

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

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| In the Matter of |) | Case Nos.: 04-O-10402-RAP (04-O-13053-RAP; |
| |) | 04-O-15487-RAP) |
| BRUCE DUANE CARROLL, |) | |
| |) | |
| Member No. 108725, |) | DECISION AND ORDER SEALING |
| |) | CERTAIN DOCUMENTS |
| <u>A Member of the State Bar.</u> |) | |

I. INTRODUCTION

On December 8, 2005, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed the notice of disciplinary charges (NDC) against respondent **BRUCE DUANE CARROLL**¹ in this proceeding. Respondent filed his response to the NDC on February 8, 2006.

At a status conference on February 2, 2006, respondent informed the court that he had contacted the State Bar of California's Lawyer Assistance Program (LAP) for help with a mental health issue. In addition, respondent asked to participate in the State Bar Court's Alternative Discipline Program (ADP). Accordingly, the court referred respondent to the undersigned judge for evaluation for participation in the ADP.

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¹ Respondent was admitted to the practice of law in this state on June 3, 1983, and has been a member of the State Bar of California since that time.

On January 3, 2006, respondent signed a Participation Plan with the LAP. On April 18, 2006, the court received a declaration from respondent regarding the nexus between his mental health issue and his misconduct. And, on April 19, 2006, the court received a report from the medical doctor who is treating respondent's mental health issue.

By about October 2006, the parties submitted a Stipulation Regarding Facts and Conclusions of Law (Stipulation) to the court. (Rules Proc. of State Bar, rules 132, 802(a), 803(a).) On October 3, 2006, the court signed an order approving the Stipulation and that order and the Stipulation were lodged together as a single document.

Also, on October 3, 2006, the court signed and lodged a Confidential Statement of Alternative Dispositions and Orders (Confidential Statement). In the Confidential Statement, the court found sufficient evidence of a nexus between (1) respondent's mental health issue and (2) the misconduct to which respondent stipulated in this proceeding. In addition, the court set forth, in the Confidential Statement, the levels of discipline that it will recommend to the Supreme Court (1) if respondent successfully completes the ADP and (2) if respondent fails to successfully complete the ADP.

Finally, on October 3, 2006, a Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program (Contract) signed by respondent was also lodged.

On October 5, 2006, the court filed an order accepting respondent into the ADP with a start date of October 3, 2006. Thereafter, respondent participated in the LAP and the ADP. And, on January 7, 2010, the court filed an order in which it found that respondent had successfully completed the ADP and ordered that the Stipulation and the order approving it be filed on January 7, 2010. Finally, on January 7, 2010, the court took the matter under submission for decision.

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II. FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MISCONDUCT

The court adopts the facts and conclusions of law that are set forth in the Stipulation as its findings of fact and conclusions of law.² Briefly, those facts and conclusions establish the following misconduct and aggravation. In addition, the record in this proceeding establishes the following mitigation.

A. Case Number 04-O-10402-RAP – The Hannah Client Matter

In January 2001, Mr. R. Hannah employed respondent on a contingency basis to represent him in a civil action against his former employer Teledyne Industries, Inc. In October 2001, respondent filed, in the in Los Angeles County Superior Court, a civil complaint alleging race discrimination and disability discrimination against Teledyne for Hannah. In September 2003, the superior court granted summary judgment against Hannah.

Count 1 – Failure to Perform

Respondent recklessly and repeatedly failed to perform legal services with competence in willful violation of Rules of Professional Conduct of the State Bar, rule 3-110(A)³ because he failed to undertake discovery, appear at two depositions in September 2003, respond to discovery, appear at the summary judgment hearing, which resulted in a summary judgment against Hannah, and inform Hannah of the judgment entered against him.

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² The Stipulation, including the court's order approving the Stipulation, is attached hereto and incorporated by reference as if it were fully set forth herein.

³ All further references to rules are to these Rules of Professional Conduct of the State Bar of California.

