

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of ) Case Nos.: **05-O-03820** (06-O-14375)  
)  
**JAMES J. MURRAY,** )  
) **DECISION AND ORDER SEALING**  
**Member No. 66952,** ) **CERTAIN DOCUMENTS**  
)  
A Member of the State Bar. )  
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**I. Introduction**

In this original disciplinary proceeding, respondent **James J. Murray** 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 one year, that execution of that period of suspension be stayed, and that he be placed on probation for two years subject to certain conditions, including a one-year period of suspension.

**II. Pertinent Procedural History**

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) against respondent on December 4, 2006. Thereafter, respondent sought to participate in both the State Bar of California’s Lawyer Assistance Program (LAP) and the State Bar Court’s Alternative Discipline Program (ADP).

On February 9, 2007, respondent contacted the State Bar's Lawyer Assistance Program (LAP) to assist him with his mental health issues and on February 27, 2007, signed a pre-enrollment evaluation plan.

On April 4, 2007, respondent filed his response to the NDC.

In May 2007, respondent submitted a declaration, which met with the approval of the court and which established a nexus between respondent's mental health issues and his misconduct in this matter. And, on June 6, 2007, respondent executed a long-term Participation Plan with the LAP.

On July 30, 2007, the parties entered into a Stipulation Re Facts and Conclusions of Law (Stipulation), which set forth the factual findings, legal conclusions and mitigating and aggravating circumstances in this matter. The Stipulation was received by the court on July 30, 2007.

On August 14, 2007, the State Bar's disciplinary recommendation was received by the court. On that same date, respondent's brief regarding the level of discipline was lodged with the court.

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 October 22, 2007.<sup>1</sup>

However, on July 27, 2010, the State Bar filed a request for the issuance of an Order to Show Cause (OSC) requiring respondent to show cause as to why he should not be terminated from the ADP. Respondent did not file a response to the State Bar's request for an OSC. On August 2, 2010, an Alternative Discipline Program Status Conference was held at which respondent failed to appear. The court issued an order to show cause as to whether respondent should remain in the ADP. The August 2, 2010 order was properly served on respondent.

The hearing on the OSC was held on August 27 and September 8, 2010. Respondent was represented by his counsel Megan Zavieh. The court determined that respondent was not in compliance with the ADP's requirements. Respondent was, therefore, terminated from the ADP based upon his noncompliance with the conditions of the ADP—specifically, his non-compliance with the LAP requirements.

On September 9, 2010, the court filed its order, terminating respondent from the ADP. Upon respondent's termination from the ADP, the court filed the parties' Stipulation in this matter.

The court now issues this decision recommending the high level of discipline set forth in the Confidential Statement.

### **III. Findings of Fact and Conclusions of Law**

Respondent was admitted to the practice of law in California on December 18, 1975, and has been a member of the State Bar of California at all times since.

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. The Stipulation sets

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<sup>1</sup> The parties' Stipulation, the Confidential Statement, and the ADP Contract were all lodged on October 22, 2007.

forth the factual findings, legal conclusions and aggravating and mitigating circumstances in this matter.

In brief, in case No. 05-O-03820, respondent stipulated that he: (1) failed to perform legal services competently by not responding to discovery demands and failing to take action to collect \$2,500 owed to his client in willful violation of rule 3-110(A) of the Rules of Professional Conduct of the State Bar of California;<sup>2</sup> (2) failed to adequately inform a client of significant developments in the client's matter with regard to which he had agreed to provide legal services in willful violation of section 6068, subdivision (m);<sup>3</sup> and (3) failed to provide a client with a prompt and accurate accounting in willful violation of rule violation 4-100(B)(3).

In case No. 06-O-14375, respondent stipulated that he: (1) failed to perform legal services competently by not performing any services of value for a client in willful violation of rule 3-110(A); (2) failed to adequately communicate with his client in willful violation of section 6068, subdivision (m); (3) failed to promptly refund an unearned fee to a client in willful violation of rule 3-700(D)(2); (4) failed to provide a client with a prompt and accurate accounting in willful violation of rule violation 4-100(B)(3); (5) failed upon termination of employment to take reasonable steps to avoid reasonably foreseeable prejudice to his client's rights in willful violation of rule 3-700(A)(2); and (6) failed to cooperate and participate in a disciplinary investigation pending against him in willful violation of section 6068, subdivision (i).

The parties also stipulated to certain aggravating and mitigating factors in this matter. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,<sup>4</sup> stds. 1.2(e) and

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<sup>2</sup> Unless otherwise indicated, all further references to rule(s) refer to the Rules of Professional Conduct of the State Bar of California.

<sup>3</sup> Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

<sup>4</sup> All further references to standard(s) or std. are to this source.

(b.) In aggravation, respondent has a prior record of discipline. (Std. 1.2(b)(i).) The parties also stipulated that respondent engaged in multiple acts of misconduct. (Std. 1.2(b)(ii).) Furthermore, as stipulated, respondent's misconduct significantly harmed a client. (Std. 1.2(b)(iv).) And, the parties further stipulated that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).)

