

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 08-V-12548-PEM
)	
JOSE A. VELASQUEZ)	DECISION AND RECOMMENDATION
)	TO SUPREME COURT
Member No. 112156)	
)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

The issue in this case is whether petitioner **Jose A. Velasquez** (“petitioner”) has demonstrated, by a preponderance of the evidence, his rehabilitation, present fitness to practice, and present learning and ability in the general law, such that this court may recommend to the Supreme Court that petitioner’s suspension from the practice of law be terminated. (Cf. Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

For the reasons stated below, this court finds that petitioner has shown, by a preponderance of the evidence, that he is rehabilitated, presently fit to practice law, and has present learning and ability in the general law. The court will therefore recommend to the Supreme Court that petitioner’s suspension from the practice of law be terminated.

II. PROCEDURAL HISTORY

On April 25, 2007, petitioner was removed from judicial office by the Commission on Judicial Performance following a hearing. The order of removal was final after the Supreme Court denied petitioner’s petition for review of that order on October 10, 2007. The order also

resulted in petitioner's suspension from the practice of law in this state. (See Cal. Const., art. VI, § 18, subd. (e).)

Consequently, on October 26, 2007, petitioner filed a petition for relief from actual suspension from the practice of law with the Supreme Court. On January 23, 2008, the Supreme Court issued an order¹ transferring this matter to the State Bar Court "for consideration and recommendation based on petitioner's rehabilitation, present fitness to practice, and present learning and ability in the general law. (Cf. Rules of Proc. Of State Bar, div. V, Standards for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)"²

On June 27, 2008, petitioner filed with the State Bar Court a Petition for Relief from Actual Suspension, seeking the termination of his actual suspension on the grounds that he is sufficiently rehabilitated and presently fit to practice law, and has present learning and ability in the general law. Petitioner was represented by attorneys James Friedhofer and Douglas Reynolds. The State Bar was represented by Deputy Trial Counsel Wonder Liang.

On August 7, 2008, petitioner filed an Amended Petition for Relief from Actual Suspension ("petition"). On August 11, 2008, the Office of the Chief Trial Counsel of the State Bar of California ("State Bar") filed a response to the petition, opposing petitioner's request for relief from actual suspension based on the grounds that petitioner has not shown his rehabilitation, present fitness to practice, and/or present learning and ability in the general law.

On August 25, 2008, petitioner agreed to waive time so that he could file a supplemental petition. Therefore, on August 28, 2008, the court issued an order vacating the upcoming hearing date. Petitioner subsequently filed a Supplemental Petition for Relief from Actual Suspension on October 29, 2008.

This matter was ultimately heard by the State Bar Court on March 3, 2009, and was taken under submission on that same day.

¹ Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of the Supreme Court's January 23, 2008 order.

² All further references to standard(s) are to this source.

III. JURISDICTION

Petitioner was admitted to the practice of law in California on December 12, 1983. In June 1995, petitioner became a judge of the Monterey County Municipal Court. Petitioner was later elevated to the Monterey County Superior Court where he served as a Superior Court judge until 2007. Prior to June 1995 and after October 10, 2007, petitioner was a member of the State Bar of California.³ Since October 10, 2007, petitioner has not been entitled to practice law in this state pursuant to his removal from the bench.

IV. FINDINGS OF FACT

A. Petitioner's Underlying Judicial Disciplinary Proceeding

1. Discipline Imposed

On April 25, 2006, the Commission on Judicial Performance ("the Commission") initiated formal proceedings against petitioner. Petitioner was charged with eight counts of willful misconduct in office, conduct prejudicial to the administration of justice, and improper action within the meaning of article VI, section 18, of the California Constitution.

The Supreme Court appointed three special masters to hold an evidentiary hearing and report to the Commission. Commencing on August 21, 2006, a three-day hearing was held before the special masters. The hearing was followed by oral argument on November 3, 2006.

