

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of) Case Nos.: **05-O-01317 (06-O-13282;**
) **06-O-15469; 07-O-13110;**
) **09-O-13024)**
SYDNEY ELISE FAIRBAIRN,)
) **DECISION AND ORDER SEALING**
) **DOCUMENTS**
Member No. 122349,)
)
)
A Member of the State Bar.)

I. Introduction

In this disciplinary proceeding, respondent Sydney Elise Fairbairn stipulated to violations of professional misconduct, including failing to maintain funds in a client trust account, failing to render appropriate accounts of client funds, failing to maintain and preserve, for five years from final disposition complete records of all client funds or properties coming into respondent's possession, failing to accurately maintain records of funds and disbursement of funds, acts of moral turpitude, and other trust accounting violations. All charges relate to a single client whose trust account was mismanaged and which therefore impacted on three other investors who were involved with the client.

Respondent participated in, and has now successfully completed, the State Bar Court's Alternative Discipline Program (ADP). (See Rules Proc. of State Bar, rules 5.380-5.389.)

Accordingly, the court recommends that respondent be suspended from the practice of law for one year, that execution of such suspension be stayed, and that respondent be placed on probation for two years on conditions including that she be suspended for the first 60 days of her probation period. (See Rules Proc. of State Bar, rule 5.384.)¹

II. Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed a Notice of Disciplinary Charges (NDC) against respondent on May 7, 2009.

In 2009, respondent sought to participate in the State Bar's Lawyer Assistance Program (LAP). On June 7, 2009, respondent executed a Participation Agreement with the LAP.

Respondent also sought to participate in the court's ADP. In furtherance of her participation in the ADP, on September 30, 2009, respondent submitted a declaration to the court which established that, at the time of her misconduct, she was suffering from mental health issues. In November 2009, respondent executed a stipulation regarding facts and conclusions of law in this matter. Respondent's declaration and the stipulated facts establish a causal connection between respondent's mental health issues and the misconduct found in this disciplinary proceeding. As such, the court found that respondent had adequately established a nexus between her mental health issues and her misconduct in this matter, i.e., that her mental health issues directly caused the misconduct set forth in this matter.

On December 14, 2009, the court lodged its Confidential Statement of Alternative Dispositions and Orders (Statement), setting forth the recommended discipline if respondent successfully completed or was terminated from the court's ADP. On that same day, respondent entered into a Contract and Waiver for Participation in the State Bar Court's Alternative

¹ References to rules are to the Rules of Procedure of the State Bar, unless otherwise noted.

Discipline Program; the parties' stipulation was filed with the court; and respondent was accepted as a participant in the ADP.

On May 3, 2011, the LAP issued a Certificate of One Year Participation in the Lawyer Assistance Program — Mental Health (certificate), setting forth that respondent has complied with the requirements of the LAP Participation Agreement/Plan for one year prior to the date of this certificate, and that during this period, respondent has maintained mental health stability and has participated successfully in the LAP.

On June 13, 2011, the court found that respondent successfully completed the ADP. The court also indicated that it would issue this decision recommending to the Supreme Court the imposition of the lower level of discipline reflected in the Statement.

III. Findings of Facts and Conclusions of Law

The parties' Stipulation Re Facts and Conclusions of Law (stipulation), approved by the court and filed on December 14, 2009, is incorporated by reference as if set forth fully herein. The stipulation sets forth the factual findings, conclusions of law, and certain aggravating and mitigating circumstances in this matter.

Respondent was culpable of professional misconduct including, failing to maintain funds in a client trust account, failing to render appropriate accounts of client funds, failing to preserve for five years from final disposition, complete records of all client funds or properties coming into respondent's possession, failing to accurately maintain records of funds and disbursement of funds, acts of moral turpitude, and other trust account violations. All charges relate to a single client whose trust account was mismanaged and which therefore impacted on three other investors who were involved with the client.

In aggravation, trust funds or property were involved, and respondent was unable or refused to account to the client or person who was the object of the misconduct for improper

conduct towards the funds or property. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(iii).)² In addition, this matter involved multiple acts of wrongdoing by respondent. (Std. 1.2(b)(ii).)

In mitigation, respondent has no prior record of discipline. (Std. 1.2(e)(i).) Respondent also was candid and cooperative with the State Bar by entering into the stipulation in this matter. (Std. 1.2(e)(v).) Furthermore, at the time respondent engaged in the misconduct, respondent was suffering from mental health issues which 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* (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.) 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 2009 and has successfully completed the ADP. Respondent's successful completion of the ADP, as well as the certificate from the LAP, qualify as clear and convincing evidence that respondent no longer suffers from the mental health issues which led to her misconduct. Accordingly, it is appropriate to consider respondent's successful completion of the ADP as a further mitigating circumstance. (Std. 1.2(e)(iv).)

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² References to standard(s) or std. are to this source.

IV. Discussion

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

After reviewing the parties' briefs on discipline and considering the standards and case law cited therein, the parties' stipulation setting forth the facts, conclusions of law and aggravating and mitigating circumstances with respect to this disciplinary proceeding, and respondent's declaration regarding the nexus between her mental health issues and her misconduct in this matter, the court advised the parties of the discipline which would be recommended to the Supreme Court if respondent successfully completed the ADP and the discipline that would be recommended if respondent was terminated from the ADP.

After agreeing to the recommended discipline, respondent executed the contract to participate in the ADP and was accepted for participation in the ADP.

Thereafter, respondent successfully participated in the ADP and, as set forth in the order filed on June 13, 2011, the court found that respondent successfully completed the ADP. Accordingly, the court will recommend to the Supreme Court the imposition of the discipline set forth in the Statement if respondent successfully completed the ADP.

V. Recommended Discipline

The court therefore recommends that respondent **Sydney Elise Fairbairn** be suspended from the practice of law in California for one year, that execution of that period of suspension be

stayed, and that respondent be placed on probation³ for a period of two years subject to the following conditions:

1. Respondent must be suspended from the practice of law for the first 60 days of her probation;
2. During the probation period, respondent must comply with the provisions of the State Bar Act and the State Bar Rules of Professional Conduct;
3. Within 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;
4. Within 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;
5. 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 her in the State Bar Court and if so, the case number and

³ 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.)

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;

6. Subject to 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
7. Unless respondent has been terminated from the Lawyer Assistance Program (LAP) prior to her successful completion of the LAP, respondent must comply with all provisions and conditions of respondent's Participation Agreement with the 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 respondent's compliance or non-compliance with LAP requirements. Revocation of the written waiver for release of LAP information is a violation of this condition. However, if respondent has successfully completed the LAP, respondent need not comply with this condition.⁴

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) because she has already done so with a passing score of 94 in March 2010.

⁴ It is not recommended that respondent be ordered to attend a session of the State Bar Ethics School because she has already attended and passed the test given at the end of that session on August 26, 2010.

Finally, it is recommended that costs be awarded to the State Bar pursuant to 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.

VI. Order Sealing Documents

The court directs a court case administrator to file this Decision and Order Sealing Documents. Thereafter, pursuant to rule 5.388(c) (former rule 806(c)) of the Rules of Procedure of the State Bar (Rules of Procedure),⁵ all other documents not previously filed in this matter are ordered sealed under rule 5.12 (former 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 official 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 will be given a copy of this order sealing the documents by the person making the disclosure.

IT IS SO ORDERED.

Dated: June _____, 2011

PAT McELROY
Judge of the State Bar Court

⁵ Effective January 1, 2011, new Rules of Procedure of the State Bar of California became effective.