

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

In the Matter of)	Case No. 03-O-00515-RMT
DAVID J. SCHIERING,)	DECISION AND ORDER FILING AND
Member No. 175510,)	SEALING CERTAIN DOCUMENTS
<u>A Member of the State Bar.</u>)	

This disciplinary proceeding arises from acts of moral turpitude by respondent David J. Schiering (“respondent”) in knowingly making misrepresentations to a prospective employer and others regarding his prior work experience.

Respondent reached a stipulation as to facts and conclusions of law with the Office of the Chief Trial Counsel of the State Bar of California (“State Bar”). Thereafter, respondent executed a Contract and Waiver for Participation in the State Bar Court Alternative Discipline Program (“ADP”),¹ and the court accepted respondent as a participant in the ADP. (Rules Proc. of State Bar, rules 800-807.)

As set forth below in greater detail, respondent has successfully completed the ADP. Accordingly, pursuant to rule 803 of the Rules of Procedure of the State Bar of California (“Rules of Procedure”), the court hereby recommends that respondent be publicly reprovved with conditions in this matter.

SIGNIFICANT PROCEDURAL HISTORY

On March 7, 2003, respondent contacted the State Bar’s Lawyer Assistance Program (“LAP”)

¹The ADP was formerly known as the State Bar Court’s Pilot Program for Respondents with Substance Abuse or Mental Health Issues (“Pilot Program”). The court will use ADP throughout this decision to refer to this program.

for assistance with his mental health issues.

On June 4, 2003, the State Bar filed a Notice of Disciplinary Charges (“NDC”) against respondent in the above-entitled matter.

Respondent filed a response to the NDC on June 26, 2003.

On June 26, 2003, respondent filed a request that this matter be referred to the ADP, and on June 27, 2003, respondent’s request was granted.

On October 20, 2003, respondent, his counsel and Deputy Trial Counsel Brooke A. Schafer executed a Stipulation Re Facts and Conclusions of Law.

The State Bar’s brief regarding the issue of discipline in this matter was received by the court on October 23, 2003.

On November 16, 2003, respondent executed a LAP Participation Agreement.

Respondent submitted a modified version of his Early Neutral Evaluation Conference Statement as a brief on the issue of discipline on November 24, 2003.² Thereafter, on December 9, 2003, respondent submitted a Supplemental Brief Re Level of Discipline.

On February 17, 2004, respondent and his counsel executed a Contract and Waiver for Participation in the State Bar Court ADP.

On March 12, 2004, respondent submitted a Nexus Statement establishing a nexus between his mental health issues and his misconduct in this matter.

The Stipulation Re Facts and Conclusions of Law was approved by the court on April 8, 2004, and respondent was accepted into the ADP.

On April 21, 2004, the parties’ Stipulation Re Facts and Conclusions of Law was lodged with the court. On that same date, the court’s Decision Re Alternative Recommendations for Degree of Discipline and the Contract and Waiver for Participation in the State Bar Court ADP were lodged in this matter.

²Due to a temporary problem with her computer system, respondent’s counsel was unable to produce a brief on the issue of discipline in a normal format and was compelled, instead, to modify and re-submit the Early Neutral Evaluation Conference Statement that had been prepared in June 2003.

The LAP issued a Certificate of One Year Participation in the LAP dated March 13, 2007, certifying that respondent has complied with the requirements set forth in his LAP Participation Agreement/Plan for at least one year prior to March 13, 2007, and that during this time period, respondent has maintained mental health and stability and has participated successfully in the ADP.

On April 18, 2007, the court filed an order noting that respondent has successfully completed the ADP and setting forth that the court would prepare its decision and recommendation regarding the lower level of discipline. On that same date, the parties' Stipulation Re Facts and Conclusions of Law was filed in this matter.

FACTS AND CONCLUSIONS OF LAW

The Stipulation Re Facts and Conclusions of Law, approved by the court on April 8, 2004, is incorporated by reference as if set forth fully herein.

Jurisdiction

Respondent was admitted to the practice of law in California on December 12, 1994, and has been a member of the State Bar of California at all times since that date.

