

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 09-H-19332-LMA
)	
MARY ANNE MULLEN NAGY)	DECISION
)	
Member No. 171942)	
)	
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this disciplinary matter addressing noncompliance with conditions of a reproof, Mark Hartman appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent did not appear in person or by counsel.

After considering the evidence and the law, the court recommends, among other things, that respondent be suspended from the practice of law for one year; that execution of that suspension be stayed, and that she be actually suspended for 90 days and until she complies with rule 205, Rules Proc. of State Bar.¹

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on February 24, 2010, and was properly served on respondent on that same date at her official membership records address, by

¹ Future references to rule are to this source.

certified mail, return receipt requested, as provided in Business and Professions Code section² 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) This correspondence was returned unclaimed by the United States Postal Service.

On March 1, 2010, respondent was properly served at her official address with a notice advising her, among other things, that a status conference would be held on March 30, 2010

Respondent did not appear at the March 30 status conference. On that same date, she was properly served with a status conference order at her official address by first-class mail, postage prepaid.

Respondent did not file a responsive pleading to the NDC. On April 7, 2010, a motion for entry of default was filed and properly served on respondent at her official address by certified mail, return receipt requested. The motion advised her that minimum discipline of 90 days' actual suspension, among other things, would be sought if she was found culpable. Respondent did not respond to the motion.

On April 28, 2010, the court entered respondent's default and enrolled her inactive effective three days after service of the order. The order was filed and properly served on her at her official address on that same date by certified mail, return receipt requested. The court judicially notices its records pursuant to Evidence Code section 452, subdivision (d) that this correspondence was returned unclaimed by the United States Postal Service.

The State Bar's and the court's efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415.)

²Future references to section are to the Business and Professions Code.

The matter was submitted for decision on May 25, 2010.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 1, 1994, and has been a member of the State Bar at all times since.

B. Facts

On April 29, 2009, respondent entered into a stipulation re facts, conclusions of law and disciplinary disposition with the State Bar of California in State Bar Court case number 02-O-12150 (02-O-12175). The agreed-to disposition was a private reproof with specified conditions.

On May 15, 2009, the Hearing Department of the State Bar Court filed an order approving the stipulation. On the basis of the parties' agreement, this court imposed a private reproof with conditions, including quarterly reporting, effective June 5, 2009.

Soon after May 15, 2009, respondent received notice of the State Bar Court reproof order and conditions. At all times thereafter, respondent had actual knowledge of the order of reproof and conditions.

On June 2, August 25 and November 20, 2009, the Office of Probation mailed and respondent received letters reminding her of the conditions of the reproof. A representative of the Office of Probation spoke with respondent on September 3, 2009 about the reproof conditions.

Pursuant to the reproof order, respondent was ordered to comply with the following terms and conditions for a period of three years from the effective date of the order:

1. Schedule a meeting and meeting with the Office of Probation within 30 days of the effective date of discipline to discuss the terms and conditions of the reproof; and

2. Submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the condition period attached to the reproof, certifying under penalty of perjury whether respondent has complied with the State Bar Act, the Rules of Professional Conduct and all conditions of the reproof during the preceding calendar quarter.

Respondent has not completed the following reproof conditions:

1. Scheduling a meeting and meeting with the Office of Probation within 30 days of the effective date of discipline to discuss the terms and conditions of the reproof; and

2. Submitting quarterly reports to the Office of Probation due on the 10th of October 2009 and January 2010.

Respondent still had not complied with these conditions as of February 23, 2010, the date the NDC was filed.

C. Conclusions of Law

Rule 1-110 requires an attorney to comply with the conditions attached to a reproof or other discipline administered pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court.

By not complying with the conditions attached to the reproof order as set forth above, respondent wilfully violated rule 1-110.

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof.

Misconduct,³ std. 1.2(b).)

