

PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

FILED APRIL 28, 2011

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 10-R-00372
)	
HECTOR GARCIA,)	OPINION
)	
Petitioner for Reinstatement.)	
_____)	

Petitioner Hector Garcia resigned from the practice of law with charges pending, effective April 2, 2003. On November 6, 2009, he attempted to file a petition for reinstatement with the State Bar Court. The petition was rejected by the court clerk and returned by mail because, among other stated reasons, it was not accompanied by a conforming proof of service under the applicable rules. On November 20, 2009, Garcia filed a second petition with another improper proof of service, which the clerk rejected. Garcia successfully filed his petition for reinstatement on January 21, 2010.

Effective January 1, 2010, the California Rules of Court were modified to include a requirement that, at the time of filing for reinstatement, the petitioner must provide proof of passing the Attorneys' Examination administered by the Committee of Bar Examiners within three years before filing the petition. (Cal. Rules of Court, rule 9.10(f).) Garcia's petition did not include such proof. Accordingly, the hearing judge granted the motion of the Office of the Chief Trial Counsel of the State Bar (State Bar) to dismiss Garcia's petition based on this omission. The hearing judge also simultaneously denied Garcia's request to designate

November 20, 2009, rather than January 21, 2010, as the date his petition was filed. Garcia seeks review of the hearing judge's dismissal order.

Based on our de novo review of the record (Cal. Rules of Court, rule 9.12), we find that the court clerk properly rejected Garcia's petition for reinstatement because it did not comply with the applicable rules. We also reject his request to designate November 20, 2009 as the filing date of his petition, and affirm the hearing judge's dismissal order.

I. FACTUAL FINDINGS¹

Garcia attempted to file a petition for reinstatement with the State Bar Court on November 6, 2009. The court clerk rejected the petition for filing and returned it by mail. Along with the petition, the clerk included a form rejection notice that lists six standard reasons for rejecting a pleading and includes a space for "other" reasons. The clerk's November 6, 2009 rejection notice checked the following three standard reasons for rejection of the petition:

- The pleading is not accompanied by a proof of service that (a) bears an original signature; (b) sets forth the date upon which service was made; and (c) contains the exact title of the pleading(s) served. (See rules 61 and 62, Rules Proc. for State Bar Ct. Proceedings; Rule 1112, Rules of Practice of State Bar Ct.)
- The pleading presented for filing does not contain an original, handwritten signature. "Pleading" refers to the original of any separate pleading or other paper submitted for filing (for instance, if a motion and memorandum of points and authorities are presented as separate documents, each document must contain an original, handwritten signature). (See rule 1112, Rules of Practice of State Bar Ct.)
- The original is not accompanied by the requisite number of copies. (See rule 1112, Rules of Practice of State Bar Ct.)

The rejection notice also advised Garcia to "Please Refer to the [sic] Rules of Procedure of the State Bar of California 660-666," which sets forth the requirements for a reinstatement petition.

On November 20, 2009, Garcia attempted to file a second petition. The proof of service attached to this second petition merely recited the service of the first petition. After indicating

¹ The findings of fact are based upon our independent review of the official court file, including all motions, declarations and attachments filed in the hearing department.

the steps taken during the previous service attempt, the server provided only the following declaration regarding the current service:

Subsequently, on November 18, 2009, in the City of Yreka, I placed two envelopes with postage fully prepaid and again they were addressed to the above [State Bar Court and State Bar of California]. The State Bar Court package contained four petitions, [t]he package addressed to the State Bar of California contained one petition for Reinstatement. The difference with the package is that the package addressed to the State Bar Court does not have a \$1,600.00 filing fee. I originally executed the proof of service on November 4, 2009, at Yreka, California and I am now signing this proof of service on November 18, 2009 in the City of Yreka, County of Siskiyou, State of California.

The court clerk rejected the second petition for filing, returning it to Garcia the same day along with his filing fee and a rejection notice. The clerk's November 20, 2009 rejection notice listed the following reasons:

- The pleading is not accompanied by a proof of service that (a) bears an original signature; (b) sets forth the date upon which service was made; and (c) contains the exact title of the pleading(s) served. (See rules 61 and 62, Rules Proc. for State Bar Ct. Proceedings; Rule 1112, Rules of Practice of State Bar Ct.)
- Other: Please include the following documents when resubmitting the Petition of Reinstatement 1) Complete copies of federal income tax returns for the previous three years. 2) Statement Establishing Rehabilitation, Moral Character Qualifications and Demonstrating Present Ability and Learning in the General Law.

Garcia did not request judicial review of the court clerk's actions or seek any other clarification from the court about the grounds for rejection. More than seven weeks passed between the second rejection and his successful January 21, 2010 filing. Garcia explains this delay as "excusable neglect on his part."

On April 29, 2010, the State Bar filed a motion to dismiss the petition under rule 9.10(f) of the California Rules of Court, which requires proof, at the time of filing for reinstatement, that the petitioner has taken and passed the Attorneys' Examination within three years prior to filing the petition. On May 6, 2010, Garcia filed his opposition to the motion to dismiss, and to avoid the exam requirement, requested that the hearing judge issue an order, nunc pro tunc, designating November 20, 2009 as the date the petition was filed. Garcia argued that the court clerk failed to

properly perform her ministerial duties by refusing “to file the Petition on the grounds that the Proof of Service was legally insufficient.” The State Bar filed a response on May 21, 2010.