Case No. 03-O-00515

On October 19, 2002, respondent mailed a letter to a prospective employer, a litigation firm, inquiring about a position as an associate with the firm, working primarily in construction litigation. Among other things, respondent's letter stated that (1) he had "significant construction defect litigation experience, including such skills as research, drafting law/motion, discovery and sitting second chair at trial"; (2) he had a "well rounded litigation background, acquired at both a large law firm and as in-house counsel"; and (3) he had "managed cases in such diverse areas as contract disputes, complex business litigation, employment law, business law, wills/trusts/probate and products liability." Respondent knew that these representations were not true when he sent the letter to the prospective employer.

Respondent attached his resume to the October 19, 2002, letter to the prospective employer. The resume claimed, among other things, that respondent had worked as an attorney with a large, named Los Angeles law firm between 1995 and 1998 and that, while with this law firm, he had "responsibility for a caseload, which focused on complex business litigation and construction defect

litigation, including research, writing, depositions, discovery, law/motion, arbitration and trial preparation.” Respondent knew when he made these representations that they were not true.

In fact, respondent had never been employed by the large Los Angeles law firm, which dissolved in 1996. Moreover, respondent had never been employed by any large law firm in any capacity and had never obtained the legal experience that he had claimed.

In October 2002, respondent also sent letters and resumes regarding legal positions to four to six other prospective employers. In each of these letters and resumes, respondent made similar misrepresentations regarding his work experience.

On October 24, 2002, respondent made additional misrepresentations to the prospective employer. On that date, respondent e-mailed a message to the prospective employer in which he provided references. One of these references was a former supervisor of respondent, whom he described as a “retired partner” of the large Los Angeles law firm. Respondent sent this e-mail in an effort to procure an interview with the prospective employer. In reality, however, respondent’s former supervisor had never been employed by the large Los Angeles law firm in any capacity and had never been a licensed attorney in California. Instead, this individual was one of respondent’s supervisors from a prior place of employment several years earlier.

After some inquiries by the prospective employer, respondent abandoned his efforts to obtain a position with that firm.

Respondent admitted, and the court so finds, that by knowingly making misrepresentations to the prospective employer and others regarding his prior work experience in letters, resumes and at least one e-mail message, he committed acts of moral turpitude, dishonesty or corruption in violation of Business and Professions Code section 6106.³

³The parties have requested, in the interests of justice, that the court dismiss Count Two and Count Three of the NDC in this proceeding. Each of these counts allege violations of Business and Professions Code section 6106. The court grants the parties’ request for dismissal of these charges.

AGGRAVATION AND MITIGATION

Aggravation

The court finds that respondent engaged in multiple acts of misconduct since he made misrepresentations to the prospective employer in both a letter and resume on October 19, 2002, and in a subsequent e-mail on October 24, 2002. Additionally, he made similar misrepresentations to four to six other prospective employers in October 2002. (Standard 1.2(b)(ii), Standards for Attorney Sanctions for Professional Misconduct (“standard(s)”.)

Mitigation

Respondent has no prior record of discipline since his admission to practice in December 1994. However, at the time of his misconduct in October 2002, respondent had been admitted to practice for less than eight years. Such a relatively short period of practice without prior discipline is entitled to only slight weight as a mitigating circumstance.⁴ (Standard 1.2(e)(i); *In the Matter of Aguiluz* (Review Dept 1992) 2 Cal. State Bar Ct. Rptr. 32, 44; *Kelly v. State Bar* (1988) 45 Cal.3d 649, 658.)

The victims of respondent’s misconduct neither suffered any harm nor relied on his misrepresentations (standard 1.2(e)(iii)), and respondent was candid and cooperative with the State Bar during its investigation of his misconduct (Standard 1.2(e)(v).)⁵

At the time of his misconduct, respondent was suffering from severe financial distress, which caused him stress and anxiety, as a result of the fact that he had been unemployed for several months and had a mortgage and bills to pay. (*In re Naney* (1990) 51 Cal.3 186, 196; *Amante v. State Bar* (1990) 50 Cal.3d 247, 254.)