The parties also stipulated that respondent's participation in the LAP was an additional mitigating circumstance. However, as respondent did not successfully complete the ADP, he will not receive mitigation credit for his period of participation in either the ADP or the LAP.<sup>5</sup>

#### **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.)

After considering the Stipulation, scope of respondent's acts of misconduct, the mitigating and/or aggravating circumstances, the standards, the relevant case law, and

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<sup>5</sup> At the time that respondent engaged in misconduct, he was suffering from mental health and emotional issues, which causally contributed to his misconduct. Supreme Court and Review Department case law establish that extreme emotional difficulties are a mitigating factor where expert testimony establishes that these 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.)

Here, in accepting respondent into the ADP, the court found that respondent had suffered from mental health and emotional issues and that there was a sufficient connection between those issues and the stipulated misconduct. (Rules Proc. of State Bar, rule 802.) But, respondent's misconduct while participating in the ADP and his termination from the ADP prevent the court from making a finding that respondent has established his sustained rehabilitation by clear and convincing evidence. Therefore, the court cannot give respondent any mitigation credit for his participation in the LAP or the ADP.

respondent's declaration regarding the nexus between his mental health issues and his misconduct in this matter, the court advised respondent and the State Bar of the low and high levels of discipline which would be recommended to the Supreme Court, depending on whether respondent successfully completed the ADP or was terminated from the ADP. In particular, the court considered standards 1.2, 1.3, 1.4, 1.5, 1.6, 1.7(a), 2.2(b), 2.4(b), 2.6 and 2.10; as well as *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703 and *In re Silverton* (2005) 36 Cal.4th 81. The recommended discipline was set forth in the Confidential Statement.

Accordingly, because respondent has been terminated from the ADP, this court now recommends to the Supreme Court the imposition of the high level of discipline, as set forth more fully below.

## **V. Recommendations**

### **A. Discipline**

It is hereby recommended that respondent **James J. Murray**, State Bar No. 66952, be suspended from the practice of law in California for one (1) year, that execution of that period of suspension be stayed, and that he be placed on probation<sup>6</sup> for a period of two (2) years subject to the following conditions:

1. Respondent James J. Murray is suspended from the practice of law for the first year of probation.
2. Respondent James J. Murray 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;

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<sup>6</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.)

- 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;

- 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;
- g. Respondent must obtain psychiatric or psychological help/treatment from a duly licensed psychiatrist, psychologist, or clinical social worker at respondent's expense a minimum of two (2) times per month and must furnish evidence to the Office of Probation that respondent is so complying with each quarterly report. Help/treatment should commence immediately, and in any event, no later than thirty (30) days after the

effective date of the discipline in this matter. Treatment must continue for two years or until a motion to modify this condition is granted and that ruling becomes final.

If the treating psychiatrist, psychologist, or clinical social worker determines that there has been a substantial change in respondent's condition, respondent 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 of the State Bar of California. The motion must be supported by a written statement from the psychiatrist, psychologist, or clinical social worker, by affidavit or under penalty of perjury, in support of the proposed modification; and

- h. Respondent must pay restitution (including the principal amount, plus interest of 10% per annum) to the payee(s) listed below. If the Client Security Fund (CSF) has reimbursed one or more of the payee(s) for all or any portion of the principal amount(s) listed below, respondent must also pay restitution to CSF in the amount(s) paid, plus applicable interest and costs.

<u>Payee</u>	<u>Principal Amount</u>	<u>Interest Accrues From</u>
Diane McCutchan or her heirs or estate	\$1,375	June 29, 2006 at the rate of 10% per annum

Respondent must pay the above-referenced restitution on the payment schedule set forth below. Respondent must provide satisfactory proof of payment to the Office of Probation with each quarterly probation report, or as otherwise directed by the Office of Probation. No later than thirty (30) days prior to the expiration of the period of probation, respondent must make any necessary final payment(s) in order to complete the payment of restitution, including interest, in full.

<u>Payee/CSF (as applicable)</u>	<u>Minimum Payment Amount</u>
Diane McCutchan or her heirs or estate	\$75

To the extent that respondent has paid any restitution prior to the effective date of the Supreme Court's order imposing discipline in this proceeding, respondent will be given credit for such payment(s) provided satisfactory proof of such is, or has been, shown to the Office of Probation.

3. At the expiration of the period of probation, if respondent James J. Murray has complied with all conditions of probation, the one (1) year period of stayed suspension will be satisfied and that suspension will be terminated.

**B. Multistate Professional Responsibility Exam**

It is also recommended that respondent 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 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).)

**C. Rule 9.20, California Rules of Court**

It is further recommended that respondent 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, respectively, after the effective date of the Supreme Court's final disciplinary order in this matter. Failure to comply with rule 9.20 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.)

Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

**D. 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.

**VI. 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 \_\_\_\_\_, 2010

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PAT McELROY  
Judge of the State Bar Court