

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case Nos. 01-O-02736-PEM; 01-O-04310;
)	01-O-05293; 02-O-11014;
BERNABE HERNANDEZ,)	03-O-02602; 03-O-04475;
)	04-O-10312; 04-O-10444;
Member No. 110671,)	04-O-10824 (Cons.)
)	
A Member of the State Bar.)	
)	
)	DECISION AND ORDER SEALING
)	DOCUMENTS

I. Introduction

In this disciplinary proceeding, respondent **Bernabe Hernandez** stipulated to misconduct involving seven clients, which misconduct occurred from 1998 through 2003, including failing to perform services, improperly withdrawing from employment, failing to communicate with clients, failing to return unearned fees and files, and failing to promptly deliver properties in his possession which the client is entitled to receive.

In October 2005, after respondent and the Office of the Chief Trial Counsel of the State Bar of California (State Bar) reached a stipulation as to facts and conclusions of law (Stipulation), this court approved the Stipulation and accepted respondent as a participant in the State Bar Court's Alternative Discipline Program (ADP).¹ (Rules Proc. of State Bar, rules 800-807.)²

However, respondent has recently been terminated from the State Bar Court's ADP as a result of his failure to comply with its requirements.

Accordingly, pursuant to rule 803 and in light of his admitted misconduct, the court hereby

¹This program is also known as the State Bar Court's Program for Respondents with Substance Abuse and Mental Health Issues and formerly known as the Pilot Program.

²References to rule are to the Rules of Procedure of the State Bar, unless otherwise stated.

recommends that respondent be suspended from the practice of law for three years, that execution of the suspension be stayed, and that respondent be placed on probation for five years on conditions that include his actual suspension for two years and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

II. Significant Procedural History

A. Respondent's Acceptance into the Alternative Discipline Program

The State Bar had filed three Notice of Disciplinary Charges (NDC) against respondent, as follows:

- a. On April 30, 2003: Case Nos. 01-O-02736, 01-O-04310, 01-O-05293, 02-O-11014;
- b. On October 22, 2004: Case Nos. 03-O-02602, 03-O-04475; and
- c. On January 25, 2005: Case Nos. 04-O-10312, 04-O-10444, 04-O-10824.

Respondent filed responses to these three NDCs.

Following discussions at a status conference, respondent's case was referred to the Alternative Discipline Program to evaluate whether respondent met the requirements for participation in the program on January 24, 2005. A prerequisite to participation in the ADP is an attorney's acceptance in the State Bar's Lawyer Assistance Program (LAP). (Rules Proc. of State Bar, rule 802(a).) Accordingly, respondent also was required to contact the LAP and determine if he wanted to enroll in that program. On June 5, 2005, after an extensive evaluation process, respondent entered into a long-term participation agreement with the LAP.

On October 24, 2005, the court approved a stipulation as to facts and conclusions of law (Stipulation) submitted by the parties for purposes of respondent's participation in the ADP. (Rules Proc. of State Bar, rule 802(a).) At the same time, this court issued its Confidential Statement of Alternative Dispositions and Orders (Statement), pursuant to rule 803(a). After considering the court's disciplinary recommendations, respondent elected to participate in the ADP. Following the execution of a Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program (Program Contract), this court accepted respondent into the ADP on October 24, 2005.

Respondent's eligibility and acceptance into the ADP was based on, among other things: 1)

his participation in the LAP; 2) the stipulation as to facts and conclusions of law he entered with the State Bar; 3) the nexus evidence he provided; and 4) his agreement to accept the court's low and high levels of recommended discipline set forth in the Statement, lodged on October 24, 2005. (Rules Proc. of State Bar, rule 802.) The terms and conditions of participation were set forth in the Program Contract, which respondent signed on October 24, 2005.

Specifically, paragraph 14 of the Program Contract provides as follows:

Respondent acknowledges and agrees that Respondent's participation in the ADP may be terminated by the Court for non-compliance with the ADP requirements, including but not limited to the following: (a) positive urinalysis tests on multiple occasions; (b) missed treatment or group meetings; (c) allegations of additional misconduct which occurred after Respondent was accepted into the ADP; or (d) failure to comply with the terms of this Contract.

B. Respondent's Termination from the Alternative Discipline Program

On June 30, 2006, the State Bar requested the court to issue an order to show cause (OSC) why respondent should not be terminated from the ADP and to set a hearing. The State Bar alleged that respondent had committed numerous violations of his Program Contract, made multiple misrepresentations to this court and incurred new misconduct. Respondent did not file a response to the motion.

On September 11, 2006, due to respondent's noncompliance with the requirements of the ADP, the court issued an OSC why respondent should not be terminated from the ADP. (Rules Proc. of State Bar, rule 805.)

