

Filed February 28, 2014

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of)	Case No. 12-O-11136
)	
GLENN C. NUNES,)	OPINION AND ORDER
)	
A Member of the State Bar, No. 210453.)	
_____)	

Glenn C. Nunes appeals from a hearing judge’s discipline recommendation of a public reproof for his violations of Business and Professions Code section 6068, subdivision (i) (failure to cooperate in a disciplinary investigation)¹ and section 6068, subdivision (l) (failure to satisfy the conditions of an agreement in lieu of discipline (ALD)).² Nunes argues that his misconduct warrants a private reproof. The Office of the Chief Trial Counsel of the State Bar (State Bar) requests that we affirm the hearing judge’s decision.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we find that a public reproof is justified by Nunes’s misconduct and his cavalier attitude toward the disciplinary process, which he has displayed from the outset of the State Bar investigation. Moreover, the factors in aggravation and mitigation, as well as the standards and decisional law, support the recommended discipline. We accordingly affirm the hearing judge’s decision and order that Nunes be publicly reproofed, subject to the conditions stated herein.

¹ Section 6068, subdivision (i), provides that it is the duty of an attorney “[t]o cooperate and participate in any disciplinary investigation . . . pending against himself or herself.” All further references to sections are to the Business and Professions Code.

² Section 6068, subdivision (l) provides that it is the duty of any attorney “[t]o keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.”

I. FACTS AND PROCEDURAL HISTORY

We adopt and summarize the hearing judge's findings, which were largely based on the parties' stipulation as to undisputed facts and conclusions of law.³ (See Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight on review].) We add facts from the record that are relevant to our analysis.

A. Nunes Failed to Cooperate in NSF Check Investigation

Nunes was admitted to the State Bar on December 1, 2000. In June 2009, he issued a check for over \$13,000 drawn against insufficient funds in his client trust account (NSF check). Nunes eventually paid the full amount of the check. The State Bar initiated an investigation regarding the NSF check and sent four letters and left a telephone message inquiring about the insufficient funds between July 2009 and February 2010. The State Bar then filed a notice of disciplinary charges (NDC) in October 2010 after Nunes failed to respond to any of the attempts to contact him. Subsequently, he was permitted to enter into an ALD in consideration for his promise to comply with its conditions for a year (December 2010 through December 2011), and the case was dismissed. Specifically, Nunes was required to (1) submit quarterly reports and a final report to the Office of Probation of the State Bar, and (2) provide the State Bar with proof that he had attended the State Bar Ethics School and passed the test given at the end of the session.

B. Nunes Failed to Comply with ALD Conditions

Though the ALD conditions were not burdensome, Nunes made no attempt to satisfy them in the time prescribed. For this reason, on March 21, 2012, the State Bar filed the NDC in this proceeding, charging Nunes with failure to cooperate in the underlying disciplinary

³ At the hearing below, the State Bar relied exclusively on the stipulated facts to establish culpability and presented one witness on aggravation, Probation Deputy Teresa Laubscher. Nunes presented no witnesses other than himself to testify about culpability or mitigation.

investigation and failure to satisfy the ALD conditions listed above. The parties then entered into a comprehensive stipulation as to the undisputed facts and conclusions of law, which included Nunes's stipulation to his culpability on both charges and to most of the material facts.

C. June 20, 2012 Hearing

At the disciplinary hearing held on June 20, 2012, Nunes represented that he had registered for Ethics School a few days earlier and would attend on August 23, 2012. He also stated he would submit the four quarterly probation reports that should have been filed in 2011, and "would be extremely enthusiastic in complying" with any conditions attached to a private reproof. Based on these representations, the hearing judge found that Nunes's recognition of the wrongfulness of his misconduct mitigated his culpability. On that basis, she recommended a private reproof in her August 22, 2012 decision.

However, on September 14, 2012, the State Bar moved to reopen the record on the grounds that Nunes had neither attended Ethics School on August 23rd as promised nor had he submitted any of his overdue probation reports. (Rules Proc. of State Bar, rule 5.113 [motion to reopen proper before period for requesting review expires].) The State Bar argued this evidence should be considered as further evidence in aggravation. The hearing judge granted the motion, vacated her decision, and resumed the discipline hearing on November 1, 2012.

D. November 1, 2012 Hearing

At the continued hearing, Nunes was questioned about his failure to attend Ethics School in August. He responded: "I got busy with my caseload." Nunes did not offer specific testimony or corroborating evidence about the nature of that workload. However, within days of missing the August session (and before the State Bar filed its motion to reopen), Nunes registered for the October 25, 2012 session, which he attended and successfully completed.

