

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 05-O-04243
)	
MICHAEL FRANK BORKOWSKI,)	DECISION AND ORDER SEALING
)	CERTAIN DOCUMENTS
Member No. 105068,)	
)	
<u>A Member of the State Bar.</u>)	

INTRODUCTION

In this original disciplinary proceeding, respondent Michael Frank Borkowski (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 three (3) years, that execution of that period of suspension be stayed, and that he be placed on probation for three (3) years subject to certain conditions, including a 90-day period of suspension.

PERTINENT PROCEDURAL HISTORY

On July 14, 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. 05-O-04243. The State Bar filed a First Amended Notice of Disciplinary Charges in case no. 05-O-04243 on July 21, 2006.

Thereafter, on October 18, 2006, respondent contacted the State Bar's Lawyer Assistance Program (LAP) to assist him with his substance abuse issue. Respondent signed a long-term Participation Plan with the LAP on April 12, 2007.

Following a settlement conference before the Honorable Richard A. Platel of the State Bar Court (Hearing Department), Judge Platel issued an order referring this matter to the State Bar Court's ADP for evaluation of respondent's eligibility for participation in the program.

The parties entered into a Stipulation Re Facts, Conclusions of Law (Stipulation) in early January 2007. The Stipulation sets forth the factual findings, legal conclusions and mitigating and aggravating circumstances in this matter.

In furtherance of his participation in the ADP, respondent submitted a declaration to the court in February 2007, which established a nexus between respondent's substance abuse issue and his misconduct in this matter.

Following receipt of the parties' written briefs on the issue of discipline, the court issued a Confidential Statement of Alternative Dispositions and Orders dated June 25, 2007, formally advising the parties in writing 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 the court's alternative possible dispositions, respondent and his counsel executed the Contract and Waiver for Participation in the State Bar Court's ADP; the court executed the order approving the parties' Stipulation; the court accepted respondent for participation in the ADP; and respondent's period of participation in the ADP began on June 25, 2007.

Respondent thereafter participated successfully in both the LAP and the State Bar Court's ADP. On June 29, 2010, after the LAP Evaluation Committee decided that respondent had

successfully completed the LAP, the court filed an order finding that respondent has successfully completed the ADP. Thereafter, the parties' Stipulation in this matter was filed, and this matter was submitted for decision.

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 original disciplinary matter, respondent stipulated to recklessly or repeatedly failing to perform legal services with competence in willful violation of rule 3-110(A) of the Rules of Professional Conduct of the State Bar of California¹ and to failing to respond to client inquiries and failing to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m) of the Business and Professions Code.²

In aggravation, respondent has four prior records of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i).)³

A. Effective April 27, 1992, respondent was privately reprovved in State Bar Court case no. 89-O-14838 for violating former rule 5-101(A) [acquiring an adverse interest]. In mitigation, respondent had no prior record of discipline (std. 1.2(e)(i)); no client harm occurred (1.2(e)(iii)); absence of bad faith (1.2(e)(ii)); and cooperation was displayed to the State Bar during the disciplinary investigation (std. 1.2(e)(v)). There was no evidence in aggravation.

B. Effective May 12, 1996, respondent was publicly reprovved with conditions in State Bar Court case no. 94-O-19152 for willfully violating rule 3-700(A)(2) [improper

¹ Unless otherwise indicated, all further references to rule(s) refer to the Rules of Professional Conduct of the State Bar of California.

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

³ All further references to standard(s) or std. are to this source.

withdrawal]. There were no mitigating circumstances. In aggravation, respondent had a prior record of discipline. (Std. 1.2(b)(i).)

C. Effective September 12, 1998, respondent was suspended from the practice of law for six months; the execution of such suspension was stayed; and respondent was placed on probation for one year in Supreme Court matter S070902 (State Bar Court case no. 96-O-06385; 97-H-13020 (Cons.)) for willfully violating Business and Professions Code section 6068, subdivisions (m) and (i). In mitigation, respondent cooperated fully and was candid with the State Bar during the investigation and litigation phases of this matter. (Std. 1.2(e)(v).) In aggravation, respondent had two prior records of discipline. (Std. 1.2(b)(i).)

D. Effective July 20, 2002, respondent was suspended from the practice of law for two years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii); the execution of such suspension was stayed; and respondent was placed on probation for one year on condition that he be actually suspended for 60 days in Supreme Court matter S105718 (State Bar Court case no. 01-O-01629) for willfully violating Business and Professions Code section 6068, subdivision (m), and rules 3-700(D)(1) and (D)(2). In mitigation, respondent cooperated with the State Bar during its investigation and agreed to discipline without a hearing. (Std. 1.2(e)(v).) In aggravation, respondent had three prior records of discipline. (Std. 1.2(b)(i).)

In mitigation, no harm occurred to the client as a result of respondent's misconduct. (Std. 1.2(e)(iii).) Respondent was cooperative and candid with the State Bar. (Std. 1.2(e)(v).) Respondent has exhibited remorse for his wrongdoing by sending a letter of apology to his client and refunding her retainer. (Std. 1.2(e)(vii).) In addition, respondent voluntarily contacted the LAP and entered into a long-term participation agreement with the LAP. In June 2010, the LAP

Evaluation Committee decided that respondent had successfully completed the LAP. In addition, respondent has now successfully completed the ADP. It is therefore appropriate to consider respondent's successful completion of the ADP and the LAP as a further mitigating circumstance in this matter. (Std. 1.2(e)(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 court considered the discipline recommended by the parties, as well as certain standards and case law. In particular, the court considered standards 1.2, 1.3, 1.4, 1.5, 1.6, 1.7(b), and 2.4(b) and *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229 and *Gary v. State Bar* (1988) 44 Cal.3d 820.

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.

DISCIPLINE

Recommended Discipline

It is hereby recommended that respondent Michael Frank Borkowski, State Bar Number 105068, be suspended from the practice of law in California for three (3) years, that execution of

that period of suspension be stayed, and that he be placed on probation⁴ for a period of three (3) years subject to the following conditions:

1. Respondent Michael Frank Borkowski is suspended from the practice of law for the first 90 days of probation.
2. Respondent Michael Frank Borkowski 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.

⁴ 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.)

- e. 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;
- 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 Ethics School, and passage of the test given at the end of that session; and
- g. Respondent must abstain from use of any alcoholic beverages, and shall not use or possess any narcotics, dangerous or restricted drugs, controlled substances, marijuana, or associated paraphernalia, except with a valid prescription.

At the expiration of the period of probation, if Michael Frank Borkowski has complied with all conditions of probation, the three (3) year period of stayed suspension will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is further recommended that Michael Frank Borkowski 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).)

Rule 9.20, California Rules of Court⁵

It is further recommended that respondent Michael Frank Borkowski 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.

⁵ Rule 9.20 of the California Rules of Court was formerly numbered rule 955.

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 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: September _____, 2010

PAT McELROY
Judge of the State Bar Court