FILED MAY 29, 2014

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **GERARD BRENNAN HARVEY,** **Member No. 152669,** A Member of the State Bar.	)	Case No.: **13-C-11781 - RAH** **DECISION**

Introduction and Significant Procedural History

Respondent has a long history of addiction and mental health issues. Most recently, he pled guilty and was convicted of a violation of Health and Safety Code section 11550 [unlawfully using and being under the influence of a controlled substance, to wit, methamphetamine.] He was sentenced to formal probation and ordered to participate in Proposition 36 requirements, among other conditions.

On July 8, 2013, the review department of the State Bar Court issued an order referring the matter to the hearing department for a hearing and decision recommending the discipline to be imposed in the event that the hearing department found that the facts and circumstances surrounding the offense(s) for which respondent was convicted involved moral turpitude or other misconduct warranting discipline.

Trial in this court commenced on February 3, 2014. Deputy Trial Counsel Maria L. Ghobadi of the Office of the Chief Trial Counsel represented the State Bar of California, and Victoria L. Campbell represented respondent. The matter was submitted for decision on March 14, 2014.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 6, 1991, and has been a member of the State Bar of California at all times since that date.

The record of respondent's conviction is conclusive evidence of respondent's guilt of the crime for which he was convicted. (Bus. & Prof. Code, § 6101, subd. (a); *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588; *In re Crooks* (1990) 51 Cal.3d 1090, 1097.) Respondent's conviction is therefore conclusive proof that respondent committed all the elements of that crime. (*In re Duggan* (1976) 17 Cal.3d 416, 423; *In the Matter of Respondent O, supra,* 2 Cal. State Bar Ct. Rptr. at p. 588.)

Respondent's Background

Respondent is a single father with three children ages 6, 15, and 17, and two stepchildren, ages 14 and 18. He has a criminal defense practice in the Owens Valley. He started this practice in 1991, and has handled about 15,000 cases over his career as both a public defender in Inyo County and a private attorney. While a public defender, he was a mentor to other attorneys in the county, providing guidance in the criminal defense field. As a public defender, he was given an extremely large case load, varying between 750 and 1200 cases per year, covering the entire county, including Big Pine, Bishop, Independence, and Death Valley. Despite this difficult case load, out of 46 jury trials, he either won or obtained a hung jury on half of them.

In spring 2008, his mortgage adjusted from $3,300 to $5,600 per month. This caused a serious financial burden. At that time, he had been sober for 14 years, but under the pressures he was facing, he relapsed. He was fired from his job, but was rehired after going through in-patient treatment in Temecula, California, away from his family. He began to have problems with his girlfriend. His house went into foreclosure, and was sold at a trustee's sale. On the last

day he owned the house, he relapsed again and drove. He was arrested, and later convicted, for driving under the influence.

Respondent acknowledges his problem and has gained insight into its impact on his career and his family. Further, he agrees that he has to be monitored. He currently sees a drug abuse counselor and goes to either Narcotics Anonymous or Alcoholics Anonymous meetings twice a week.

Respondent has been active in his community. He participated in a local theater company and was in the Rotary Club. For ten years, he was president of the Inyo-Mono Advocates for the Handicapped, advocating for the well-being of those with mental or physical handicaps. He has participated in youth T-ball and soccer and is now an AYSO soccer referee for four games each Saturday.

Culpability Findings

Respondent's Conviction and the Surrounding Facts and Circumstances

On March 22, 2013, respondent was in court at the Inyo County Superior Court in Independence, California waiting for his matter to be called. Deputy Glenn McClinton, a bailiff at the court, noticed that respondent was exhibiting behavior consistent with someone under the influence of a central nervous system stimulant. Deputy McClinton approached respondent and asked if he was not feeling well. Respondent explained that he was just tired, and he was allowed to finish his matter, after which he left the courtroom. Deputy McClinton was concerned that he may attempt to drive, so he spoke with an investigator from the District Attorney's office and requested that he come to the court to interview respondent. Deputy McClinton spoke with respondent again and inquired as to whether he was intoxicated or otherwise under the influence. Respondent advised Deputy McClinton that he had "tested clean" that morning. When the investigator arrived, respondent was given a narcotics evaluation, and

he concluded that respondent was under the influence of methamphetamine. A urine sample revealed the presence of both amphetamine/methamphetamine and marijuana. Respondent was immediately arrested and on April 17, 2013, pled guilty to a violation of Health and Safety Code section 11550. The court placed respondent on formal probation and imposed Proposition 36 requirements, among other conditions.

Respondent admitted to handling several matters on the court's March 22, 2013, calendar and that he never told his clients or the court that he was under the influence of methamphetamine and that he lied to Deputy McClinton when he stated that he had "tested clean" that morning. Despite his condition, his clients were not harmed by his handling their cases in this condition.

Prior convictions and subsequent infraction.

