decision.

II. ISSUES ON REVIEW

After independently reviewing the record (Cal. Rules of Court, rule 9.12) and considering the parties' briefs on review, the primary issues before us are:

1. Did the State Bar prove that DeBiase acted with moral turpitude by sending two letters on his company letterhead identifying himself as an attorney when his license was on inactive status?
2. If DeBiase did not act with moral turpitude, what discipline, if any, should be imposed for the remaining charge of failing to update his membership records?

III. SUMMARY OF DECISION[2]

We do not agree with the hearing judge that DeBiase acted with moral turpitude by sending the letters, and find him not culpable. However, we agree with the hearing judge that DeBiase is culpable of temporarily failing to update his membership records. And like the hearing judge, we consider this to be a "minimal de minimis violation," particularly since he corrected the record immediately upon discovering his oversight. Given the overwhelming mitigation, we find that imposing discipline for this minor offense would not protect the public,

[2] The factual findings and legal conclusions herein have been established by clear and convincing evidence. Such evidence must be strong enough to leave no substantial doubt and to command the "unhesitating assent of every reasonable mind. [Citation; internal quotations omitted.]" (*In re Angelia P*. (1981) 28 Cal.3d 908, 919.)

the courts or the legal profession. Therefore, we exercise our discretion to dismiss this violation with prejudice in the interests of justice.[3]

IV. PROCEDURAL HISTORY

These proceedings began on July 16, 2008, when the State Bar filed a Notice of Disciplinary Charges (NDC). The NDC alleges in three counts that DeBiase: (1) failed to support the laws of the United States and California, in violation of section 6068, subdivision (a),[4] when he engaged in the unauthorized practice of law (UPL) and/or improperly held himself out as entitled to practice law in violation of sections 6125 and 6126; (2) acted with moral turpitude in violation of section 6106 by engaging in UPL and/or improperly holding himself out as entitled to practice law and by knowingly making false statements regarding his suspension status; [5] and (3) failed to update his membership address in violation of section 6068, subdivision (j). At trial, the hearing judge granted the State Bar's oral motion to dismiss Count One (UPL).

V. FINDINGS OF FACT

DeBiase was admitted to practice law in California in 1989, and has no record of prior discipline. He first practiced entertainment, litigation and business law in California. Then he moved to New York in 1997, and founded Centaur Entertainment, Inc., a successful record

[3] The State Bar acknowledges that "the record in this case is less than perfect." It also regrets stipulating to certain mitigation and failing to challenge testimony that it now claims is inherently incredible. In essence, the State Bar asks us to look behind its stipulations to judge the credibility of certain evidence. We decline to do so since the evidence was admitted either by stipulation or without opposition, and it was not refuted. Stipulations are encouraged and, once entered, bind the parties unless rejected by the court. (See *Schneider v. State Bar* (1987) 43 Cal.3d 784, 793.) No good cause exists to reject the stipulations or the uncontroverted evidence.

[4] Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

[5] Since DeBiase did not receive his bill for State Bar dues, it went unpaid and his license was ultimately suspended for non-payment. The State Bar has stipulated that during the relevant times, DeBiase did not know about the suspension. Consequently, the State Bar has advanced the moral turpitude charge based *solely* on DeBiase sending two letters on behalf of his company while on voluntary inactive status, not because his license was later suspended.

company. By 2000, DeBiase no longer represented clients since he was working full-time as the president and sole owner of Centaur. In order to reduce his bar dues and avoid MCLE requirements, DeBiase considered changing his membership status from active to voluntary inactive. He believed that even on inactive status, he could still use company letterhead as an attorney on Centaur's behalf since he owned the company and was representing only himself in its legal matters.

To confirm his belief, DeBiase called the State Bar membership records division. A State Bar representative told him he could continue to write letters and do legal work for Centaur, but he could not appear in court nor represent third parties. DeBiase testified that he would not have requested inactive status if he could not work as an attorney for Centaur. After this conversation with the State Bar representative, DeBiase became voluntarily inactive on December 31, 2000.

In May 2003, DeBiase moved Centaur's office from New York City to Brooklyn, New York, but failed to update his membership records address information. This lapse was inadvertent. In fact, DeBiase had previously updated his information six times between 1989 and 2003. Consequently, Centaur's accounting department, which paid all bills including annual State Bar membership dues, did not receive the dues statement for 2004, and the bill was not paid. Since the accounting department had handled the dues statements for several years, DeBiase was unaware that he was no longer receiving the statements.

