

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case Nos.: **09-O-12176 (09-O-14165);**
) **09-N-12374; 12-O-13024 (Cons.)**
KENNETH JOHN KLEINBERG,)
) **DECISION AND ORDER SEALING**
Member No. 110732,) **CERTAIN DOCUMENTS**
)
A Member of the State Bar.)

Introduction

In this consolidated disciplinary proceeding, respondent Kenneth John Kleinberg (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 three years, that execution of that period of suspension be stayed, and that he be placed on probation for four years subject to certain conditions, including a nine-month period of suspension (with credit given for the period of inactive enrollment under section 6233).

Significant Procedural History

The State Bar of California, Office of the Chief Trial Counsel (State Bar) filed a Notice of Disciplinary Charges (NDC) against respondent on June 9, 2009, in case No. 09-N-12374. This matter was originally assigned to Judge Richard A. Honn.

On September 10, 2009, respondent contacted the State Bar's Lawyer Assistance Program (LAP) to assist him with his mental health issue(s).

Following a settlement conference, case No. 09-N-12374 was referred by Judge Honn to the State Bar Court's Alternative Discipline Program (ADP) before the undersigned.

On November 18, 2009, respondent submitted a statement to the court which established a nexus between respondent's mental health issue(s) and his misconduct in case No. 09-N-12374.

The State Bar filed a NDC against respondent in case Nos. 09-O-12176 (09-O-14165) on January 7, 2010. This matter was assigned to the undersigned judge.

The court filed an order on February 2, 2010, consolidating case No. 09-N-12374 and case No. 09-O-12176 (09-O-14165).

Respondent entered into a long-term Participation Plan with the LAP in April 2010.

On July 14, 2010, the court received a Stipulation Re Facts and Conclusions of Law (Stipulation), executed by the parties that same day, in case Nos. 09-N-12374; 09-O-12176 (09-O-14165).

On October 12, 2010, respondent submitted a declaration to the court which established a nexus between respondent's mental health issue(s) and his misconduct in case Nos. 09-N-12374; 09-O-12176 (09-O-14165).

Following briefing by the parties, 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 to the Supreme Court if respondent was terminated from, or failed to successfully complete, the ADP. In early January 2011, the court memorialized in writing the alternative discipline recommendations in a Confidential Statement of Alternative Dispositions and Orders (Confidential Statement); respondent executed a Contract

and Waiver for Participation in the State Bar Court's ADP (Contract);¹ the court signed an order approving the parties' Stipulation, and the Stipulation was filed; the court accepted respondent for participation in the ADP; and respondent's period of participation in the ADP commenced on January 6, 2011.²

Respondent was ordered inactive pursuant to Business and Professions Code section 6233 effective August 15, 2011. He was also ordered to comply with certain requirements set forth in California Rules of Court, rule 9.20, as modified by this court within 30 days after the effective date of his inactive enrollment. Respondent's inactive enrollment under Business and Professions Code section 6233 terminated on September 4, 2012.

The State Bar filed a NDC against respondent in case No. 12-O-13024 on November 30, 2012. This matter was assigned to the undersigned judge. Pursuant to an order filed on December 10, 2012, this matter was referred for evaluation for the ADP.

On December 14, 2012, LAP closed respondent's case due to respondent's successful completion of the LAP, as was found by the LAP Evaluation Committee.

In January 2013, the parties executed a Stipulation Re Facts and Conclusions of Law in case No. 12-O-13024, which was received by the court on January 23, 2013.

On February 22, 2013, respondent submitted another declaration to the court which addressed the nexus between his misconduct in case No. 12-O-13024 and his mental health issue(s).

Following the filing of the parties' briefs on the appropriate level of discipline if case No. 12-O-13024 were included with the other ADP matters, the court advised the parties of (1) the discipline which would be recommended to the Supreme Court with respect to all four cases if

¹ The Confidential Statement and Contract were lodged on January 7, 2011.

² On January 7, 2011, the court filed an order finding that respondent is accepted into the ADP, and the start date of respondent's participation in the ADP is January 6, 2011.

respondent successfully completed the ADP, and (2) the discipline which would be recommended to the Supreme Court with respect to all four cases if respondent was terminated from, or failed to successfully complete, the ADP. On April 23, 2013, the court (1) signed an order amending the Confidential Statement lodged on January 7, 2011; (2) respondent executed an agreement and order amending the ADP Contract lodged on January 7, 2011; (3) the Stipulation in case No. 12-O-13024 was filed; (4) respondent was accepted into the ADP with regard to case No. 12-O-13024; (5) case No. 12-O-13024 was consolidated with case Nos. 09-N-12374; 09-O-12176 (09-O-14165) (Cons.); and on April 23, 2013, the court filed an order that respondent has successfully completed the ADP.

Findings of Fact and Conclusions of Law

Culpability Findings

The parties' Stipulation with respect to case Nos. 09-O-12176 (09-O-14165); 09-N-12374 (Cons.) and the parties' Stipulation with respect to case No. 12-O-13024, including the court's orders approving the Stipulations, are attached hereto and hereby incorporated by reference, as if fully set forth herein.

