

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: **02-H-11586; 02-O-11333**
) **(02-O-13889); 03-O-04867**
REED LEONARD McLURKIN,) **(04-O-10541) (Cons.)**
)
Member No. 165323,) **DECISION AND ORDER SEALING**
) **CERTAIN DOCUMENTS**
A Member of the State Bar.)
)
_____)

After the filing of formal disciplinary charges against respondent Reed Leonard McLurkin (respondent) on June 18, 2002, in case number 02-H-11586, respondent contacted the State Bar of California’s Lawyer Assistance Program (LAP) to assist him with his mental health issues, and in December 2003, respondent executed a Participation Agreement with the LAP.

Respondent also sought to participate in the State Bar Court’s Alternative Discipline Program (ADP),¹ and on October 2, 2002, the Honorable Paul A. Bacigalupo issued an order referring respondent to the ADP.

Effective January 6, 2003, case number 02-H-11586 was reassigned to the Honorable Robert M. Talcott.

¹ At the time, the ADP was referred to as the Pilot Program for Respondents with Substance Abuse or Mental Health Issues.

The parties entered into a Stipulation Re Facts and Conclusions of Law in connection with respondent's participation in the ADP on February 18, 2003 in case numbers 02-H-11586; 02-O-11333; and 02-O-13889 (ADP Stipulation).

On May 19, 2003, respondent submitted a declaration regarding the nexus between his mental health issues and his misconduct in this matter. Respondent submitted a supplemental declaration on July 24, 2003.

On November 24, 2003, the court lodged its Decision Re Alternative Recommendations for Degree of Discipline, the Contract and Waiver for Participation in the State Bar Court's ADP (Contract),² and the parties' ADP Stipulation,³ and respondent was accepted into the ADP as of this date.

On March 8, 2006, the Parties' Addendum to Stipulation Re: Facts and Conclusions of Law, Adding Remaining Investigation Matters (Addendum) was lodged with the court,⁴ and the court received respondent's supplemental nexus declaration regarding case numbers 03-O-04867 and 04-O-10541.

Effective November 3, 2006, these matters were reassigned to the undersigned judge.

On January 26, 2009, the court issued an order finding that respondent has successfully completed the ADP, and this matter was submitted for decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this matter, respondent stipulated to misconduct in four client matters, as well as to a violation of Business and Professions Code section 6103⁵ for failing to comply with certain

² The Contract was executed by respondent on November 24, 2003.

³ On February 26, 2004, the Honorable Robert M. Talcott issued an order approving the stipulation nunc pro tunc from November 24, 2003.

⁴ On November 16, 2006, the court issued an order that the March 8, 2006 Addendum was accepted by the court.

⁵ Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

conditions attached to a private reproof. With respect to the client matters, respondent stipulated in three matters to intentionally, recklessly, or repeatedly failing to perform legal services with competence in willful violation of rule 3-110(A) of the Rules of Professional Conduct of the State Bar of California⁶ and failing to communicate with his client in violation of section 6068, subdivision (m). In two matters, respondent stipulated to failing to return unearned fees in willful violation of rule 3-700(D)(2) and failing to cooperate with and participate in a State Bar disciplinary investigation in violation of section 6068, subdivision (i). In one matter each, respondent stipulated to failing to return a client file in willful violation of rule 3-700(D)(1) and failing, upon termination of employment, to take reasonable steps to avoid reasonably foreseeable prejudice to his client in willful violation of rule 3-700(A)(2).

In mitigation, the parties stipulated that at the time of his misconduct, respondent suffered emotional difficulties due to stress caused by a family member's mental health issue.⁷ In aggravation, respondent has one prior imposition of discipline. In 2001, respondent received a private reproof and was ordered to comply with specified conditions attached to the reproof for failing to competently perform legal services and failing to adequately communicate with clients in two client matters. In addition, the parties stipulated in aggravation that respondent displayed a lack of candor and cooperation to a client.⁸ The court also found in aggravation that respondent engaged in multiple acts of wrongdoing.

The parties' Stipulation, including the court's order approving the stipulation, and the parties' Addendum are attached hereto and hereby incorporated by reference, as if fully set forth

⁶ Unless otherwise indicated, all further references to rules refer to the Rules of Professional Conduct of the State Bar of California.

⁷ Although the parties stipulated in mitigation that respondent had registered to take State Bar Ethics School, the court did not find this to be a mitigating circumstance.

⁸ Although the parties also stipulated that respondent displayed a lack of cooperation with the State Bar's disciplinary investigation, the court did not find this to be an aggravating circumstance, as respondent was found culpable of violating section 6068, subdivision (i) based upon the same facts.

herein. The Stipulation and the Addendum set forth the factual findings, legal conclusions, and aggravating and mitigating circumstances in this matter.

