FILED JUNE 25, 2007

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of	)	**Case No. 06-C-14253-PEM**
	)	
DAVID WALTER BAER,	)	**DECISION**
	)	
Member No. 99262,	)	
	)	
A Member of the State Bar.	)	

I. Introduction

This contested proceeding is based upon the conviction of respondent **David Walter Baer** of a misdemeanor violation of Penal Code section 242 (battery).

After considering the facts and circumstances surrounding respondent's conviction, the aggravating and mitigating evidence, and relevant case law, the court orders that respondent be privately reproved.

II. Pertinent Procedural History

On October 16, 2006, following receipt of evidence that the respondent's conviction had become final, the Review Department of the State Bar Court augmented its October 6, 2006 order of referral and referred this matter to the Hearing Department for a hearing and decision recommending the discipline to be imposed if the Hearing Department finds that the facts and circumstances surrounding respondent's criminal violation involved moral turpitude or other misconduct warranting discipline.

On October 25, 2005, the State Bar Court issued a Notice of Hearing on Conviction (Notice of Hearing). A copy of the Notice of Hearing, Notice of Augmented Referral Order, and Notice of Assignment and Notice of Initial Status Conference was properly served on respondent on that same date. Respondent filed an answer on December 4, 2006. (Rules Proc. of State Bar, rule 601.)

On January 29, 2007, the parties filed a stipulation to some of the facts underlying the State Bar charges.

A one-day trial was held on February 7, 2007. Attorney Edward O. Lear represented respondent. Deputy Trial Counsel Mark Hartman of the Office of the Chief Trial Counsel of the State Bar of California represented the State Bar. Following receipt of closing briefs from the parties, this court took the matter under submission on April 2, 2007.

III. Findings of Fact and Conclusions of Law

Respondent is conclusively presumed, by the record of his conviction in this proceeding, to have committed all of the elements of the crime of which he was convicted. (Bus. & Prof. Code, § 6101, subd. (a); *In re Crooks* (1990) 51 Cal.3d 1090, 1097; *In re Duggan* (1976) 17 Cal.3d 416, 423; and *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588.)

Findings of Fact

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 1, 1981, and has been a member at all times since that date.

B. March 22, 2006 Incident

This case involved a domestic dispute that ended in a physical altercation. On the morning of March 22, 2006, respondent and his wife got into a heated verbal argument. At some point during the argument respondent left his house, telling his wife he did not want to speak to her any longer. He then got into his car to go to work. His wife, who had followed him to his car, opened the car door. Respondent attempted to pull the car door closed, whereupon a tug of war ensued. Respondent proceeded to get out of his car and slapped his wife with open hands. Respondent's wife then fell on the ground. There was no testimony that respondent pushed her down.[1] Respondent admitted that he did not help his wife to get up. Rather, respondent's wife got up by herself and walked toward the house. Respondent followed her asking her if she were "okay." She then turned around and glared at respondent, whereupon he spit on her coat. Respondent returned to his car and

[1] Respondent's wife did not testify at trial.

went to work.

At the hearing on this incident respondent readily took responsibility for all his actions . He admitted slapping his wife and creating the situation that caused her to fall. Furthermore, he testified that he alone was responsible for his behavior and that his wife was in no way responsible for that behavior.

C. Respondent's Arrest

The incident was reported to the police, who on March 23, 2006, the following day, came to respondent's house to arrest him. At the time of respondent's arrest, the arresting officer noted that respondent's wife had a red colored mark on her left eye. Respondent was jailed for 24 hours. His wife assisted in obtaining his release and picked him up from jail.

D. Events Following Respondent's Arrest

On March 24, 2006, in *People v. David Baer* (Marin County Superior Court, case No. CR146696) (*People v. Baer*), respondent was charged with corporal injury of a spouse in violation of Penal Code section 273.5 subdivision (a).