Count 2 – Failure to Communicate

Respondent failed to respond to Hannah's reasonable status inquiries in willful violation of Business and Professions Code section 6068, subdivision (m),⁴ because respondent failed to respond to Hannah's two August 2002 letters requesting a status report on his lawsuit.

Count 3 – Failure to Communicate

Respondent failed to keep Hannah reasonably informed of significant developments in Hannah's lawsuit in willful violation of section 6068, subdivision (m), because respondent failed to notify Hannah of his multiple failures to perform (e.g., that respondent failed to appear at two depositions and that the superior court entered summary judgment against him and awarded Teledyne its costs against him).

Count 4 – Failure to Cooperate

Respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i) because he failed to promptly respond to the multiple letters from State Bar investigators regarding the Hannah client matter.

B. Case Number 04-O-13053-RAP -- The Papaleo Client Matter

In August 2002, Mr. W. Papaleo employed respondent to represent him on a contingency fee basis in an employment discrimination case against his former employer Quest Software, Inc.

In March 2003, respondent filed a civil complaint against Quest for Papaleo in the Orange County Superior Court. Then, in June 2003, Quest removed the Papaleo's lawsuit to the United States District Court for the Central District of California. In October 2003, respondent and defense counsel Dennis Childs filed a required joint status report with the federal district court. Respondent thereafter, however, effectively withdrew from employment by failing to perform any further substantive legal services for Papaleo.

⁴ All further statutory references are to the Business and Professions Code.

In about March 2004, the federal district court issued an order to show cause (OSC) directing Papaleo to show cause why his lawsuit should not be dismissed for lack of prosecution and for Papaleo's failing to file an opposition to Quest's February 2004 motion to dismiss and to appear at the March 2004 hearing on Quest's motion. Respondent failed to respond to the OSC and failed to appear at the hearing on the OSC. Accordingly, the federal district court dismissed Papaleo's lawsuit.

Count 5 – Failing to Perform

Respondent recklessly and repeatedly, if not intentionally, failed to perform legal services with competence in willful violation of rule 3-110(A) because he failed to make court appearances, failed to comply with Federal Rule 26, failed to provide discovery, failed to oppose Quest's motion to dismiss, and failed to file a response to the OSC, and otherwise failed to take the necessary steps to properly prosecute Papaleo's lawsuit against Quest.

Count 6 – Improper Withdrawal

Respondent improperly withdrew from employment in the Papaleo matter in willful violation of rule 3-700(A)(2) because respondent did not give Papaleo due notice of his effective withdrawal from employment.

Count 7 – Failure to Release Client File

In accordance with the parties' request in the Stipulation, Count 7 is dismissed with prejudice in the interest of justice.

Count 8 – Failure to Communicate

Respondent willfully violated section 6068, subdivision (m) because he failed to return Papaleo's numerous telephone calls.

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Count 9 – Failure to Communicate

Respondent failed to keep Papaleo informed of significant developments in willful violation of section 6068, subdivision (m) because respondent failed tell Papaleo that respondent did not file an opposition to Quest's motion to dismiss, appear at the hearing on Quest's motion, comply with Federal Rule 26, provide discovery responses, file a response to the OSC, attend the hearing on the OSC, or inform Papaleo that his case was dismissed.

Count 10 – Failure to Cooperate

Respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i) because he failed to promptly respond to the multiple letters from State Bar investigators regarding the Papaleo client matter.

C. Case Number 04-0-15487-RAP -- The Nakano Client Matter

In February 2003, Mr. Y. Nakano employed respondent to represent him in a criminal matter pending in the Los Angeles Superior Court and to pursue a civil action against the California Commerce Club, Inc. (Commerce Club) based on the circumstances leading to his arrest.

In March 2003, respondent appeared for Nakano at arraignment in the criminal matter. Respondent continued to represent Nakano in the criminal matter throughout 2003, but thereafter, respondent effectively withdrew from employment in the criminal matter because, after 2003, respondent did not take any further action on behalf of Nakano in that matter. Respondent never told Nakano that he was withdrawing from employment in the criminal matter.