The special masters presented their report to the Commission on December 22, 2006. In their report, the special masters found, by clear and convincing evidence, that petitioner engaged in 11 acts of willful misconduct, 11 acts of prejudicial misconduct, and six acts of improper action. Although the misconduct was found to be serious and repeated, the special masters concluded that, with proper external effort and introspection, petitioner appeared capable of conducting himself within both the letter and spirit of the ethical canons.

On April 25, 2007, the Commission issued its decision. The Commission adopted the special masters' findings of fact, but reached its own legal conclusions based on its independent

³ An individual admitted and licensed to practice law in California is not a member of the State Bar while he or she is holding office as a judge of a court of record. (Cal. Const., art. VI, § 9.)

review of the record and the law. The Commission found petitioner's misconduct to be wide ranging in nature and impact. The Commission found that petitioner engaged in 21 instances of willful misconduct and 25 instances of prejudicial misconduct. The Commission concluded that the imposition of a censure (as recommended by petitioner), rather than removal, would be woefully inadequate. This conclusion was based on (1) petitioner's extensive pattern of misconduct; (2) his prior judicial discipline;⁴ (3) his lack of recognition or understanding of the ethical and legal principals underlying the misconduct; (4) his "less than candid" testimony before the special masters regarding one of the charges;⁵ (5) the very strong likelihood of future misconduct; and (6) his blatant disrespect for the constitutional rights he swore to uphold and the undignified tone he set in his courtroom. Accordingly, the Commission ordered petitioner's removal.

On October 10, 2007, the California Supreme Court denied a hearing on petitioner's writ of review from the Commission's April 25, 2007 removal order and affirmed the Commission's factual findings and conclusions of law. The Supreme Court's denial of petitioner's Writ of Review made the Removal Order a final decision.

2. Nature of the Underlying Judicial Misconduct

Briefly summarized, the misconduct found by the Commission that formed the basis for its decision to remove petitioner from the bench, was as follows:

a. Count I

The Commission found that petitioner conducted probation violation hearings and ordered the incarceration of eight separate defendants without affording or advising them of their

⁴ The Commission noted petitioner's 1997 censure and his April 2006 advisory letter. Petitioner's 1997 censure was based on the following misconduct: (1) displaying a crucifix on the wall behind the bench; (2) authorizing a private group to use his name with his judicial title in a newspaper advertisement endorsing one side in the ongoing abortion debate; (3) creating an appearance of prejudgment by publicly announcing a policy of imposing a special predetermined sentence in all DUI cases; and (4) making statements in court, in newspapers, and on television broadcasts disparaging fellow Monterey County judges and certain attorneys. Petitioner received the April 2006 advisory letter for addressing defendants directly in Spanish regarding matters of substance in violation of Code of Civil Procedure section 185, subdivision (a), which provides that all judicial proceedings are to be conducted in English.

⁵ The Commission concluded that petitioner's misconduct did not involve dishonesty.

constitutional rights. These rights included the right to notice of the basis of the alleged probation violation, the right to be represented by counsel, and the right to a formal hearing. Accordingly, the Commission found that petitioner's probation violation hearings failed to comply with minimum due process requirements as specified by the California Supreme Court in *People v. Vickers* (1972) 8 Cal.3d 451, 457-458.

In his written briefing before the Commission, petitioner contended that most of his conduct with respect to the probation hearings was legal error and not subject to discipline. The Commission concluded otherwise, finding that petitioner's actions went well beyond mere legal error and reflected a disregard of the defendants' fundamental right to due process.

