

FILED JANUARY 12, 2010

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos.: 02-O-13697; 04-N-10379 (Cons.)
)	
RICHARD DAVID COMESS,)	DECISION AND ORDER SEALING
)	CERTAIN DOCUMENTS
Member No. 198665,)	
)	
<u>A Member of the State Bar.</u>)	

On June 26, 2003, the State Bar of California, Office of the Chief Trial Counsel (OCTC), filed a Notice of Disciplinary Charges against respondent Richard David Comess (respondent) in case no. 02-O-13697. This matter was initially assigned to the Honorable Alban I. Niles.

Thereafter, on September 8, 2003, respondent contacted the State Bar of California's Lawyer Assistance Program (LAP) to assist him with his substance abuse and mental health issues.

Judge Niles issued an order on October 27, 2003, referring this matter to the State Bar Court's Alternative Discipline Program (ADP)¹ before the Honorable Robert M. Talcott.

Respondent executed a Participation Agreement with the LAP on January 15, 2004.²

On February 20, 2004, respondent submitted a declaration establishing a nexus between his substance abuse and mental health issues and his misconduct in this matter.

¹ The State Bar Court's Alternative Discipline Program was previously known as the Pilot Program for Respondents with Substance Abuse or Mental Health Issues.

² Respondent's Participation Agreement was amended in 2008.

Effective April 1, 2004, case no. 02-O-13697 was reassigned to the undersigned judge.

The parties entered into a Stipulation Re Facts and Conclusions of Law (Stipulation) which was received by the court on April 1, 2004.

On May 21, 2004, the court executed the Decision Re Alternative Recommendations for Degree of Discipline (Decision Re Alternative Recommendations) which set forth 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.

On July 17, 2004, respondent executed the Contract and Waiver for Participation in the State Bar Court's ADP (Contract).

On August 27, 2004, the court executed an order approving the parties' Stipulation. On that same date, the Decision Re Alternative Recommendations, the Contract, and the parties' Stipulation were lodged, and respondent's participation in the ADP commenced.³

On December 10, 2007, the court filed an order extending respondent's participation in the ADP until further order.

Effective October 3, 2008, respondent was involuntarily enrolled inactive pursuant to Business and Professions Code section 6233. Effective January 28, 2009, respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6233 was terminated.

On June 11, 2009, the court issued an order finding that respondent has successfully completed the ADP; the parties' Stipulation was filed; and this matter was submitted for decision. However, on September 24, 2009, the court issued an order vacating the submission date and ordering respondent to provide certain documentation by October 2, 2009. Respondent,

³ On September 8, 2004, the court issued an order that respondent was accepted into the ADP, and the start date of respondent's participation was August 27, 2004.

however, failed to provide all such documentation by the required date. As such, the court took this matter under submission on October 27, 2009.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

With respect to case no. 02-O-13697, respondent was suspended from the practice of law from September 1, 2001 to October 5, 2001, for failing to comply with his Minimum Continuing Legal Education requirements. While suspended, respondent met with a prospective client. At the meeting, respondent gave the prospective client legal advice and agreed to represent the client for a \$4,000 flat fee. A few days later, the client paid respondent the \$4,000. After his suspension was terminated, respondent signed a substitution of attorney form in the client's matter and filed it with the court. Shortly thereafter, however, respondent ceased communicating with the client and stopped working on the client's case. Several months later, an attorney retained by the client wrote to respondent and requested that respondent refund the \$4,000 to the client. Although respondent received this letter, he did not respond to it, and as of March 30, 2004, respondent had not refunded any of the advanced fees paid by the client. Respondent stipulated that by: (1) holding himself out as being entitled to practice law; (2) accepting legal fees; and (3) otherwise practicing law when he was not an active State Bar member, respondent willfully violated Business and Professions Code sections⁴ 6125 and 6126, and thereby failed to support the laws of California as required by section 6068, subdivision (a). Respondent also stipulated that he: (1) committed acts involving dishonesty in willful violation of section 6106 by misrepresenting to his client that he was entitled to practice law when he was not an active member of the State Bar; and (2) willfully violated rule 3-700(D)(2) of the Rules of Professional

⁴ Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

Conduct of the State Bar of California⁵ by failing to promptly refund any of the \$4,000 advance fee his client paid him, despite not having earned the fee.

