

PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

FILED JULY 1, 2010

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of) Nos. **08-O-11949** (06-O-14316)
)
DAVID CHIPMAN VENIE,) **OPINION ON REVIEW**
)
A Member of the State Bar.)
_____)

Respondent, David Chipman Venie, is appealing a hearing judge’s decision finding that letters he sent to inmates to advertise his professional services were deceptive, in violation of rule 1-400(D) of the Rules of Professional Conduct¹ and section 6106 of the Business and Professions Code.² The hearing judge recommended, inter alia, that Venie be placed on actual suspension for 30 days. Although the State Bar has not appealed the hearing judge’s decision, it urged below that Venie should be actually suspended from the practice of law for a period of 60 days. Venie argues that a public reproof, at most, should be imposed.

Having independently reviewed the record (*In re Morse* (1995) 11 Cal.4th 184, 207), we find clear and convincing evidence in support of the hearing judge’s culpability determinations, with the modifications noted below. However, our independent review authorizes us to increase the recommended discipline if we deem it appropriate, regardless of whether the State Bar has appealed. (*Ibid.*) We find it appropriate in this case, in view of Venie’s repeated deceptions

¹All further references to “rule(s)” are to the Rules of Professional Conduct, unless otherwise noted.

²All further references to “section(s)” are to the Business and Professions Code, unless otherwise noted.

involving moral turpitude, and recommend that Venie be actually suspended for 90 days, which is consistent with the applicable standards³ and the relevant decisional law.

I. PROCEDURAL AND FACTUAL BACKGROUND

Venie was admitted to the practice of law in California in December 1999, and he has no prior disciplinary history. The State Bar filed a Notice of Disciplinary Charges (NDC) on August 18, 2008, charging him with two violations of rule 1-400(D) (misleading advertising) and two violations of section 6106 (moral turpitude) as the result of his two-year letter-writing campaign to county jail inmates. In his decision filed on August 13, 2009, the hearing judge found Venie culpable of all four counts.

Between 2005 and early 2007, Venie mailed solicitation letters advertising his availability for hire to inmates in various San Diego County detention centers, including the Las Colinas jail. Most of these letters were not delivered because the San Diego County Sheriff's Department (Sheriff's Department), which is responsible for operating the county jails, has a policy not to deliver advertisements to inmates.⁴

On July 29, 2005, Venie wrote a letter to the Sheriff's Department, complaining that "someone there [at the jail] apparently believes that the letters are all unlawful 'solicitations' and, therefore, can be refused." Venie asserted that he knew "of no California law prohibiting the inmates from receiving [advertisements or solicitations]." He threatened to seek legal action if the Sheriff's Department refused to deliver his solicitation letters.

³All further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, unless otherwise noted.

⁴The Sheriff's Department's Manual of Policies and Procedures provides: "Advertisements mailed to inmates will not be delivered. . . ." Advertisements are defined as "materials for which the apparent primary purpose is to . . . promote products and/or services for the purpose of entering into a commercial transaction." The Department inspects all incoming mail addressed to inmates, and discards all advertising.

In response, Sanford Toyen, an attorney for the Sheriff's Department, wrote to Venie on August 4, 2005, informing him that the Department opened all incoming mail to check for contraband, but any mail marked as "confidential/legal mail" was opened only in the presence of the inmate to whom it was addressed and was not read by a sheriff's deputy. Toyen explained, however, that attorney solicitations were considered advertising and therefore were not delivered to inmates. He further clarified:

Sheriff's policy . . . distinguishes legal mail from attorney solicitations. The Sheriff's Department goes to great length to make sure that, in inspecting incoming mail for contraband, legal communications between an attorney and his inmate client are kept confidential. However, attorney solicitations (as are all advertisements and solicitations that are mailed to inmates) are simply discarded. This policy is one of necessity . . . [because] our jails would be flooded with such advertisements mailed to inmates and the distribution of important non-advertising mail would be significantly slowed.

In closing, Toyen's letter stated:

The logical conclusion to draw from these facts is that solicitations should not be sent to inmates in the jails. The only way such solicitations from an attorney would reach their intended recipients would be if the attorney were to violate the Rules of Professional Conduct by failing to label the envelopes containing such written communications with the appropriate notice that such communications are advertisements.

