

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: 07-O-11488 (08-O-10679)-RAH
)
BRYANT KEITH CALLOWAY,) DECISION
)
Member No. 140431,)
)
A Member of the State Bar.)
_____)

INTRODUCTION AND PERTINENT PROCEDURAL HISTORY

In this contested original disciplinary matter, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) was represented at trial by Deputy Trial Counsel Larry DeSha (DTC DeSha). Respondent appeared in this matter *in propria persona*.

In this matter, respondent was charged in a four-count Notice of Disciplinary Charges (NDC) filed on September 24, 2008, with violations of the sections 6103, 6068, subdivision (o)(3) and 6068, subdivision (k) of the Business and Professions Code.¹ Respondent filed a response to the NDC on November 21, 2008.

Following the March 9, 2009, pretrial conference, the court issued an order that the parties were stipulating to facts, and that the trial set for March 25, 2009, would be on discipline only.

¹ Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

In March 2009, the parties entered into a Stipulation as to Undisputed Facts which was filed with the court on March 25, 2009.

At trial on March 25, 2009, the court granted the oral motion of DTC DeSha to amend the NDC by adding certain language to paragraphs 23, 26 and 27. Respondent did not oppose the oral motion. Trial was continued to April 6, 2009, on the issue of mitigation.

On May 4, 2009, the State Bar filed a brief on the issue of discipline. Respondent's discipline brief was filed on May 5, 2009,² and this matter was submitted for decision on that date.

The court reserved ruling on the admission of further character declarations offered by respondent, marked as exhibits H, I, J, and K. The Office of the Chief Trial Counsel had no objection to the admission of these declarations. As such, they are ordered received into evidence.

FINDINGS OF FACT

Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 6, 1989, and has been an active member of the State Bar of California since that date.

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On March 9, 2007, the Los Angeles County Superior Court, in case no. 06U14162, granted respondent's motion to set aside the default of two of respondent's clients, pursuant to respondent's motion under Code of Civil Procedure § 473.

As part of its order granting relief, the Court ordered respondent to pay \$1,700 to his opposing counsel for attorney fees, and pay a sanction of \$1,000 to the State Bar Client Security Fund. Both payments were to be made no later than March 23, 2007.

² Although respondent's brief was filed one day late, the court accepted it for filing.

Respondent has never paid anything to his opposing counsel or the Client Security Fund in compliance with the order, nor has he ever sought any relief from the ordering court.

Respondent never reported the \$1,000 sanction to the State Bar.

Case No. 08-O-10679

On January 20, 2006, the California Supreme Court filed a disciplinary order which imposed on respondent a stayed suspension of two years and probation for two years, subject to conditions which had been recommended by the Hearing Department of the State Bar Court.

The probation conditions thus imposed were, in pertinent part:

- a. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 for the two years beginning on February 19, 2006.
- b. After the last quarterly report on January 10, 2008, respondent must file a final report no earlier than January 29, 2008 and no later than February 18, 2008.
- c. No later than February 18, 2008,³ respondent must submit to the Office of Probation satisfactory evidence of completion of no less than four (4) hours of Minimum Continuing Legal Education (MCLE) approved courses in law office management, attorney- client relations and/or general legal ethics.

Respondent faxed the first Quarterly Report on April 11, 2006. It was due on April 10, 2006, and was thus one day late. He did not submit the signed original until August 4, 2006, after telephonic requests on May 19 and July 28, 2006, from his assigned Probation Deputy.

³ Although the parties Stipulation as to Undisputed Facts filed on March 25, 2009, sets forth this date as February 19, 2006, this date is incorrect. The correct date is February 18, 2006, respondent's last day of probation.

Respondent timely filed the second Quarterly Report on July 10, 2006.

Respondent filed the third Quarterly Report on October 17, 2006. It was due on October 10, 2006, and was thus seven days late.

Respondent timely filed the next three Quarterly Reports on January 10, April 10, and July 10, 2007.