Regarding case no. 04-N-10379, the Supreme Court filed an order on November 18, 2003, which, among other things, required respondent to comply with rule 955 of the California Rules of Court⁶ and perform the acts specified in subdivisions (a) and (c) of that rule within thirty (30) and forty (40) days, respectively, after the effective date of the Supreme Court's order. A copy of the order was served on respondent. Rule 955, subdivision (c) required respondent to file with the Clerk of the State Bar Court an affidavit attesting to his compliance with the provisions of rule 955, subdivision (a). Although respondent was to have complied with subdivision (c) of rule 955 by January 27, 2004, he failed to timely do so. Respondent filed the rule 955 compliance affidavit fifteen days late. Respondent stipulated that he willfully violated section 6103 by failing to comply with a court order by failing to timely file the affidavit of compliance with rule 955 as ordered by the Supreme Court.

In aggravation, respondent has been disciplined on two prior occasions. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i) (standard(s)).)

1. On November 18, 2003, the Supreme Court filed an order suspending respondent from the practice of law for two years; staying execution of the suspension; and ordering that respondent be actually suspended for 90 days and until the State Bar Court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California (Rules of Procedure). In that matter, respondent was found culpable in one client matter of willful violations of rule 3-110(A) [failure to competently perform legal services], rule 3-700(A)(2) [improper withdrawal from employment], rule 3-700(D)(1) [failure to promptly

⁵ Unless otherwise indicated, all further references to rule(s) refer to the Rules of Professional Conduct of the State Bar of California.

⁶ Rule 955 has been renumbered rule 9.20.

return client file], rule 3-700(D)(2) [failure to refund unearned fees]; section 6068, subdivision (m) [failure to communicate with client], section 6103 [disobedience of court order], section 6068, subdivision (a) [failure to support laws of State of California],⁷ section 6106 [dishonesty in holding himself out as entitled to practice law], and section 6068, subdivision (i) [failure to cooperate with a State Bar disciplinary investigation]. Respondent's misconduct occurred between September 2001 and February 2002.

2. By order filed on January 12, 2004, the Supreme Court suspended respondent from the practice of law for three years; stayed execution of the suspension; and actually suspended respondent from the practice of law for six months and until he makes restitution to one client and until the State Bar Court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure. In that matter, respondent was found culpable of misconduct in two client matters. Respondent was found culpable in both client matters of violations of rule 3-110(A) [failure to competently perform legal services], 3-700(A)(2) [improper withdrawal from employment], and section 6068, subdivision (m) [failure to adequately communicate with clients]. Additionally, he was found culpable of a violation of rule 3-700(D)(2) [failure to refund unearned fees] in one of the client matters and a violation of rule 3-700(D)(1) [failure to return client files] in the second client matter. He was also found culpable of a failure to cooperate with a State Bar disciplinary investigation in violation of section 6068, subdivision (i). Respondent's misconduct occurred between December 2000 and January 2002. Respondent's misconduct in the current proceeding significantly harmed his client and the administration of justice (standard 1.2(b)(iv)) and evidences multiple acts of wrongdoing (standard 1.2(b)(ii)). There are no mitigating circumstances.

⁷ Respondent's violation of section 6068, subdivision (a) arises from his unauthorized practice of law in violation of sections 6125 and 6126. Although respondent's misconduct occurred at the same time as his current misconduct, it involved a different client.

The parties' stipulation as to facts and conclusions of law, including the court's order approving the stipulation, is attached hereto and hereby incorporated by reference, as if fully set forth herein. The stipulation as to facts and conclusions of law set forth the factual findings, legal conclusions, and aggravating 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.)

Furthermore, at the time respondent engaged in his misconduct, he was suffering from substance abuse issues, and respondent's substance abuse issues directly caused or contributed to the misconduct which forms the basis for this proceeding. Supreme Court case law establishes that an attorney's rehabilitation from alcoholism or other substance abuse problems can be accorded significant weight if it is established that (1) the abuse was addictive in nature; (2) the abuse causally contributed to the misconduct; and (3) the attorney has undergone a meaningful and sustained period of rehabilitation. (*Harford v. State Bar* (1990) 52 Cal.3d 93, 101; *In re Billings* (1990) 50 Cal.3d 358, 367.)

Respondent executed a Participation Agreement with the LAP on January 15, 2004.⁸ The LAP issued a Certificate of One Year Participation in the Lawyer Assistance Program dated June 3, 2009, which reflects that, for at least one year prior to this date, respondent has complied with requirements set forth in his LAP Participation Agreement, and during this time period, respondent has maintained mental health and stability, and has successfully participated in the LAP.

In addition, the LAP issued a Certificate of One Year Participation in the Lawyer Assistance Program – Substance Use, dated September 21, 2009, which reflects that the LAP is not aware of the use of any unauthorized substance by respondent for at least one year prior this date.

