

Filed November 15, 2022

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of)	SBC-19-M-XXXXXX
)	
APPLICANT C,)	OPINION
)	
Applicant for Admission.)	
_____)	

Applicant C¹ requests review of a Hearing Department order dismissing her moral character case with prejudice as a discovery sanction. The proceeding was before the Hearing Department as Applicant C had appealed an adverse moral character determination from the Committee of Bar Examiners of the State Bar (Committee). The Committee is represented by the Office of Chief Trial Counsel of the State Bar (OCTC). The hearing judge granted the Committee’s motion to dismiss the proceeding with prejudice based on Applicant C’s failure to participate in a deposition, which Applicant C argues was in error.² The Committee maintains that dismissal was appropriate.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge’s dismissal of the proceeding with prejudice.

¹ Because this case involves an important legal issue to applicants seeking admission to practice law in California, we have deemed it appropriate for publication. (Rules Proc. of State Bar, rule 5.159(E).) However, the underlying proceedings and hearings in this moral character matter remain confidential, and applicant, who we refer to as Applicant C, has not waived confidentiality. (Rules of State Bar, tit. 4, Admissions and Educational Stds., rule 4.4 [applicant records are confidential].)

² The proceeding was dismissed before trial.

I. BACKGROUND

On September 4, 2019, the Committee determined that Applicant C had not met her burden of establishing good moral character, which is required for admission to practice law in California. Applicant C appealed the determination by filing an Application for Moral Character Proceeding and Request for Hearing on November 1.

On June 22, 2020, Applicant C filed a motion for relief from participating in a deposition, which the hearing judge denied on June 23, 2020. On June 30, 2020, the Committee filed a motion to dismiss because Applicant C did not appear at a deposition on June 29. Applicant C later appeared and participated at a deposition on August 17. Therefore, on August 20, the hearing judge denied the Committee's June 30 motion as moot.

On August 24, 2020, the Committee filed a motion to dismiss the matter, or in the alternative, to compel Applicant C to answer questions she refused to answer at the August 17 deposition. The Committee stated that Applicant C asserted the federal Fifth Amendment privilege against self-incrimination when asked questions regarding her California bank accounts and insufficient funds activity from 2001 through 2003. Applicant C filed an opposition to the Committee's August 24, 2020 motion on August 31. On March 24, 2021, she filed a revised opposition, asserting that the Committee's August 24, 2020 motion was moot because she provided OCTC with a declaration answering the questions it had asked the court to compel her to answer in the motion.

The case was stayed and/or abated from August 24, 2020, through August 25, 2021.³ On August 25, 2021, the hearing judge entered an order setting trial dates.

³ On August 24, 2020, we stayed proceedings in the Hearing Department while we considered Applicant C's petition for interlocutory review she had filed in the Review Department. On September 25, we granted in part Applicant C's request and stayed the matter until an in-person hearing could be held and remanded the proceedings to the Hearing Department. The matter was then abated in the Hearing Department until August 25, 2021.

On September 10, 2021, the Committee filed a motion requesting an extension of the investigative period and requesting additional discovery. Applicant C opposed the motion. On October 1, the hearing judge granted the Committee's motion and ordered: the investigation period extended to November 15, that discovery may be conducted until December 22, and that the trial dates were vacated.

The hearing judge issued another order on October 1, 2021, granting in part the Committee's August 24, 2020 motion, and allowing for "further deposition of [Applicant C]—in the proposed areas (overruling the assertion of Fifth Amendment privilege), as well as in any new relevant areas resulting from OCTC's investigation."

Applicant C requested clarification and reconsideration of the October 1, 2021 orders. On October 4, the hearing judge denied reconsideration. The judge stated that the October 1 order granting the Committee's August 2020 motion for alternative relief "allow[ed] for a continued deposition of Applicant [C] in the proposed areas where the Fifth Amendment was asserted." The judge also clarified the order's granting of OCTC's request for further deposition of Applicant C in any "new relevant areas," stating that further deposition of Applicant C could include "issues, topics, and materials learned, *post* the date of [Applicant C's] previous OCTC deposition."