Respondent faxed the seventh Quarterly Report on October 10, 2007, but he never submitted the signed original, despite a telephonic request on December 10, 2007 from his assigned Probation Deputy.

Respondent never filed the eighth Quarterly Report, due on January 10, 2008.

Respondent never filed a Final Report, which was due no later than February 18, 2008.

Respondent never filed any evidence of having completed the ordered four hours of MCLE.

CONCLUSIONS OF LAW⁴

Count One – Case No. 07-O-11488 – Section 6103

The State Bar failed to prove that respondent violated section 6103. Section 6103 provides, in pertinent part, “A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear . . . constitute causes for disbarment or suspension.” However, there is no evidence that respondent had knowledge of the court order imposing sanctions. “Such knowledge is an essential element to establishing that an attorney willfully disobeyed or violated [the order] in violation of section 6103.” (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787.) Accordingly, count one is dismissed with prejudice.

Count Two – Case No. 07-O-11488 – Section 6068, Subdivision (o)(3)

⁴ Any culpability findings by the court prior to the issuance of this decision were merely tentative findings.

The State Bar failed to prove by clear and convincing evidence that respondent violated section 6068, subdivision (o)(3). Section 6068, subdivision (o)(3) provides that, within 30 days of knowledge, an attorney has a duty to report, in writing, to the State Bar the imposition of judicial sanctions of \$1,00.00 or more which are not imposed for failure to make discovery. As noted above, there is no evidence that respondent had knowledge of the court order imposing sanctions. Accordingly, count two is dismissed with prejudice.

Count Three – Case No. 08-O-10679 – Section 6068, Subdivision (k)

The State Bar proved by clear and convincing evidence that respondent violated section 6068, subdivision (k) which provides that it is the duty of an attorney to comply with all conditions attached to a disciplinary probation. Respondent violated his disciplinary probation imposed pursuant to the Supreme Court’s January 20, 2006, order by failing to file or timely file the quarterly reports and the final report noted above, and by failing to file any evidence of having completed the ordered four hours of MCLE.

Count Four – Case No. 08-O-10679 – Section 6103

By failing to comply or timely comply with the probation conditions set forth above, respondent violated the Supreme Court’s January 20, 2006 discipline order. However, as this violation is predicated on the same facts used to find the violation of section 6068, subdivision (k), it is duplicative of court three. As “little, if any, purpose is served by duplicative allegations of misconduct” (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060), court four is dismissed with prejudice.

AGGRAVATING/MITIGATING CIRCUMSTANCES

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

1. In 1998, respondent was privately reprovved by the State Bar Court with conditions for three years for violating rule 3-110(A) of the Rules of Professional Conduct by repeatedly failing to provide competent legal services to a client and section 6068, subdivision (m) by failing to keep his client informed of significant developments in her matter. In aggravation, respondent's misconduct harmed his client. In mitigation, respondent's good character was attested to by a wide range of references in the general and legal communities.

2. On May 22, 2000, the Supreme Court issued order no. S086626 (State Bar Court Case No. 99-H-11493) suspending respondent from the practice of law for one year and until: (1) he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii) and (2) makes and provides proof of specified restitution; the execution of such suspension was stayed; and respondent was placed on probation for two years subject to certain conditions of probation, including restitution. Discipline was imposed for violations of sections 6103 and rule 1-110 of the Rules of Professional Conduct of the State Bar of California for failing to comply with conditions attached to his earlier private reprovval. Specifically, respondent failed to timely submit quarterly reports; failed to cooperate and furnish a report in response to a written request from his probation monitor; and failed to timely provide proof of passage of the Multistate Professional Responsibility Examination. In aggravation, respondent had a prior record of discipline. Respondent's cooperation during the disciplinary investigation and proceedings was noted, as well as extreme difficulties in his personal life which were occurring at the time of the misconduct.

