

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of) Case Nos.: **01-O-04049-RAP; 02-N-14104-RAP**
) **& 02-O-10439-RAP [Investigation**
) **Case Nos. 03-O-01609; 03-O-02878;**
ROBERT VICTOR MASENGA,) **03-O-03864 & 04-O-10527]**
Member No. 62020,)
) **DECISION & ORDER FILING AND**
) **SEALING CERTAIN DOCUMENTS**
A Member of the State Bar.)

INTRODUCTION & PERTINENT PROCEDURAL HISTORY

This consolidated disciplinary matter involving respondent **ROBERT VICTOR MASENGA** (respondent) arises out of the following extensive acts of misconduct: (1) repeatedly engaging in the unauthorized practice of law by performing legal services in five separate client matters while on actual suspension under a Supreme Court disciplinary order or involuntarily inactive enrollment or both; (2) failing to cooperate with two State Bar disciplinary investigations; (3) failing to obey a Supreme Court order directing him to comply with former rule 955 of the California Rules of Court (now rule 9.20 of the California Rules of Court); and (4) recklessly failing to competently perform legal services in two separate client matters.

After the filing of formal disciplinary charges by the Office of the Chief Trial Counsel of the State Bar of California (State Bar) and following a voluntary settlement conference,

respondent sought to participate in the State Bar's Lawyer Assistance Program (LAP) and the State Bar Court's Alternative Discipline Program (ADP).¹

In March 2003, respondent contacted the LAP to assist him with his mental health issues, and on April 23, 2003, respondent executed an initial Participation Agreement with the LAP.

On April 7, 2003, respondent submitted a declaration to the court which established that at the time of his misconduct, respondent was suffering from mental health issues. The parties thereafter submitted a Stipulation Re Facts and Conclusions of Law, which was received by the court on August 8, 2003. On December 23, 2003, the court received from the parties an addendum to their Stipulation Re Facts and Conclusions of Law.

Respondent's declaration and the stipulated facts, as well as the opinion of a medical professional, establish a causal connection between respondent's mental health issues and the misconduct found in this disciplinary proceeding. As such, the court found that respondent had adequately established a nexus between his mental health issues and his misconduct in this matter, i.e., that his mental health issues directly caused the misconduct set forth in this matter.

After each of the parties submitted a brief regarding the level of discipline in this matter, the court lodged its Decision Re Alternative Recommendations for Degree of Discipline on January 20, 2004, setting forth the recommended discipline if respondent successfully completed or was terminated from the court's ADP. Also, on January 20, 2004, respondent entered into a Contract and Waiver for Participation in the State Bar Court's ADP; the parties' Stipulation Re Facts and Conclusions of Law and the parties' addendum to their Stipulation were lodged with the court; and respondent was accepted as a participant in the ADP.

¹ The ADP was formerly known as the State Bar Court's Pilot Program for Respondent's with Substance Abuse or Mental Health Issues and the State Bar Court's Program for Respondents with Substance Abuse or Mental Health Issues.

On February 26, 2004, the court lodged an order approving nunc pro tunc the Stipulation Re Facts and Conclusions of Law, which stipulation the court previously received on August 8, 2003.

On August 12, 2004, the court received from the parties a second addendum to their Stipulation Re Facts and Conclusions of Law.² In light of the parties' second addendum, the court lodged an Amended Decision Re Alternative Recommendations for Degree of Discipline on September 30, 2004, setting forth the recommended discipline if respondent successfully completed or was terminated from the court's ADP.

The LAP issued a Certificate of One Year Participation in the Lawyer Assistance Program dated July 16, 2007, which reflects that respondent has complied with the requirements set forth in the LAP Participation Agreement for at least one year prior to July 16, 2007, and that during this time period, respondent has maintained mental health and stability and has participated successfully in the LAP.

Respondent's participation in the ADP allowed the court to monitor respondent's progress in the LAP and his overall efforts at addressing the problems that led to his misconduct. Respondent was a very cooperative participant in the ADP.

On July 18, 2007, the court held a status conference in this matter. On July 26, 2007, the court filed a Status Conference Order which sets forth that respondent has successfully completed the ADP. Also, on July 26, 2007, the following documents were filed: the parties' Stipulation Re Facts and Conclusions of Law; the court's order approving that stipulation; and the parties' two addendums to their Stipulation Re Facts and Conclusions of Law.

² This second addendum was later lodged with the court on September 30, 2004.

The court now issues this decision recommending that the Supreme Court impose upon respondent the discipline set forth below in this decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties' Stipulation Re Facts and Conclusions of Law, the court's order approving that stipulation, and the parties' two addendums to their stipulation are attached hereto and hereby incorporated by reference, as if fully set forth herein. The parties' stipulation and their two addendums to the stipulation set forth the factual findings, legal conclusions, and certain aggravating and mitigating circumstances in this matter.

Furthermore, at the time respondent engaged in the misconduct for which he has been found culpable, respondent was suffering from mental health issues, and respondent's mental health issues directly caused the misconduct in this proceeding. Supreme Court and Review Department case law establish 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; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.) However, the Supreme Court has also held that, absent a finding of rehabilitation, emotional problems are not considered a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney, supra*, 51 Cal.3d at p. 197.)

