

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: 12-H-13428-DFM
)
ANDREW P. MULLALY,)
) DECISION
)
Member No. 185716,)
)
)
A Member of the State Bar.)

INTRODUCTION

In this reprobation violation proceeding, Respondent **Andrew P. Mullaly** (Respondent) is charged with failing to comply with conditions attached to a private reprobation previously imposed on him by the State Bar Court in April 2011 (case number 08-O-13688). Those alleged failures included failing to provide quarterly reports on a timely basis or at all; failing to enroll in and pass the Multi-State Professional Responsibility Examination during the one year of his period of reprobation; and failing to enroll in and pass the State Bar’s Ethics School during that same period of time. Respondent has admitted throughout the pendency of this matter his failure to comply with those conditions.

For the reasons discussed below, the court recommends, among other things, that Respondent be suspended from the practice of law in California for two years; that execution of that period of suspension be stayed; and that Respondent be placed on probation for a period of

two years, with various conditions of probation including a requirement that he be actually suspended for a period of 90 days.

PERTINENT PROCEDURAL HISTORY

This proceeding was initiated by the filing of a Notice of Disciplinary Charges (NDC) on June 5, 2012. On June 20, 2012, Respondent filed his response to the NDC, acknowledging his violation of many of the various conditions and providing certain background information to seek to explain his inaction.

An in-person status conference was held on July 2, 2012. At that time, the court scheduled the matter to be tried on September 27, 2012; scheduled a pretrial conference on September 17, 2012; and provided a September 10, 2012 deadline for the filing of pretrial conference statements. A written order confirming those dates and the parties' pretrial obligations and deadlines was signed and served by this court on July 3, 2012.

The State Bar's pretrial conference statement was filed on September 10, 2012. At the time of the scheduled pretrial conference on September 17, no pretrial conference statement had yet been filed by Respondent. At that pretrial conference, Respondent was given until September 21, 2012, to file a pretrial conference statement. That order was confirmed in writing on September 18, 2012. Despite being given a second deadline, Respondent did not file his pretrial conference statement until September 24, 2012.

Trial was commenced and completed on September 27, 2012. At the commencement of the trial, the parties informed the court that they had reached a stipulation on all issues related to the State Bar's case on culpability issues, including the admissibility of all of the State Bar's proffered exhibits. That stipulation was then filed, and the State Bar's exhibits were received in evidence by the court. Respondent then testified on his own behalf with regard to potentially

mitigating factors. The case was completed and the matter was submitted for decision on September 27, 2012.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 14, 1972, and has been a member at all times since that date.

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On March 29, 2011, Respondent entered into a Stipulation Re Facts, Conclusions of Law and Disposition and Order Approving Private Reapproval (“Stipulation”) with the Office of the Chief Trial Counsel of the State Bar of California in case number 08-O-13688. On April 4, 2011, the State Bar Court filed an order approving the Stipulation (“Reapproval Order”). The misconduct giving rise to this stipulation arose out of a single client matter and included violations of section 6068(m) [failure to respond promptly to reasonable status inquiries by a client] and rule 3-110(A) [failure to perform legal services with competence]. On April 25, 2011, the Reapproval Order became effective.

Under the terms of the Stipulation and resulting Reapproval Order, Respondent was privately reapproved by the State Bar Court and subject to conditions of reapproval for a period of one year. These conditions of reapproval included the following:

Respondent was required to submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period attached to the reapproval. In those quarterly reports Respondent was required to state under penalty of perjury whether he had complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of the reapproval during the preceding calendar quarter.

Respondent was required to submit a final report to the Office of Probation, containing the same information as the quarterly reports, no earlier than twenty days before the last day of the condition period and no later than the last day of the condition period.

Respondent was required to provide proof to the Office of Probation of attendance at a session of the Ethics School and passage of the test given at the end of the session within one year of the effective date of the reprobation.

Respondent was required to provide proof of passage of the Multistate Professional Responsibility Examination (“MPRE”), administered by the National Conference of Bar Examiners, to the Office of Probation within one year of the effective date of the reprobation.

On April 22, 2011, the State Bar’s Office of Probation mailed a letter to Respondent reminding him of the conditions attached to his private reprobation. The letter provided Respondent with the form to use in completing his quarterly reports, a schedule of the State Bar’s Ethics classes, and a schedule of the MPRE testing dates. The letter explicitly warned Respondent that failure to comply with any of the various conditions of reprobation could result in additional discipline. Respondent received the April 22, 2011 letter from the Office of Probation.

Despite the language of the stipulation and the reminder from the Office of Probation, Respondent has failed to comply with each of the above conditions of reprobation, as set forth more fully below.

Quarterly Reports

Respondent filed his first quarterly report, due on or before July 10, 2011, on July 11, 2011. Hence the report was filed late, albeit by only a single day.¹

Respondent filed his second quarterly report, due on or before October 10, 2011, on October 14, 2011, four days late. Although the document purported to have been signed on October 7, 2011, the post office mark on the accompanying envelope indicated that it had been mailed on October 12, 2011.

¹ The report was mailed within the required time, but arrived after the deadline. This conduct, standing alone, would not warrant discipline. Unfortunately, it was a harbinger of misconduct to come.

Respondent failed completely to file his third and fourth quarterly reports, due January 10 and April 10, 2012, respectively. He also failed to file his final report, due on or before April 25, 2012. At the time of the trial of this matter, those reports had still not been filed.