Even though respondent had actual knowledge that the pretrial hearing in the criminal matter was set for January 7, 2004, respondent failed to appear for the pretrial hearing on January 7. As a result, a bench warrant was issued for Nakano's arrest. Respondent, however, never told Nakano that a bench warrant had been issued for his arrest.

In August 2004, Nakano appeared in court without counsel and explained to the court that he was unaware of the January 7, 2004 pretrial hearing or of the issuance of the bench warrant. The court recalled the bench warrant, and Nakano had to obtain new counsel to defend him in the criminal matter.

In January 2004, respondent filed a civil complaint against the Commerce Club for Nakano in the Los Angeles Superior Court. Respondent thereafter effectively withdrew from employment by failing to perform any further legal service for Nakano in the civil action.

On two days in May 2004, respondent failed to appear at two duly-noticed depositions in the civil action. Respondent never notified Nakano that his deposition had been set, and made no arrangements to attend Nakano's deposition.

In June 2004, the superior court granted the Commerce Club's *unopposed* motions to compel Nakano to respond to various discovery requests and for sanctions. Respondent did not appear at the hearing on those motions. On June 17, 2004, the superior court imposed sanctions totaling \$3,000 on Nakano and respondent. The sanctions were to have been paid to the Commerce Club within 30 days. Respondent never told Nakano about the discovery requests, the motions, or the \$3,000 in sanctions.

On July 1, 2004, the superior court granted the Commerce Club's *unopposed* motion to compel additional discovery responses from Nakano and imposed additional sanctions totaling \$1,151 on Nakano and respondent. Respondent did not attend the hearing on that motion. Respondent never told Nakano about the additional discovery, the motion to compel, or the \$1,151 in sanctions.

To date, respondent has failed to comply with the superior court's June 17, 2004 and July 1, 2004 sanction orders.

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Moreover, on September 20, 2004, the superior court granted the Commerce Club's *unopposed* motions for terminating sanctions and dismissed the civil action.

Count 11 – Failure to Perform

Respondent recklessly and repeatedly, if not intentionally, failed to perform legal services with competence in the criminal matter in willful violation of rule 3-110(A) because respondent failed to attend the January 7, 2004 pretrial hearing and then failed to perform any further legal service for Nakano in the criminal matter.

Count 12 – Improper Withdrawal

Respondent improperly withdrew from employment in the criminal matter in willful violation of rule 3-700(A)(2) because respondent did not give Nakano due notice of his effective withdrawal from employment.

Count 13 – Failure to Communicate

Respondent failed to keep Nakano informed of significant developments in the criminal matter in willful violation of section 6068, subdivision (m) because respondent never told Nakano about the bench warrant.

Count 14 – Failure to Perform

Respondent recklessly and repeatedly, if not intentionally, failed to perform legal services with competence in the civil action in willful violation of rule 3-110(A) because he failed to respond to discovery for Nakano, attend depositions, attend hearings, and oppose the discovery motions and the motions for terminating sanctions.

Count 15 – Improper Withdrawal

Respondent improperly withdrew from employment in the civil action in willful violation of rule 3-700(A)(2) because respondent did not give Nakano due notice of his effective withdrawal from employment.

Count 16 – Failure to Communicate

Respondent failed to keep Nakano informed of significant developments in the civil action in willful violation of section 6068, subdivision (m) because respondent never told Nakano about the sanctions, respondent's failure to respond to discovery, the discovery requests, the discovery motions, the motions for terminating sanctions, and the dismissal of the civil action.

Count 17 – Failure to Obey Court Order

Respondent willfully violated his duty, under section 6103, to obey court orders requiring him to do acts connected with or in the course of his profession, which he ought in good faith to do when he failed to pay the \$3,000 sanctions in accordance with the superior court's June 17, 2004 sanctions order and when he failed to pay the additional sanctions totaling \$1,151 in accordance with the superior court's July 1, 2004 order.