Respondent submitted letters from several individuals who have attested to respondent’s

⁴Respondent voluntarily enrolled as an inactive member of the State Bar effective January 1, 1995, less than one month after his admission to practice. He remained on inactive status until February 27, 2001. Thus, at the time of his misconduct in this proceeding, respondent had only been entitled to practice law for a period of approximately 18 months.

⁵The parties have stipulated that respondent voluntarily enrolled himself as an inactive member of the State Bar, effective January 1, 2003. He has remained on voluntary inactive status since that date.

good character. These individuals include a former law school professor, a colleague with whom respondent worked for more than 10 years, a fellow accountant who had known respondent for more than five years, a former law school classmate, and respondent's dentist, who has known respondent professionally for more than 15 years. (Standard 1.2(e)(vi).)

Finally, respondent was suffering from mental health issues at the time of his misconduct which expert testimony would establish was directly responsible for the misconduct in this matter, and respondent has established through clear and convincing evidence that he no longer suffers from such difficulties. (Standard 1.2(e)(iv).)

Respondent's Nexus Statement establishes that, at the time of his misconduct, respondent was suffering from mental health issues. In addition, respondent's Nexus Statement and the stipulated facts also establish a causal connection between respondent's mental health issues and the misconduct found in this disciplinary proceeding. The court therefore finds that respondent has 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.

Furthermore, respondent sought assistance from the LAP in March 2003 to assist him with his mental health issues. Respondent signed an agreement to be evaluated by the LAP and complied with LAP's conditions and request for evaluation. On November 16, 2003, respondent entered into a long-term participation agreement with the LAP. Since entering into the LAP, respondent has maintained compliance with the terms of his participation agreement. Pursuant to rule 804 of the Rules of Procedure, in March 2007, the court received from the LAP a Certificate of One Year Participation in the LAP dated March 13, 2007, certifying that respondent has complied with the requirements set forth in his LAP Participation Agreement/Plan for at least one year prior to March 13, 2007, and that during this time period, respondent has maintained mental health and stability and has participated successfully in the ADP.

In addition to participating in the LAP, respondent was accepted into the court's ADP effective April 8, 2004. 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. Since his acceptance into the ADP, respondent has complied with all the terms and

conditions of the program. Accordingly, based upon respondent's dedication to his mental health stability and to the ADP and the LAP, the court found in April 2007 that respondent had successfully completed the ADP.

Respondent is entitled to significant mitigating credit for his participation in the LAP and his successful completion of the court's ADP.

DISCUSSION

The purpose of State Bar attorney disciplinary proceedings is not to punish the attorney but, rather, to protect the public and the courts, 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.)

Standard 2.3 of the Standards for Attorney Sanctions for Professional Misconduct provides that culpability of a member of an act of moral turpitude, fraud or intentional dishonesty toward a court, client or another person must result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the misconduct and the degree to which it relates to the member's acts within the practice of law.

_____ Standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

_____ The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id.* at p. 251.)

_____ In its discipline brief, the State Bar cites the State Bar Court Review Department's opinion in *In re Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, as being on point in terms of an analogous factual situation to respondent's misconduct in the current proceeding. In *Mitchell*, the attorney was found culpable of misrepresenting his educational background on his resume, which was sent to various law firms, one of which granted him an interview. The respondent attorney did not correct or attempt to correct this misrepresentation during the interview. The attorney's

misconduct was aggravated by the fact that he had sent false resumes to two other law firms and, additionally, had made false statements in response to interrogatories propounded by the State Bar in the disciplinary proceeding. The Review Department recommended that the attorney be suspended for a period of one year, that execution of the suspension be stayed, and that he be placed on probation for one year upon conditions which included his actual suspension for 60 days.

In its brief on the issue of discipline, the State Bar recommended that if respondent successfully completes the ADP, he should be publicly reprovved and should be required to comply with specified conditions attached to his reprovval for a period of two years.