In addition, the Commission found that petitioner surrendered his role as an impartial jurist by becoming embroiled with defendants. In various cases, petitioner independently investigated facts, refused to consider documents the defendant had brought to court, engaged in contests with defendants to determine who was lying, and increased sentences out of impatience and pique when a defendant attempted to provide an explanation or questioned petitioner's sentence.

b. Count II

The Commission found that in several instances petitioner became embroiled with defendants at the time of sentencing, and threatened to increase time in custody and, in some instances, actually increased time in custody. In each of these cases, petitioner was found to have acted in anger. And in each, his anger was triggered when a defendant questioned the sentence or offered a defense or explanation in response to an accusation.

c. Count III

The Commission found that in five separate cases petitioner effectively turned legal proceedings into a game show with the defendant attempting to guess the correct answer to obtain lower fines. Petitioner would ask misdemeanor defendants charged with exhibition of speed whether it "felt good" to "peel out." If the defendant did not provide an affirmative answer, then petitioner concluded that the defendant had failed to accept responsibility. This conduct was found to be prejudicial to the public esteem for the judiciary.

d. Count IV

The Commission found that petitioner, in seven cases, gave defendants at initial arraignment the choice of diversion or jail time without advising them of their right to plead not guilty. The Commission found that said conduct interfered with the defendants' exercise of their right to a jury trial, which is one of the most basic and important constitutional rights. Petitioner conceded that this conduct constitutes prejudicial misconduct.

e. Count V

The Commission found that petitioner manifested a callous indifference to the bounds of his authority by issuing bench warrants for defendants when he knew they were not required to appear. Petitioner issued and maintained the warrants for the improper purpose of teaching the defendants' attorneys a lesson. Petitioner's misconduct resulted in the incarceration of at least two defendants in violation of due process. In his brief to the Commission, petitioner argued that his conduct in issuing the warrants constituted, at most, mere legal error. However, at petitioner's oral presentation before the Commission, he conceded that he had improperly penalized defendants for their attorneys' failure to appear.

In addition, the Commission found that petitioner engaged in willful misconduct when he ordered an attorney, on a matter in which the petitioner knew he had been disqualified, to produce letters that had been submitted to the presiding judge. The Commission determined that petitioner "not only exceeded his authority, but did so to pursue a personal interest."

f. Count VI

In Count VI, the Commission found that petitioner's attempts at humor in a public courtroom were, under the circumstances, found to be undignified, out of place, and prejudicial to the public esteem for the judiciary.

In addition, the Commission found that petitioner made disparaging and demeaning comments addressed to attorneys in open court. The Commission deemed these comments as inappropriate, noting that they interfered with the attorney-client relationship.

g. The Commission's Findings in Mitigation

Notwithstanding its decision to remove petitioner, the Commission found the following factors in mitigation: (1) petitioner's positive contributions to the community outside of his judicial capacity; (2) petitioner's reputation as a role model in the Latino community; and (3) the testimony of four Monterey attorneys who found petitioner to be hardworking, courteous, and appropriate in court.

B. Petitioner's Rehabilitation and Present Fitness to Practice Law

1. Petitioner's General Background

Petitioner, as the son of migrant farm workers, has faced many challenges in life. As a child, petitioner learned English as a second language. Despite his humble beginnings, petitioner went on to college and graduated from San Jose State University in 1980. Thereafter, petitioner enrolled in law school at Santa Clara University. In 1983, petitioner graduated from Santa Clara University with a law degree and became a member of the State Bar of California in December 1983.

Petitioner practiced law for over 11 years prior to being elected to the Monterey County Municipal Court. During that time period, petitioner had no record of attorney discipline.

2. Character Evidence

Petitioner presented five character declarations. Each of these declarants expressed high regard for petitioner's work ethic and integrity, notwithstanding his misconduct. Some of these declarants also attested to his remorse for his misconduct on the bench. Favorable character testimony and reference letters from attorneys are entitled to considerable weight in mitigation. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) The State Bar countered with one additional character declaration. These six declarations are summarized below:

a. Donald G. Freeman, Esq.

Donald G. Freeman has been licensed to practice law since 1973. He has represented the cities of Carmel-by-the-Sea and Seaside for over 20 years as the City Attorney. Mr. Freeman is generally aware of the charges resulting in petitioner's removal from the bench. Mr. Freeman

appeared before petitioner on several occasions and found him to be courteous, respectful, fair, and knowledgeable about the matters before him. Mr. Freeman believes that petitioner is competent and qualified to practice law, and that he remains an asset to the legal profession.

b. Mark W. Hafen, Esq.