On December 14, 2021, Applicant C filed a motion requesting relief from any further depositions. She stated she attended a deposition that day, but terminated it when OCTC asked her questions she considered to be outside of the scope of the hearing judge's orders. The Committee opposed the motion. On December 15, the hearing judge denied Applicant C's motion and stated that Applicant C was "expected to cooperate with the sitting through of her deposition by the close of the extended investigation period (December 22, 2021). (See

generally, Rules Proc. of State Bar, rule 5.463 [deposition]; Rules of the State Bar, rules 4.40, 4.42 [duty and burden of applicant].)”

OCTC then scheduled Applicant C’s deposition for December 20, 2021. On December 17, the Committee requested an order requiring Applicant C to appear at the December 20 deposition. Applicant C filed an opposition asserting that the hearing judge was not adhering to the judge’s own orders from October. On December 17, the judge stated that the December 15 order “stands,” and denied the Committee’s motion as moot. The judge reiterated that the investigation period would close on December 22 and that OCTC was “allowed to conduct its deposition of [Applicant C] under rule 5.463 of the Rules of Procedure.”⁴

On December 20, 2021, the Committee filed a motion to dismiss the matter with prejudice, asserting that Applicant C did not attend the deposition scheduled for that day. Applicant C filed an opposition, asserting that the December 15 order did not require her to sit for a deposition. She stated that she was “not opposed to sitting [for] a further deposition as defined in [the] October 1 and October 4 orders,” noting that she appeared at the December 14 deposition, but “there were no questions within the scope” put to her on December 14, and, therefore, “there was no deposition to attend.”

On January 4, 2022, Applicant C requested interlocutory review of the hearing judge’s December 15, 2021 order denying her motion requesting relief from further depositions. On January 6, 2022, the judge granted the Committee’s December 20, 2021 motion to dismiss. The judge stated that the December 15, 2021 order had required Applicant C to cooperate by sitting through her deposition before December 22. The judge found that dismissal with prejudice was appropriate:

⁴ Rule 5.463(B) of the Rules of Procedure of the State Bar provides, in part, “The Office of Chief Trial Counsel may take the applicant’s deposition.”

The Committee is entitled to discovery, which includes the taking of [Applicant C's] deposition. (Rules Proc. of State Bar, rule 5.463(B); rule 5.124(I) [dismissal with prejudice as discovery sanction].) The court has extended many opportunities for [Applicant C] to sit for her deposition, having denied the Committee's two prior motions to dismiss. However, considering that [Applicant C] has now willfully chosen to not appear for two deposition dates, improperly refused to answer questions at a third, and unilaterally terminated a fourth, the court sees little reason not to order terminating sanctions.⁵ Moreover, as the extended discovery period has now expired without [Applicant C] sitting for her full deposition, the court sees no justification for extending it again to cure the prejudice to the Committee by [Applicant C's] willful decision not to participate—particularly where it is the applicant who carries the burden of proof and has the duty to cooperate with the moral character investigation. (Rules of the State Bar, rules 4.40, 4.42.)⁶

The judge imposed terminating sanctions under rule 5.124(I) of the Rules of Procedure of the State Bar and dismissed the proceeding.⁷

On January 10, 2022, Applicant C filed a motion to reconsider the January 6 order. The Committee filed an opposition. On January 12, the hearing judge denied the motion for reconsideration for failure to present any new facts or law. The order stated:

[Applicant C's] decision to pursue an interlocutory review of this court's December 15 Order is irrelevant to the basis from which this court decided the merits of the dismissal order. Indeed, [Applicant C's] decision to pursue relief in the Review Department *after* the period of the extended investigation had lapsed—rather than immediately after this court's order of October 1 which extended the investigation period, or immediately after this court's December 15 order denying [Applicant C's] motion to be relieved from sitting through a

⁵ The judge stated in a footnote: "The court has further considered the effect on the protection of the public and concludes that granting the requested dismissal does not negatively impact the public. (Rules Proc. of State Bar, rule 5.69.)" Rule 5.69(C) of the Rules of Procedure of the State Bar states: "The Civil Discovery Act's provisions about misuse of the discovery process and permissible sanctions (except provisions for monetary sanctions and the arrest of a party) apply in State Bar Court proceedings. The Court may not order dismissal as a discovery sanction without considering the effect on the protection of the public."

⁶ Rules of State Bar, tit. 4, Admissions and Educational Stds., rules 4.40(A) (applicant has burden of establishing good moral character), 4.42 (duty to update application with information relevant to moral character application).