In his Supplemental Brief Re Level of Discipline, respondent argued that, in very significant ways, the facts presented in this proceeding are not comparable with the facts of *In re Mitchell*. Respondent asserts that (a) the misconduct in *Mitchell* continued for a period of approximately three years, while respondent's misconduct in the current proceeding lasted only about one month; (b) the respondent in *Mitchell* actually obtained employment at two law firms, while respondent did not even obtain an interview at the firms to whom he sent the resumes; (c) the respondent in *Mitchell* submitted false statements to the State Bar in response to interrogatories in the disciplinary proceeding; and (d) the respondent in *Mitchell* demonstrated a lack of understanding of the inherent dishonesty of his conduct, whereas respondent in the current proceeding has admitted his wrongdoing and expressed remorse for his conduct. Additionally, respondent argues that three of the four out-of-state cases cited by the Review Department in its opinion in *Mitchell* imposed only a "censure" with no period of actual suspension.

Respondent argues that, even without reference to the ADP, the appropriate discipline in this matter is a stayed suspension of one year, with two years' probation and no period of actual suspension. Respondent further argues that, if he successfully completes the ADP, this proceeding should be dismissed without the imposition of discipline or with an agreement in lieu of discipline. Respondent argues that, at most, his misconduct warrants a private reprovval.

At the time respondent engaged in the misconduct for which he has been found culpable, respondent was suffering from mental health disorders, and respondent's mental health disorders 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, supra*, 51 Cal.3d at p. 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 compliance with all terms and conditions set forth by the LAP, as well as the Certificate of One Year Participation in the Lawyer Assistance Program from the LAP pursuant to rule 804 of the Rules of Procedure, qualify as clear and convincing evidence that he no longer suffers from the mental health disorders which led to his misconduct.

Thus, although the misconduct found by the Review Department in *In re Mitchell, supra*, is substantially similar to respondent's misconduct in the current proceeding, the court agrees that the misconduct in *Mitchell* occurred over a longer period of time, and that the respondent in *Mitchell* did not appreciate the gravity of his misconduct. Furthermore, respondent has been participating in the LAP since 2003 and has successfully completed the ADP. Accordingly, it is appropriate to recommend discipline less than that warranted by the standards in this matter. Nevertheless, in light of the inherent dishonesty of respondent's misconduct, the court concludes that it would be inappropriate to simply dismiss this proceeding, even with an agreement in lieu of discipline. Therefore, the court hereby orders the following discipline.

DISCIPLINE ORDER

Accordingly, it is ordered that respondent **DAVID J. SCHIERING** is publicly reprovved. Pursuant to the provisions of rule 270(a) of the Rules of Procedure, the public reprovval will be effective when this decision becomes final. Furthermore, pursuant to rule 9.19(a) of the California

Rules of Court and rule 271 of the Rules of Procedure, the court finds that the interests of respondent and the protection of the public will be served by the following specified conditions being attached to the public reproof imposed in this matter. Failure to comply with any condition attached to this reproof may constitute cause for a separate proceeding for wilful breach of rule 1-110 of the Rules of Professional Conduct of the State Bar of California. Respondent is hereby ordered to comply with the following conditions attached to his public reproof for a period of two years following the effective date of this Order:

1. 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 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;
3. 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 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 condition;
4. 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 during which these 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 conditions attached to this public reproof 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 during which these conditions are in effect and no later than the last day of said period;

5. 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 attached to this public reproof;
6. Within one year after the effective date of this Order, 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;
7. Within one year after the effective date of this Order, respondent must take and pass the Multistate Professional Responsibility Examination (“MPRE”) administered by the National Conference of Bar Examiners and must provide satisfactory proof of his passage of the MPRE to the Office of Probation within that one-year period;
8. The conditions attached to this public reproof will commence on the date this Order becomes final.

COSTS

_____ 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.

ORDER FILING AND SEALING CERTAIN DOCUMENTS

The court orders the clerk to file this Decision and Order Filing and Sealing Certain documents. Thereafter, pursuant to rule 806(c) of the Rules of Procedure, all other documents not previously filed in this matter will be sealed pursuant to rule 23 of the Rules of Procedure.

IT IS SO ORDERED.

Dated: June 25, 2007

RICHARD A. PLATEL
Judge of the State Bar Court