On March 28, 2006, six days after the altercation between respondent and his wife, respondent enrolled in a certified domestic violence program. On April 4, 2006, respondent sought psychiatric consultation and treatment with Dr. Roger L. Freed, who is board certified in adult, child and forensic psychiatry. Respondent commenced treatment with Dr. Freed on a biweekly basis. The focus of respondent's treatment with Dr. Feed was on techniques for coping with stress, attendant anxiety and depression, and anger management. In addition to entering individual counseling with Dr. Freed, respondent sought out and entered into family counseling with his daughter and wife in October of 2006. Dr. Freed testified that at the time respondent entered into treatment, respondent had a number of stressors, including his family life, his father's serious health problems, respondent's own medical condition, and some financial setbacks.

E. Respondent's Conviction

On May 19, 2006, in *People v. Baer*, respondent pled guilty to misdemeanor battery of his wife in violation of Penal Code section 242, and was told to return to court for his pre-sentence probation report and judgment.

On July 12, 2006, after reading the probation report in *People v. Baer*, the court sentenced respondent to probation for 18 months. The court further ordered respondent to complete a certified batterer's program and participate in psychotherapy or any other treatment as directed by the probation department, as well as to comply with other requirements.

Conclusions of Law

The State Bar argues that respondent's criminal conviction does not amount to moral turpitude, but contends that the facts and circumstances surrounding his criminal violation involved other misconduct warranting discipline.

The California Supreme Court held that an attorney's conviction of drunk driving, with a prior such conviction, does not per se establish moral turpitude and that the facts and circumstances of that conviction did not involve moral turpitude, but did involve misconduct warranting discipline. (*In re Kelley* (1990) 52 Cal.3d 487.)

In *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52, an experienced family law attorney engaged in an altercation with police who had been summoned when he refused to leave his estranged wife's apartment. The attorney was convicted for battery on a police officer. In *In The Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, an attorney was convicted of several drunk driving offenses, some of which involved assaultive or uncooperative conduct toward arresting officers. The court found in both of these cases that the facts and circumstances surrounding the attorneys' criminal convictions did not involve moral turpitude, but did involve other misconduct warranting discipline.

Similarly, in this matter, respondent's conviction for misdemeanor battery does not per se establish moral turpitude. Moreover, the facts and circumstances surrounding respondent's 2006 conviction of violating Penal Code section 242 did not constitute moral turpitude. However, given that respondent's criminal offense involved the use of physical force against another person, the court finds that the facts and circumstances surrounding respondent's criminal violation, while not involving moral turpitude, do constitute other misconduct warranting discipline.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[2] The court finds there are compelling mitigating factors.

Respondent was admitted to the practice of law in California in December 1981 and has no prior record of discipline. Respondent's 25 years of discipline-free practice at the time of his misconduct in 2006 is a strong mitigating factor. (Standard 1.2(e)(i).) "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.) A lengthy period of practice without misconduct, such as respondent's, is a significant indicator of the lack of potential for future misconduct. (See *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 363.) Thus, respondent's 25 years of practice of law with no prior record of discipline before committing misconduct is entitled to considerable weight in mitigation. (See *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749.)

Personal stress factors, such as estrangement, illness, or death of a family member can constitute mitigating evidence. Such emotional difficulties may mitigate discipline. (Standard 1.2(e)(iv).)

Respondent testified as to the stressors in his life that existed at the time he slapped his wife. Respondent's father, with whom he had a close relationship, was in very ill health suffering from late stage Parkinson's disease, and was in the process of dying. Respondent, himself, had been diagnosed with uveitis, a disease of the eye resulting in reduced vision, so that during a certain period he was essentially functioning with only one eye.[3] A further stressor was that respondent had bought a house, which had major leaks every time it rained, resulting in damages and costly expenses.

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[2]All further references to standards are to this source.

[3]Respondent stated that the medication he took to control his uveitis put him on edge and made him feel unsettled.

The court notes that respondent never testified that these stressors directly caused him to slap his wife. However, Dr. Freed testified that these stress factors lessened respondent's ability to cope with stress. He also testified that respondent's depression likely contributed to respondent's inability to be patient with his wife. Dr. Freed further testified that through treatment and counseling respondent has developed the ability to step back from challenges and look objectively at the stressors in his life. As part of his testimony, Dr. Freed provided his professional opinion that respondent has developed new techniques to deal with stress and anger and that respondent's prognosis is very good.

