

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case Nos.: <b>04-O-14833</b> ; 04-O-15267 (Cons.)
	)	
<b>MICHAEL JOHANN SCHUNK,</b>	)	<b>DECISION AND ORDER SEALING</b>
	)	<b>CERTAIN DOCUMENTS</b>
<b>Member No. 212138,</b>	)	
	)	
<u>A Member of the State Bar.</u>	)	

**INTRODUCTION**

In this consolidated original disciplinary proceeding, respondent Michael Johann Schunk (respondent) was accepted for participation in the State Bar Court’s Alternative Discipline Program (ADP). As the court has now terminated respondent from the ADP, the court will recommend to the Supreme Court that respondent be suspended from the practice of law in California for two (2) years, that execution of that period of suspension be stayed, and that he be placed on probation for five (5) years subject to certain conditions, including a minimum 120-day period of suspension, and that he remain suspended until certain requirements are satisfied.

**PERTINENT PROCEDURAL HISTORY**

The State Bar of California, Office of the Chief Trial Counsel (State Bar) filed a Notice of Disciplinary Charges (NDC) against respondent on June 3, 2005, in case no. 04-O-14833. The matter was originally assigned to the Honorable Pat McElroy.

Thereafter, on August 12, 2005, the State Bar filed an NDC against respondent in case no. 04-O-15267. This matter was also assigned to Judge McElroy.

Respondent contacted the State Bar's Lawyer Assistance Program (LAP) on December 12, 2005, for assistance with his substance abuse issue(s).

On December 14, 2005, the undersigned judge, acting as settlement judge in these matters, filed an order transferring respondent's cases to the undersigned ADP judge in Los Angeles for evaluation of respondent's eligibility for participation in the State Bar Court's ADP. Thereafter, on December 27, 2005, the undersigned judge filed an order reassigning these matters to the undersigned judge for all further proceedings.

The court filed an order on March 2, 2006, consolidating case nos. 04-O-14833 and 04-O-15267.

Respondent submitted a declaration to the court on March 2, 2006, which established a nexus between respondent's substance abuse issue(s) and his misconduct in this matter.

On April 24, 2006, the court filed an order finding that respondent is not eligible for the ADP and returning the matter to the originally assigned hearing judge for adjudication, as respondent had failed to appear for two status conferences.

On July 3, 2006, Judge McElroy filed an order following a status conference re-referring respondent back to the ADP.

In furtherance of his participation in the ADP, respondent signed a long-term Participation Plan with the LAP on July 14, 2006.

The parties entered into a Stipulation Re Facts and Conclusions of Law (Stipulation) in case nos. 04-O-14833; 04-O-15267 (Cons.) in mid-July 2006. The Stipulation sets forth the factual findings, legal conclusions and aggravating circumstances in this matter. The Stipulation was received by the court on August 18, 2006.

Thereafter, the court advised 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 possible dispositions, respondent executed the Contract and Waiver for Participation in the State Bar Court's ADP; the court executed a Confidential Statement of Alternative Dispositions and Orders (Confidential Statement) formally advising the parties in writing of the alternative discipline recommendations in this matter; the court accepted respondent for participation in the ADP; and respondent's period of participation in the ADP began on November 21, 2006.<sup>1</sup>

Respondent thereafter participated in both the LAP and the State Bar Court's ADP. However, on January 11, 2009, the State Bar filed a Motion for an Order to Show Cause Re: Termination or, in the Alternative, Inactive Enrollment Based on Non-Compliance with ADP Court Orders.

On March 19, 2010, the court filed an order enrolling respondent as an inactive member of the State Bar of California pursuant to Business and Professions Code section 6233 effective May 20, 2010 through July 20, 2010. The order also provided that effective July 21, 2010, respondent's status would be as an active member of the State Bar without further order of the court.

Thereafter, the State Bar filed a request on September 8 and 10, 2010, for an Order to Show Cause (OSC) and for termination of respondent from the ADP.