Toyen enclosed a copy of rule 1-400 with his letter. Venie disregarded Toyen's letter and continued to send solicitations to inmates. This prompted Toyen to write again on October 21, 2005, admonishing him:

Recently, I was surprised to discover that you had mailed letters soliciting employment to an inmate in which you not only failed to identify the solicitation as an advertisement (as required by Rule 1-400), but you also falsely labeled the solicitation as "Legal Mail." As I explained to you in my previous letter, solicitations are not "Legal Mail." The purpose of the "Legal Mail" designation is intended to facilitate confidential attorney-client communications through correspondence. It is not intended to allow attorneys an "end run" around our policies prohibiting unsolicited advertisements to inmates through the mail system.

Toyen concluded the letter:

“I am urging you to discontinue this practice. Your conduct has caused us to increase our vigilance with respect to letters coming from your office. The next time that the Sherriff’s Department discovers an example of you [mislabeling a solicitation] the Sherriff will refer this matter to the State Bar for appropriate action.” (Emphasis in the original.)

Venie believed that Toyen’s analysis was incorrect, although he did not appeal to Toyen’s superiors nor did he seek legal action vindicating his right to solicit the inmates. Instead, he continued his written solicitations to inmates,⁵ and “experimented” with various modifications to the format of the letters and to the descriptions of the contents written on the envelopes in order to evade the Sheriff’s policy of discarding attorney solicitations. For example, he changed some of the letters to include a heading: “Re: Urgent news about your [specified charges]” Some stated: “Re: urgent newsletter” or if they were written in Spanish, “Re: urgente boletin.” A footnote in very small typeface at the bottom of most of the letters advised the inmate to disregard the letter if he or she had already retained an attorney, and another footnote stated: “This communication is an informational letter to you meant to advertise professional criminal defense attorney services for hire.”

Venie omitted the word “advertisement” on the front of the envelopes, and instead, marked most as “legal mail” or “attorney mail,” or “attorney client mail.” He frequently included other verbiage such as “open immediately” or “newsletter” directly underneath “legal mail.” On the back of the envelopes, Venie often added the slogan, “Because your freedom is our business” and also replaced his name with “Freedom Law Center.”

Venie testified that he had a single purpose in making these modifications to the envelopes: “I was trying to find some language that would get the letters delivered. And I knew

⁵The record contains 12 solicitation letters and examples of 21 envelopes sent to inmates at the Las Colinas jail. None of these inmates were Venie’s clients.

that ‘legal mail’ would get delivered, because Mr. Toyen told me that. And I knew . . . if I put ‘advertisement’ on the outside of the envelope, 100 percent that was going to be thrown out. . . .” Venie’s efforts to solicit business from the San Diego County inmates met with little or no success, and in mid-2007, he closed his California practice and relocated to New Mexico.

II. LEGAL ANALYSIS

A. First and Fourteenth Amendment Challenge to Regulation of Advertising

Venie argues that his letter-writing is protected by the First Amendment, as incorporated through the Fourteenth Amendment to the U. S. Constitution.⁶ The First Amendment protects commercial speech by attorneys (*Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 383), as well as commercial speech directed at prisoners. (*Shapero v. Kentucky Bar Ass’n.* (1988) 486 U.S. 466, 472-473.) However, the First Amendment does not proscribe regulation of false or misleading communications. (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 624.) We accordingly reject Venie’s constitutional challenge to the regulation of his communications.

B. Counts One and Three: Rule 1-400(D) – Misleading Advertising

The hearing judge found that Venie willfully violated rule 1-400(D), as charged in Counts One and Three, by sending various letters to county jail inmates seeking professional employment in a manner that was false, deceptive or intended to confuse, deceive, or mislead. We agree with this culpability finding, at least with respect to his envelopes.⁷ Envelopes that do not contain the words “‘Advertisement,’” “‘Newsletter’” or “‘words of similar import on the

⁶Venie also claims that the Policy and Procedures of the Sheriff’s Office with respect to delivery of advertising violates the First Amendment, but we decline to make any determination on this claim. Regardless of his untested belief that the Policy and Procedures are unconstitutional, the focus of our disciplinary concern is his intentional deception.