⁷ The order contained a typographical error, citing rule 5.125(I) of the Rules of Procedure of the State Bar, where no such rule exists. Rule 5.124(I) of the Rules of Procedure of the State Bar provides: "Dismissal may be ordered as a discovery sanction. Unless the Court orders otherwise for good cause shown, dismissal is with prejudice."

deposition—does not alter the analysis, the procedural history in this matter, or the clarity of this court’s previous orders and [Applicant C’s] decision to disregard them.

On January 13, 2022, we denied Applicant C’s request for interlocutory review as moot as the matter had been dismissed on January 6. On January 27, Applicant C filed a request for review of the January 6 order dismissing the case; she also requested reconsideration of our January 13 order. On February 3, we denied the request for reconsideration, but deemed the remainder of Applicant C’s January 27 pleading as a request for review of the January 6 order dismissing the case. (Rules Proc. of State Bar, rule 5.151(A) [hearing judge order disposing of entire proceeding is reviewable].)

After briefing on review, on July 7, 2022, we gave notice to the parties that oral argument would be held in this matter on August 18. Applicant C and OCTC filed notices indicating that they intended to appear remotely at oral argument. OCTC then filed a request for Committee representatives to observe the remote proceeding. On August 16, Applicant C filed an objection to the request. On August 17, we denied the Committee’s request. On August 18, Applicant C failed to attend oral argument. We heard oral argument from OCTC and then submitted the matter.

II. TERMINATING SANCTIONS WERE PROPER

In moral character proceedings, once an applicant has appealed to the State Bar Court after an adverse determination from the Committee, the court must determine whether the applicant possesses good moral character. (Rules Proc. of State Bar, rule 5.460; Bus. & Prof. Code, § 6060, subd. (b).) During a moral character proceeding, OCTC investigates the applicant’s moral character, discovery occurs, and then the matter proceeds to trial. During discovery, OCTC is permitted to take the applicant’s deposition. (Rules Proc. of State Bar, rule 5.463(B).) Moral character hearings in the State Bar Court are de novo and not limited to

matters considered by the Committee. (Rules Proc. of State Bar, rule 5.460.) The burden of establishing good moral character is on the applicant. (Rules of State Bar, tit. 4, Admissions and Educational Stds., rule 4.40(A); *Hallinan v. Committee of Bar Examiners* (1966) 65 Cal.2d 447, 451.)

The standard of review we apply to procedural rulings is abuse of discretion or error of law. (*In the Matter of Respondent L* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 454, 461.) Therefore, we evaluate whether or not the judge exceeded the “bounds of reason,” given all the circumstances before the court. (See *In the Matter of Geyer* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 74, 78.) The same standard is used to review discovery sanctions. (*In the Matter of Torres* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 19, 23-24.) To impose a discovery sanction, two requirements must be met: (1) failure to comply with court-ordered discovery and (2) the failure must be willful. (*Id.* at p. 23, citing *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545; *Calvert Fire Ins. Co. v. Cropper* (1983) 141 Cal.App.3d 901, 904.) In analyzing a discovery ruling, we are guided by long-standing California public policy favoring disclosure and the objectives that the discovery rules were enacted to accomplish: (1) ascertaining the truth and preventing perjury; (2) providing an effective means to detect and expose false claims and defenses; (3) making facts available in a simple, convenient, and inexpensive way; (4) educating the parties before trial as to the value of their claims and defenses; (5) expediting litigation; (6) safeguarding against surprise; (7) preventing delay; (8) simplifying and narrowing the issues; and (9) expediting and facilitating preparation and trial. (*In the Matter of Torres, supra*, 5 Cal. State Bar Ct. Rptr. at pp. 22-23 & fn.7, citing *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376.)

Disobeying a court order to provide discovery is a misuse of the discovery process under the Civil Discovery Act. (Code Civ. Proc., § 2023.010, subd. (g); see also Rules Proc. of State

Bar, rule 5.69(C) [Civil Discovery Act provisions about misuse of discovery and sanctions applicable in State Bar Court proceedings].) A permissible sanction in the State Bar Court under the Civil Discovery Act is a terminating sanction that dismisses the action. (Code Civ. Proc., § 2023.030, subd. (d)(3); Rules Proc. of State Bar, rules 5.69(C) [court must consider effect on protection of public when ordering dismissal as discovery sanction], 5.124(I) [dismissal as discovery sanction].)