On May 21, 2004, the State Bar mailed DeBiase a Notice of Delinquency, which was also not received by Centaur and was returned as undeliverable. On August 27, 2004, the State Bar mailed a formal notice that the California Supreme Court had ordered DeBiase's suspension for non-payment of membership dues. The letter was returned as undeliverable, stamped with the notation: "return to sender; moved; fwdg. ord. expired." The State Bar did not attempt to contact

DeBiase by phone, fax, or e-mail, although this information was available from the State Bar's own records.

On September 16, 2004, DeBiase's membership status was changed to involuntarily inactive by order of the California Supreme Court. DeBiase did not discover that his dues were unpaid or that his membership was suspended until June 27, 2006. When he became aware of the problem, he paid his full membership fees and penalties, completed his MCLE requirements, and updated his membership records information within two weeks. On July 10, 2006, the State Bar reinstated DeBiase to full active status.

During the time his license was not active, DeBiase sent two cease-and-desist letters on behalf of Centaur within approximately one month. On February 22, 2006, he sent the first letter to Masterbeat Entertainment, Inc. in Los Angeles for trademark infringement. The Centaur letterhead he used bore its logo. DeBiase began his letter by stating "I am the attorney for Centaur Entertainment, Inc . . . ." He signed the letter with his name followed by the honorific title "Esq." On March 23, 2006, DeBiase sent the second letter to New York attorney Joseph Nicholson, accusing his client of copyright infringement. The letter was written on the same Centaur stationery, and referenced DeBiase as both the attorney for Centaur and "Esq." The recipients of these two letters (collectively "the Centaur letters") were aware that DeBiase's license to practice law was inactive, and were not misled in any way.

VI. CONCLUSIONS OF LAW

COUNT TWO – DEBIASE IS NOT CULPABLE FOR MORAL TURPITUDE, CORRUPTION OR DISHONESTY

The NDC alleges that DeBiase acted with moral turpitude, corruption or dishonesty in violation of section 6106 by "knowingly engaging in the unauthorized practice of law and/or holding himself out as entitled to practice law and by knowingly making false statements regarding his suspension status on or about June 27, 2006." When the State Bar dismissed

Count One alleging UPL, it limited the facts in Count Two to DeBiase's mailing of the two Centaur letters on February 22, 2006 and March 23, 2006.

We therefore are left to consider only whether DeBiase's mailing of the Centaur letters constituted moral turpitude. (*Grim v. State Bar* (1991) 53 Cal.3d 21, 33 ["An attorney cannot be disciplined for a violation not alleged in the notice to show cause"].) The hearing judge found that there was no *intentional deception,* but nonetheless found moral turpitude based on an alternate theory of *gross negligence*. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 ["Gross negligence or recklessness in discharging one's duties as an attorney involves moral turpitude and thereby violates section 6106"].) We do not agree with the hearing judge that DeBiase committed acts of moral turpitude by sending the Centaur letters.

Three facts illustrate that when DeBiase sent the letters, he did not intentionally plan to deceive anyone about his license status: (1) he represented only himself; (2) he contacted the State Bar *before* sending the two letters; and (3) the recipients of the letters knew he was an inactive member of the bar at the time. These circumstances also demonstrate that DeBiase did not act with gross negligence. Guided by case authority where gross negligence amounts to moral turpitude, DeBiase's conduct simply does not establish the type or degree of carelessness that would warrant such a finding.[6] In fact, the uncontroverted evidence establishes that he believed in good faith that he was permitted to write the letters based on his call to the State Bar. And while this belief was mistaken, we find it was honestly held.[7] In reviewing the evidence, we

[6] See *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 495, 506 [gross negligence/moral turpitude for holding out as licensed to practice and accepting new clients in personal injury case with knowledge of suspension].

[7] See *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 319 [no moral turpitude where respondent made single court appearance while ignorant of inactive status]; *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 904-905 [no moral turpitude where respondent created false impression entitled to practice law in South Carolina but had unsuccessfully attempted to alert clients and public as to her status].

must "resolve all reasonable doubts in favor of the attorney. [Citations.]" (*Alberton v. State Bar* (1984) 37 Cal.3d 1, 11.) Given the circumstances, DeBiase is not culpable of moral turpitude by either intentional acts or gross negligence, and we dismiss this count with prejudice.