⁷The letters present a more questionable basis on which to find culpability for a violation of rule 1-400(D)(4). With two exceptions, they expressly stated on each first page that they were “‘meant to advertise professional criminal defense service for hire.” While these statements were set forth in small typeface in footnotes, we do not find clear and convincing evidence that this presentation was misleading or deceptive.

outside thereof” are presumed to be in violation of rule 1-400, according to Standard 5 adopted by the Board of Governors pursuant to rule 1-400(E). Venie intentionally omitted the terms “advertisement” or “solicitation” from all of the envelopes because he knew with “100 percent” certainty that using them would result in his letters being discarded. Instead, he devised various combinations of words to deceive the Sheriff’s Department into allowing the envelopes to reach the inmates.

Venie’s claim that he attempted to comply with rule 1-400 by adding “newsletter” under “legal mail” or “attorney mail” on the envelopes is unavailing since he did so only to circumvent the Sheriff’s Department’s policy. Venie admitted: “I was trying to comply with the mandates of rule 1-400(D) without signaling to Mr. Toyen and the other people that this was an advertisement and would be thrown away.” Furthermore, the contents of the envelopes were *not* newsletters. Rather, as he stated, they were “informational letter[s]. . . meant to advertise professional criminal defense attorney services for hire.” Venie also argues that including the terms “legal mail” “attorney mail,” and “open immediately” on the envelopes satisfied rule 1-400 because they are “words of similar import” to “Advertisement” or “Newsletter.” His assertion is disingenuous at best, and we reject it. We thus adopt the hearing judge’s finding that Venie violated rule 1-400(D) under Counts One and Three. (*Leoni v. State Bar, supra*, 39 Cal.3d at p. 627 [failure to “clearly identify” letters as solicitation for employment violated former rule 2-101(A)].)

However, we find that the evidence establishing violations of rule 1-400 under Counts One and Three is the same as that which establishes moral turpitude in violation of section 6106, as alleged in Counts Two and Four. We therefore find Counts One and Three to be duplicative and allot no additional weight for the rule 1-400 violations in determining the level of discipline. (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 11.)

C. Counts Two and Four: Section 6106 – Moral Turpitude

The hearing judge found that Venie used the words “attorney client mail,” “legal mail,” and “attorney mail” on the front of his envelopes in an intentional effort to deceive Sheriff’s Department officials, thereby willfully committing acts of moral turpitude in violation of section 6106.⁸ He further found that Venie’s testimony about his legal reasoning to justify using these terms was self-serving and not credible.⁹ We give great weight to the hearing judge’s credibility determination and find no basis to disturb it. (Rules Proc. of State Bar, rule 305(a); *Marquette v. State Bar* (1988) 44 Cal.3d 253, 260-261.) As the hearing judge correctly observed: “Venie was faced with a dilemma: properly identify his mail to inmates as a newsletter/advertisement for professional employment, which would be discarded, or falsely identify his letters as legal mail that would reach an inmate and, hopefully, result in a client. In a strictly economic decision, Venie chose dishonesty over his ethical obligations.” Whatever else may be encompassed by the term “moral turpitude,” it most assuredly includes the use of deception to attempt to gain employment. (*In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, 341 [deliberate misrepresentation on resume to gain employment by law firm constitutes moral turpitude].)

III. DISCIPLINE ANALYSIS

In determining the appropriate level of discipline, we first consider evidence in aggravation and mitigation. (Rule Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof.

⁸Section 6106 provides for disbarment or suspension for the commission of any act involving moral turpitude, dishonesty or corruption, whether or not the act is committed in the course of his relations as an attorney.

⁹Venie’s reliance on *Wolff v. McDonnell* (1974) 418 U.S. 539 is misplaced. The *Wolff* decision addressed the circumstances under which confidential attorney-client privileged mail (including “legal mail”) may be delivered to inmates and how such mail should be identified to ensure its confidentiality. The *Wolff* decision has no relevance to a determination of whether a letter constitutes a misleading advertisement in violation of rule 1-400 or section 6106.

Misconduct, std. 1.2(b) and (e).) This evidence must be balanced against Venie's particular violations. (Std. 1.6(b).)