On April 10, 2008, respondent was conducting a jury trial in the Bishop Court House. During the trial and his questioning of Inyo County Sheriff Sergeant Hollowell, officers noticed respondent was exhibiting behavior consistent with someone under the influence of a controlled substance. Due to respondent's in-court behavior he was arrested during a court recess and taken to the police station. A drug recognition evaluation was conducted at the police station. During the drug evaluation performed by Bishop Police Officer Carter, he noticed respondent's face appeared red and flush, his heart rate was between 100-110 beats per minute, his eyes appeared red, glassy, and his eyelids droopy. After respondent failed the various sobriety exams during the drug evaluation and based on Officer Carter's own observations of respondent, he determined respondent was under the influence of a controlled substance. Respondent refused to submit to a urine or blood analysis.

On May 7, 2008, Sergeant Holloway and District Attorney Investigator Roberts were dispatched to the Inyo County Courthouse due to a report that respondent was intoxicated while

in court. Sergeant Holloway entered the courtroom and observed respondent for 15 minutes. While observing respondent in court, Sergeant Holloway noticed respondent had difficulty remaining still, he was grinding his teeth, and he appeared red. Due to Sergeant Holloway's observations he believed respondent was under the influence of a controlled substance. Officers then approached respondent while he was in court and arrested him. Respondent was taken to the police station and a drug recognition evaluation was conducted. Respondent's heart rate was 114 beats per minute, and after failing the various sobriety exams, Sergeant Holloway concluded respondent was under the influence of a controlled substance. A urine sample collected at the time of respondent's arrest was analyzed and confirmed the presence of methamphetamine and marijuana in respondent's system.

In neither of these cases, however, were respondent's clients harmed by his improper behavior of appearing before the court while under the influence of methamphetamine.

On July 17, 2008, the Office of the Attorney General filed a criminal complaint in the Inyo County Superior Court, case no. MBCRM-08-46532, charging respondent with two misdemeanor counts of violating Health and Safety Code Section 11550 [unlawfully using and being under the influence of a controlled substance, to wit, methamphetamine] on April 10 and May 7, 2008. On September 3, 2008, respondent pled no contest to one count of violating Health and Safety Code Section 11550 and the remaining count was dismissed.

The matter was referred to the Office of Probation to determine whether respondent was eligible for Deferred Entry of Judgment pursuant to Penal Code section 1000. On September 17, 2008, respondent was found eligible for that process and was ordered to voluntarily enroll in a court-recognized drug abuse rehabilitation program, report to probation, and pay fines and restitution. On July 7, 2010, the court terminated the deferred entry of judgment and dismissed the matter pursuant to Penal Code section 1000.

On December 31, 2010, respondent was pulled over by California Highway Patrol Officer Otten. Officer Otten conducted a series of field sobriety tests, at the conclusion of which he believed respondent exhibited impairment throughout all portions of the exam. A urine sample collected at the time of respondent's arrest was analyzed and confirmed the presence of methamphetamine, amphetamine, and marijuana in respondent's system.

On May 24, 2011, the Office of the Attorney General filed a criminal complaint in the Inyo County Superior Court, case no. MBCRM-11-51885, charging respondent with one misdemeanor count of a violating Vehicle Code section 23152(a) [driving under the influence of alcohol or drugs (DUI)], a violation of Health and Safety Code Section 11550, and two unrelated misdemeanors. On November 2, 2011, respondent pled guilty to one count of violating Vehicle Code section 23152(a). All remaining counts were dismissed. On November 2, 2011, respondent was sentenced to three years of probation, ordered to pay fines and restitution, to attend and complete a DUI first-offender program, ordered not to drive with alcohol in his system, to submit to alcohol testing, and obey all laws, among other conditions.

On April 18, 2013, respondent was driving a vehicle while talking on his cellphone. Bishop Police Officer Stephens initiated a traffic stop and was informed by dispatch that respondent's license was suspended. Respondent, while on probation for Inyo County Superior Court, case no. MBCRM-13-55077, was cited for violating Vehicle Code sections 14601.1(a) [driving on a suspended license], 23123(a) [talking on a cell phone while driving], and 16028(a) [failure to have auto insurance].

Conclusion(s) of Law

The court finds that the current misconduct and the facts and circumstances which surround it, do not involve moral turpitude, but constitute other conduct warranting discipline.

Aggravation[1]

Harm to the Public and the Administration of Justice (Std. 1.5(f).)

Respondent appeared in court on this and other occasions while intoxicated and repeatedly over a period of years disobeyed other laws and probation conditions. Respondent was on criminal probation for a prior driving under the influence charge from 2010 when he committed the present offense. Further, after he pled guilty to the violation underlying this matter, he was cited for a Vehicle Code violation for driving on a suspended license and talking on the telephone while driving, an aggravating factor. (See *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) Such behavior not only has the potential of harming his clients, it also reflects poorly on the legal system and lawyers in general and demonstrates a lack of respect for the law. These are aggravating circumstances.

Mitigation

No Prior Record (Std. 1.6(a).)

