

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - LOS ANGELES

In the Matter of ) Case No.: **09-O-16751-PEM**  
)  
**ADAM RANALD FAIRBAIRN,** ) **DECISION**  
)  
**Member No. 168204,** )  
)  
A Member of the State Bar. )

**Introduction**<sup>1</sup>

In this disciplinary proceeding, respondent **Adam Ranald Fairbairn** is charged with three acts of misconduct in one client matter. The charged acts of misconduct include collecting an illegal fee, failing to refund promptly any part of a fee paid in advance that has not been earned and committing an act of moral turpitude. This court finds, by clear and convincing evidence, that respondent is culpable of collecting an illegal fee and committing an act of moral turpitude. Based on the extent and serious nature of the present misconduct, the court recommends, among other things, that respondent be actually suspended for two years and until he makes restitution to Bruce Brymer in the amount of \$10,000; and until he complies with standard 1.4(c)(ii), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct.<sup>2</sup>

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<sup>1</sup> Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

<sup>2</sup> Future references to standard or std. are to this source.

### **Significant Procedural History**

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on December 19, 2011. On January 31, 2012, respondent filed a response to the NDC.

A four-day trial was held on April 2 and 4 and May 8 and 9, 2012. The State Bar was represented by Deputy Trial Counsel Eli D. Morgenstern and respondent represented himself. Following closing arguments, the court took this matter under submission on May 9, 2012.

### **Findings of Fact and Conclusions of Law**

Respondent was admitted to the practice of law in California on December 14, 1993, and has been a member of the State Bar of California at all times since that date.

#### **Case No. 09-O-16751 The Fisk Matter**

##### **Facts**

Marilyn June Neal died in August 2007. Her niece, Paula Fisk, was named executor of the estate. Although Fisk cared for her aunt,<sup>3</sup> she was not named as one of the beneficiaries of the estate. The sole beneficiaries of the estate were Neal's two children, Bruce Brymer<sup>4</sup> and Lynette Potter. Neal's will was executed in 2004. It is clear from the 2004 will, that Neal had inherited mineral rights and, upon her death, she wanted them, including any oil and gas leases, to go Brymer and Potter.

Prior to February 2008, Fisk, as executor of Neal's estate came to respondent's office with the will and death certificate. This court believes that Fisk wanted to figure out a way where she could obtain some of the mineral rights of the estate since she had been Neal's primary

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<sup>3</sup> At the time of their mother's death, Bruce Brymer lived in Texas and Lynette Potter lived in Arizona.

<sup>4</sup> The will spells his name as Bryner.

caretaker.<sup>5</sup> Respondent told Fisk it would cost her \$20,000 to probate the estate. She hired him to represent her in the probate.

In a February 20, 2008 letter, respondent asked Brymer and Potter each to pay \$10,000 as one-half of the executor's and attorney's fees for respondent to administer the estate. He explained that, since the estate was not liquid, transfer of the property asset, including the oil and gas leases, had to be completed through probate at someone's expense. He further explained that the expected cost of probating the will and payment of fees to the personal representative (executor) of the estate and to respondent as attorney of the estate was estimated at \$20,000.

Further, in the letter to Brymer and Potter, respondent told them that, if they did not pay their portion of the fees, they needed to agree to transfer one-third of each of their interest in the estate to Fisk and she would bear the cost of probate. Respondent also stated that, if Brymer and Potter did not agree to either option, Fisk would forego being the executor, and Elizabeth Joyce Lamb, Brymer's 83-year-old aunt, would become the executor instead.

After Brymer received the letter, he telephoned respondent within five days. He was worried that, if he did not pay the fees, his mineral rights under the terms of his mother's estate might be jeopardized. Brymer was so concerned about his mineral rights being jeopardized that he pulled money out of his 401(k) plan to cover the cost of respondent's request for fees.<sup>6</sup> On March 4, 2008, respondent wrote to Brymer stating that the \$10,000 payment would be the

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<sup>5</sup> The court's belief is based on the testimony of respondent's wife who was present when Fisk came to respondent's office three times. At the first meeting, Fisk made it clear that she wanted an equal third of the estate because she had been the primary caretaker. At the second meeting, respondent and Fisk were batting around some ideas on how she could get one-third of the mineral rights of the estate. At that meeting, respondent gave her some ideas on how to get one-third of the estate and, according to respondent's wife, Fisk called respondent a genius.