A. Mitigation

Venie practiced law for six years without discipline prior to the commencement of his misconduct, but this entitles him to very little weight in mitigation. (Std. 1.2(e)(i); *Smith v. State Bar* (1985) 38 Cal.3d 525, 540 [six years of blemish-free practice "not a strong mitigating factor"]; *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831, 837 [six years of blemish-free practice entitled to no mitigative weight].) Venie contends that he also is entitled to mitigation for his good faith effort to seek guidance from the State Bar investigator about the format of his letters. We decline to give this any mitigative weight since it was not the proper function of the State Bar to advise Venie how to make his communications compliant with the rules. (*In re Morse, supra*, 11 Cal.4th at p. 211.)

Venie further asserts that he is entitled to good faith mitigation because of his numerous revisions to his communications in an attempt to comply with rule 1-400. (Std. 1.2(e)(ii).) We reject this argument. In order to establish good faith mitigation, Venie must prove that his efforts were both honest *and* reasonable. (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653.) The Sheriff's Department's restriction on delivering advertisements was "one of necessity" to ensure that important mail such as attorney/client communications would be timely received by inmates. Accordingly, it was unreasonable that Venie took matters into his own hands rather than pursue an appropriate legal challenge or otherwise seek modification of the Sheriff's Department's policy. (See *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9 [attorney obligated to obey court order even if he believed it was in error unless steps taken to have it modified or vacated].) Moreover, given that Venie's primary goal in

revising his communications was to evade detection by the Sheriff's Department, we find that his efforts were dishonest and lacked good faith.

B. Aggravation

The record establishes two factors in aggravation. Most significantly, Venie's letter-writing efforts constitute multiple acts of misconduct. (Std. 1.2(b)(ii).) He did not send just one or two solicitations but made at least 23 separate attempts to evade detection by the Sheriff's Department. Venie also demonstrated a lack of appreciation of the nature of his wrongdoing and indifference to its consequences. (Std. 1.2(b)(v).) Although he was twice informed of the Sheriff's Department policy against sending unsolicited advertising to inmates, Venie continued to send the advertisements by camouflaging the envelopes as legal mail. He stopped his efforts only because he was unsuccessful in obtaining clients and eventually closed his California practice.

C. Level of Discipline

In determining the degree of discipline, we first consider the standards, which, although not binding, are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.) Standard 1.3 sets forth the purposes of disciplinary proceedings, which are "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

We have found Venie culpable of conduct involving moral turpitude. Standard 2.3, which applies to acts of moral turpitude, fraud, or intentional dishonesty, suggests a broad range of discipline from actual suspension to disbarment, depending upon the extent to which the misconduct harmed or misled an individual and upon the magnitude of the misconduct and the degree to which it relates to the attorney's practice of law. The record is silent as to whether anyone was harmed or misled by Venie's letter-writing campaign, and we find that his

misconduct was, at most, indirectly related to the practice of law. (*In the Matter of Mitchell, supra*, 1 Cal. State Bar Ct. Rptr. at p. 339) [distribution of false resumes to obtain employment “did not occur during the actual practice of law”].)

We consider three discipline cases involving deceptive written solicitations for professional employment. The most lenient is *Leoni v. State Bar, supra*, 39 Cal.3d 609, wherein two attorneys engaged in a massive solicitation campaign that lasted over a year and a half and involved over 250,000 letters and informational brochures sent to individuals who were in foreclosure or otherwise had debt-related problems. The Supreme Court found these letters were misleading and violated former rule 2-101 (the predecessor to rule 1-400) because, among other things, they did not “clearly identify the message as a communication for employment” (*Id.* at p. 627.) Notwithstanding the immense scope of the letter-writing campaign and the seven complaints filed with the State Bar, the court imposed only a public reprimand for four reasons, none of which is present here. First, the Supreme Court found that despite being misleading, the letters did not contain false or untrue statements. (*Id.* at p. 627.) Accordingly, moral turpitude was not found. (*Id.* at p. 628.) Second, the court considered as mitigating each attorneys’ 30 years of discipline-free practice. Third, the court found the attorneys made a good faith effort to modify the letters so as to make them truthful and not misleading. (*Ibid.*) Fourth, and most importantly, the court found that actual suspension would be “inappropriately harsh” because, at the time of its decision, the regulation of attorney advertising was “an evolving area of law.” (*Id.* at p. 614.) We thus find that *Leoni* is distinguishable from the instant case.