On September 10, 2010, the court filed an OSC regarding the court's intent to terminate respondent from participation in the ADP based on allegations by the State Bar that respondent willfully violated certain sections of the Business and Professions Code. Respondent did not file

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<sup>1</sup> The parties' Stipulation, the Confidential Statement and the ADP Contract were all lodged on November 21, 2006.

a response to the OSC. Thereafter, the court filed an order on September 29, 2010, terminating respondent from participation in the ADP for violating the terms of his ADP Contract. This matter was submitted for decision on September 29, 2010.

Respondent thereafter sought interlocutory review of the court's order terminating respondent's participation in the ADP. The Review Department of the State Bar Court, however, filed an order on October 28, 2010, summarily denying respondent's petition for interlocutory review.

### **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 case no. 04-O-14833, respondent stipulated that he: (1) held himself out as practicing or entitled to practice law and practiced law when he was not an active State Bar member in willful violation of Business and Professions Code sections<sup>2</sup> 6125 and 6126, and thereby failed to support the laws of the State of California in willful violation of section 6068, subdivision (a); and (2) committed an act or acts involving dishonesty, moral turpitude, and/or corruption in violation of section 6106 by willfully misrepresenting to his client that he could provide him legal counsel and services when he knew he was suspended from the practice of law.

In case no. 04-O-15267, respondent stipulated that he: (1) held himself out as practicing or entitled to practice law and practiced law when he was not an active State Bar member in willful violation of sections 6125 and 6126, and thereby failed to support the laws of the State of California in willful violation of section 6068, subdivision (a); and (2) committed an act or acts involving dishonesty, moral turpitude, and/or corruption in violation of section 6106 by willfully misrepresenting his status with the State Bar to his client.

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<sup>2</sup> Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

In aggravation, respondent's misconduct was surrounded by or followed by dishonesty, bad faith, overreaching, concealment, or other violations of the State Bar Act or Rules of Professional Conduct. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(iii).)<sup>3</sup> In addition, respondent's misconduct harmed significantly a client, the public, or the administration of justice. (Std. 1.2(b)(iv).)

The parties stipulated that there were no mitigating circumstances. However, the court notes that respondent has no prior record of discipline. Nevertheless, respondent's lack of a prior record of discipline is entitled to little weight in mitigation, as the misconduct in this matter commenced less than three years after respondent's admission to the practice of law. (See *Howard v. State Bar* (1990) 51 Cal.3d 215, 222 [three-year blemish-free record is given little mitigating weight].) Furthermore, as respondent did not successfully complete the ADP, he will not receive mitigating credit for his period of participation in either the ADP or the LAP.

### **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 court considered the discipline recommended by the State Bar,<sup>4</sup> as well as certain standards and case law. In particular, the court considered standards 1.2, 1.3, 1.4, 1.5, 1.6, 2.3, and 2.6 and *In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639; *In the*

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<sup>3</sup> All further references to standard(s) or std. are to this source.

<sup>4</sup> Respondent did not submit a discipline brief to the court.

*Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229; and *Farnham v. State Bar* (1976) 17 Cal.3d 605.

Because respondent has now been terminated from the ADP, this court, in turn, now recommends to the Supreme Court the imposition of the higher level of discipline, set forth more fully below.

## **DISCIPLINE**

### **Recommended Discipline**

It is hereby recommended that respondent Michael Johann Schunk, State Bar Number 212138, be suspended from the practice of law in California for two (2) years, that execution of that period of suspension be stayed, and that he be placed on probation<sup>5</sup> for a period of five (5) years subject to the following conditions:

1. Respondent Michael Johann Schunk is suspended from the practice of law for a minimum of the first 120 days of probation, and he will remain suspended until the following requirements are satisfied:
  - A. He makes restitution to Paul Fraga in the amount of \$500 plus 10 percent interest per year from January 8, 2004 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Paul Fraga, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;
  - B. He makes restitution to Daniel Masursky in the amount of \$500 plus 10 percent interest per year from November 1, 2003 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Daniel Masursky, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;<sup>6</sup> and

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<sup>5</sup> 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.)