Case No. 09-N-11234 – California Rules of Court, Rule 9.20

In case No. 09-N-11234, respondent stipulated that he (1) willfully violated California Rules of Court, rule 9.20, by not complying with rule 9.20, subdivision (a), filing a false declaration with the State Bar Court, and not timely filing his rule 9.20 declaration; and (2) willfully violated Business and Professions Code section³ 6106 by intentionally or with gross negligence filing a false declaration with the State Bar Court.

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³ Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

Case No. 09-O-12176 – Agopian Matter

In case No. 09-O-12176, respondent stipulated that he (1) held himself out as entitled to practice law and engaged in the unauthorized practice of law (UPL) and violated sections 6125 and 6126; (2) willfully violated section 6068, subdivision (a), by violating sections 6125 and 6126; and (3) willfully violated section 6103 by willfully disobeying a court order.

Case No. 09-O-14165 – Failing to Comply with Probation Conditions

In case No. 09-O-14165, respondent stipulated that he willfully violated sections 6068, subdivision (k), in nine instances by failing to comply with conditions attached to his disciplinary probation.

Case No. 12-O-13024 – Warren/Koenig Matter

In case No. 12-O-13024, respondent stipulated that he held himself out as practicing law or entitled to practice law and practiced when he was not an active State Bar member in willful violation of sections 6125 and 6126, and thereby willfully failed to support the laws of California.

Aggravation

Prior Record of Discipline (Standard 1.4(c)(ii).)⁴

In aggravation, respondent has a record of prior discipline. Effective December 6, 2008, respondent was suspended for two years, the execution of which was stayed, and respondent was placed on probation for five years with conditions including restitution, and he was actually suspended for 120-days in Supreme Court matter S166492 (State Bar Court case No. 04-O-11238). Respondent stipulated to four counts of violating section 6068, subdivision (a), by (1) failing to file an employee's W-2 form with Social Security; (2) failing to pay Social Security and federal taxes; (3) failing to pay state income tax; and (4) failing to withhold and pay

⁴ All further references to standard(s) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Medicare tax and state unemployment insurance/state disability insurance from an employee's salary. Respondent also stipulated to violating section 6106 for providing a false W-2 form to an employee.

Misconduct Surrounded by Concealment (Standard 1.2(b)(iii).)

Respondent concealed his suspension from opposing counsel, his clients, and the court before which he had a pending matter.

Mitigation

Extreme Emotional/Physical Difficulties (Standard 1.2(e)(iv).)

Respondent was caring for his elderly and ill mother during the time of his misconduct. Respondent's mother died on February 6, 2009. Respondent experienced significant distress as a result of his perception of his mother's care by others. It is appropriate to consider respondent's successful completion of the LAP and the ADP as a mitigating circumstance in this matter.

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(a), 2.3 and 2.6 and *Shapiro v. State Bar* (1990) 51 Cal.3d 251; *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480; *Powers v. State Bar* (1988) 44 Cal.3d 337; *Lydon v. State Bar* (1988) 45 Cal.3d 1181; *Bercovich v. State Bar* (1990) 50 Cal.3d 116; *In the*

Matter of Snyder (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 593; *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602; *In the Matter of Esau* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 131; and California Rules of Court, rule 9.20.

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.

Recommendations

It is hereby recommended that respondent Kenneth John Kleinberg, State Bar Number 110732, 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 a period of four years subject to the following conditions:

1. Respondent is suspended from the practice of law in the State of California for the first nine months of his probation (with credit given for inactive enrollment, which was effective August 15, 2011, through September 3, 2012 (Bus. & Prof. Code, § 6233));⁵
2. 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;
3. Within 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;
4. Within 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;
5. 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

⁵ 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.)

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 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 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 20 days before the last day of the period of probation and no later than the last day of the probation period;

6. Subject to 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; and
7. Within one year after the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar Ethics School, and passage of the test given at the end of that session.⁶

Multistate Professional Responsibility Examination

It is further recommended that Kenneth John Kleinberg be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline 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.

California Rules of Court, Rule 9.20

It is not recommended that Kenneth John Kleinberg be ordered to comply with the requirements of California Rules of Court, rule 9.20, as he was ordered to comply with the requirements set forth in rule 9.20, as modified by this court, in connection with his inactive enrollment under to section 6233.

⁶ Respondent remains under the restitution obligations ordered by the Supreme Court in Supreme Court matter S166492 (State Bar Court case No. 04-O-11238) and must continue to comply with those restitution obligations as ordered in that prior disciplinary matter. Accordingly, the court will not recommend that respondent pay restitution in this matter. If respondent seeks to modify his restitution requirements in his prior disciplinary matter, he must file a motion seeking modification of his restitution requirements in State Bar Court case No. 04-O-11238 (Supreme Court matter S166492).

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 2015. 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) of the Rules of Procedure of the State Bar of California (Rules of Procedure), all other documents not previously filed in this matter are ordered sealed pursuant to rule 5.12 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 disclosure. 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 19, 2013

RICHARD A. PLATEL
Judge of the State Bar Court