Respondent has been participating in the LAP since 2003 and has successfully completed the ADP. Respondent's successful completion of the ADP, which required his successful participation in the LAP, as well as the Certificate of One Year Participation in the Lawyer

Assistance Program from LAP, qualify as clear and convincing evidence that respondent no longer suffers from the mental health issues which led to his misconduct. Accordingly, it is appropriate to consider respondent's successful completion of the ADP as a further mitigating circumstance. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(iv) [all further references to standards are to this source].)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney but, rather, to protect the public, to preserve public confidence in the legal profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

Prior to respondent being accepted for participation in the ADP, each party submitted a brief to the court on the appropriate discipline in this matter. After reviewing those two briefs and considering the standards and case law cited therein, the parties' stipulation and their two addendums to that stipulation setting forth the facts, conclusions of law and aggravating and mitigating circumstances with respect to this consolidated disciplinary proceeding, and respondent's declaration regarding the nexus between his mental health issues and his misconduct in this matter, the parties were advised of the discipline which would be recommended to the Supreme Court if respondent successfully completed the ADP and the discipline which would be recommended if respondent was terminated from the ADP. Respondent thereafter entered into a contract to participate in the ADP and was accepted for participation in the ADP.

Thereafter, respondent successfully participated in the ADP and, as set forth in a status conference order filed on July 26, 2007, the court found that respondent successfully completed

the ADP. Accordingly, the court will recommend to the Supreme Court the imposition of the discipline set forth in the court's Amended Decision Re Alternative Recommendations for Degree of Discipline if respondent successfully completed the ADP.

RECOMMENDED DISCIPLINE

IT IS HEREBY RECOMMENDED that respondent **ROBERT VICTOR MASENGA** be suspended from the practice of law in the State of California for a period of two years, that execution of the two-year suspension be stayed, and that he be placed on probation for a period of five years on the following conditions:

1. Respondent must be actually suspended from the practice of law for the first 90 days of the period of probation and until he provides satisfactory proof to the State Bar's Office of Probation that he has made restitution to (a) Barry Deziel in the amount of \$500 plus interest thereon at the rate of 10 percent per annum from January 1, 2002, until paid; (b) Bette Deziel in the amount of \$975 plus interest thereon at the rate of 10 percent per annum from February 1, 2003, until paid; and (c) Julius Szabo in the amount of \$2,550 plus interest thereon at the rate of 10 percent per annum from January 1, 2002, until paid (or to the Client Security Fund to the extent of any payment from the fund to Barry Deziel, Bette Deziel, or Julius Szabo plus interest and costs, in accordance with Business and Professions Code section 6140.5). Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d). To the extent that respondent has paid any restitution prior to the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent is to be given credit for such payments provided satisfactory proof of such is or has been shown to the State Bar's Office of Probation.
2. If respondent's actual suspension extends for two or more years, he is to remain on actual suspension until he provides satisfactory proof to the State Bar Court of his rehabilitation, present fitness to practice law, and present learning and ability in the general law pursuant to Standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.
3. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct.
4. Within 10 calendar 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, respondent must report such change in writing to both the State Bar's Office of Probation and to the Membership Records Office of the State Bar.

5. Respondent must comply with all provisions and conditions of his Participation Agreement with the Lawyer Assistance Program (LAP) and must provide an appropriate waiver authorizing the LAP to provide the State Bar's Office of Probation and this court with information regarding the terms and conditions of respondent's participation in the LAP and his compliance or non-compliance with LAP requirements. Revocation of the written waiver for release of LAP information is a violation of this probation condition.
6. Respondent must submit written quarterly reports to the State Bar's Office of Probation on 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 all conditions of probation during the preceding calendar quarter. If the first report will cover less than 30 calendar days, that report must be submitted on the reporting 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 calendar days before the last day of the probation period and no later than the last day of the probation period.
7. Subject to the assertion of applicable privileges, respondent must answer fully, promptly and truthfully, all inquiries of the State Bar's Office of Probation which are directed to him personally or in writing relating to whether respondent is complying or has complied with these probation conditions.
8. Within one year after the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent must provide the State Bar's Office of Probation with satisfactory proof of his attendance at a session of State Bar Ethics School and of his passage of the test given at the conclusion of that session.
9. The period of probation will begin on the effective date of the Supreme Court's final disciplinary order in this proceeding.

The court further recommends that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within the greater of one year after the effective date of the Supreme Court's final disciplinary order in this matter or the period of his actual suspension and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same time period.

The Court also recommends that respondent 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 calendar days, respectively, from the effective date of the Supreme Court's final disciplinary order in this proceeding.

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in California Business and Professions Code section 6140.7 and as a money judgment.

ORDER FILING AND SEALING CERTAIN DOCUMENTS

As noted *ante*, the parties' Stipulation Re Facts and Conclusions of Law, the court's order approving that stipulation, and the parties' addendum and second addendum to their Stipulation Re Facts and Conclusions of Law were all filed in this proceeding on July 26, 2007. The court now orders the Case Administrator to file this Decision and Order Filing and Sealing Certain Documents. Thereafter, pursuant to rule 806(c) of the Rules of Procedure of the State Bar of California (Rules of Procedure), all other documents not previously filed in this matter are to be sealed pursuant to rule 23 of the Rules of Procedure.

It is further ordered that 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 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: January 28, 2008.

RICHARD A. PLATEL
Judge of the State Bar Court