Given the evidence before it, including Dr. Freed's testimony that respondent has developed the tools to deal with his anger management problem, it appears highly unlikely that respondent will again engage in an act of domestic violence against his wife. Thus, the court finds that evidence of respondent's psychological difficulties as testified to by Dr. Freed, coupled with the evidence of respondent's rehabilitative efforts that have led to the unlikelihood of a recurrence of his offending behavior, constitute a mitigating circumstance to which the court gives some weight.

Respondent testified as to his pro bono and community service activities. Respondent is a member of the executive committee of the State Bar's trust and estates section. Respondent is also the head of his law firm's fund raising efforts for the United Way. Through his efforts, respondent has substantially expanded the firm's involvement in the United Way. More recently respondent has become actively involved in his law firm's effort to raise money for the San Francisco Food Bank. Respondent also worked on an ordinance to limit condominium conversions in San Francisco. Most significantly, respondent took on a pro bono case for Marin County Legal Aide/Legal Aid of the North Bay. From 2003 to 2006, respondent spent approximately 350 hours working with his law firm on an action on behalf of Marin County mobile home owners against Manufactured Home Communities, Inc. Respondent testified that neither he, nor his law firm, charges the plaintiff mobile home owners for his services. Any attorney fees awarded in the action were to be paid by the defendants. He testified that it is his law firm's plan to donate all fees in excess of costs to Legal Aid of the North Bay. In recognition for his pro bono work, in May of 2006, respondent received a "Special Recognition Award" from the California State Assembly for his volunteer legal services

to the low income people of Marin. (See respondent's Exhibit C.)

Thus, the court rejects the State Bar's contention that respondent's pro bono work on behalf of Legal Aid of Marin and others has not been significant. Rather, the court finds respondent 's uncontroverted testimony as to his pro bono work and community services to be credible. (See, *In the Matter of Crane & DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139,158, fn. 22 [a respondent's own testimony regarding the respondent's own community service may be considered as some evidence in mitigation, notwithstanding that it does not meet the requirement that good character be established by a wide range of references].)

Moreover, in addition to respondent's testimony, Robert Stratton, a character witness for respondent, testified that respondent stands out in terms of his pro bono work at their law firm. Mr. Stratton corroborated that respondent spends considerable time on pro bono work, that respondent has been the partner spearheading the strategy in the mobile home case, and that the attorney fees resulting from that case will be donated to Marine County Legal Aid.

Thus, the court assigns significant weight in mitigation to respondent's pro bono work and volunteer work. (Std. 1.2(e)(vi).)

The court finds respondent extremely remorseful and sincere in his efforts to atone for his misconduct. (Std. 1.2(e)(vii).) Respondent has acknowledged the wrongfulness of his conduct and has accepted compete and total responsibility for that wrongful conduct. For example, on cross-examination respondent was repeatedly asked whether there was anything his wife had done that caused his behavior. Respondent denied that his wife had done anything to cause his behavior. Also impressive is the fact that six days after respondent's misconduct, he sought treatment for his behavior. He enrolled in a Marin County Domestic Violence Certified Batterer's Program. Moreover, within a week of the misconduct, respondent sought more help for his behavior by arranging anger management treatment with Dr. Freed. In addition to respondent's testimony, Dr. Freed testified that respondent is deeply motivated for meaningful change regarding his relationship with his wife and child and has made significant gains in maintaining his composure. In fact, in October of 2006, respondent entered into counseling with his wife to learn better parenting methods.

This court rejects the State Bar's contention that respondent did not take objective steps

demonstrating spontaneous remorse or timely atonement for the consequences of his misconduct because respondent did not go and find a certified program for batterers or seek the help of a psychiatrist within the first 24 hours after the incident. The State Bar's characterization of respondent's participation in the Marin County Domestic Violence Certified Batterer's program as something respondent did under the pressure of criminal prosecution ignores the testimony regarding the quality of respondent's participation in that program. Peter Van Dyke (Van Dyke), a domestic counselor in the Marin County Domestic Violence Program, testified that unlike many program participants who act as if they do not want to be in the program, respondent embraced the program such that he was in the top one percent of his class. In fact, because of respondent's excellent participation, Van Dyke invited respondent to work on the hotline service.[4] According to Van Dyke, only ten percent of the participants are invited to participate in the hotline service.