Supreme Court and Review Department case law establish that extreme emotional difficulties are a mitigating factor where expert testimony establishes that these 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 executed a Participation Agreement with the LAP in December 2003,⁹ and on August 27, 2007, the LAP closed respondent's case as the LAP Evaluation Committee determined respondent had successfully completed the LAP.

Respondent also successfully completed the court's ADP. Respondent's successful completion of the ADP and the 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 mitigating circumstance in this matter. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e)(iv).)

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

⁹ Although respondent executed a LAP Participation Agreement on this date, he contacted the LAP no later than September 30, 2002.

the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

After reviewing the parties' joint brief on the issue of discipline which was received on February 19, 2003, and considering the Standards for Attorney Sanctions for Professional Misconduct (standard(s)) and case law cited therein, the parties' stipulation setting forth the facts, conclusions of law, and the aggravating and mitigating circumstances with respect to case numbers 02-H-11586; 02-O-11333; and 02-O-13889, and respondent's declaration and supplemental declaration regarding the nexus between his mental health issues and his misconduct, the Honorable Robert M. Talcott advised the parties 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, or failed to successfully complete, the ADP.¹⁰

In determining the appropriate discipline to recommend in this matter if respondent successfully completed the ADP, the court considered the discipline recommended by the parties, as well as certain standards and case law. The parties recommended discipline of two years' stayed suspension, five years' probation and no actual suspension. The court also considered standards 1.6, 2.4(b), 2.6, 2.9 and 2.10 and the case law cited in the parties' joint discipline brief: *Conroy v. State Bar* (1990) 51 Cal.3d 799; *King v. State Bar* (1990) 52 Cal.3d 307; and *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697. In determining the appropriate discipline recommendation, the court also considered that

¹⁰ Although two investigation matters were later incorporated into this proceeding, there was no increase in the alternative discipline recommendations. However, respondent was required to pay restitution to a client during his period of participation in the ADP, and respondent satisfied this requirement. Other than this additional restitution requirement to be completed during respondent's ADP participation period, the parties did not seek any increased discipline for these matters.

respondent's successful completion of the ADP would be considered as a further mitigating circumstance in this matter.

After agreeing to the discipline which the court would recommend to the Supreme Court if respondent successfully completed or was terminated from, or failed to successfully complete, the ADP, respondent executed the Contract to participate in the ADP; the Contract was lodged with the court; and respondent's period of participation in the ADP commenced.

Thereafter, respondent successfully participated in the ADP and, as noted above, the court has found that respondent has successfully completed both the ADP and the LAP. Accordingly, the court will recommend to the Supreme Court the imposition of the discipline set forth in the court's Decision Re Alternative Recommendation for Degree of Discipline if respondent successfully completed the ADP.

RECOMMENDED DISCIPLINE

IT IS HEREBY RECOMMENDED that respondent **REED LEONARD McLURKIN** be suspended from the practice of law for a period of two years, that execution of such suspension be stayed, and that respondent be placed on probation for a period of five years on the following conditions:

1. During the period of probation, respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California;
2. 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, respondent must report such change of information in writing to the Membership Records Office of the State Bar and to the Office of Probation;

3. Respondent must submit written quarterly probation reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period during which these probation conditions are in effect. Under penalty of perjury, respondent must state whether he has complied with the State Bar Act, the Rules of Professional Conduct and all of the probation conditions set forth in this Decision during the preceding calendar quarter. If the first report will cover a period of 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 period during which these probation conditions apply and no later than the last day of said period;

4. Subject to the assertion of applicable privileges, respondent must fully, promptly and truthfully answer any inquires which are directed to him by the Office of Probation either personally or in writing, relating to whether respondent is complying or has complied with these probation conditions;

5. The period during which these probation conditions apply will commence on the effective date of the final order of the Supreme Court imposing discipline in this proceeding.

6. At the expiration of the period of probation, if respondent has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

This court also recommends that respondent be required to take and pass the Multistate Professional Responsibility Examination (MPRE), administered by the National Conference of Bar Examiners, and to provide proof of passage of the MPRE to the Office of Probation within one year after the effective date of the final Supreme Court order imposing discipline in this

proceeding Failure to pass the MPRE or to provide proof of 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 not recommended that respondent provide the Office of Probation with satisfactory evidence of his successful completion of State Bar Ethics School, as respondent previously provided proof to the Office of Probation of his attendance at Ethics School on May 3, 2007.

COSTS

It is recommended that costs are awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

DIRECTION RE DECISION AND ORDER SEALING CERTAIN DOCUMENTS

The court directs a court case administrator to file the parties' Stipulation Re Facts and Conclusions of Law lodged on November 24, 2003, the Order Approving Stipulation lodged on February 26, 2004, the Parties' Addendum to Stipulation Re: Facts and Conclusions of Law, Adding Remaining Investigation Matters lodged on March 8, 2006, as well as this Decision and Order 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 ordered 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.

IT IS SO ORDERED.

Dated: April 23, 2009.

RICHARD A. PLATEL
Judge of the State Bar Court