The facts here meet the requirements of an appropriate discovery sanction as Applicant C failed to comply with court-ordered discovery and the failure was willful. Applicant C did not comply with the hearing judge's orders requiring her to sit for a deposition and cooperate with the investigation and discovery. In addition, we find that Applicant C's failure to comply was willful: the orders plainly required Applicant C to appear for a deposition and her motion for relief from further depositions was denied. Even after the December 17, 2021 order stating that the Committee was "allowed to conduct its deposition of [Applicant C]," she refused to attend the properly-noticed December 20 deposition. Therefore, the judge correctly determined that sanctions were appropriate.

We also find that the hearing judge did not abuse her discretion by imposing terminating sanctions. "Terminating sanctions are warranted against a litigant who persists in the outright refusal to comply with [her] discovery obligations. [Citation.]" (*In the Matter of Torres, supra*, 5 Cal. State Bar Ct. Rptr. at p. 25.) The judge issued several orders requiring Applicant C's appearance at a deposition, however, Applicant C continually refused to comply. Applicant C's deposition was necessary for discovery and for OCTC to proceed to trial. As Applicant C was the moving party in this proceeding, OCTC was entitled to ascertain the truth of her claim of good moral character, explore the facts of her application, evaluate its own position regarding her moral character, and use the deposition to expedite the proceeding and trial. (*In the Matter of*

Torres, supra, 5 Cal. State Bar Ct. Rptr. at pp. 22-23 & fn.7.) Applicant C’s refusal to participate in the deposition halted discovery and precluded a trial from occurring. “[B]ecause of the drastic nature of a terminating sanction, it should only be granted when the party has had an opportunity to comply with a court order. [Citation.]” (*Id.* at p. 25.) Applicant C had the opportunity to comply with the orders to participate in the deposition, but did not do so. Therefore, terminating sanctions were appropriate.

III. APPLICANT C’S ARGUMENTS ON REVIEW

We have carefully considered all of Applicant C’s arguments on review and find they are unsupported. Any arguments not specifically addressed here have been considered and rejected as meritless.

In the October 1, 2021 order, the hearing judge overruled Applicant C’s arguments regarding the Fifth Amendment to the United States Constitution. Applicant C argues this was in error because there was no controversy concerning the Fifth Amendment because she had answered the questions in a March 2021 declaration provided to OCTC. However, the statements provided in the declaration did not fully answer the questions and were not a substitute for a deposition. In her request to reconsider the October 1 order, Applicant C specifically requested the judge reconsider the decision allowing OCTC to further depose her concerning the questions she had previously refused to answer under the Fifth Amendment. The judge denied reconsideration in the October 4 order. The October orders clearly required Applicant C to cooperate and answer specific questions, and she repeatedly refused to do so. We reject Applicant C’s arguments that the orders only required her to answer questions pursuant to “new” matters under the extended investigation and discovery period. Accordingly, we reject her related argument that it was proper for her to terminate the December 14 deposition because

OCTC asked questions beyond the scope of the judge's orders. Nothing in the record supports her interpretation of the October orders.

Applicant C also argues that the Rules of Procedure of the State Bar do not provide for a new investigation period after a case has been abated. She also asserts that OCTC asked for the new investigation period to harass her and frustrate her request for a trial, which she bases on OCTC's failure to "make use" of the period because OCTC did not issue subpoenas, make further discovery requests, or interview witnesses—OCTC sought only Applicant C's deposition. These arguments are also without merit. The rules regarding moral character proceedings allow for extension of the investigation period and for abatement. (Rules Proc. of State Bar, rules 5.462(A) [investigation period may be extended for good cause], 5.464 [proceeding may be abated].) Nothing in the Rules of Procedure of the State Bar specifies that the investigation period cannot be extended after an abatement. There is no evidence of harassment by OCTC. Applicant C's *own* actions in failing to cooperate with the deposition caused the dismissal of her case without a trial.

Applicant C argues the hearing judge's December 15, 2021 order only denied her requested relief and did not *require* her to attend further depositions. We reject this argument. The order denied Applicant C's motion requesting relief from further depositions and explicitly stated that Applicant C was to cooperate and sit through a deposition before December 22. The court reiterated in an order on December 17 that OCTC was allowed to take Applicant C's deposition.

Next, Applicant C argues that her procedural rights were violated when the hearing judge dismissed the case while her January 4, 2022 request for interlocutory review was pending.⁸

⁸ Applicant C requested review of the hearing judge's December 15, 2021 order denying her motion for relief from further deposition.

