

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of)	Case No. 05-H-05229-JMR
)	
MICHAEL THOMAS DELL'OSSO,)	DECISION
)	
Member No. 103439,)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this reproval violation proceeding, respondent **Michael Thomas Dell'Osso** is found culpable, by clear and convincing evidence, of violating conditions attached to a public reproval previously imposed on him by the State Bar Court.

The court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of said suspension be stayed, and that respondent be actually suspended from the practice of law for one year and until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules Proc. of State Bar, rule 205.)

II. Pertinent Procedural History

On February 10, 2006, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed a Notice of Disciplinary Charges (NDC) against respondent with the State Bar Court. A copy of the NDC was properly served upon respondent on February 10, 2006, by certified mail, return receipt requested, addressed to respondent at his official membership records address (official address) maintained by respondent pursuant to Business and Professions Code section 6002.1, subdivision (a).¹ The copy of the NDC served upon respondent was not returned by the U.S.

¹On January 20, 2006, Deputy Trial Counsel Mark Hartman (DTC Hartman) sent a 20-day letter about this matter by first-class mail to respondent at his official membership records

Postal Service as undeliverable or for any other reason.

On February 16, 2006, a Notice of Assignment and Notice of Initial Status Conference was filed in this matter, setting an in-person status conference for March 20, 2006. A copy of said notice was properly served upon respondent by first-class mail, postage fully prepaid, on February 16, 2006, addressed to respondent at his official address. The copy of said notice was returned by the U.S. Postal Service bearing a handwritten notation that respondent was no longer at that address.

On February 22, 2006, a notice changing the date of the in-person status conference to April 10, 2006, was filed in this matter. A copy of said notice was properly served upon respondent by first-class mail, postage fully prepaid, on February 22, 2006, addressed to respondent at his official address. The copy of said notice was not returned by the U.S. Postal Service as undeliverable or for any other reason.

On March 7, 2006, DTC Hartman reached respondent by telephone. DTC Hartman informed respondent that the NDC had been filed; that his response was due; and that the State Bar intended to file a motion for the entry of respondent's default. On March 7, 2006, respondent told DTC Hartman that he wished to resign with disciplinary charges pending, and that his current address is 22 Stewart Road, Lathrop, California 95330 (Lathrop address). On March 7, 2006, a resignation package was sent by first-class mail to respondent at the Lathrop address.

As respondent did not file a response to the NDC as required by rule 103 of the Rules of Procedure of the State Bar of California (Rules of Procedure), on March 8, 2006, the State Bar filed and properly served a motion for the entry of respondent's default. The motion also contained a request that the court take judicial notice of respondent's State Bar membership records address history pursuant to Evidence Code section 452, subdivision (h),² the declaration of DTC Mark Hartman, and Exhibit 1.

When respondent failed to file a written response within 10 days after service of the motion

address. This letter asked respondent to meet with DTC Hartman on or before February 9, 2006. The letter was not returned by the U.S. Postal Service as undeliverable or for any other reason. However, respondent did not contact the State Bar.

²The court grants this request.

for the entry of his default, on April 11, 2006, the court filed and properly served an Order of Entry of Default (Rule 200 - Failure to File Timely Response), Order Enrolling Inactive and Further Orders.³

On April 27, 2006, the State Bar filed a brief on the issues of culpability and discipline, requesting the waiver of the hearing in this matter.

This matter was thereafter taken under submission for decision on May 1, 2006.⁴

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).) These findings of fact are based on these deemed admissions and the exhibits.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 10, 1982; was a member of the State Bar of California at all times pertinent to these charges; and is currently a member of the State Bar of California.

B. Violation of Repeal Conditions

In November 2004, respondent and the State Bar signed a stipulation regarding facts, conclusions of law, and disposition (stipulation) in State Bar Case No. 03-H-04989. The stipulation provided for a public reproof with conditions (public reproof).

On December 22, 2004, the State Bar Court filed an order approving the stipulation (order) imposing the public reproof, which was effective on January 12, 2005.

The conditions attached to the public reproof in State Bar Case No. 03-H-04989 required respondent to do the following: (1) file quarterly reports by April 10, July 10, and October 10, 2005, and by January 10, 2006; (2) file a final report by January 12, 2006; (3) provide proof of having

³Respondent involuntary inactive enrollment pursuant to Business and Professions Code section 6007(e) was effective three days after the service of this order by mail.