As for the probation reports, Nunes testified that on October 17, 2012, about ten days prior to the resumed hearing, he had given the four overdue quarterly reports to his paralegal for mailing to the State Bar.⁴ But he conceded that he had not yet submitted a “final report.” Nunes said he had not promptly filed the overdue probation reports after the June hearing because he had thought they were “moot.”

In light of the new evidence adduced in the November 1, 2012 hearing, the judge filed an amended decision deleting her earlier finding in mitigation that Nunes recognized the wrongfulness of his conduct. Instead, she found his indifference towards rectification was additional aggravation. Accordingly, she increased her discipline recommendation from a private reproof to a public reproof.

II. CULPABILITY

Count One: Failure to Cooperate (§ 6068, subd. (i))

Nunes stipulated to willfully violating section 6068, subdivision (i), by failing to respond to the State Bar’s four inquiry letters and a telephone message and thereby failing to cooperate and participate in a disciplinary investigation pending against him. This legal conclusion is not in dispute and we adopt it.

Count Two: Failure to Comply with ALD (§ 6068, subd. (l))

Nunes stipulated to willfully violating section 6068, subdivision (l), by violating the quarterly reporting and Ethics School conditions of his ALD and thereby failing to keep all agreements made in lieu of disciplinary prosecution. This legal conclusion is also not in dispute and we adopt it.

⁴ Nunes did not present his paralegal as a witness to corroborate his testimony. However, the State Bar offered the Probation Deputy’s testimony that she had not received any of Nunes’s quarterly reports. We need not resolve this testimonial dichotomy since, as we discuss post, our analysis of Nunes’s indifference assumes, arguendo, that he sent the four reports on October 17, 2012.

III. AGGRAVATION AND MITIGATION

The State Bar must establish aggravating circumstances by clear and convincing evidence⁵ and Nunes has the same burden to prove mitigating circumstances. (Stds. 1.2(b) and 1.2(e).)⁶ It is our responsibility to independently examine the record on these issues. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 791.)

The hearing judge found two factors in aggravation (multiple acts of misconduct and indifference towards rectification) and four factors in mitigation (no prior record, no client harm, cooperation in entering into a stipulation, and demonstrated legal abilities). We adopt all of these findings with the exception that Nunes's legal abilities are not entitled to mitigative weight.

A. Aggravation

1. Multiple Acts (Std. 1.2(b)(ii))

We agree with the hearing judge's finding that Nunes's misconduct evidences multiple acts of misconduct constituting aggravation. (Std. 1.2(b)(ii).) Although he was charged with only two acts of misconduct, the misconduct involved multiple failures to satisfy his ALD obligations over a one-year period. (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 702 [attorney's failure to file two probation reports and timely provide proof of completion of required MCLE hours involves multiple (three) acts of wrongdoing].)

⁵ Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

⁶ All references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. Effective January 1, 2014, the standards were amended. Since this case was submitted for ruling in 2013, we apply the earlier version of the rules in this case, and all further references are to the former standards unless otherwise noted.

2. Indifference towards Rectification (Std. 1.2(b)(v))

The chronology of events underscores Nunes's utter failure to undertake timely efforts to comply with the relatively minimal demands placed on him by the State Bar between the summer of 2009 and the fall of 2012. To begin with, the State Bar sought an explanation from Nunes about the NSF check on five separate occasions over a period of more than a year. Nunes never responded. In addition, he failed to make *any* effort to satisfy the ALD conditions during the year-long compliance period. Similarly, the only compliance effort he made after the NDC was filed in March 2012, and before his June 2012 hearing, was to register for Ethics School. Notably, after the hearing judge proposed a lenient level of discipline in the form of a private reproof, Nunes still failed to promptly comply with the ALD conditions. Instead, he skipped Ethics School without valid justification and instead waited until October to attend the class. He also did not file the missing probation reports until at least October 2012. His belated compliance came seven months after the State Bar filed its NDC charging him with failing to cooperate and to comply with the conditions of his ALD, and four months after he assured the judge that he realized he needed to take his disciplinary responsibilities more seriously.

We find Nunes's explanation unavailing that his untimely compliance with his ALD obligations was due to lack of staff support and his heavy workload. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [time constraints of busy solo practice and lack of management skills generally not considered mitigation].) Moreover, his purported confusion as to whether he had to file the overdue ALD reports strains credulity because he had previously testified under oath that he *would* file them.