On June 14, 2010, the hearing judge denied Garcia’s request to designate November 20, 2009 as the filing date, and granted the motion to dismiss the petition for reinstatement because Garcia had failed to provide proof that he had passed the Attorneys’ Examination. On July 9, 2010, the hearing judge denied Garcia’s motion to set aside the dismissal.

II. LEGAL CONCLUSIONS

Garcia argues that the court clerk breached her ministerial duty when she rejected his petition for filing due to a legally insufficient proof of service on November 20, 2009. According to Garcia, the clerk was required to file the petition since his proof of service was in substantial compliance with Code of Civil Procedure section 1013a. We reject Garcia’s argument, finding that former rules 60 and 661² of the Rules of Procedure required the clerk to reject his petition since the proof of service was defective.

Rule 661 required Garcia to serve a copy of the petition on the State Bar by certified mail, return receipt requested, and to file a conforming proof of service with his petition. In particular, the rule provided:

RULE 661. REQUIREMENTS

- (a) The petition . . . shall be verified by the petitioner
- (b) The petitioner shall serve a copy of the petition on the Office of Trials pursuant to the rule for service of initial pleadings (rule 60)
- (c) The petition shall not be filed by the Court unless accompanied by a proof of service establishing compliance with the service requirements of this rule. The petition shall be accompanied by a filing fee of \$1,600

² The rules were revised effective January 1, 2011. We look to the language of former rules to determine the requirements of the petition submitted on November 20, 2009. Unless otherwise noted, all further references to “rule(s)” are to the former Rules of Procedure of the State Bar of California.

Rule 60(c) required all initial pleadings to be served upon the State Bar “in the appropriate venue by certified mail, return receipt requested” Rule 62 provided that the actual form of the proof of service must be “made as provided in Code of Civil Procedure section 1013a,” which provides for proof by affidavit or certificate.³ In sum, a proof of service that fails to comply with these requirements “shall not be filed.” (Rule 661(c).)

Garcia’s proof of service did not fulfill these requirements. It did not state that service was by certified mail, return receipt requested. Rather, the server offered only a confusing statement that she “placed two envelopes with postage fully prepaid and again they were addressed to the above,” without specifying where she “placed” the envelopes or what delivery method was used. Moreover, the proof of service failed to contain the “exact title of the document served and filed.” (Code Civ. Proc., § 1013a, subd. (1).) The document to be filed was listed as “petition,” and the document served as “petition for Reinstatement.” Both are wrong since the exact title was “Petition for Reinstatement After Disbarment or Resignation.”

As with the filing fee, proper service and a conforming proof of service were clear conditions precedent to filing the petition. (See *Duran v. St. Luke’s Hospital* (2003) 114 Cal.App.4th 457, 459 [clerk had duty to collect proper fee and action deemed untimely where fee not timely paid].) Thus, the court clerk was required to reject the petition when Garcia failed to

³ Subdivision (1) provides that the proof of service may be made by the following method: “An affidavit setting forth the exact title of the document served and filed in the cause, showing the name and residence or business address of the person making the service, showing that he or she is a resident of or employed in the county where the mailing occurs, that he or she is over the age of 18 years and not a party to the cause, and showing the date and place of deposit in the mail, the name and address of the person served as shown on the envelope, and also showing that the envelope was sealed and deposited in the mail with the postage thereon fully prepaid.” Despite Garcia’s position to the contrary, we find nothing “inconsistent” between the requirements of section 1013a and the requirements of former rules 60 and 661. (See *Woods v. Young* (1991) 53 Cal.3d 315, 325 [specific provision will govern general provision even though general provision standing alone is broad enough to include subject to which specific provision relates].)

comply with these mandatory requirements. (Rule 661(c); see also State Bar Ct. Rules of Prac., rule 1112(a)(1) [proof of service must contain “exact title of the pleading(s) served” or pleading will be rejected].)

Garcia attempts to avoid the unambiguous requirements of rules 60 and 661 by arguing that they are merely “local” rules, and the ultimate power to reject a filing must come exclusively from statute. This argument ignores the fact that the Rules of Procedure are promulgated by the State Bar Board of Governors pursuant to authority expressly conveyed to it under Business and Professions Code section 6086. The Legislature delegated to the Board the power to adopt rules in order to facilitate and govern proceedings in the State Bar Court. Likewise, the Rules of Practice of the State Bar Court were adopted by the Executive Committee of the State Bar Court for the same purpose. (See Bus. & Prof. Code, § 6086.5 [rules of practice may not conflict with rules of procedure].) Pursuant to this express authority, the Board has adopted the requirements for filing petitions for reinstatement, which were not met in this case.

Finally, the cases cited by Garcia in support of a nunc pro tunc order to back-date the petition do not apply. In those cases cited by Garcia, the court clerk acted negligently while in this case the clerk’s refusal to file the petition was mandated by the rules. Accordingly, the hearing judge did not commit error in denying Garcia’s request to order nunc pro tunc that November 20, 2009 was the date his petition was filed. We note that Garcia has not lost his right to seek reinstatement to the practice of law since he remains entitled to do so once he successfully complies with all prerequisites to filing his petition.

III. CONCLUSION

We reject Garcia’s request to designate November 20, 2009 as the filing date of his petition for reinstatement, and affirm the hearing judge’s order dismissing the matter. The hearing judge dismissed the petition without prejudice and did not order the return of the \$1,600

filing fee. We find that the appropriate procedure is to dismiss the petition with prejudice and return Garcia's \$1,600 filing fee. Accordingly, the Office of Finance of the State Bar will issue a check for \$1,600 payable to Hector Garcia.

REMKE, P. J.

We concur:

EPSTEIN, J.

PURCELL, J.