Ethics School

Respondent failed, by April 25, 2012, to provide the Office of Probation with proof of attendance at a session of the Ethics School and passage of the test given at the end of the session within one year of the effective date of the reproof. He has still not enrolled in the class.

MPRE

Respondent failed, by April 25, 2012, to provide the Office of Probation with proof of passage of the MPRE within one year of the effective date of the reproof. He has still not taken the class, although he testified that he has now enrolled in the examination to be given in November 2012.

Count 1 - Rule 1-110, Rules of Professional Conduct [Failure to Comply with Conditions of Reproof]

Rule 1-110 of the Rules of Professional Conduct of the State Bar of California requires an attorney to comply with the conditions attached to a reproof. Respondent's failure to perform the conditions of reproof, itemized above, constituted willful violations by him of his obligations under rule 1-110.

LEVEL OF DISCIPLINE

Aggravating Circumstances

The State Bar bears the burden of establishing aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)² The court finds the following aggravating factors:

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

Prior Record of Discipline

Respondent's prior record of discipline is an aggravating circumstance. (Std. 1.2(b)(i).) Effective June 9, 2009, Respondent was privately reprovved with conditions for one year in State Bar Court case no. 08-O-13363 for failure to perform services competently in willful violation of rule 3-110(A) of the Rules of Professional Conduct and failure to respond promptly to requests for status reports in willful violation of Business and Professions Code section 6068, subdivision (m).

Multiple Acts of Misconduct

Respondent engaged in multiple acts of misconduct by violating numerous conditions of his reproval. (Standard 1.2(b)(ii).)

Lack of Insight and Remorse

Respondent has demonstrated indifference toward rectification of his misconduct. (Std. 1.2(b)(v).) As previously noted, he has yet to file the delinquent quarterly reports or enroll in the State Bar's Ethics School. Such continued indifference to his duty to comply with those requirements is an aggravating factor. (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 702.)

Mitigating Circumstances

Emotional Difficulties

Extreme emotional difficulties may be considered mitigating where it is established by expert testimony that they were responsible for the attorney's misconduct. (Std. 1.2(e)(iv); *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.) Respondent testified to the emotional upset and grief suffered by him as a result of the illness and sudden, unexpected death of Respondent's sister on January 9, 2011.

The evidence offered by Respondent did not provide clear and convincing evidence that his problems are a mitigating factor here. There was no expert testimony, or other convincing evidence, showing the required nexus between Respondent's claimed emotional problems and his misconduct. Nor was there sufficient evidence for this court to conclude that any emotional problems suffered by Respondent in the past have now been satisfactorily resolved.

Cooperation

Respondent entered into an extensive stipulation of facts and freely admitted certain of the charges in this case, for which conduct Respondent is entitled to some mitigation. (Std. 1.2(e)(v); see also *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [where appropriate, more extensive weight in mitigation is accorded those who admit to culpability as well as facts].) The weight of that mitigating credit, however, is offset slightly by his failure to comply with his court-ordered obligation to file a timely pretrial conference statement in this proceeding, conduct which would normally be an aggravating factor. (See *In the Matter of Meyer, supra*, 3 Cal. State Bar Ct. Rptr. at p. 702.)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silvertown* (2005) 36 Cal.4th 81, 91-92.)

Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors, including aggravation and mitigation. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

In looking to the standards, the court finds that standard 2.9 provides that an attorney's willful violation of rule 1-110 must result in suspension. Further, standard 1.6(b) adds that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions. Finally, standard 1.7(a) provides that if an attorney, who has been found culpable of professional misconduct in a disciplinary proceeding, has a record of one prior imposition of discipline, the degree of discipline imposed in the current proceeding must be greater than that imposed in the prior proceeding unless the prior discipline was remote in time and the offense minimal in severity.

Respondent has been found culpable of failing to comply with almost all of the conditions attached to his earlier private reproof. There are additional aggravating circumstances present and very little in the way of mitigating circumstances. Of particular

concern to this court is Respondent's ongoing indifference to complying with his professional obligations.

The State Bar has recommended that Respondent be suspended from the practice of law for two years; that execution of that period of suspension be stayed; and that Respondent be placed on probation for a period of two years, with various conditions of probation including a requirement that he be actually suspended for a period of 90 days. This court agrees. (See *In the Matter of Meyer, supra*, 3 Cal. State Bar Ct. Rptr. 697 [90-day actual suspension for misconduct remarkably similar to instant action]; *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103; *Conroy v. State Bar* (1990) 51 Cal.3d 799.)

RECOMMENDATION

Discipline

The court recommends that Respondent **Andrew P. Mullaly**, Member No. 185716, be suspended from the practice of law for two years; that execution of that suspension be stayed; and that Respondent be placed on probation for two years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first ninety (90) days of probation.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.
3. 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.

4. 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.
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.
5. Subject to the proper or good faith assertion of any applicable privilege, Respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to Respondent, whether orally or in writing, relating to whether Respondent is complying or has complied with the conditions of this probation.
6. 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.)

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter.

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 the Supreme Court order imposing discipline in this matter, 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).)

California Rules of Court, Rule 9.20

The court also recommends that Respondent be ordered to 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 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order.³

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³ Respondent must file a rule 9.20(c) affidavit even if he has no clients on the date of the Supreme Court order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or a contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d); see also *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 296.)

Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: October _____, 2012

DONALD F. MILES
Judge of the State Bar Court