

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No. 10-H-00400-PEM
)	
DENNIS E. POWELL,)	
)	DECISION
Member No. 68376,)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this reproof violation proceeding, respondent **Dennis E. Powell** is found culpable, by clear and convincing evidence, of violating conditions attached to a private reproof previously imposed on him by the State Bar Court.

The court recommends, among other things, that respondent be suspended from the practice of law for one year, that execution of said suspension be stayed, and that respondent be actually suspended from the practice of law for 60 days and until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules Proc. of State Bar, rule 205.)

II. Pertinent Procedural History

On March 16, 2010, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and served a Notice of Disciplinary Charges (NDC) on respondent at his official membership records address in the State of Washington. (Rules Proc. of State Bar, rule 60.) On April 30, 2010, the State Bar properly filed and served a First Amended NDC on respondent.

Respondent signed the return receipt. Respondent did not file a response to the NDC or the First Amended NDC. (Rules Proc. of State Bar, rule 103.)

Respondent's default was entered on July 14, 2010. Respondent was enrolled as an inactive member on July 17, 2010. Respondent did not participate in the disciplinary proceedings.

The court took this matter under submission on August 9, 2010, after the filing of State Bar's Brief.

III. Findings of Fact and Conclusions of Law

All factual allegations of the First Amended NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on April 30, 1976, and has since been a member of the State Bar of California.

B. Violation of Repeal Conditions

In February 2009, respondent and the State Bar entered into a stipulation regarding facts and disposition in State Bar Court case No. 05-O-05001. On March 23, 2009, the State Bar Court approved the stipulation and imposed upon respondent discipline consisting of a private reproof with attached conditions (order) for a period of one year.

Soon after March 23, 2009, respondent received notice of the order, effective April 13, 2009. The conditions attached to the private reproof required respondent to do, among other things, the following: (1) file quarterly reports by July 10, 2009, October 10, 2009, January 10, 2010, and April 10, 2010; (2) file a final report by April 13, 2010; (3) provide proof of having completed six hours of instruction of mandatory continuing legal education (MCLE) in legal

ethics by April 13, 2010; and (4) provide proof of having passed the Multistate Professional Responsibility Examination (MPRE) by April 13, 2010.

On or about April 13, 2009, the Office of Probation mailed a letter to respondent reminding him of all of the conditions of the reproof and providing him with a form for his use in submitting required quarterly reports. Respondent received this letter shortly after it was mailed. On May 19, 2009, respondent had a discussion with the Office of Probation in which they discussed his duties under all of his reproof conditions.

On July 2, 2009, respondent filed a defective July 10, 2009 quarterly report in that it was dated June 29, 2009, and did not contain the required certifications for the entire quarter ending June 30, 2009. On July 2, July 9, August 26, and September 3, 2009, the Office of Probation notified respondent that his July 10 quarterly report was defective and repeatedly requested that he submit a compliance quarterly report. Although respondent received each of these notifications, he did not submit any further quarterly report for quarter ending June 30, 2009.

Furthermore, as of April 30, 2010, respondent had not:

1. Filed any of the quarterly reports due on January 10 and April 10, 2010;
2. Filed the final report due on April 13, 2010;
3. Provided proof of having completed the MCLE condition by April 13, 2010; and
4. Provided proof of having passed the MPRE by April 13, 2010.

***Count One: Rule 1-110 of the Rules of Professional Conduct*¹**

Rule 1-110 requires State Bar members to comply with conditions attached to reproofs. The State Bar has proven by clear and convincing evidence that respondent willfully violated rule 1-110 by failing to: (1) file a proper July 10, 2009 quarterly report; (2) file the quarterly

¹Unless otherwise indicated, all further references to rules refer to the Rules of Professional Conduct of the State Bar of California.

reports due on January 10 and April 10, 2010; (3) file the final report due on April 13, 2010; (4) provide proof of having completed the MCLE condition by April 13, 2010; and (5) provide proof of having passed the MPRE by April 13, 2010.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)²

B. Aggravation

There are two aggravating factors. (Std. 1.2(b).)

Respondent has one prior record of discipline.³ (Std. 1.2(b)(i).) Respondent was privately reproved with one year probation for failure to perform services in one client matter. (State Bar Court case No. 05-O-05001, filed March 23, 2009, and effective April 13, 2009.)

² All further references to standards are to this source.

³ The State Bar omitted to submit a copy of respondent's prior record of discipline in case No. 05-O-05001. It is well-settled that the "long-standing prescribed procedure in the State Bar Court is to offer in evidence the admissible prior recordThis procedure of physically admitting a prior record of discipline insures that all bodies vested with deciding this case, including [the Review Department] and the Supreme Court, are examining the identical documents and all counsel can cite uniformly to those documents." (*In the Matter of Kizer* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 87, 93.)

Thus, a certified copy of all prior records of discipline should have been submitted in order to be considered as evidence in aggravation. (Rules Proc. of State Bar, rule 216; stds. 1.2(b)(i) and 1.7(a).) As an exception to the long-standing prescribed procedure, the court has independently obtained copies of respondent's prior record of discipline and will take judicial notice of those records in this matter. (Evid. Code, § 452, subd. (d).)

The court hereby directs the Clerk to mark respondent's prior record of discipline (case No. 05-O-05001) as a court exhibit in this proceeding and to include that exhibit as a part of the record that is transmitted to the Supreme Court.

Respondent's failure to participate in this disciplinary matter before the entry of his default is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

The purpose of 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.)

Respondent's misconduct involved failure to comply with his reproof conditions. Standard 2.9 recommends suspension for violation of rule 1-110.

The State Bar urges a one year's stayed suspension and 90 days' actual suspension, citing *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 in support of its recommended discipline.

In *Meyer*, an attorney who had two prior records of discipline (private reprovals) was actually suspended for 90 days with a two years' stayed suspension and a three years' probation for failing to file quarterly reports and complete MCLE courses. He violated the same probation conditions attached to his first and second prior record of discipline.

Unlike *Meyer*, respondent has one prior record of discipline. In view of respondent's misconduct, the case law and the aggravating evidence, placing respondent on an actual suspension for 60 days would be appropriate to protect the public and to preserve public confidence in the profession.

VI. Recommendations

A. Discipline

Accordingly, the court hereby recommends that respondent **Dennis E. Powell** be suspended from the practice of law for one year, that said suspension be stayed, and that

respondent be suspended from the practice of law for a minimum of 60 days. He is to remain suspended until he files and the State Bar Court grants a motion to terminate his suspension.

(Rules Proc. of State Bar, rule 205.)

It is recommended that respondent be ordered to comply with any probation conditions imposed by the State Bar Court as a condition for terminating his suspension. (Rules Proc. of State Bar, rule 205(g).)

It is also recommended that if respondent remains suspended for two years or more as a result of not satisfying the preceding conditions, he will remain suspended until he has shown proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Standard 1.4(c)(ii) and Rules Proc. of State Bar, rule 205.)

B. Multistate Professional Responsibility Exam

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination within one year after the effective date of this order, or during the period of his suspension, whichever is longer, 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).)

C. California Rules of Court, Rule 9.20

If respondent remains actually suspended for 90 days or more, he must also 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 120 and 130 calendar days, respectively, after the effective date of this order. Willful failure to do so may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.⁴

⁴ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

D. Costs

It is further 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: November _____, 2010

PAT McELROY
Judge of the State Bar Court