Respondent has one prior instance of discipline. (Std. 1.2(b)(i).)⁴ As previously noted, in State Bar Court case no. 02-O-12150 (02-O-12175), a private reproof with conditions was imposed pursuant to the parties' stipulation for not complying with conditions of an agreement in lieu of discipline (ALD)⁵ and for violations of rule 3-110(A) of the Rules of Professional Conduct (two counts) and section 6068, subdivision (m) (two counts) in two client matters. Multiple acts of misconduct were considered as an aggravating factor. There were no mitigating factors. The court notes the similarity of the misconduct of not complying with ALD requirements and with conditions of the private reproof.

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

Respondent continued to fail to comply with the terms of her reproof even after having contact with the Office of Probation and prior to the filing of the NDC. (Std. 1.2(b)(v).)

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence.

³Future references to standard or std. are to this source.

⁴The State Bar has the burden of proving all aggravating circumstances by clear and convincing evidence. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 932-933; *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 148.) Rule 216(a) of the Rules of Procedure provides, in relevant part, that a prior record of discipline consists of an authenticated copy of all charges, stipulations, findings and decisions reflecting or recommending imposition of discipline.

Rule 216 anticipates that the State Bar will introduce certified copies of documents reflecting a respondent's prior record of discipline. Such practice makes the prior record of discipline a part of the official record of the State Bar Court proceeding and enhances the ability of the Supreme Court to conduct its independent, *de novo* review of the State Bar Court's decision and the record supporting that decision.

In this proceeding, the State Bar did not attach copies of all documents reflecting respondent's prior disciplinary record. Accordingly, on its own motion, the court has judicially noticed its records reflecting respondent's prior disciplinary record pursuant to Evidence Code section 452, subdivision (d).

⁵Not filing or not timely filing 14 quarterly reports and not submitting evidence of compliance with her Lawyer's Assistance Program participation plan.

(Std. 1.2(e).) Since respondent did not participate in these proceedings, no mitigating evidence was presented.

C. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline.

Standard 2.9 applies in this matter and calls for suspension for culpability of wilful violation of rule 1-110.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar seeks respondent’s actual suspension for 90 days, among other things.⁶

Analogizing to cases addressing the violation of probation conditions, the court believes that greater discipline is warranted for violations of conditions that are significantly related to the misconduct that led to the reproof, particularly when respondent has not taken rehabilitative steps or where there is a serious concern about the need for public protection. (Cf., *In the Matter*

⁶ In its motion for entry of default, the State Bar sought stayed suspension for one *and* two years. (Default motion, 5: 13-19.)

of Taggart (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 311.) In the instant case, respondent had been ordered to comply with conditions of a reproof after not complying with conditions of an ALD. Significant discipline is merited.

Respondent's misconduct and lack of participation in this matter raises concerns about her ability or willingness to comply with her ethical responsibilities to the public and to the State Bar. No explanation has been offered that might persuade the court otherwise and the court can glean none. Having considered the evidence and the law, the court believes that a 90-day actual suspension to remain in effect until she complies with the requirements of rule 205, among other things, is adequate to protect the public and proportionate to the misconduct found and the court so recommends.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent MARY ANNE MULLEN NAGY be suspended from the practice of law for one year; that said suspension be stayed; and that she be actually suspended from the practice of law for 90 days and until the State Bar Court grants a motion to terminate respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Rule 205(a), (c), Rules Proc. of State Bar.)

It is also recommended that she be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating her actual suspension.

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until she has shown proof satisfactory to the State Bar Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also, rule 205(b).)

It is also recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing her compliance with said order.⁷

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners within one year from the effective date of the Supreme Court's order or during the period of her actual suspension, whichever is longer, and furnish satisfactory proof of such to the State Bar Office of Probation within said period.

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.

Dated: September _____, 2010

LUCY ARMENDARIZ
Judge of the State Bar Court

⁷ Failure to comply with rule 9.20 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a rule 9.20(c) affidavit even if she has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)