In light of this chronology, we find Nunes's efforts to satisfy his ALD to be too little and too late in the disciplinary process. Indeed, his continued foot-dragging with respect to the ALD conditions *after* he entered into the culpability stipulation in this matter undermines his argument

that his willingness to stipulate shows he is not indifferent toward rectification. Taken together, we find Nunes's course of conduct over a three-year period to be clear and convincing evidence of his indifference toward rectification and is a significant aggravating circumstance. (See *In the Matter of Meyer, supra*, 3 Cal. State Bar Ct. Rptr. at p. 702.)

B. Mitigation

We adopt the hearing judge's decision assigning mitigation to Nunes's eight and one-half years of discipline-free practice (std. 1.2(e)(i)), and the lack of client harm (std. 1.2(e)(iii)). He is also entitled to mitigation for his cooperation in entering into a comprehensive stipulation of facts and culpability (std. 1.2(e)(v)), though, as mentioned above, the mitigation is diminished somewhat by his subsequent conduct. We do not find clear and convincing evidence of Nunes's demonstrated legal abilities, given his inability to balance his practice with his ethical obligations.

IV. DISCIPLINE

Applicable both to Nunes's failure to cooperate in a disciplinary investigation and failure to comply with the conditions of his ALD, standard 2.6 provides for "disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3." In turn, standard 1.3 provides "the primary purposes . . . of sanctions . . . 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 acknowledge that this is Nunes's first discipline, his misconduct did not cause client harm, and he stipulated to culpability and most material facts. Nevertheless, we take Nunes's multiple violations of the ALD and his indifference towards rectification seriously. Despite numerous opportunities, he has yet to demonstrate his

willingness to fully engage in the discipline process or accept the wrongfulness of his failure to do so.

We find guidance in the Supreme Court's decision in *Conroy v. State Bar* (1990) 51 Cal.3d 799. In *Conroy*, the attorney failed to timely complete the professional responsibility exam, which was a condition of his first discipline, a private reproof. (*Id.* at p. 804.) The attorney then failed to participate in his second disciplinary proceeding until he filed a petition for writ of review with the Supreme Court. Before the Supreme Court, he "impl[ie]d" that "his misconduct constituted a mere technical lapse" and evidenced "a lack of understanding of the gravity of his earlier misdeeds and the import of the State Bar's regulatory functions." (*Id.* at p. 806.) In light of "these substantial aggravating circumstances," the attorney's violation of a single private-reproof condition was sufficient to warrant a 60-day actual suspension. (*Ibid*; see also *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813, 822 [public reproof for attorney who violated private reproof by not timely taking professional responsibility exam and had no mitigation; however, attorney participated extensively in proceedings, belatedly took exam, and had misconduct aggravated only by prior reproof]; *In the Matter of Meyer, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 705-706 [90-day actual suspension for attorney who violated two reproof conditions by not filing reports or completing continuing education credits, had no mitigation, and whose misconduct was aggravated by multiple acts, indifference, lack of cooperation for not appearing at conferences or trial, and two prior private reprovals].)

Accordingly, we agree with the hearing judge that imposing a public reproof which attaches conditions for two years, similar to those he has thus far failed to adhere to, would be discipline appropriate to protect the public and to preserve public confidence in the profession.

V. ORDER

Glenn C. Nunes is ordered publicly reprovved, effective 15 days after service of this opinion and order. (Rules Proc. of State Bar, rule 5.127(B).)

Further, Nunes must comply with specified conditions set forth in this order. (Cal. Rules of Court, rule 9.19(a); Rules Proc. of State Bar, rule 5.128.) Failure to comply with any condition may constitute cause for a separate proceeding for willful breach of rule 1-110 of the Rules of Professional Conduct of the State Bar of California.

Nunes is ordered to comply with the following conditions for a period of two years following the effective date of this order:

1. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his reprovval.
2. Within 30 days after the effective date of this public reprovval, he must contact the Office of Probation and schedule a meeting with a probation deputy to discuss these conditions attached to his public reprovval. Upon direction of the Office of Probation, he must meet with a probation deputy either in-person or by telephone. During the period in which these conditions are in effect (reprovval period), he must promptly meet with probation deputies as directed and upon request.
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 and the State Bar Office of Probation.
4. He must submit written quarterly reports to the Office of Probation on January 10, April 10, July 10, and October 10 of each year of his reprovval period. 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 reprovval 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 reprovval period and no later than the last day of the reprovval 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.

VI. COSTS

We further order 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.