⁴Exhibit 1 attached to the State Bar's motion for the entry of respondent's default and Exhibits 1-4 attached to the State Bar's brief on the issues of culpability and discipline are deemed admitted.

attended State Bar Ethics School by January 12, 2006; and (4) provide proof of having passed the Multistate Professional Responsibility Examination (MPRE)⁵ by January 12, 2006.

As of February 10, 2006, respondent had not:

1. Filed any of the quarterly reports due on April 10, July 10, and October 10, 2005, and on January 10, 2006;
2. Filed the final report due on January 12, 2006;
3. Provided proof of having attended State Bar Ethics School by January 12, 2006; and
4. Provided proof of having passed the MPRE by January 12, 2006.

Count One: Rule 1-110 of the Rules of Professional Conduct of the State Bar of California⁶

Rule 1-110 requires State Bar members to comply with conditions attached to reprovals. The State Bar has proven by clear and convincing evidence that respondent wilfully violated rule 1-110 by failing to: (1) file the quarterly reports due on April 10, July 10, and October 10, 2005, and on January 10, 2006; (2) file the final report due on January 12, 2006; (3) provide proof of having attended State Bar Ethics School by January 12, 2006; and (4) provide proof of having passed the MPRE by January 12, 2006.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No evidence in mitigation was offered in this proceeding, and none can be gleaned from the record. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁷

B. Aggravation

In aggravation, respondent has a record of three prior impositions of discipline. (Std.

⁵Although the NDC refers to this as the Multistate Professional Responsibility, Exhibit 3 attached to the State Bar's brief on the issues of culpability and discipline makes clear that the proper name is the Multistate Professional Responsibility Examination. However, the court finds this error de minimus and that respondent had sufficient notice of the charges against him.

⁶Unless otherwise indicated, all further references to rules refer to the Rules of Professional Conduct of the State Bar of California.

⁷All further references to standards are to this source.

1.2(b)(1).)

(1) Effective May 9, 2003,⁸ respondent was privately reprovved with a one year condition period in State Bar Court Case No(s). 02-O-14361; 02-O-14363; 02-O-15179 for: (a) wilfully failing to respond promptly to reasonable client status inquiries (in two matters) and also failing to keep a client reasonably informed of a significant development in the client's legal matter (in one of those two matters; (b) wilfully failing to cooperate and participate in a disciplinary investigation (in three matters); and (c) failing to refund an unearned fee (one matter). In mitigation, respondent had no prior record of discipline; acted in good faith; and no harm occurred to clients. In aggravation, respondent's misconduct evidenced multiple acts of wrongdoing or demonstrated a pattern of misconduct.

(2) Effective January 12, 2005, respondent was publicly reprovved with a one year condition period in State Bar Court Case No. 03-H-04989 for failing to comply with conditions attached to his prior private reprovval, to wit, failing to provide any quarterly compliance reports, a final compliance report, proof of passage of the MPRE, and proof of Ethics School attendance and passage of the test given at the end of said course. In mitigation, respondent displayed spontaneous candor and cooperation to the State Bar during disciplinary proceedings. In aggravation, respondent had a prior record of discipline.

(3) Effective February 19, 2006, respondent was suspended from the practice of law in Supreme Court matter S138781 (State Bar Court Case No. 04-O-13507; 04-O-13950) for two years and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), the execution of said suspension was stayed, and respondent was placed on probation for two years on conditions including that he be actually suspended for six months for failing to respond to his client's reasonable status inquiries and for practicing law when he was not entitled to do so. In mitigation, respondent cooperated with the State Bar by agreeing to the imposition of discipline. In aggravation,

⁸Pursuant to Evidence Code section 452, subdivision (d), the court takes judicial notice of respondent's prior records of discipline.

respondent had two prior records of discipline.

Respondent engaged in multiple violations of the conditions attached to his reproof. (Std. 1.2(b)(ii).)

Respondent's failure to participate in this disciplinary proceeding prior to the entry of his default is a further aggravating circumstance. (Standard 1.2(b)(vi).)

V. Discussion

The purpose of disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In addition, 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.

Respondent's misconduct involved failing to: (1) file the quarterly reports due on April 10, July 10, and October 10, 2005, and on January 10, 2006; (2) file the final report due on January 12, 2006; (3) provide proof of having attended State Bar Ethics School by January 12, 2006; and (4) provide proof of having passed the MPRE by January 12, 2006. Standard 2.9 recommends suspension for a violation of rule 1-110.