Respondent's willingness to accept his own wrongdoing, to engage in rehabilitative measures, and to support others by working on the hotline service demonstrates that respondent has embraced the voluntary ameliorative behavior, which disciplinary standards are designed to encourage. Accordingly, the court finds such ameliorative behavior is entitled to strong mitigating weight.

B. Aggravation

An aggravating circumstance is an event or factor established clearly and convincingly by the State Bar as having surrounded a member's professional misconduct and which demonstrates that a greater degree of sanction than set forth in the standards is needed to adequately protect the public, courts and legal profession. (Std. 1.2(b).)

The State Bar argues that respondent concealed the facts of the incident that gave rise to his conviction from one of his character witnesses, Robert Sheppard (Sheppard), thus constituting an aggravating circumstance. (Std.1.2 (b)(iii).) Respondent contends that the reason that Sheppard was

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[4] The hotline service is a telephone service manned by a volunteer who speaks to a batterer when the batterer calls the hotline. The main goal is help the batterer cool down. Respondent testified that he is going to attend the orientation and become a volunteer on the hotline. The court finds there is absolutely no reason to believe that respondent is not going to become a volunteer on the hotline after his probationary period expires.

unable to provide details with respect to the incident was because Sheppard was to testify only to respondent's honesty and capability as an attorney, not as to the incident itself. The court rejects the contentions of both respondent and the State Bar.

The court does not find the evidence clearly and convincingly demonstrates that respondent concealed his misconduct from Sheppard. Sheppard testified that when respondent told him about the incident, he had not paid close attention to what respondent had told him. He felt he had received "too much information." Moreover, Sheppard admitted that the impression he had of the incident was colored by his own knowledge of respondent and respondent's wife. However, the court finds that before calling Sheppard to testify as a character witness, respondent should have ensured that Sheppard correctly understood the facts and circumstances of respondent's battery conviction. Thus, given Sheppard's testimony, the court finds it to be neither aggravating nor mitigating.

The court does not find clear and convincing evidence to support the State Bar's assertion that respondent failed to cooperate during the disciplinary proceedings. The fact that respondent did not stipulate to the State Bar's proposed stipulation in its entirety is not a sufficient basis for a finding in aggravation. ((Std.1.2 (b)(vi).)

Finally, this court rejects the State Bar's contention that respondent's exhibits A and B, which are photographs taken of his face a few days after he battered his wife, were introduced to insinuate that respondent was the victim and not the perpetrator of violence. Based on the totality of the evidence before it, the court believes that the photographs were introduced to show how heated the argument between respondent and his wife had been. Respondent clearly testified that he, not his wife, was responsible for his misconduct. He was also clear in his testimony that his wife did not taunt him, call him names, or provoke his behavior. Respondent never claimed to have acted in self-defense. Thus, the evidence before the court clearly and convincingly demonstrates that respondent accepted responsibility as the perpetrator, not the victim, in the incident which led to his battery conviction.

V. Discussion

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of

disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

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.

In this criminal conviction case involving other misconduct warranting discipline, the standards provide for the imposition of sanctions ranging from reproval to disbarment depending on the nature and extent of the attorney's misconduct. (Std. 3.4.) "[D]iscipline is imposed according to the gravity of the crime and the circumstances of the case." (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.) The standards "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has been long-held that the court "is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.)

The State Bar urges, among other things, that respondent be actually suspended for 30 days to adequately protect the public, citing *In the Matter of Stewart*, *supra*, 3 Cal. State Bar Ct. Rptr. 52 to support its recommendation.

