

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos.: 06-H-12126 ; 07-O-11706;
)	09-O-13246 (Cons.)
KATHLEEN MARGARET)	
FITZGERALD,)	DECISION AND ORDER SEALING
)	CERTAIN DOCUMENTS
Member No. 145252,)	
)	
<u>A Member of the State Bar.</u>)	

In this consolidated disciplinary proceeding, respondent Kathleen Margaret FitzGerald (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 two (2) years, that execution of that period of suspension be stayed, and that she be placed on probation for three (3) years subject to certain conditions, including a 90-day period of suspension.

PERTINENT PROCEDURAL HISTORY

On June 28, 2006, respondent contacted the State Bar’s Lawyer Assistance Program (LAP) to assist her with her mental health issue.

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. 06-H-12126 on July 3, 2006.

On January 16, 2007, respondent entered into a long-term Participation Plan with the LAP.

In furtherance of her participation in the ADP, respondent submitted a declaration to the court which established a nexus between respondent's mental health issue and her misconduct in this matter.

The parties entered into a Stipulation Re Facts and Conclusions of Law (Stipulation I) on or prior to February 26, 2007, which set forth the factual findings, legal conclusions, and aggravating circumstances in case no. 06-H-12126. Stipulation I was received by the court on February 26, 2007.

Following briefing by the State Bar,¹ 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 respondent agreed to the alternative possible dispositions, the court memorialized the alternative dispositions in writing in a Confidential Statement of Alternative Dispositions and Orders (Confidential Statement); respondent and her counsel executed the Contract and Waiver for Participation in the State Bar Court's ADP; the court signed an order approving Stipulation I; the court accepted respondent for participation in the ADP; and respondent's period of participation in the ADP began on September 18, 2007.²

The State Bar filed a NDC against respondent in case no. 07-O-11706 on August 12, 2009.

On November 12, 2009, the court ordered another matter involving respondent, case no. 09-O-13246, consolidated for ADP evaluation.

¹ Respondent did not submit a brief on the issue of discipline.

² Stipulation I, the Confidential Statement, and the ADP Contract were lodged on September 19, 2007.

In November 2007, the parties entered into a Stipulation Re Facts and Conclusions of Law which set forth the factual findings, legal conclusions, and aggravating circumstances with respect to case nos. 07-O-11706 and 09-O-13246 (Stipulation II). Stipulation II was received by the court on November 17, 2009.³

Respondent submitted a nexus statement on February 5, 2010, with respect to case nos. 07-O-11706 and 09-O-13246.

In March 2010, respondent and her counsel executed an Agreement and Order Amending Contract and Waiver for Participation in the State Bar Court's ADP.⁴

On March 30, 2010, the court executed an Order Amending Confidential Statement of Alternative Dispositions and Orders. The alternative discipline recommendations, however, were not increased by the inclusion of case nos. 07-O-11706 and 09-O-13246 in this ADP matter.

On April 1, 2010, the court filed an order consolidating case nos. 07-O-11706 and 09-O-13246 with case no. 06-H-12126, and Stipulation II, the Agreement and Order Amending Contract and Waiver for Participation in the State Bar Court's ADP, and the Order Amending Confidential Statement of Alternative Dispositions and Orders were lodged.

After respondent was accepted for participation in the ADP in September 2007, respondent participated in both the LAP and the State Bar Court's ADP. On November 3, 2010, after receiving a satisfactory recommendation from a mental health professional, the court filed an order finding that respondent has successfully completed the ADP. This matter was submitted for decision on November 3, 2010.

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³ The court signed an order approving Stipulation II on March 30, 2010.

⁴ The Agreement and Order Amending Contract and Waiver for Participation in the State Bar Court' ADP was signed by the undersigned on March 30, 2010.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulation I and Stipulation II, as well as the court's orders approving each stipulation, are attached hereto and hereby incorporated by reference, as if fully set forth herein.

In case no. 06-H-12126, respondent stipulated that she willfully violated rule 1-110 of the Rules of Professional Conduct of State Bar of California⁵ by failing to comply with certain conditions of her public reproof imposed in a prior disciplinary matter.

With respect to case no. 07-O-11706,⁶ respondent stipulated that she: (1) willfully entered into an agreement for, charged, and collected an illegal fee in violation of rule 4-200(A); (2) willfully failed to support the laws of California in violation of Business and Professions Code section⁷ 6068, subdivision (a) by violating section 6125 and 6126; (3) intentionally, recklessly, or repeatedly failed to perform legal services with competence in violation of rule 3-110(A); (4) willfully failed to respond promptly to reasonable client status inquiries in violation of section 6068, subdivision (m); (5) willfully failed to release promptly, upon termination of employment, to the client, at the client's request, all the client's papers and property in violation of rule 3-700(D)(1); and (6) willfully failed to participate and cooperate in a disciplinary investigation in violation of section 6068, subdivision (i).

In case no. 09-O-13246, respondent stipulated that she violated rule 3-110(A) by failing to complete legal services for her client.