COUNT THREE -- DEBIASE IS CULPABLE FOR FAILING TO MAINTAIN HIS STATE BAR MEMBERSHIP RECORDS

DeBiase concedes that he failed to update his address with the State Bar membership records department after he moved his office from New York to Brooklyn in 2003. Under section 6068, subdivision (j), an attorney has a duty to comply with the requirements of section 6002.1, including updating his official membership records address within 30 days of any change. (§ 6002.1, subd. (a)(1).) "It is the attorney's obligation to keep the State Bar informed of any address changes. [Citation.]" (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) Since DeBiase failed to do so, he is culpable, but we note that within two weeks, he complied with all State Bar requirements and was reinstated to full active status.

VII. AGGRAVATION AND MITIGATION

The parties stipulated to no aggravation and six factors in mitigation. We assign very significant weight to DeBiase's impressive mitigation, which included: (1) no prior discipline in 20 years of practice combined with present misconduct that is not serious (std. 1.2(e)(i)); (2) no harm to any client, third party or the judicial system from sending the Centaur letters (std. 1.2(e)(iii)); (3) complete cooperation and full candor with the State Bar in discipline proceedings (std. 1.2(e)(v)); (4) community service and pro bono work, including extensive litigation on issues of first impression involving sexual orientation discrimination, and helping to raise millions of dollars for charitable organizations (*Schneider v. State Bar, supra,* 43 Cal.3d at p. 799 [service to community is mitigating factor]); (5) extraordinary good character attested to by a wide range of references in the legal and general communities who were aware of the full

extent of his misconduct (std. 1.2(e)(vi))[8]; and (6) remorse and quick resolution of the suspension issue (std. 1.2(e)(viii)).

VIII. DISCIPLINE DISCUSSION

The primary issue before us is whether DeBiase should receive *any* discipline for failing to update his membership records. While we do not condone this oversight, we stress that DeBiase comes before us to determine whether this single instance of misconduct, standing alone, merits discipline. We conclude it does not. Indeed, the Supreme Court has pointed out that "only the most serious instances of repeated misconduct and multiple instances of misappropriation have warranted actual suspension . . . . " (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367.) We fully agree with the hearing judge that DeBiase's oversight, standing alone, represents a minor violation.

DeBiase's inadvertence does not call for discipline. Examining his actions carefully, it is clear that failing to update his membership records was a one-time oversight. In fact, prior to his move to the Brooklyn office, he had properly updated his address records six times. And his telephone, fax and e-mail information have always been accurate and available to the State Bar. Certainly, he did not intend to avoid the State Bar or hide his whereabouts. These circumstances suggest leniency. (Compare *Powers v. State Bar* (1988) 44 Cal.3d 337, 342 [no leniency where attorney failed to update address information despite prior record of discipline, did not appear at noticed hearings and terminated all contact with State Bar].)

We also weigh DeBiase's single violation against his extraordinary mitigation. He has practiced discipline-free for over 20 years. In fact, this proceeding arose from the only complaint ever lodged against him. He has an exemplary record of pro bono and community

[8] We expressly note the declaration of one of many impressive character witnesses. Mr. Gary Clinton, Dean of Students and Counsel to the Dean of University of Pennsylvania Law School (DeBiase's alma mater) has known DeBiase for 25 years and opined that he "ranks among the top two dozen Penn Law alums in community development and charity."

service and presented a wide range of character references. He timely corrected his oversight with membership records, and fully cooperated with the State Bar, including traveling across the country to attend hearings. No harm to the public or the judicial system resulted. Given his outstanding mitigation, the lack of any aggravation, and the de minimus nature of DeBiase's violation, we dismiss this charge with prejudice in the furtherance of justice. (Former Rules Proc. of State Bar, rules 260, 261.)[9] Imposing discipline on DeBiase nearly five years after such a minor violation would not serve the goals of attorney discipline as he clearly poses no threat to the public, the courts or the legal profession. (Std. 1.3 [purpose of attorney discipline not to punish attorney but to protect public, courts and legal profession].)[10]

IX. COSTS

Respondent is not ordered to pay costs. (See Bus. & Prof. Code, § 6086.10, subd. (a).)

PURCELL, J.

We concur:

REMKE, P. J.

EPSTEIN, J.

[9] These rules were amended effective January 1, 2011, and are now numbered 5.122 and 5.123, respectively.

[10] In view of our dismissal, we do not examine DeBiase's procedural claims that the hearing judge abused his discretion by: (1) denying a motion to dismiss after the State Bar's case-in-chief, (2) continuing the trial after the State Bar rested its case-in-chief to permit it to call witnesses to authenticate the Centaur letters, and (3) denying DeBiase's request to call State Bar trial counsel as a witness.