Furthermore, standard 1.7(b) provides that if an attorney is found culpable of misconduct in any proceeding and the member has a record of two prior impositions of discipline, the degree of discipline to be imposed in the current proceeding must be disbarment, unless the most compelling mitigating circumstances clearly predominate. Respondent has three prior records of discipline. Thus, pursuant to standard 1.7(b), disbarment would appear to be the appropriate discipline to recommend in this matter. 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.)

Although this is the fourth disciplinary proceeding involving respondent, the court does not

find disbarment appropriate in this matter, given the low level of discipline imposed in respondent's first two prior disciplinary proceedings, and the fact that respondent's misconduct has involved few clients. Nevertheless, the court is troubled by respondent's continuing failure to comply with conditions attached to disciplinary reprovals. The court notes that in respondent's first disciplinary matter, respondent was privately reprovved with conditions. In respondent's second disciplinary matter, he was found culpable of failing to comply with conditions attached to his prior private reprovval, to wit, failing to provide any quarterly compliance reports, a final compliance report, proof of passage of the MPRE, and proof of Ethics School attendance and passage of the test given at the end of said course. He was publicly reprovved and again placed on conditions including quarterly reports, MPRE, and Ethics School. However, as discussed *supra*, respondent failed to file any of the required quarterly reports and failed by a certain date to provide proof of having attended State Bar Ethics School and of having passed the MPRE. The court notes that respondent entered into a stipulation regarding culpability and discipline in both his first and second disciplinary matters. He was therefore well aware of the conditions attached to his reprovals. Accordingly, the court is quite concerned about respondent's repeated failure to comply with the conditions attached to his prior reprovals.

The court is also concerned about respondent's failure to participate in this disciplinary proceeding. Such failure to participate leaves the court without any information about the underlying cause of respondent's misconduct or from learning of any mitigating circumstances surrounding his misconduct.

The State Bar urges a two year stayed suspension and an actual suspension of one year and until the State Bar Court grants a motion to terminate respondent's actual suspension pursuant to rule 205 of the Rules of Procedure. In support of its recommended discipline, the State Bar cites *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697.

In *Meyer*, the attorney was suspended for two years, the execution of said suspension was stayed, and he was placed on three years' probation on conditions including an actual suspension of 90 days for failing to file two quarterly reports and complete six hours of Mandatory Continuing Legal Education courses. In aggravation, Meyer had two prior records of discipline (private

reprovals - one for failing to comply with conditions attached to an earlier private reproof), engaged in multiple acts of wrongdoing, was indifferent toward rectification, and failed to cooperate. No mitigating circumstances were found.

The court finds the misconduct in the instant proceeding more egregious than that of the attorney in *Meyer*. Respondent's misconduct was more extensive than the attorney in *Meyer*, and respondent violated more conditions of his prior reproof. In addition, respondent has three prior records of discipline compared to the two prior records of the attorney in *Meyer*. In his third prior disciplinary matter, respondent was actually suspended from the practice of law for six months. The court notes that respondent's misconduct in this present proceeding occurred both before and after respondent entered into a stipulation as to facts, conclusions of law and disposition in this third prior disciplinary matter. Thus, to protect the public and preserve public confidence in the profession, the court finds it appropriate in this matter to recommend discipline greater than that in *Meyer* and greater than that imposed by the Supreme Court in respondent's third prior disciplinary proceeding. Accordingly, the court concurs with the State Bar's discipline recommendation.

VI. Recommended Discipline

The court hereby recommends that respondent **Michael Thomas Dell'Osso** be suspended from the practice of law for two years, that execution of said suspension be stayed, and that respondent be actually suspended from the practice of law for one year and until he files and the State Bar Court grants a motion to terminate his actual suspension. (Rules Proc. of State Bar, rule 205.)

It is also recommended that respondent be ordered to comply with any probation conditions hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

If respondent remains actually suspended for two years or more, it is further recommended that respondent remain suspended until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

It is also recommended that respondent take and pass the Multistate Professional

Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, Multistate Professional Responsibility Exam Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the Office of Probation, within one year after the effective date of this order or during the period of his actual suspension, whichever is longer. Failure to pass the MPRE within the specified time may result in actual suspension by the Review Department, without further hearing, until passage. But see California Rules of Court, rule 951(b), and rule 321(a)(1) and (3) of the Rules of Procedure.

It is further recommended that respondent be ordered to comply with rule 955, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order herein. **Wilful failure to comply with the provisions of rule 955 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt or criminal conviction.**

VII. 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.

Dated: July 21, 2006

JOANN M. REMKE
Judge of the State Bar Court