Mark W. Hafen has known petitioner since around 1990. Prior to his election to the bench, petitioner served as opposing counsel to Mr. Hafen on several cases. Mr. Hafen found petitioner to be a highly competent attorney who was always prepared and vigorously defended the claims or defenses of his clients. Despite reviewing the Commission's order removing petitioner from the bench, Mr. Hafen still believes that petitioner should be allowed to practice law. Mr. Hafen maintains that petitioner has not lost his burning desire to obtain a good result for his clients, and that he will provide zealous representation to his clients for a reasonable price.

c. Joseph F. Landreth, Esq.

Joseph F. Landreth has practiced law in Salinas, California for over 35 years. Mr. Landreth has known petitioner since before he was elected to the bench. Mr. Landreth found petitioner to be hardworking, knowledgeable, and a vigorous advocate for his clients. After petitioner was elected to the bench, Mr. Landreth appeared before petitioner and found him to be knowledgeable and prepared. Following petitioner's removal from the bench, Mr. Landreth has observed that petitioner is remorseful about his conduct and has taken full responsibility without trying to shift the blame of his removal to anyone but himself. In addition, Mr. Landreth notes that since petitioner's removal, he has lectured to various organizations regarding his failings. Mr. Landreth has reviewed the Commission's order of removal, but, nevertheless, firmly believes that petitioner would be a benefit to the legal profession.

d. Eugene J. Martinez, Esq.

Eugene J. Martinez has been a member of the State Bar for 30 years. He was a prosecutor for 12 years and has been a criminal defense attorney in Salinas, California for approximately 17 years. Mr. Martinez has known petitioner for approximately 20 years. Mr. Martinez knew petitioner prior to his election to the bench and found him to be a competent

attorney who represented his clients with vigor. After petitioner was elected, Mr. Martinez appeared before him on several occasions and always found that petitioner handled his court and caseload well. Although Mr. Martinez is familiar with the Commission's order of petitioner's removal, he still believes that petitioner will competently and honestly carry out the duties and obligations of an attorney.

e. Jose Luis Sandoval, Esq.

Jose Luis Sandoval has been an attorney for almost 19 years. Mr. Sandoval first met petitioner in 1990. Petitioner soon became Mr. Sandoval's mentor and guide. Mr. Sandoval notes that petitioner has always shown a high degree of intelligence and a clear and competent mind. Mr. Sandoval is also impressed with the remorse that petitioner has shown since his removal. Mr. Sandoval has found that petitioner matured a lot since his removal from the bench, and that he has demonstrated, through his words and behavior, that he fully comprehends the errors in judgment that led to his removal. After reviewing the Commission's order of removal, Mr. Sandoval believes that petitioner is competent and fit to practice law.

f. Nancy W. Keough, Esq.

In sharp contrast to the five declarations noted *ante*, the State Bar introduced the declaration of Nancy W. Keough.⁶ Ms. Keough has been an attorney in the State of California since 1975. She has served as both a prosecutor and defense attorney. Ms. Keough worked as an attorney in the Monterey County Public Defender's Office from March 1983 until she retired in January 2000. Ms. Keough first became aware of petitioner in 1983. Ms. Keough would periodically see petitioner in court. Although she had no occasion to oppose petitioner in any case, based on her observations in court, she "was not impressed with what [she] saw vis a vis [sic] his competence as an attorney."

Ms. Keough later found petitioner to be the worst judge before whom she had ever practiced. She found that he was ignorant of the law and that his behavior "often bordered on bizarre." Ms. Keough observed petitioner behave in a manner that was outrageous, unfair, malicious, mean, vindictive and improper. Ms. Keough does not believe that petitioner should

⁶ Ms. Keough also testified in this proceeding.

be reinstated to the practice of law. She believes that any promises that petitioner may make regarding his reforming his behavior are not worthy of belief, because petitioner made and failed to keep similar promises relating to his 1997 public censure.