However, the facts and circumstances surrounding the conviction of the attorney in *Stewart* are distinguishable from the facts and circumstances surrounding respondent's conviction. In *Stewart*, an experienced family law attorney engaged in an altercation with police who had been summoned when he refused to leave his estranged wife's apartment. The Review Department found that the attorney provoked a dangerous and risky confrontation with the police in his own domestic dispute and that he should have known better given his extensive experience in handling family law matters. Considering the aggravating circumstances, such as the attorney's prior discipline, use of alcohol, and lack of appreciation for the seriousness of his misconduct, the court suspended the attorney for two years, stayed, and placed him on probation for two years with a 60-day actual

suspension, for his criminal conviction for the misdemeanor of battery on a police officer. Comparing the facts and circumstances surrounding *Stewart's* conviction to that of this case, the court finds *Stewart's* misconduct to be more serious than respondent's misconduct here.

In another conviction referral matter, *In re Hickey* (1990) 50 Cal.3d 571, the attorney was given a three-year stayed suspension, a three-year probation and a 30-day actual suspension for his criminal conviction of carrying a concealed weapon and failure to properly withdraw from legal representation in a client matter. His criminal conduct, which arose from repeated abuse of alcohol, involved repeated acts of physical violence toward his wife and others.

In this instant matter, respondent's criminal offense is not as egregious as that of the attorneys in *Stewart* and *Hickey*. The circumstances surrounding respondent's conviction involved slapping and spitting on his wife and then driving away from her to go to work. He did not engage in any assaultive behavior toward others or pose a danger to the community. There is no evidence that respondent engaged in repeated acts of physical violence toward his wife and others.

"Past disciplinary conviction referral cases in which assaultive behavior was the principal offense have generally resulted in suspension of varying degrees." (*In the Matter of Stewart, supra,* 3 Cal. State Bar Ct. Rptr. 52, 60-61.) Here, the nature and extent of assaultive behavior is easily distinguishable from the cited cases. Although respondent was abusive when he slapped his wife and spit on her, he did not pose the kind of danger or engage in similar serious violent acts as were found in *Stewart* (battery on a police officer) or in *Hickey* (carrying a concealed weapon). In light of the facts and circumstances in this matter, suspending respondent from the practice of law for 30 days would be excessive and punitive.

Rather, the court finds *In re Kelley, supra,* 52 Cal.3d 487 to be particularly instructive. In *Kelley*, the Supreme Court publicly reproved an attorney and placed her on disciplinary probation for a period of three years subject to conditions which included her referral to the State Bar's Program on Alcohol Abuse. The attorney had twice been convicted of drunk driving over a 31-month period. The second conviction occurred while she was still on probation for the first conviction. The attorney participated in the disciplinary proceeding and presented evidence in mitigation, including the absence of a prior disciplinary record, extensive community service,

compliance with all criminal probation conditions since her second conviction and cooperation in the disciplinary proceedings. The Supreme Court found her behavior evidencing lack of respect for the legal system and an alcohol abuse problem. Both problems, if not checked, could spill over into her professional practice and adversely affect her representation of clients and her practice of law.

Respondent's behavior is not as egregious as the behavior of the attorney in *Kelley*. Unlike the *Kelley* attorney, respondent's underlying criminal conviction in the instant proceeding is his first conviction. Respondent has no prior record of misconduct in his 25 years of practice and has engaged in extensive community service. Moreover, respondent has also remained in total compliance with all requirements of his criminal probation conditions.

In view of respondent's criminal conviction, case law, and the standards, the court finds that a private reproval is sufficient to protect the public from the threat of future professional misconduct.

VI. Discipline

Accordingly, the court hereby orders that respondent **David Walter Baer** be privately reproved with the following conditions for one year:

1. Respondent must submit written quarterly reports to the State Bar's Office of Probation on January 10, April 10, July 10, and October 10 of the one-year condition period attached to the reproval. Under penalty of perjury, respondent must state whether respondent has complied with the provisions of the State Bar Act, the Rules of Professional Conduct, and all reproval conditions during the preceding calendar quarter. If the first report will cover less than 30 days, that report will be submitted on the next following 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 one-year condition period attached to the reproval and no later than the last day of the condition period attached to the reproval; and

2. Respondent must comply with all conditions of probation imposed in the underlying

criminal matter and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation.

This order is effective upon finality of this decision.

Dated: June ___, 2007

PAT McELROY
Judge of the State Bar Court