On September 25, 2006, the court held an in-person hearing on the OSC. The State Bar was represented by Deputy Trial Counsel Cydney Batchelor and Donald Steedman. Respondent did not appear.

Based on clear and convincing evidence, the court found that respondent had violated the terms of the Program Contract and the ADP, as follows:

- a. *Restitution* – Respondent failed to make any monthly restitution payments to Abelardo Mendoza, Joseph Hull and Gerald Marchello or the Estate of Gerald

Marchello³ beginning December 1, 2005. However, he paid Marvin Ingwell \$600 in July 2006, which is equivalent to eight monthly installment restitution payments; a balance of \$1,900 is still due and owing.

- b. *LAP* – Respondent failed to call in the daily phone-in system and missed a drug and alcohol test schedule on November 21, 2005.
- c. *Change of Address* – Respondent failed to update his address of record with the Office of Probation and the Membership Records Office of the State Bar. He had relocated his office in or about September 2005.
- d. *Court Appearances* – Respondent failed to attend two ADP status conferences in January and March 2006.

Consequently, by order filed September 26, 2006, the court terminated respondent from the ADP based upon his noncompliance with the conditions of the ADP and ordered that the Stipulation be filed. The court indicated that it would issue this decision recommending the higher level of discipline reflected in the Statement. (Rules Proc. of State Bar, rule 803(a).)

III. Facts and Conclusions of Law

Respondent was admitted to the practice of law in California on December 12, 1983, and has been a member of the State Bar of California at all times relevant to this proceeding.

The Stipulation approved by the court and filed on September 26, 2006, is hereby incorporated by reference, as if set forth fully herein.

In the Stipulation, respondent admitted to a total of 16 violations in seven different client matters. These violations include respondent's failure to perform legal services with competence in four matters; failure to communicate significant developments to the clients or respond to reasonable status inquiries in seven matters; failure to return unearned fees in two matters; failure to promptly return the client's file in one matter; improper withdrawal from employment in one matter; and failure to promptly deliver properties in his possession which the client is entitled to

³Gerald Marchello had passed away in April 2006.

receive in one matter.⁴

IV. Aggravation and Mitigation

The parties also stipulated to certain aggravating and mitigating factors. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁵

In aggravation, respondent stipulated that his misconduct evidences multiple acts of wrongdoing with respect to seven client matters. Respondent also has admitted that his misconduct caused significant harm to his clients. Moreover, he failed to provide written fee agreements to his clients, an uncharged violation in the NDC. Finally, he failed to cooperate with the State Bar in its investigations of eight matters, two of which were dismissed without prejudice. (Stds. 1.2(b)(ii), (iv), and (vi).)

In mitigation, the parties stipulated that respondent has no prior record of discipline since being admitted to practice in 1983 (15 years of unblemished record until 1998 when his misconduct began). And he promptly took objective steps to make restitution to certain clients, which demonstrated remorse and recognition of his wrongdoing. (Stds. 1.2(e)(i) and (vii).)

However, although the parties stipulated that respondent was candid and cooperative with the State Bar during its resolution of these matters, the mitigating force of this factor is dramatically reduced based on respondent's termination from the ADP. (Std. 1.2(e)(v).)

The Supreme Court has held that extreme emotional difficulties are a mitigating factor where expert testimony establishes that those emotional difficulties were directly responsible for the misconduct, provided that the attorney has also established, through clear and convincing evidence, that he or she no longer suffers from such difficulties. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 527; *In re Naney* (1990) 51 Cal.3d 186, 197; *In re Lamb* (1989) 49 Cal.3d 239, 246; standard.1.2(e)(iv).) However, the Supreme Court also has held that, absent a finding of

⁴Specific violations were: rules 3-110(A), and 3-700(A)(2), 3-700(D)(1), 3-700(D)(2), and 4-100(B)(4) of the Rules of Professional Conduct and Business and Professions Code section 6068, subdivision (m).

⁵All further references to standards are to this source.

rehabilitation, emotional problems are not considered to be a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney*, *supra*, 51 Cal.3d at p. 197.)

In accepting respondent into the ADP, the court found that respondent has suffered from major depressive disorder and that there was a sufficient connection between respondent's psychological problems and the stipulated misconduct. (Rules Proc. of State Bar, rule 802(c).) However, respondent's conduct before this court while participating in the ADP and his termination from that program prevent the court from making a finding that respondent has established his sustained rehabilitation by clear and convincing evidence. Accordingly, respondent is not provided with any mitigation credit for his participation in the LAP or the ADP.

V. Degree of Discipline

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession and maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.) Standard 1.6(b) provides that the specific discipline for a particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

The standards applicable to this proceeding are standards 2.2(b), 2.4(b), 2.6, and 2.10, which provide for reproof, suspension or disbarment, depending upon the gravity of the offenses and the harm to the clients. While the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

Citing to the standards and *Young v. State Bar* (1990) 50 Cal.3d 1204, the State Bar recommended a three-year stayed suspension, a five-year probation, and a two-year actual suspension if respondent fails to successfully complete the ADP. Respondent did not submit a brief on the appropriate level of discipline prior to entering the ADP.