<sup>6</sup> Any restitution to the Client Security Fund (CSF) is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d). To the extent the CSF has paid only principal amounts, respondent will still be liable for interest payments to said individual(s), as set forth above. With each written quarterly report required herein, respondent must provide to the Office of Probation satisfactory proof of all restitution payments made by him during that quarter or applicable reporting period. To the extent that respondent has paid any restitution prior to the effective date of the Supreme Court's final disciplinary order in this proceeding,

- C. If he remains suspended for two years or more as a result of not satisfying the preceding conditions, 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).)
2. Respondent Michael Johann Schunk 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) 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;
  - C. 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;
  - 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. 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;

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respondent will be given credit for such payments provided satisfactory proof of such is or has been shown to the Office of Probation.

- E. 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;
- F. Within one (1) year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar Ethics School, and passage of the test given at the end of that session; and
- G. If respondent has not been terminated from the Lawyer Assistance Program (LAP), respondent must comply with all provisions and conditions of his Participation Agreement/Plan with the LAP and must provide the Office of Probation with certification of completion of the LAP. Respondent must immediately report any non-compliance with any provision(s) or conditions(s) of his Participation Agreement/Plan to the Office of Probation. Respondent 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. Respondent will be relieved of this condition upon providing to the Office of Probation satisfactory certification of completion of the LAP;

If respondent has been terminated from the LAP prior to his successful completion of the LAP, respondent must obtain an examination of his mental and physical condition with respect to his substance abuse issue(s) pursuant to rule 184 of the Rules of Procedure from a qualified practitioner approved by the Office of Probation and must comply with any treatment/monitoring plan recommended following such examination. The examination and any further help/treatment/monitoring recommended by the examining practitioner will be at respondent's own expense. The examination must be conducted no later than thirty (30) days after the effective date of the Supreme Court's final disciplinary order in this matter. Help/treatment/monitoring should commence immediately after said examination and, in any event, no later than thirty (30) days after said examination. With each quarterly report, respondent must furnish to the Office of Probation sufficient evidence, as specified by the Office of Probation, that he is so complying with this condition of probation. Treatment/monitoring must continue for the period of probation or until a motion to modify this condition is granted and that ruling becomes final;

If the examining or treating practitioner determines that there has been a substantial change in respondent's condition, respondent or the State Bar's Office of Probation or the Office of the Chief Trial Counsel may file a



motion for modification of this condition with the Hearing Department of the State Bar Court, pursuant to rule 550 of the Rules of Procedure. The motion must be supported by a written statement from the examining or treating practitioner, by affidavit or under penalty of perjury, in support of the proposed modification;

Upon the request of the Office of Probation, respondent must provide the Office of Probation with medical and confidentiality waivers and access to all of respondent's medical records necessary to monitor this probation condition. Revocation of any medical/confidentiality waiver is a violation of this condition. Any medical records obtained by the Office of Probation will be confidential and no information concerning them or their contents will be given to anyone except members of the Office of the Chief Trial Counsel, the Office of Probation, and the State Bar Court, who are directly involved with maintaining, enforcing or adjudicating this condition.

3. At the expiration of the period of probation, if Michael Johann Schunk has complied with all conditions of probation, the two (2) year period of stayed suspension will be satisfied and that suspension will be terminated.

### **Multistate Professional Responsibility Examination**

It is further recommended that Michael Johann Schunk be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) 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).)

### **Rule 9.20, California Rules of Court<sup>7</sup>**

It is further recommended that respondent Michael Johann Schunk be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within thirty (30) and forty (40) calendar days,

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<sup>7</sup> Rule 9.20 was formerly numbered rule 955.

respectively, after the effective date of the Supreme Court's final disciplinary order in this matter.

### **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 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 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

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RICHARD A. PLATEL  
Judge of the State Bar Court