Ms. Keough's declaration and testimony echo many of the findings of the Commission. Ms. Keough, however, has not had any contact with petitioner since before he was removed from the bench. Therefore, she provides limited insight into petitioner's present state of rehabilitation and fitness to practice law.

3. Petitioner's Remorse and Recognition of Wrongdoing

At the hearing on this matter, petitioner acknowledged that, at the time of his misconduct, he was wrong and that he failed to appreciate the role of a judge.⁷ Petitioner also expressed remorse for his misconduct.

In addition, petitioner has taken steps designed to timely atone for the consequences of his misconduct. (Cf. std. 1.2(e)(vii).) Petitioner has made efforts to help others learn from his failings. As reported in the Salinas Californian, petitioner participated in administration of justice classes at Hartnell College in Salinas, and publicly acknowledged his acts of judicial misconduct. The court finds petitioner's public acknowledgements to be beneficial to both his rehabilitation and to the education of future generations of attorneys and jurists.

The State Bar argues that petitioner has not shown rehabilitation because he has not completed anger management classes or counseling.⁸ The court disagrees. While the evidence demonstrates that petitioner failed to maintain the composure required of a jurist, there is no indication that petitioner has ever manifested anger control issues in his personal life or private practice. In fact, petitioner's 11 years of discipline-free practice suggest otherwise. Therefore, the court finds that petitioner need not complete anger control counseling to prove rehabilitation and present fitness to practice law.

⁷ The Commission also found that petitioner conceded numerous incidents of serious misconduct.

⁸ The Commission's decision did not contain any requirement or recommendation that petitioner complete anger management classes or counseling.

The State Bar further argues that petitioner has failed to show that the behavior leading to the misconduct will not occur again. While the court can never be certain of a petitioner's future conduct, several factors in the present case lead the court to believe that petitioner's misconduct is unlikely to be repeated. First, the role of a judge is considerably different than that of an attorney. Contrary to his experience as a judge, petitioner has demonstrated, over a significant period of time, the ability to practice law within the requisite ethical confines. Second, the court finds that petitioner's understanding and acceptance of his judicial misconduct decreases the odds of recidivism. And third, petitioner already paid a steep price for his judicial misconduct. He lost his job and his livelihood for the past 17 months. During this time, petitioner has been able to reflect upon and appreciate the privilege of practicing law. His attitude and showing of remorse lead the court to believe that he will take all the precautions necessary to avoid future misconduct.

4. Petitioner's Community Service

Petitioner has also demonstrated extensive participation in community service.⁹ He devotes many hours with the Marina Equestrian Center, including involvement with the center's campaign to prevent the City of Marina from developing what were existing open trails and stables which were formerly part of Fort Ord. He also serves as a den leader for a cub scout troop, and spends time cutting corn and delivering it to local 4-H clubs.

C. Petitioner's Present Learning and Ability in the General Law

On March 8, 2008, petitioner sat for and passed the Multistate Professional Responsibility Examination ("MPRE") with a scaled score of 110. On August 21, 2008, petitioner completed the State Bar's Ethics School which is certified for 6 hours of Minimum Continuing Legal Education ("MCLE") in ethics. On August 25, 2008, petitioner attended an MCLE program entitled "Ethical Consideration for Prosecutors and Criminal Defense Attorneys," presented by the State Bar. On September 12, 2008, petitioner participated in an online MCLE program entitled "Ethics and the Courtroom," presented by the State Bar. On

⁹ "Postmisconduct pro bono work and community service are factors evidencing rehabilitation and present moral qualifications." (*In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 430.)

September 25, 2008, petitioner participated in an MCLE program entitled “What Every Lawyer Needs to Know About the Upcoming Changes to the Rules of Professional Conduct,” presented by the State Bar. In addition, petitioner has recently completed 21 MCLE credits in the areas of law office management, criminal law, and elimination of bias, and 42 hours of continuing education regarding the Department of Real Estate requirements for a real estate broker. Since August 2008, petitioner has regularly read the advance sheets published by *The Daily Journal*.