In mitigation, it is now appropriate to consider respondent's successful completion of the ADP as a mitigating circumstance in this matter. (Std. 1.2(e)(iv).)

⁵ Unless otherwise indicated, all further references to rule(s) refer to the Rules of Professional Conduct of the State Bar of California.

⁶ Although Stipulation II refers to this matter as case no. 09-O-13246, this is in error, as the proper case no. is 07-O-11706.

⁷ Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

In aggravation, respondent has three prior records of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i).)⁸

A. Effective September 18, 2003, respondent was publicly reprovved with a condition in case nos. 02-O-12629 (02-O-14382; 03-O-00840) for willfully failing to promptly refund unearned fees in violation of rule 3-700(D)(2); willfully failing to render appropriate accounts to a client in violation of rule 4-100(B)(3); repeatedly or recklessly failing to perform legal service with competence in violation of rule 3-110(A); and (4) willfully failing to respond promptly to reasonable client status inquiries in violation of section 6068, subdivision (m). In mitigation, respondent had no prior record of discipline (std. 1.2(e)(i)), and respondent had favorable witnesses as to her good character from a variety of attorneys and judges (std. 1.2(e)(vi)). There were no mitigating circumstances.

B. Effective June 30, 2004, respondent was publicly reprovved with conditions for one year in case no. 03-O-02533 for failing to cooperate in a State Bar investigation in willful violation of section 6068, subdivision (i). In aggravation, respondent had a prior record of discipline. (Std. 1.2(b)(i).) There were no mitigating circumstances. It was noted that the misconduct in this matter occurred at or about the same time as the misconduct in respondent's prior matters and had this matter been included with the prior disciplinary matters, the appropriate level of discipline would have remained a public reprovval. In addition, it was noted that after the filing of the NDC in this matter, respondent fully cooperated with the State Bar and refunded all legal fees paid by her client.

C. Effective July 13, 2005, respondent was publicly reprovved with conditions for one year in case no. 04-O-14672 for holding herself out as entitled to practice law and actually practicing law while not an active member of the State Bar in willful violation of

⁸ All further references to standard(s) or std. are to this source.

sections 6125 and 6126, and thereby failing to support the laws of California and willfully violating section 6068, subdivision (a) by advertising or holding herself out as practicing or entitled to practice law or otherwise practicing law when she was not an active member of the State Bar. In aggravation, respondent had two prior records of discipline (std. 1.2(b)(i)). In mitigation, respondent did not harm the client or the person who was the object of the misconduct. (Std. 1.2(e)(iii).) Respondent also promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of her misconduct. (Std. 1.2(e)(vii).)

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 State Bar, 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), 2.4(b), 2.6, 2.9 and 2.10 and *Conroy v. State Bar* (1990) 51 Cal.3d 799 and *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697.

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.

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DISCIPLINE

Recommended Discipline

It is hereby recommended that respondent Kathleen Margaret FitzGerald, State Bar Number 145252, be suspended from the practice of law in California for two (2) years, that execution of that period of suspension be stayed, and that she be placed on probation⁹ for a period of three (3) years subject to the following conditions:

1. Respondent Kathleen Margaret FitzGerald is suspended from the practice of law for the first 90 days of probation;
2. Respondent Kathleen Margaret FitzGerald 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 her in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would

⁹ 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.)

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 Ethics School, and passage of the test given at the end of that session;
 - G. Respondent must comply with all provisions and conditions of her Participation Agreement/Plan with the Lawyer Assistance Program (LAP) and must provide the Office of Probation with certification of completion of the LAP. Respondent must immediately report any non-compliance with any provision(s) or condition(s) of her Participation Agreement/Plan to the Office of Probation. Respondent 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 her compliance or non-compliance with LAP requirements. Revocation of the written waiver for release of LAP information is a violation of this condition. Respondent will be relieved of this condition upon providing to the Office of Probation satisfactory certification of completion of the LAP.
3. At the expiration of the period of probation, if Kathleen Margaret FitzGerald has complied with all conditions of probation, the two (2) year period of stayed suspension will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is also recommended that Kathleen Margaret FitzGerald 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 Court¹⁰

It is further recommended that respondent Kathleen Margaret FitzGerald 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.

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 Stipulation I and Stipulation II, as well as this Decision and Order Sealing Certain Documents. Thereafter, pursuant to rule 5.388(c) (former rule 806(c)) of the Rules of Procedure of the State Bar of California (Rules of Procedure),¹¹ all other documents not previously filed in this matter are ordered sealed pursuant to 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 disclosures. All persons to whom protected material is disclosed will be given a copy of this order sealing the documents by

¹⁰ Rule 9.20 was formerly rule 955 of the California Rules of Court.

¹¹ On January 1, 2011, new Rules of Procedure became effective.

the person making the disclosure.

IT IS SO ORDERED.

Dated: January 25, 2011.

RICHARD A. PLATEL
Judge of the State Bar Court