Respondent also successfully completed the ADP. Respondent's successful completion of the ADP, which required his successful participation in the LAP, as well as the certificates from the LAP, qualify as clear and convincing evidence that respondent no longer suffers from the mental health and substance abuse 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. (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 the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

⁸ Although respondent executed a LAP Participation Agreement on January 15, 2004, he initially contacted the LAP on September 8, 2003. Respondent's Participation Agreement was amended in 2008.

After reviewing the parties' joint brief on the issue of discipline, which was received by the court on April 1, 2004, and considering the standards and case law cited therein, the parties' stipulation setting forth the facts, conclusions of law, and the aggravating circumstances in this matter, and respondent's declaration regarding the nexus between his mental health and substance abuse issues and his misconduct, the court 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.

In determining the appropriate discipline to recommend in this matter if respondent successfully completes the ADP, the court considered the discipline recommended by the parties, as well as certain standards and case law. In particular, the court considered standards 1.2, 1.3, 1.4, 1.5, 1.6, 1.7(b), 2.3, 2.6 and 2.10, and the case law cited in the parties' joint brief, including *Durbin v. State Bar* (1979) 23 Cal.3d 461, *Athearn v. State Bar* (1982) 32 Cal.3d 38, *Shapiro v. State Bar* (1990) 51 Cal.3d 251, *Bercovich v. State Bar* (1990) 50 Cal.3d 116, *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, *Farnham v. State Bar* (1988) 47 Cal.3d 429, and *Morgan v. State Bar* (1990) 51 Cal.3d 598.

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 in July 2004, and respondent's period of participation in the ADP commenced on August 27, 2004.

Thereafter, respondent successfully participated in the ADP and, as discussed earlier, in June 2009, the court found that respondent has successfully completed the ADP. Accordingly, the court will recommend to the Supreme Court the imposition of the discipline set forth in the

court's Decision Re Alternative Recommendations if respondent successfully completed the ADP.

RECOMMENDED DISCIPLINE

IT IS HEREBY RECOMMENDED that respondent **RICHARD DAVID COMESS, State Bar Number 198665**, be suspended from the practice of law in California for one (1) year, that execution of that period of suspension be stayed, and that he be placed on probation for a period of three (3) years subject to the following conditions:

1. Respondent Richard David Comess is suspended from the practice of law for a minimum of the first 60 days of probation⁹ (with credit given for the period of inactive enrollment pursuant to Business and Professions Code section 6233 which commenced on October 3, 2008 and ended on January 28, 2009), and he will remain suspended until the following requirements are satisfied:
 - i. Respondent must provide satisfactory proof to the Office of Probation that he has made restitution to Terry Rusheen in the amount of \$4,000, plus interest of ten percent (10%) per annum from October 1, 2001. If the Client Security Fund (CSF) has reimbursed Rusheen for all or any portion of the above-referenced \$4,000, respondent must remain actually suspended from the practice of law until he makes restitution to CSF of the amount paid, plus applicable interest and costs, and until he provides satisfactory proof of such payment to the Office of Probation.
 - ii. If respondent remains suspended for two years or more as a result of not satisfying the preceding condition, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

⁹ The probation period and these probation conditions will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

- iii. If Richard David Comess remains suspended for 90 days or more, he must also comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of this order. Failure to do so may result in disbarment or suspension.
2. Respondent Richard David Comess must also comply with the following additional conditions of probation:
- a. During the probation period, respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California;
 - b. Within ten (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 Office of Probation and to the Membership Records Office of the State Bar;
 - c. 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 LAP to provide the Office of Probation and this court with information regarding the terms and conditions of respondent's participation in the LAP and his compliance with LAP requirements. Revocation of the written waiver for release of LAP information is a violation of this condition;
 - d. Respondent must submit written quarterly reports to the 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 respondent 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 thirty (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 twenty (20) calendar days before the last day of the period of probation and no later than the last day of that period;
 - e. Subject to the assertion of applicable privileges, respondent must answer fully, promptly and truthfully, all inquiries of the Office of Probation which are directed to him personally or in writing relating to whether respondent is complying or has complied with the conditions of his probation; and

- f. Within one (1) year of the effective date of the Supreme Court's final disciplinary order in this matter, respondent must provide the 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.
3. At the expiration of the period of probation, if Richard David Comess has complied with all conditions of probation, the one (1) year period of stayed suspension will be satisfied and that suspension will be terminated.

It is also recommended that Richard David Comess take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court's disciplinary order in this matter, or during the period of his suspension, whichever is longer and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

COSTS

It is recommended 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 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 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: March _____, 2011

RICHARD A. HONN
Judge of the State Bar Court