Applicant C failed, however, to seek a stay of the proceedings in the Hearing Department. (Rules Proc. of State Bar, rule 5.150(H) [party intending to file interlocutory petition and seek stay in Hearing Department must file petition and concurrently make motion to hearing judge to stay].) Applicant C points to no law requiring the judge to wait to issue an order on OCTC's pending dismissal motion while she sought interlocutory review of the judge's December 15 order requiring her to cooperate at a deposition by the end of the discovery period. This argument is also rejected.

Finally, Applicant C argues that the hearing judge committed misconduct in an August 23, 2021 status conference because the judge brought up the possibility of another deposition, without a request from OCTC. She asserts that the judge was trying to "trick" her into a further deposition and that this was "procedural harassment." Nothing in the record supports Applicant C's interpretation of the proceedings and we find no misconduct committed by the judge at the status conference. In addition, Applicant C has failed to show any actual prejudice she suffered. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469 [attorney must show specific prejudicial effect].) Therefore, we reject Applicant C's argument. As we noted, *ante*, the State Bar is tasked with determining an applicant's moral character and the applicant has the burden to prove good moral character. Applicant C cannot meet this burden by refusing to cooperate in the investigation; it was not harassment to take Applicant C's deposition on matters related to her moral character.

IV. CONCLUSION AND DISPOSITION

Applicant C chose not to appear for two scheduled depositions, improperly refused to answer questions at another deposition, and terminated a fourth deposition. Before granting the motion to dismiss, the hearing judge had denied two other motions to dismiss from the Committee. The dismissal of Applicant C's appeal of the Committee's adverse moral character

determination was not an abrupt decision. The judge issued valid orders directing Applicant C to cooperate and sit for a full deposition, and Applicant C repeatedly refused. As an applicant, Applicant C must demonstrate that she has good moral character for admission to practice law in California. She obstructed discovery, causing dismissal, which prevented the State Bar Court from determining whether she is morally fit to practice law. For the reasons discussed *ante* throughout this opinion, we find that dismissal was appropriate and affirm the judge's order dismissing the case.

In analyzing the dismissal, we find it necessary to make clear what a dismissal “with prejudice” means in a moral character proceeding such as this, where the case was dismissed without a moral character hearing on the merits. Rule 5.124(I) of the Rules of Procedure of the State Bar states, “Dismissal may be ordered as a discovery sanction. Unless the Court orders otherwise for good cause shown, dismissal is with prejudice.” After a dismissal with prejudice, an applicant is prohibited from beginning a new proceeding in the State Bar Court based on the same adverse moral character determination from the Committee. (See Rules of State Bar, tit. 4, Admissions and Educational Stds., rule 4.49 [applicant who has received adverse moral character determination must wait two years from date of final determination to file another Application for Determination of Moral Character].) Because Applicant C's case was dismissed with prejudice, she may not again appeal the underlying moral character determination from the Committee. (Rules Proc. of State Bar, rule 5.465 [effect of State Bar Court decision].) To allow Applicant C to do so would reward her for obstructing discovery in this matter. Therefore, if Applicant C continues to seek admission to practice law in California, she must submit a new Application for Determination of Moral Character.⁹ Under the Rules of the State Bar, the

⁹ This Opinion does not alter any other requirements Applicant C may need to complete in order to seek admission to practice law in California.

Committee may determine when Applicant C may file a new Application for Determination of Moral Character. (Rules of State Bar, tit. 4, Admissions and Educational Stds., rule 4.49 [date to file new Application for Determination of Moral Character determined by State Bar].)

Accordingly, we affirm the dismissal with prejudice. Applicant C may not reopen this proceeding or begin a new proceeding in the State Bar Court based on the underlying Application for Determination of Moral Character. This opinion does not preclude Applicant C from appealing any other adverse moral character determinations from the Committee in the future, as allowed by applicable rules, based on a different Application for Determination of Moral Character.

HONN, P.J.

WE CONCUR:

STOVITZ, J.*

CHAWLA, J.**

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

** Judge of the Hearing Department of the State Bar Court, designated to serve in this matter as a Review Department Judge Pro Tem, pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar.

No. SBC-19-M-XXXXX

In the Matter of
APPLICANT C

Hearing Judge
Hon. Phong Wang

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