



PUBLIC MATTER

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**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO**

In the Matter of)	Case No.: 04-O-12658-PEM
)	
DAMIAN RENE FERNANDEZ,)	DECISION AND ORDER SEALING
)	CERTAIN DOCUMENTS
Member No. 206662,)	
)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this disciplinary proceeding, respondent Damian Rene Fernandez (“respondent”) was accepted for participation in the State Bar Court’s Alternative Discipline Program (“ADP”). As the court has now found that respondent has successfully completed the ADP, the court will recommend to the Supreme Court that respondent 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 two years.

II. PERTINENT PROCEDURAL HISTORY

On February 15, 2006, respondent contacted the State Bar’s Lawyer Assistance Program (“LAP”) to assist him with his mental health issue. Respondent subsequently signed a LAP Participation Plan.

On February 21, 2006, the State Bar of California’s Office of the Chief Trial Counsel (“State Bar”) filed a Notice of Disciplinary Charges (“NDC”) against respondent in case no. 04-

O-12658. Respondent sought to participate in the State Bar Court's ADP. On March 20, 2006, this matter was referred to the ADP.

On April 24, 2006, respondent submitted a declaration to the court, which established a nexus between respondent's mental health issue and the charges in this matter.

The parties entered into a Stipulation Re Facts and Conclusions of Law ("Stipulation") in August 2006. The Stipulation set forth the factual findings, legal conclusions and mitigating and aggravating circumstances involved in case no. 04-O-12658.

Following briefing by the parties, the Honorable Judge JoAnn M. Remke issued a Confidential Statement of Alternative Dispositions and Orders dated October 10, 2006, formally advising the parties of: (1) the discipline which would be recommended to the Supreme Court if respondent successfully completed the ADP; and (2) the discipline which would be recommended if respondent failed to successfully complete or was terminated from the ADP. After agreeing to those alternative dispositions, respondent and his counsel executed the Contract and Waiver for Participation in the State Bar Court's ADP; Judge Remke accepted respondent for participation in the ADP; and respondent's period of participation in the ADP began on October 10, 2006.

Respondent participated successfully in both the LAP and the State Bar Court's ADP. On September 27, 2010, after receiving a Certificate of One Year of Participation in the LAP - Mental Health, the court filed an order finding that respondent has successfully completed the ADP.¹

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties' Stipulation, including the court's order approving the Stipulation, is attached hereto and hereby incorporated by reference, as if fully set forth herein. In this single-client

¹ This order mistakenly noted that the court's recommended discipline would include a three-year, rather than a two-year, period of probation.

matter, respondent stipulated to misappropriating, by gross negligence, at least \$4,322.44 in settlement funds, in willful violation of Business and Professions Code section 6106.

Respondent further stipulated that his willful failure to maintain client funds in a client trust account constituted a violation of rule 4-100(A) of the California Rules of Professional Conduct.

In mitigation, respondent was suffering from severe financial difficulties at the time of the misconduct, was candid and cooperative with the State Bar, and made full restitution to his client.

In addition, respondent 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 - Mental Health, qualify as clear and convincing evidence that respondent no longer suffers from the mental health issue 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, std. 1.2(e)(iv).)

No aggravating circumstances were identified.

IV. DISCUSSION

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

In determining the appropriate alternative discipline recommendations if respondent successfully completed the ADP or was terminated from, or failed to successfully complete, the ADP, the discipline recommended by the parties, as well as certain standards and case law were considered. The standards and case law presented by the parties included standards 1.3, 1.4, 1.5,

1.6, and 2.2, and *In re Silverton* (2005) 36 Cal.4th 81; *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229; *McKnight v. State Bar* (1991) 53 Cal.3d 1025; *Murray v. State Bar* (1985) 40 Cal.3d 575; *Greenbaum v. State Bar* (1976) 15 Cal.3d 893; *Walter v. State Bar* (1970) 2 Cal.3d 880; *Himmel v. State Bar* (1971) 4 Cal.3d 786; and *Yapp v. State Bar* (1965) 62 Cal.2d 809.

Because respondent has now successfully completed the ADP, this court, in turn, now recommends to the Supreme Court the imposition of the lower level of discipline, set forth more fully below, contained in the Confidential Statement of Alternative Dispositions and Orders.

V. DISCIPLINE

It is hereby recommended that respondent **Damian Rene Fernandez**, State Bar Number 206662, 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 probation² for a period of two years subject to the following conditions of probation:

1. 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;
2. Within ten (10) days of any change, respondent 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 thirty (30) days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request;

² The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

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 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. Respondent 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 thirty (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 twenty (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, respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with the probation conditions; and
6. Respondent must comply with all provisions and conditions of his Participation Plan with the Lawyer Assistance Program ("LAP").

At the expiration of the period of probation, if Damian Rene Fernandez has complied with all conditions of probation, the one-year period of stayed suspension will be satisfied and that suspension will be terminated.

It is also recommended that Damian Rene Fernandez take and pass the Multistate Professional Responsibility Examination ("MPRE") administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the State Bar's Office of Probation in Los Angeles, within one year after the effective date of the discipline herein. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage. (But see Cal. Rules of Court, rule 9.10(b), and Rules Proc. of State Bar, rule 321(a)(1) and (3).)

It is not recommended that respondent be ordered to attend either the State Bar's Ethics or Client Trust Accounting Schools as he completed both of these schools in March 2010.

VI. 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.

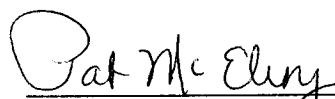
VII. DIRECTION RE DECISION AND ORDER SEALING CERTAIN DOCUMENTS

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 disclosures. 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: December 20, 2010


PAT McELROY
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on December 20, 2010, I deposited a true copy of the following document(s):

DECISION AND ORDER SEALING CERTAIN DOCUMENTS

STIPULATION RE FACTS AND CONCLUSIONS OF LAW

in a sealed envelope for collection and mailing on that date as follows:

by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

DAMIAN R. FERNANDEZ
LAW OFFICE OF DAMIAN R FERNANDEZ
336 N 2ND ST
SAN JOSE, CA 95112

by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

by overnight mail at , California, addressed as follows:

By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Erica Dennings, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on December 20, 2010.

George Hue
Case Administrator
State Bar Court