V. DISCUSSION

In order for this court to recommend the termination of petitioner’s suspension, petitioner has the burden of proving, by a preponderance of the evidence, that he is rehabilitated, has present fitness to practice and present learning and ability in the general law.

To establish rehabilitation, the court must first consider the prior misconduct from which petitioner seeks to show rehabilitation, including the aggravating and mitigating circumstances surrounding the misconduct and any other circumstances of misconduct. (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 578.) The amount of evidence of rehabilitation varies according to the seriousness of the misconduct at issue. Second, the court must examine petitioner’s actions since the imposition of his discipline to determine whether his actions, in light of his prior misconduct, sufficiently demonstrate rehabilitation by a preponderance of the evidence. (*Id.* at p. 581.)

The misconduct that gave rise to petitioner’s suspension included violating the probation of defendants who appeared without their attorneys, threatening more jail time for defendants who asked legitimate questions, telling some defendants their only choice was to plead guilty or attend Alcoholics Anonymous, and making disparaging comments about attorneys. The Commission concluded that petitioner’s pattern of misconduct reflected an abuse of authority and a serious infringement of criminal defendants’ constitutional rights. This misconduct had a negative impact on the judicial system, in that it undermined the integrity and respect for the judiciary and therefore weakened the constitutional foundation of the system of justice. While the court does not minimize the scope of petitioner’s misconduct, it is worthy of note that none of the Commission’s findings of judicial misconduct involved dishonesty.

Since his removal from the bench and suspension from the practice of law, petitioner has taken great strides toward rehabilitation. Petitioner testified that his removal from the bench has left an indelible mark on his life. He acknowledges that his removal was justified, and that he is remorseful for his misconduct. Petitioner's remorse and understanding of his judicial misconduct is reflected in his actions as well as his words. Petitioner's lectures at Hartnell College reflect an acceptance and understanding of his own misconduct, as well as a genuine desire to help others learn from his mistakes.

The evidence before the court demonstrates that petitioner no longer lacks recognition or understanding of the ethical and legal principals underlying his misconduct. Petitioner was removed from the bench and suspended from the practice of law approximately 17 months ago. During this significant period of time, petitioner has been able to reflect on his misconduct as a jurist; thereby utilizing his time away from the law to learn from his mistakes.

In addition, five of petitioner's peers offered declarations in support of his petition for relief from actual suspension. All of these declarations were authored by seasoned attorneys, based on their observations regarding petitioner's integrity, demeanor, and competence. In these declarations, the declarants expressed high regard for petitioner's work ethic and integrity. They also attested to his remorse and level of understanding regarding the misconduct that led to his removal. Each of these declarants strongly advocates the termination of petitioner's suspension from the practice of law.

Based on petitioner's recognition and understanding of his misconduct, his community service work, and his favorable character evidence, the court finds that petitioner has demonstrated, by a preponderance of the evidence, his rehabilitation and present fitness to practice law.

With regard to petitioner's present learning and ability in the general law, the court finds that his passage of the MPRE and his recent completion of numerous hours of MCLE demonstrates, by a preponderance of the evidence, that petitioner possesses present learning and ability in the general law.

VI. CONCLUSION

Based on the foregoing, the court finds that petitioner has established, by a preponderance of the evidence, his rehabilitation, present fitness to practice, and present learning and ability in the general law. Accordingly, the court recommends to the Supreme Court that petitioner's suspension from the practice of law be terminated. The Clerk of the State Bar Court is directed to transmit the record of the proceedings in State Bar Court Case No. 08-V-12548 to the Supreme Court for further action as the Supreme Court deems appropriate in light of this court's recommendation.

Dated: April _____, 2009

PAT E. McELROY
Judge of the State Bar Court