Count 18 – Failure to Cooperate

Respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i) because he failed to promptly respond to the multiple letters from State Bar investigators regarding the Nakano client matter.

III. AGGRAVATION AND MITIGATION

A. Aggravation

In aggravation, Respondent's misconduct in the present proceeding evidences multiple acts of wrongdoing. (Rules Proc. of State Bar, tit. IV, Stds. For Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(ii).)⁵

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⁵ All further references to standards are to this source.

B. Mitigation

Respondent has no prior record of discipline in 20-plus years he has been a member of the State Bar of California. (Std. 1.2(e)(i).)

Respondent has been cooperative with the State Bar during the pendency of this State Bar Court proceeding. (Std. 1.2(e)(v).)

At the time respondent engaged in the misconduct found in the present proceeding, he was suffering from a mental health issue. Respondent's mental health issue directly caused or contributed to the foregoing misconduct. Case law holds that extreme emotional difficulties are a mitigating factor where expert testimony establishes that the emotional difficulties were directly responsible for the misconduct, provided that the attorney also establishes, by clear and convincing evidence, that he or she no longer suffers from the 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.) Moreover, the Supreme Court has held that, absent a finding of rehabilitation, emotional difficulties are not a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney, supra*, 51 Cal.3d at p. 197.)

As noted *ante*, on January 7, 2010, the court filed an order in which it found that respondent had successfully completed the ADP. Respondent's successful completion of the ADP required his successful participation in the LAP. Moreover, this court was presented with satisfactory evidence from a mental health professional as to respondent's mental health stability. In short, the record contains clear and convincing evidence that respondent no longer suffers from the mental health issue that led to his misconduct. Accordingly, respondent is entitled to significant mitigation for his successful completion of the ADP. (Std. 1.2(e)(iv).)

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IV. DECISION

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. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

After reviewing and considering (1) State Bar's briefs on the issue of discipline,⁶ (2) the standards, (3) the Stipulation (which sets forth the facts, conclusions of law, and aggravating and mitigating factors), and (4) respondent's declaration regarding the nexus between his mental health issue and his misconduct, the court signed and lodged the Confidential Statement, which advised the parties of the discipline that the court would recommend to the Supreme Court if respondent successfully completed the ADP and if respondent failed to successfully complete the ADP. In determining the appropriate discipline to recommend if respondent successfully completed the ADP, the court considered the discipline recommended by the State Bar, the standards, and case law. In particular, the court considered standards 1.2, 1.3, 1.4, 1.5, 1.6, 2.4, and 2.6 and the case law cited in the State Bar's brief on discipline, including *King v. State Bar* (1990) 52 Cal.3d 307, *Gadda v. State Bar* (1990) 50 Cal.3d 344, and *Matthew v. State Bar* (1989) 49 Cal.3d 784.

After agreeing to the discipline which the court would recommend to the Supreme Court if respondent successfully completed or if he failed to successfully complete the ADP, respondent executed the Contract to participate in the ADP and began his period of participation in the ADP.

Respondent thereafter participated in and successfully completed the ADP. Accordingly, the court will recommend to the Supreme Court the imposition of the discipline set forth in the

⁶ Respondent did not file a brief on discipline. Instead, he agreed with the State Bar's recommended levels of discipline.

court's Confidential Statement if respondent successfully completed the ADP, which includes probation conditions requiring that respondent obey the two sanctions orders in the Nakano client matter by paying the sanctions with interest (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 869) within the first 90 days of probation.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent **BRUCE DUANE CARROLL**, State Bar Number 108725, be suspended from the practice of law in California for one year, that execution of that period of suspension be stayed, and that he be placed on probation for a period of two years subject to the following conditions:

1. Carroll 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, Carroll must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California (Office of Probation), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.
3. Within 30 days after the effective date of discipline, Carroll must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss these terms and conditions of probation. At the direction of the Office of Probation, Carroll must meet with the probation deputy either in person or by telephone. Carroll must promptly meet with the probation deputy as directed and requested.
4. Carroll must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10. Under penalty of perjury, Carroll 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. Carroll must also state whether there are any proceedings pending against him in the State Bar Court and, if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the period of probation and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, Carroll must answer fully, promptly and truthfully, any inquiries of the Office of Probation which are directed to him personally

or in writing relating to whether he is complying or has complied with the probation conditions.