3. On January 20, 2006, the Supreme Court issued order no. S138825 (State Bar Court Case No. 04-O-13779; 05-O-02298) suspending respondent from the practice of law for two years; the execution of such suspension was stayed; and respondent was placed on probation

for two years subject to certain conditions of probation. Discipline was imposed for a violation of section 6068, subdivision (i) for failing to cooperate in a disciplinary investigation and section 6103 for violating a court order by not timely paying sanctions. In aggravation, respondent had two prior records of discipline. There were no mitigating circumstances.

Multiple acts of misconduct. (Standard 1.2(b)(ii).) The fact that respondent engaged in multiple acts of misconduct (i.e., failing to file or timely file several probation reports and failing to provide evidence of completion of required MCLE) is a further aggravating circumstance.

In mitigation, the court finds the following factors:

Good character/community service. (Standard 1.2(e)(vi).) Respondent has presented evidence from various individuals as to his excellent character and his community service.

These witnesses represent a broad cross section of the community. Each knows respondent well and all but one indicated that they were aware of the charges in this matter. They described his unselfish willingness to commit himself to *pro bono* work in the community, even in the face of serious personal financial problems. In that regard, he assisted his church with legal matters without charge, and volunteered time with the Santa Ana Unified School District Mentor Program dealing with pregnant teenage girls. He also assisted in another Mentor program for children in his church. He was a trustee of the church from 2002 – 2008, and assisted in remodeling the church during that time. Respondent participated in the College Bound program in association with University of California, Irvine, assisting local children in preparing for college. He has sponsored two children in high school, helping to pay their expenses. He helped finance a graduation ceremony at a Disneyland hotel, paying approximately \$1200 for the event. For his contributions, he received an award at the ceremony. Finally, several witnesses also pointed out his strong dedication to family and friends.

Financial and family difficulties. Respondent is married with two children. During the period of the misconduct, respondent suffered from extreme financial hardship, resulting in his home entering foreclosure. His attempts to obtain financing to resolve these difficulties were hindered by the crisis in the banking industry. In fact, the lender he had obtained a loan commitment from went out of business during the pendency of his loan application, and the loan was not funded. Because of the problems in the lending industry, he has been unable to obtain a replacement loan. In order to partially cure the default, respondent's wife withdrew her retirement funds. At the time of trial, he had obtained an extension of the trustee's sale date, and was hoping to qualify for relief currently offered by the Federal government. Respondent also suffered financial difficulties in his office as a result of the termination of his lease by his commercial landlord. This termination occurred within weeks after the commencement of the lease, resulting in extraordinary moving expenses being incurred over a short period of time.

Candor and Cooperation. (Standard 1.2(e)(v).) Respondent exhibited candor and cooperation to the State Bar during disciplinary investigation and proceedings. In that regard, respondent entered into a stipulation as to undisputed facts. Because of this stipulation, the length of time necessary for trial was dramatically reduced.

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 determining the appropriate level of discipline, the court looks first to the standards for guidance. (*In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.)

But “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.) While the standards are entitled to “great weight” (*In re Brown* (1995) 12 Cal.4th 205, 220), they do not provide for mandatory disciplinary outcomes. “[A]lthough the [s]tandards were established as guidelines, ultimately, the proper recommendation of discipline rest[s] on a balanced consideration of the unique factors in each case.” (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

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 case, the standards provide for the imposition of sanctions ranging from reproof to disbarment. (Standards 1.7(b) and 2.10.)

The State Bar recommends that respondent be disbarred in this matter. While standard 1.7(b) provides that when an attorney has two prior records of discipline, “the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate,” the Supreme Court and the Review Department of the State Bar Court have not historically applied standard 1.7(b) in a rigid fashion. Instead, the courts have weighed the individual facts of each case, including whether or not the instant misconduct represents a repetition of offenses for which the attorney has previously been disciplined. (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 977.) When the repetition shows a pattern of misconduct, the courts have typically found disbarment to be the

appropriate sanction. (See *Morgan v. State Bar* (1990) 51 Cal.3d 598, 607; *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841; *In the Matter of Thomson*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 977.)

