

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case No.: 06-O-12137-DFM
	)	06-O-14246 (07-O-12402);
	)	07-O-13741; 08-O-11985 (Cons.)
STUART IRWIN FOLINSKY,	)	
	)	DECISION AND ORDER SEALING
Member No. 65814,	)	CERTAIN DOCUMENTS
	)	
A Member of the State Bar.	)	

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INTRODUCTION

Respondent **Stuart Irwin Folinsky** 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 years, that execution of that period of suspension be stayed, and that he be placed on probation for three years subject to certain conditions including one year of actual suspension (with respondent receiving credit for the one year period of inactive enrollment under section 6233 while he was in the ADP).

PERTINENT PROCEDURAL HISTORY

This decision results from the eventual consolidation of four separate notices of disciplinary charges filed by the State Bar against respondent over a span of 26 months.

The first notice of disciplinary charges (NDC) was filed on December 14, 2006, in case no. 06-O-12137. The case was assigned to Judge Honn. Respondent filed his response to the NDC on January 5, 2007, and on February 14, 2007, Judge Honn set the case to begin trial on June 4, 2007. Thereafter respondent, represented by Erica Tabachnick, made a request that the case be considered for the ADP. Judge Honn then referred the case for evaluation by a program judge for possible inclusion in the ADP.

Respondent contacted the State Bar's Lawyer Assistance Program (LAP) to assist him with his mental health issues and signed a LAP Participation Plan on June 19, 2007. Respondent also submitted declarations to the court which established a nexus between respondent's mental health issues and his misconduct.

A Stipulation Re Facts and Conclusions of Law regarding case no. 06-O-12137 was executed by the parties in November 2007 and lodged with the court. The parties were then ordered to meet and confer and then file briefs regarding recommended high/low dispositions. After that briefing process had been completed and respondent had accepted this court's determination regarding the high/low disposition to be recommended to the Supreme Court when respondent's participation in the ADP ended, contract documents and a Confidential Statement were prepared. Those documents were finalized and executed by respondent on May 6, 2008, and respondent was accepted into the ADP on that date.

Slightly more than two months later, on July 11, 2008, the State Bar filed a new NDC against respondent in cases nos. 06-O-14246 and 07-O-12402. Respondent filed his response to the new NDC on July 24, 2008, and those cases were assigned to the undersigned for evaluation of whether they also could be included in the ADP. On August 12, 2008, this court issued an order that the parties were to file an executed stipulation regarding the new charges by October 16, 2008. When that date approached, however, the parties notified the court that the stipulation

process had been delayed because of possible additional new charges that were still being held in “notice open” by the State Bar. On October 23, 2008, the court issued an order that the parties needed to finalize a stipulation regarding the already filed charges and that the State Bar “needs to finalize and file” a new NDC for the matters in notice open, “if charges were to be filed.”

The new charges were not filed by the State Bar until February 19, 2009. On that day two separate new NDCs were filed by the State Bar. One NDC was in case no. 07-O-13741 and alleged misconduct occurring in 2004. The second NDC was in case no. 08-O-11985 and alleged misconduct in 2008.

Although respondent was already in the ADP, the evaluation process needed to be reconvened after each of these new NDCs was filed to assess whether the new charges would qualify for inclusion in the program and, if so, what potential new “high/low” discipline would result. Eventually, after all of the four NDCs were filed, a First Addendum to the original Stipulation, covering all of the new matters, was executed by the parties in August 2009, and was thereafter lodged with the court.<sup>1</sup> This combination of the original Stipulation and this “First Addendum” to that stipulation sets forth the factual findings, legal conclusions, and mitigating and aggravating circumstances in this matter.

Thereafter, the process of briefing the new high/low discipline issues, the court issuing a new consolidated proposed high/low decision for respondent to accept or reject, and the court then preparing a new contract and revised confidential statement, covering all of the charges, was undertaken. An Amended Confidential Statement was executed and lodged by the court on December 2, 2009, formally advising 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

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<sup>1</sup> The requisite nexus evidence regarding each of the new charges was also shown to the court’s satisfaction

terminated from, the ADP. On the same date, respondent executed an Amended Contract and Waiver. All of the disciplinary matters were then formally consolidated and included in the ADP.

Throughout the time that the additional charges were being evaluated for possible inclusion in the ADP, respondent was being monitored for his successful participation in LAP, and he was actively working to satisfy the various conditions imposed by this court as part of the original Confidential Statement.

After all of the cases were included in the program, on February 24, 2010, the court filed an order enrolling respondent as an inactive member of the State Bar of California, effective on April 1, 2010, pursuant to Business and Professions Code section 6233 and continuing until April 1, 2011.<sup>2</sup> Respondent was enrolled inactive during that time and was then restored to active status on April 2, 2011.

Respondent has now participated successfully in both the LAP and the State Bar Court's ADP. On March 21, 2011, LAP issued respondent a One-Year Certificate of Participation in the program and closed its case on respondent as he had successfully completed LAP. In addition, as will be further noted below, respondent's efforts during the program included resolving issues with various former clients, taking and passing the MPRE, and taking and passing the both State Bar's Ethics School and its Client Trust Accounting School.