6. Within one year of the effective date of the discipline herein, Carroll must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School and of his passage of the test given at the end of that session.
7. Carroll must comply with all provisions and conditions of his Participation Agreement/Plan with the Lawyer Assistance Program (LAP) and must provide the Office of Probation with certification of completion of the LAP. Carroll must immediately report any non-compliance with any provision(s) or condition(s) of his Participation Agreement/Plan to the Office of Probation. Carroll 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 his 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. Carroll will be relieved of this condition after he provides to the Office of Probation satisfactory certification of completion of the LAP.
8. If he has not already done so, Carroll must obey the Los Angeles Superior Court's June 17, 2004 sanctions order in case number 3EL01435 by paying, within 90 days after the effective date of the discipline herein, the \$3,000 in sanctions plus 10 percent interest thereon from July 17, 2004, until paid to the California Commerce Club, Inc. or to its successor-in-interest, if any (or to Yoshio Nakano to the extent that he has paid any portion of the \$3,000 sanctions to the California Commerce Club, Inc. or to the Client Security Fund to the extent of any payment from the fund to the California Commerce Club, Inc. plus interest and costs in accordance with Business and Professions Code section 6140.5) and by providing satisfactory proof of such payment or payments to the State Bar's Office of Probation within the same 90-day period. To the extent the Client Security Fund has paid or pays only principal amounts to the California Commerce Club, Inc., Carroll must still pay the California Commerce Club, Inc. the 10 percent interest set forth *ante*. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d). To the extent that Carroll pays any portion of the foregoing amounts before the effective date of the discipline herein, Carroll will be given credit for such payments provided satisfactory proof of such is or has been provided to the Office of Probation.
9. If he has not already done so, Carroll must obey the Los Angeles Superior Court's July 1, 2004 sanctions order in case number 3EL01435 by paying, within 90 days after the effective date of the discipline herein, the \$1,151.30 in sanctions plus 10 percent interest thereon from July 31, 2004, until paid to the California Commerce Club, Inc. or to its successor-in-interest, if any (or to Yoshio Nakano to the extent that he has paid any portion of the \$1,151.30 sanctions to the California Commerce Club, Inc. or to the Client Security Fund to the extent of any payment from the fund to the California Commerce Club, Inc. plus interest and costs in accordance with Business and Professions Code section 6140.5) and by providing satisfactory proof of such payment or payments to the State Bar's Office of Probation within the same 90-day period. To the extent the Client Security Fund has paid or pays only principal amounts to the California Commerce Club,

Inc., Carroll must still pay the California Commerce Club, Inc the 10 percent interest set forth *ante*. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d). To the extent that Carroll pays any portion of the foregoing amounts before the effective date of the discipline herein, Carroll will be given credit for such payments provided satisfactory proof of such is or has been provided to the Office of Probation.

10. The two-year probation period will begin on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.) And, at the expiration of the period of probation, if Carroll has complied with all the terms of probation, the order of the Supreme Court suspending him from the practice of law for one year will be satisfied and that suspension will be terminated.

VI. PROFESSIONAL RESPONSIBILITY EXAMINATION

It is further recommended that Bruce Duane Carroll be required to 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 and to 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).)

VII. COSTS

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

VIII. DIRECTION RE PARTIES' STIPULATION AND DECISION & ORDER SEALING CERTAIN DOCUMENTS

The court directs a court case administrator to file the parties' Stipulation Re Facts and Conclusions of Law and 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 their 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 must be given a copy of this order sealing the documents by the person making the disclosure.

IT IS SO ORDERED.

Dated: April 5, 2010.

RICHARD A. PLATEL
Judge of the State Bar Court