In support of its discipline recommendation, the State Bar cites to *In the Matter of Shalant*, *supra*, 4 Cal. State Bar Ct. Rptr. 829 and *In the Matter of Thomson*, *supra*, 4 Cal. State Bar Ct. Rptr. 966. However, these cases are distinguishable from the case currently before the court. The misconduct in both *Thomson* and *Shalant* was more egregious than the misconduct in this matter; there were little or no mitigating circumstances in *Thomson* and *Shalant*; and there were more aggravating circumstances in *Thomson* and *Shalant* than in the present proceeding. In particular, Thomson and Shalant both had four prior records of discipline⁵ which, when viewed as a whole, reveal more egregious prior misconduct than that of respondent. Furthermore, in *Thomson* and *Shalant*, there is more of a common thread or repetitive nature of the misconduct than in the present matter.

Nevertheless, the court notes that this is respondent's fourth disciplinary matter. It is also the second time that respondent has failed to comply with disciplinary conditions. However, in light of the fact that respondent has never previously received any period of actual suspension, and after considering the mitigating circumstances in this matter, particularly respondent's family issues and his candor and cooperation with the State Bar during this disciplinary proceeding, the court finds that disbarment, although called for by the standard 1.7(b), is unwarranted in this case.⁶ Nevertheless, the court finds that significant discipline is warranted, particularly based on respondent's prior disciplinary record and to impress upon respondent his

⁵ Respondent has three prior records of discipline.

⁶ As this is respondent's fourth disciplinary matter, it is noted that any further misconduct by respondent may result in disbarment. (Standard 1.7(b) [when an attorney has two prior records of discipline, the degree of discipline in the third disciplinary matter shall be disbarment unless the most compelling mitigating circumstances clearly predominate.].)

duties and obligations as an attorney. Specifically, the court finds that a significant period of actual suspension, continuing until respondent complies with standard 1.4(c)(ii), is the appropriate discipline in the matter to fulfill the purposes of disciplinary proceedings and sanctions.⁷

RECOMMENDED DISCIPLINE

According, the court recommends that respondent Bryant K. Calloway, State Bar Number 140431, be suspended from the practice of law in California for three years, that execution of that period of suspension be stayed, and that he be placed on probation for three years subject to the following conditions:

1. Respondent Bryant K. Calloway is suspended from the practice of law for a minimum of the first two (2) years of probation,⁸ and he will remain suspended until the following requirement is satisfied:
 - a. He must provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)
2. Respondent Bryant K. Calloway must also comply with the following additional conditions of probation:
 - a. During the probation period, respondent must comply with 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, 180 Howard Street, San Francisco, California 94105-1639, and to the Office of Probation in Los Angeles, all changes of information, including

⁷ The State Bar failed to prove counts one and two by clear and convincing evidence; however, given the nature of the misconduct in this matter and respondent's prior record of discipline, even if culpability had been found as to counts one and two, it would not have resulted in a greater discipline recommendation in this matter.

⁸ 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.)

current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by Business and Professions Code section 6002.1;

- c. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the probation period. In each report, respondent must state, under penalty of perjury, whether respondent has complied with the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must 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 twenty (20) days before the last day of the probation period and no later than the last day of the probation period;

- d. 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 these probation condition(s);
- e. Within one (1) year after the effective date of the Supreme Court's disciplinary order in this matter, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar of California's Ethics School and passage of the test given at the end of that course. The State Bar of California's Ethics School is held periodically at either the State Bar of California's office in San Francisco or Los Angeles, California. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287 and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201).

- 3. At the expiration of the period of probation, if Bryant K. Calloway has complied with all conditions of probation, the three-year period of stayed suspension will be satisfied and that suspension will be terminated.

It is also recommended that Bryant K. Calloway take and pass the Multistate Professional Responsibility Examination during the period of his suspension 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).)

It is further recommended that Bryant K. Calloway comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's disciplinary order in this matter. Failure to do so may result in disbarment or suspension.

COSTS

Costs are 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.

Dated: July _____, 2009

RICHARD A. HONN
Judge of the State Bar Court