In *Young*, the Supreme Court ordered the attorney be suspended from the practice of law for three years, the execution of said suspension stayed, and the attorney be placed on probation for three years on conditions including a two-year actual suspension. Just six years after being admitted to

practice law, the attorney abandoned his law practice and moved to Florida without communicating with his clients. He was found culpable of misconduct in seven counts involving nine clients. In all seven counts, he was found to have withdrawn from employment without taking reasonable steps to avoid foreseeable prejudice to his client's rights, wilfully disobeyed a court order or violated his oath or duties as an attorney, and violated his duty to support the Constitutions and laws of the United States and California. In six of the counts, he was also found to have failed to perform legal services competently, and in two counts, he failed to promptly refund unearned fees. In mitigation, the Supreme Court noted the pressures of the attorney's practice, that he suffered from hepatitis at the time he abandoned his law practice, had no prior record of discipline, was cooperative and candid with the State Bar, and demonstrated remorse. In aggravation, the Supreme Court noted that his misconduct in one count significantly harmed the administration of justice, and that he had used drugs about the time he abandoned his legal practice. While the Supreme Court found that his abandonment of his law practice was caused by a combination of the stress of a heavy trial schedule, financial problems and hepatitis, and that he used drugs at the time he abandoned his law practice, the Supreme Court rejected the Review Department's disbarment recommendation as he later resumed the practice of law and worked capably and diligently on his clients' behalf. Thus, the Supreme Court found that protection of the public did not require his disbarment.

Here, respondent cites to depression and other psychological problems as major contributing factors to his misconduct. Respondent was seeking and obtaining professional treatment and support to address his difficulties. However, since respondent has been terminated from the court's ADP, he is not entitled to any mitigating credit for his efforts since he has failed to establish his rehabilitation by clear and convincing evidence.

Moreover, it has long been held that "[r]estitution is fundamental to the goal of rehabilitation." (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1094.) Restitution is a method of protecting the public and rehabilitating errant attorneys because it forces an attorney to confront the harm caused by his misconduct in real, concrete terms. (*Id.* at p. 1093.)

Therefore, after considering the scope of respondent's acts of admitted misconduct, all of the mitigating and aggravating circumstances and the relevant case law, the court concludes that the

imposition of a lengthy period of actual suspension with appropriate conditions is warranted. In particular, as conditions of probation, the court is recommending that respondent be required to continue with his counseling and to make restitution to his former clients.

VI. Recommendation

IT IS HEREBY RECOMMENDED that respondent **Bernabe Hernandez** be suspended from the practice of law in the State of California for three years, that execution of such suspension be stayed and that respondent be placed on probation for five years on the following conditions:

1. Respondent must be actually suspended from the practice of law for the first two years of the period of probation;
2. Respondent must pay restitution,⁶ as follows:
 - a. to Abelardo Mendoza in the amount of \$1,234 (or to the Client Security Fund to the extent of any payment from the fund to Abelardo Mendoza) at a monthly installment payment of at least \$50;
 - b. to Joseph Hull in the amount of \$2,000 (or to the Client Security Fund to the extent of any payment from the fund to Joseph Hull) at a monthly installment payment of at least \$75;
 - c. to the Estate of Gerald Marchello in the amount of \$2,000 (or to the Client Security Fund to the extent of any payment from the fund to the Estate of Gerald Marchello) at a monthly installment payment of at least \$75; and
 - d. to Marvin Ingwell in the amount of \$1,900⁷ (or to the Client Security Fund to the extent of any payment from the fund to Marvin Ingwell) at a monthly installment payment of at least \$75.

Respondent must pay the monthly installment restitution by the first day of each month and begin payment within 30 days from the effective date of the Supreme Court's final

⁶The parties have stipulated that respondent only has to pay the principal amount to each payee.

⁷Respondent is given credit for his payment of \$600 to Marvin Ingwell in July 2006. Therefore, the remaining balance still owing is \$1,900 (\$2,500 - \$600).

disciplinary order in this matter, and furnish satisfactory proof thereof to the State Bar's Office of Probation with each quarterly probation report, or as otherwise directed by the Office of Probation. No later than 30 days prior to the expiration of the probation period, respondent must make any necessary final payments in order to complete the payment of restitution in full and provide satisfactory proof of payment to the Office of Probation.

Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d);

3. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;

Within 10 calendar days of any change in the information required to be maintained on the State Bar's membership records pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone or, if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office of the State Bar and to the Office of Probation;

4. Within 30 calendar days from the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request;
5. Respondent must submit written quarterly reports to the Office of Probation no later than each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, respondent must state whether he has complied with the State Bar Act, the Rules of Professional Conduct and the conditions of probation during the preceding calendar quarter. If the first report will cover less than 30 days, that report must be submitted on the reporting due date for the next calendar quarter and must cover the extended period. In addition to all quarterly reports, respondent must submit a final report, containing the same

information required by the quarterly reports. The final report must be submitted no earlier than 20 days before the last day of the probation period and no later than the last day of such period;

6. Respondent must be assigned a probation monitor. Respondent must promptly review these terms and conditions of probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, respondent must furnish to the monitor such reports as may be requested, in addition to the quarterly reports required to be submitted to the Probation Unit. Respondent must cooperate fully with the monitor;
7. Subject to the assertion of applicable privileges, respondent 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 these probation conditions;
8. Respondent must obtain psychiatric or psychological treatment from a duly licensed psychiatrist, psychologist or clinical social worker, at his own expense, a minimum of twice per month and must furnish evidence of his compliance to the Office of Probation with each quarterly report. Treatment should commence immediately and, in any event, no later than 30 days after the effective date of the Supreme Court's final disciplinary order in this proceeding. Treatment must continue for the period of probation or until a motion to modify this condition is granted and that ruling becomes final. If the treating psychiatrist, psychologist or clinical social worker determines that there has been a substantial change in respondent's condition, respondent or the State Bar may file a motion for modification of this condition with the State Bar Court Hearing Department pursuant to rule 550 of the Rules of Procedure. The motion must be supported by a written statement from the psychiatrist, psychologist or clinical social worker, by affidavit or under penalty of perjury, in support of the proposed modification;
9. Upon the request of the Office of Probation, respondent must provide the Office of Probation with medical waivers and access to all of respondent's medical records. The revocation by respondent of any medical waiver is a violation of this condition. Any medical records obtained by the Office of Probation are confidential and no information concerning them or

their contents will be given to anyone except those members of the Office of Probation, the Office of the Chief Trial Counsel and the State Bar Court who are directly involved with monitoring, enforcing or adjudicating these conditions;

10. Within one year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent will not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201);
11. The period of probation will commence on the effective date of the Supreme Court's final disciplinary order in this proceeding; and
12. At the expiration of the period of this probation, if respondent has complied with all of the terms and conditions of probation, the Order of the Supreme Court suspending respondent from the practice of law for three years will be satisfied and that suspension will be terminated.

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, Multistate Professional Responsibility Exam Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and to provide proof of passage to the Office of Probation during the period of his actual suspension. Failure to pass the MPRE, and to provide proof of such passage within the specified time will result in actual suspension by the State Bar Court Review Department, without further hearing, until respondent provides the required proof of passage of the MPRE.

It is also recommended that respondent be ordered to comply with the requirements of the California Rules of Court, rule 955 (renumbered to rule 9.20 effective January 1, 2007), and that he be ordered to perform the acts specified in rule 955(a) and (c) within 30 and 40 calendar days,

respectively, from the effective date of the Supreme Court's final disciplinary order in this proceeding. Failure to comply with rule 955 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

VII. Costs

It is further recommended that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and one-fourth of said costs be paid with membership fees for the years 2008, 2009, 2010 and 2011. It is further ordered that if respondent fails to pay any installment within the time provided herein or as may be modified by the State Bar Court pursuant to Business and Professions Code section 6086.10, subdivision (c), the remaining balance of the costs is due and enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VIII. Order Sealing Documents

In the course of determining respondent's eligibility for participation in the State Bar Court's Alternative Discipline Program, and while respondent was participating in the Program, various documents were submitted to the court for review under confidential cover, including reports and evaluations regarding respondent's recommended treatment for participation in the Lawyer Assistance Program. Pursuant to Business and Professions Code section 6234(a) and rule 806 of the Rules of Procedure of the State Bar of California, all information concerning the nature and extent of a respondent's treatment is absolutely confidential and is not be disclosed to the public absent an express written waiver by the respondent.

In light of the foregoing,

IT IS HEREBY ORDERED that pursuant to rules 23 and 806 of the Rules of Procedure of the State Bar of California the following documents are to remain confidential and sealed:

1. All reports and evaluations by mental health professionals that were submitted to the court as part of respondent's participation in the Alternative Discipline Program;
2. All information concerning the nature and extent of respondent's treatment provided by the LAP, including, but not limited to, participation reports, application agreements and

participation agreements; and

3. The Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program.

IT IS FURTHER ORDERED that the foregoing protected and sealed material will only be disclosed to: (1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the State Bar Court and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their official duties. Protected material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosure. All persons to whom protected material is disclosed will be given a copy of this order sealing the documents by the person making the disclosure.

Dated: December 15, 2006

PAT McELROY
Judge of the State Bar Court