<sup>6</sup> This court believes that Brymer testified truthfully at trial. Brymer testified that the only thing he had coming in the will was the mineral rights. Based on respondent's letter, his belief was that if he did not give respondent \$10,000 he would have to give up one-third of his interest in the mineral rights. Also, if Potter did not pay give respondent \$10,000 then she would have to give one-third of her interest and, thus, over 60% of the mineral rights would go to Fisk.

"complete paid attorney and executor fees for the estate." On March 14, 2008, Brymer sent respondent a certified check in the amount of \$10,000, which respondent deposited into his trust account with JP Morgan Chase, account number XXXXXX689-1 on March 24, 2008.

On the other hand, Potter could not come up with the \$10,000 respondent demanded from her. Accordingly, respondent sent her a letter on March 4, 2008, asking that she sign an agreement giving one-third of her interest in the mineral rights of her mother's estate to Fisk and she did so.

On November 10, 2008, respondent filed a Petition for Probate of Will and for Letters Testamentary in the Estate of Marilyn June Neal. (Riverside County Probate Court, case no. RIP094737.) Between November 10, 2008 and July 2009, Brymer did not hear from respondent or the probate court. At no time did respondent file a petition with the probate court for allowance of compensation, or seek to obtain a court order allowing the payment of his attorney's fees for services rendered.

On December 22, 2008, respondent filed a notice with the superior court that he was disqualified to act as attorney in the Neal estate because the State Bar Court had placed him on interim suspension. On that same date, there was a hearing on the petition for probate with no appearance by counsel or party. At that hearing, the court stated that, if the probate notes were not cleared, the petition would be denied without prejudice. The matter was continued to March 10, 2009.

On March 9, 2009, Fisk filed a declaration under penalty of perjury stating that she was unable to proceed with the probate of the will because she had recently learned that respondent had been disqualified to practice and was presently residing in the San Luis Obispo County Jail.

On May 28, 2009, Fisk submitted a request for dismissal of the petition. The court granted her request and dismissed the entire action. On that same date, Fisk sent Potter a letter

informing her that the court granted the dismissal because the value of the estate did not meet the minimum requirements for probate in California. Fisk waived reimbursement of her costs associated with being executor of the estate and, therefore, noted that their agreement that would have granted her a one-third interest in Potter's mineral rights was null and void.

In July 2009, Brymer sent respondent a letter requesting a refund of the \$10,000 he had paid respondent. Respondent refused to refund the fees to Brymer. Instead, he telephoned Brymer and said he had earned all of the fees he had been paid as he had performed some services for the estate and had nothing to refund. He claims to be responsible Brymer's receipt of a check in April 2008 and 2009 for \$700 from Trio Petroleum. The court does not believe respondent played a role in Brymer's receipt of a check from Trio Petroleum.

To date, respondent has not returned Brymer's \$10,000.

## **Conclusions**

### ***Count 1 (Rule 4-200(A) [Illegal Fee])***

Rule 4-200(A) provides that an attorney must not charge, collect or enter into an agreement for an illegal or unconscionable fee.

California Probate Code, section 10830 et seq. requires that an attorney for the executor file a petition for allowance of compensation and obtain a court order before attorney's fees are paid for legal services rendered. At no time did respondent file a petition with the probate court for allowance of compensation or seek to obtain a court order allowing the payment of his attorney's fees for services rendered.

By demanding that Brymer pay \$10,000 for attorney's fees, by accepting the \$10,000 payment from Brymer and by not obtaining a court order for the payment of his fees in accordance with the Probate Code, respondent entered into an agreement for, charged and collected an illegal fee in wilful violation of rule 4-200(A).

***Count 2 (Rule 3-700(D)(2) [Failure to Return Unearned Fees])***

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund any part of a fee paid in advance that has not been earned.

There is clear and convincing evidence that respondent did not returned an unearned fee to Brymer after his employment was terminated. Respondent could not earn any fee in this probate case absent a court approval. (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 324.)

***Count 3 (§ 6106 [Moral Turpitude])***

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

Respondent knew he was not entitled to attorney's fees without an order from the probate court after the legal services were performed. There is clear and convincing evidence that respondent knowingly misrepresented to Brymer that he had to pay \$10,000 for advanced attorney's fees or transfer one-third of his portion of the estate to Fisk in order for the probate to proceed.<sup>7</sup> Respondent's February 20, 2008 letter stated that Brymer was required to pay the advanced fees to respondent. By misrepresenting to Brymer that he had to pay \$10,000 in advanced fees or transfer one-third of his portion of the estate, respondent committed an act involving moral turpitude, dishonesty or corruption in violation of section 6106.