On April 6, 2011, the court issued an order finding that respondent successfully completed the ADP. On that same date, the parties' Stipulation Re Facts and Conclusions of Law and First Addendum Stipulation Re Facts and Conclusions of Law were filed.

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<sup>2</sup> The dates of inactive enrollment were confirmed by the court's order filed on March 21, 2011.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The parties' Stipulation and First Addendum Stipulation, including the court's orders approving same, are attached hereto and hereby incorporated by reference, as if fully set forth herein. Respondent and the State Bar stipulated to the following violations in five client matters: Section 6068, subdivision (m) (three counts); and Rules of Professional Conduct, rules 3-110(A) (four counts), 4-100(B)(3) and (4), 3-700(A)(2) and (D)(1) (one count each).

In mitigation, respondent was candid and cooperative; was remorseful; and demonstrated good character. In addition, it is appropriate to consider respondent's successful completion of the ADP as a further mitigating circumstance in this matter. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(iv).)<sup>3</sup> Aggravating factors included two prior instances of misconduct and harm to two clients.

## **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, 2.2, 2.4, 2.6 and 2.10 as well as *In re Silverton* (2005) 36 Cal.4th 81; *In re Brown* (1995) 12 Cal.4th 205; *In re Morse* (1995) 11 Cal.4th 184; *Colangelo v. State Bar* (1991) 53 Cal.3d 1255; *Kelly v. State Bar* (1991) 53 Cal.3d 509; *Conroy v. State Bar* (1991) 53 Cal.3d 495; *Edwards v.*

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<sup>3</sup> All further references to standard(s) or std. are to this source.

*State Bar* (1990) 52 Cal.3d 28; *Morgan v. State Bar* (1990) 51 Cal.3d 598; *Hawes v. State Bar* (1990) 51 Cal.3d 587; *Arm v. State Bar* (1990) 50 Cal.3d 763; *Gadda v. State Bar* (1990) 50 Cal.3d 344; *Snyder v. State Bar* (1990) 49 Cal.3d 1302; *Young v. State Bar* (1990) 50 Cal.3d 1204; *Doyle v. State Bar* (1976) 15 Cal.3d 973; *Spindell v. State Bar* (1975) 15 Cal.3d 973; *In the Matter of Geyer* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 74; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980; *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416; *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907; *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91; *In the Matter of Kopinski* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 716; *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32; *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229; and *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131.

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, contained in the Confidential Statement.

## **DISCIPLINE**

### **Recommended Discipline**

It is hereby recommended that respondent **Stuart Irwin Folinsky**, State Bar Number 65814, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that he be placed on probation<sup>4</sup> for a period of three years subject to the following conditions:

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<sup>4</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.)

1. Respondent **Stuart Irwin Folinsky** is suspended from the practice of law for the first one year of probation (with credit given for one year of inactive enrollment pursuant to Business and Professions Code section 6233).<sup>5</sup>

2. Respondent **Stuart Irwin Folinsky** must also comply with the following additional conditions of probation:<sup>6</sup>

- 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

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<sup>5</sup> It is recommended that respondent receive credit for the period of his inactive enrollment under section 6233 toward his period of suspension imposed in this matter. If such recommendation is adopted by the Supreme Court, respondent will, therefore, not serve any period of suspension after the effective date of the Supreme Court's order imposing discipline in this matter. It is, therefore, not recommended that respondent be ordered to comply with rule 9.20 of the California Rules of Court. Moreover, on May 10, 2010, respondent complied with a notification requirement similar to that set forth in rule 9.20 pursuant to this court's section 6233 inactive enrollment order.

<sup>6</sup> It is not recommended that respondent be ordered to complete the State Bar's Ethics and Client Trust Accounting Schools; to make restitution; or to comply with the provisions of his LAP Participation Plan/Agreement as set forth in the Amended Confidential Statement because he did so during the pendency of this proceeding.

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 year of the effective date of the discipline herein, respondent must develop a law office management/organization plan, which must be approved by the Office of Probation. This plan must include procedures to: (1) send periodic reports to clients; (2) document telephone messages received and sent; (3) maintain files; (4) meet deadlines; (5) withdraw as attorney, whether of record or not, when clients cannot be contacted or located; (6) train and supervise support personnel; and (7) address any subject area or deficiency that caused or contributed to respondent's misconduct in the current proceeding.

At the expiration of the period of probation, if **Stuart Irwin Folinsky** has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

### **Multistate Professional Responsibility Examination**

It is not recommended that **Stuart Irwin Folinsky** be ordered to take and pass the Multistate Professional Responsibility Examination as he did so during the pendency of this proceeding.

### **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. It is further recommended that costs



be paid with respondent's membership fees for the year 2012. If respondent fails to pay costs as described above, or as may be modified by the State Bar Court, costs are due and payable immediately.

**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 5.388(c) (former rule 806(c)) of the Rules of Procedure of the State Bar of California (Rules of Procedure),<sup>7</sup> 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 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: July \_\_\_\_, 2011

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DONALD F. MILES  
Judge of the State Bar Court

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<sup>7</sup> New Rules of Procedure became effective on January 1, 2011.