In *In re Morse, supra*, 11 Cal.4th 184, the Supreme Court imposed a three-year actual suspension on an attorney who mailed solicitations for his services in envelopes labeled so as to deceive the recipient that the communication came from his or her lender, rather than from the attorney. (*Id.* at p. 202.) No mitigating factors applied, other than six years of blemish-free

practice, which was afforded “minimal” weight. (*Id.* at p. 198.) Aggravating factors included multiple acts of misconduct attributable to the quantity of letters, bad faith and indifference toward rectification. (*Id.* at pp. 197-198, 206.) Additional uncharged misconduct was found in aggravation for evidence of additional mailings from an earlier time period than that addressed in the NDC. (*Id.* at p. 197.) The Supreme Court imposed three years’ actual suspension because of the broad scope of the misconduct and the numerous aggravating factors. (*Id.* at p. 190.) These facts are similar to this case, but *In re Morse* is distinguishable in that the attorney sent over four million deceptive letters over more than four years.

Perhaps closest to the mark is the case of *In the Matter of Mitchell*, *supra*, 1 Cal. State Bar Ct. Rptr. 332, where an attorney seeking professional employment distributed his resume containing misleading information about his educational background to various law firms over a three-year period. (*Id.* at p. 340.) The attorney also provided untruthful responses to the State Bar’s interrogatories. He testified “that he did not intend to deceive anyone. . . . He was merely attempting to get an interview [for a position with a law firm].” (*Ibid.*) We observed that such testimony “evidences a lack of understanding of the inherent dishonesty involved in circulating a knowingly false resume.” (*Ibid.*) We found him culpable of multiple acts of dishonesty in violation of section 6106, which was mitigated by his emotional stress due to family problems. (*Id.* at p. 341.) In looking to standard 2.3 for guidance, we concluded that 60 days’ actual suspension was appropriate, considering there was no evidence that the inaccurate resumes affected any hiring decisions. (*Id.* at pp. 339, 341.)

Our observation in *Mitchell* about an attorney’s dishonesty in seeking employment to further his career is particularly apt in this instance: “[W]e deem very serious an attorney’s deliberate use of dishonesty to further attempts to gain employment, particularly as a lawyer. An attorney is not just another job-holder or job-seeker. For years, our Supreme Court has

recognized the high duties of honesty and professional responsibility with which attorneys in this state are charged. [Citations.]” (*In the Matter of Mitchell, supra*, 1 Cal. State Bar Ct. Rptr. at p. 341.)

The misrepresentations here were more serious than in *Mitchell* because they were directed at vulnerable inmates and were intended to thwart a policy of “necessity.” The Sheriff’s Department policy had been implemented so that the jails would not be “flooded with such advertisements mailed to inmates and the distribution of important non-advertising mail would [not] be significantly slowed.” Accordingly, we adopt the discipline recommendations of the hearing judge, with the exception that we find that 90 days’ actual suspension is more appropriate, given the context of Venie’s deceptive letter-writing campaign, its potential for mischief and the fact that Venie continued with his solicitations even after he was warned that the matter would be referred to the State Bar if he did not stop.

IV. RECOMMENDED DISCIPLINE

We hereby recommend that DAVID CHIPMAN VENIE be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for two years, on the following conditions:

1. Venie must be actually suspended from the practice of law for the first 90 days of the period of his probation;
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation;
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office of the State Bar and the State Bar’s Office of Probation;
4. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct,

and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period;

5. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein;
6. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion the State Bar's Ethics School¹⁰ and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201);
7. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the one-year period of stayed suspension will be satisfied and that suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that DAVID CHIPMAN VENIE be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

¹⁰Venie's official address is in New Mexico. Rule 290(b) of the Rules of Procedure of the State Bar provides that if an attorney resides in another jurisdiction and is unable to attend State Bar Ethics School, he or she may seek authorization to attend a comparable remedial education course offered through a certified provider in the other jurisdiction by obtaining the prior approval of the Office of the Chief Trial Counsel of the State Bar of California and final approval of the State Bar Court.

VI. RULE 9.20

We further recommend that DAVID CHIPMAN VENIE be ordered to comply with rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, from the effective date of the Supreme Court order. Failure to do so may result in disbarment or suspension.

VII. COSTS

We further recommend 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 section 6140.7 and as a money judgment.

EPSTEIN, J.

We concur:

REMKE, P. J.

PURCELL, J.