**Aggravation**

**Prior Record of Discipline (Std. 1.2(b)(i).)**

Respondent has one prior record of discipline. (Std. 1.2(b)(i).) In Supreme Court order no. S186393 (State Bar Court case nos. 06-C-13231; 07-C-11040 (Cons.)), filed November 24,

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<sup>7</sup> This court rejects respondent's testimony that he did not think that, when Fisk first came to his office in February 2008, about the Neal estate, that he did not know that it was a probate case until he filed the petition in November 2008.

2010, discipline was imposed consisting of two years' stayed suspension and two years' probation on conditions, including nine months' actual suspension, with credit for interim suspension from November 24, 2008 to October 9, 2009. In the criminal matter, respondent was found guilty after an October 2008 jury trial of two felony violations of Penal Code section 245(a)(2) (assault with a firearm), with enhancements for personal use of a firearm; one felony violation of Penal Code section 246.3 (discharge of firearm with gross negligence); and one misdemeanor violation of Penal Code section 417(a)(2) (brandishing a firearm). The superior court sentenced respondent to five years' probation on conditions including 365 days in custody with credit for time served, among other things. The crimes occurred in June 2006. In addition, in one client matter, respondent was found culpable of violating rule 3-110(A) (not performing competently) and section 6068, subdivision (m) (not communicating with client). These events occurred in August to November 2006. There were no aggravating factors in the disciplinary matter. In mitigation, respondent and the State Bar stipulated to no prior discipline; candor and cooperation; and good character.

**Misconduct Surrounded/Followed by Bad Faith, Dishonesty, Concealment, Overreaching or Other Violations of State Bar Act/Rules of Professional Conduct; If Trust Funds/Property Involved, Refusal/Inability to Account to Client/Other Person for Improper Conduct Toward Funds/Property (Std. 1.2(b)(iii).)**

Respondent's misconduct was surrounded by bad faith and overreaching. (Std. 1.2(e)(iii).) Respondent engaged in a scheme with the executor to violate the probate statutes regarding the amount of fees and the means of obtaining the fees. Respondent did not inform Brymer that he was required to obtain a court order before seeking the payment of his attorney's fees. He also refused to return the \$10,000 illegal fee to Brymer, insisting that he had earned the funds.

**Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)**

Respondent's misconduct significantly harmed clients, the public or the administration of

justice. (Std. 1.2(b)(iv).) Brymer has not had the use of his \$10,000 since March 2008.

**Indifference Toward Rectification/Atonement (Std. 1.2(b)(v).)**

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Standard 1.2(b)(v).) He has not acknowledged in any way that what he did was wrong. He is not remorseful. Instead, he argues at the same time that Brymer was not his client, he helped him get monies with respect to his mineral rights.

**Mitigation**

**Good Character (Std. 1.2(e)(vi).)**

An extraordinary demonstration of good character attested to by a wide range of references in the legal and general communities who are aware of the full extent of the misconduct is a mitigating factor. (Std. 1.2(e)(vi).)

Respondent presented the following witnesses whom the court found credible in support of his good character, most of whom were aware of the nature of his misconduct:

Dr. Andrew Anthony is respondent's doctor in San Luis Obispo. He first met respondent in 1994. He is presently a member of the Rotary Club. They were on the board of Classic American Theater (CATS) together. Respondent drafted his incorporation papers and he had no trouble with his representation.

Dr. Anthony understands that respondent was hired to do some work and that he did not reimburse someone. He has not read the NDC and does not really understand the charges. However, what he understands of the misconduct seems very out of character for respondent. He might change his mind if he knew the facts, but he still thinks it would be aberrational behavior.

John Macari and respondent met in 2006. He is a communications technician and group therapist. He was a psychiatric nurse for 10 years at Atascadero State Hospital and has a clinical

psychiatric degree. They attend the same church, for which respondent does a lot of work. Respondent represented him and prevented his children from being moved to New York. Respondent's priority is his family. Macari recommends respondent to anyone as respondent works on a high ethical standard. Nothing in the NDC or the conviction changes Macari's mind about respondent's good character. He feels that respondent is needed in his community.

Angel Santiago and respondent have known each other for 14 years. Santiago has been a psychiatric technician at Atascadero State Hospital for 23 years. Nothing in the NDC or conviction changes his opinion about his good character. Respondent helped him retain custody of his children and continued to work on the case even though, at one point, he was not getting paid. Respondent has been very honest with him. Santiago believes respondent is well liked and respected.

Mark Van Dyke and respondent have known each other since 2005. He is a correctional officer whom respondent represented in a very difficult divorce even though, at one point, he was not getting paid. He finds respondent to be very honest. He has integrity and a good reputation. Van Dyke believes respondent's behavior is aberrational and nothing in the NDC changes his mind.

Jim Heggerty and respondent have known each other for 15 years. Heggerty was on the Paso Robles City Council for 10 years. Previously, he had been a logistics for Northrup Corporation for 14 years and spent 23 years in the United States Air Force as well. Although Heggerty had not read the NDC, he was aware of the conviction and was made aware of the present charges. Neither the conviction nor the present charges change his mind about respondent.

Heggerty noted that respondent was a great help in getting a scholarship foundation started. He also confirmed that respondent was very involved in the Mainstreet Association

which won a nationwide award. Mainstreet Association is a group of businesspeople who turn around the main streets of small towns. He believes respondent is a pillar of the community and that he is honest and has integrity. He should not be suspended. The misconduct was aberrational.

Moreover, respondent is very involved in his community. He was on the board of his church, Highland Church, from 2009 until December 2011. Prior to his incarceration, he was involved in the church and was instrumental in its construction. He also is on the board of CATS. He served as a board member of the North County Women's Shelter. He was an officer in the Rotary Club from 1995 to 2003. Respondent is presently a member of the Mainstreet Association in the community in which he resides.

### **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. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.3 and 2.7 apply in this matter. The most severe sanction is found at standard 2.7 which recommends a six-month actual suspension irrespective of mitigating circumstances for culpability of violating rule 4-200.

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.)

Respondent has been found culpable of violations of rule 4-200(A) and section 6106. Mitigation includes good character and community service. Aggravating circumstances include a prior disciplinary record; bad faith and overreaching; indifference toward rectification or atonement; and harm.

The State Bar originally recommended three year’s suspension stayed, two years’ probation with conditions of consisting of a two- or three- year actual suspension. After trial, the State Bar recommended disbarment. Respondent requests stayed suspension with no actual suspension.

The court found instructive *In the Matter of Phillips, supra*, 4 Cal. State Bar Ct. Rptr. 315. In *Phillips*, the attorney was disbarred for his misconduct involving five client matters and two non-client matters in nearly four years. His misconduct included charging an illegal fee, failing to return client file, sharing legal fees with a nonlawyer, forming a law partnership with a nonlawyer, failing to perform services, failing to refund unearned fee, failing to render an accounting and solicitation. The attorney began to commit professional misconduct soon after he was admitted to practice and the misconduct was surrounded by little evidence in mitigation, but significant evidence in aggravation. *Phillips* presents greater misconduct in five client matters and two non-client matters and greater aggravation than the present case, which also presents more mitigation. Accordingly, the present matter merits less discipline than *Phillips*.

After considering the law and the facts, the court believes that the public will be protected

by, among other things, an actual suspension for two years and until respondent makes restitution with interest to Brymer and until he complies with standard 1.4(c)(ii) by demonstrating his rehabilitation, fitness to practice and present learning and ability in the general law before he is allowed to resume practicing again.

Not only did respondent charge and collect an illegal fee, he schemed with the executor of the estate to violate the probate statutes to do so. Even after the probate proceeding was dismissed because the estate was too small to be probated, he refused to return the illegally-obtained funds to Brymer, claiming he had earned them. The court is concerned about his arrogance and indifference toward his ethical duties and believes that a lengthy actual suspension coupled with restitution and the requirement of proving rehabilitation before resuming practice, among other things, will suffice to protect the public in this instance.

### **Recommendations**

It is recommended that respondent ADAM RANALD FAIRBAIRN, State Bar Number 168204, be suspended from the practice of law in California for three years, that execution of that period of suspension be stayed, and that respondent be placed on probation<sup>8</sup> for a period of three years subject to the following conditions:

1. Respondent ADAM RANALD FAIRBAIRN is suspended from the practice of law for a minimum of two years, and respondent will remain suspended until the following requirement(s) are satisfied:
  - i. Respondent must make restitution to Bruce Brymer in the amount of \$10,000 plus 10 percent interest per year from March 14, 2008 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Bruce Brymer, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles; and
  - ii. Respondent must provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his

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<sup>8</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.)

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 must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.
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. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.
6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.
7. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. 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.)
8. At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the staid suspension.

**Multistate Professional Responsibility Examination**

It is recommended that respondent be ordered to 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.

**California Rules of Court, Rule 9.20**

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

**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: July 2, 2012

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PAT McELROY  
Judge of the State Bar Court