Respondent had no prior record of discipline for over 20 years before the current misconduct. This is normally a significant mitigating factor. However, its mitigating impact is diminished by respondent's repeated recent criminal conduct, as set forth above.

Extreme Emotional/Physical Difficulties (Std. 1.6(d).)

Respondent credibly testified as to serious financial stress he faced as a result of the loss of his job as a public defender and the increase in his mortgage payment in 2008.

Murat Z. Akalin, M.D., Board-certified in family medicine and in psychiatry, has been treating respondent for bipolar disorder and chemical dependence for several years. Dr. Akalin reported that respondent's substance abuse issue commenced at about age 36 which resulted in

[1] All further references to standards (std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

family, legal and occupational problems later. He first obtained treatment at age 46 and was able to maintain abstinence from methamphetamines for 18 months. Shortly thereafter, without treatment and monitoring, he relapsed. Over the past years, he has been able to maintain abstinence for as long as one year at a time, most recently in 2011 and 2012 when he wanted to improve his relationship with his children.[2]

Dr. Akalin concluded that respondent's condition was a direct cause of his misconduct. Dr. Akalin has prescribed medication to minimize the symptoms of these disorders and to reduce the likelihood of relapse, and he is guardedly optimistic that respondent will be able to regain control and avoid future incidents such as those he faced prompting this action. The court found Dr. Akalin to be a credible witness.

Respondent is entitled to some mitigation resulting from his bipolar disorder since he is able to treat this condition medically to prevent it from recurring. However, respondent is not entitled to mitigation for his illegal drug abuse, since he has failed to show by clear and convincing evidence that he is not likely to relapse.

Good Character (Std. 1.6(f).)

Respondent has been active in his community and is entitled to mitigation credit for these activities. Further, respondent's ex-wife, Dana M. Crom, who is also an attorney, testified on respondent's behalf. She noted that respondent has always been a devoted father and has consistently met his obligations to his children. She acknowledged the stress that respondent faced while with the Public Defender's Office. She was aware of the extent of the misconduct. Although this single character testimony does not represent a wide range of references from the legal and general community, the court gives it some mitigating credit, since she is an attorney and is aware of the importance of appropriate attorney conduct.

[2] Respondent was not subject to court-mandated treatment or monitoring during that time.

Cooperation with State Bar (Std. 1.6(e).)

Respondent entered into a detailed stipulation regarding the facts of this matter. Although many of these facts were easily proven by court records, his cooperation with the State Bar saved valuable court time. He is entitled to some mitigation for his cooperation.

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. 1.1.)

Standard 1.7 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 must be the most severe of the applicable sanctions. (Std. 1.7(a).) Discipline is progressive. However, the standards do not require a prior record of discipline as a prerequisite for imposing any appropriate sanction, including disbarment. (Std. 1.8.)

Standard 2.12(b) applies in this matter, allowing a range of disciplinary recommendations from reproval to suspension. 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; std. 1.1.) 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; std. 1.1.)

This case involved one misdemeanor conviction for violating Health and Safety Code section 11550, which the court found not to constitute moral turpitude in this instance. In aggravation, the court considered harm. Mitigating circumstances included no prior disciplinary record, financial stress and mental health issues (bipolar disorder), community service and good character. All but the financial stress and community service were afforded only some mitigating weight as noted above.

The State Bar recommends, among other things, six months' actual suspension. Respondent seeks no actual suspension.

The court found instructive *In re Kelley* (1990) 52 Cal.3d 487. In *Kelley*, the Supreme Court publicly reproved an attorney and placed her on disciplinary probation for a period of three years subject to conditions which included her referral to the State Bar's Program on Alcohol Abuse. The attorney was convicted of drunk driving on two occasions over a 31-month period. The second incident constituted a violation of her criminal probation in the first case. The attorney's blood alcohol level in the second case was between 0.16% and 0.17%. The attorney participated in the disciplinary proceeding and presented evidence in mitigation, including the absence of a prior disciplinary record, extensive community service, compliance with all criminal probation conditions since her second conviction and cooperation in the disciplinary proceedings. *Kelley* is more comparable to the present case but, because respondent's misconduct involved the practice of law, this case merits significantly greater discipline than *Kelley*.

In *Ridge v. State Bar* (1989) 47 Cal.3d 952, one year of actual suspension was imposed on an attorney who appeared in court under the influence of alcohol and had a .17% blood alcohol level. However, *Ridge* is distinguishable from the present case because that matter presented greater misconduct, among other things. Respondent Ridge was held in contempt after

lying to the court about only having two beers at lunch prior to conducting a preliminary hearing. Further, in one client matter, he was found culpable of prolonged failures to communicate and perform and improperly withdrawing from representation. Moreover, he was found grossly negligent, although not dishonest or venal, in mishandling his father's estate, including commingling of funds; refusing to provide an accurate accounting of assets to a beneficiary despite repeated requests over a six-year period; losing accounting records; and removing estate funds from a trust account to avoid possible attachment by the Franchise Tax Board due to tax issues unrelated to the estate.

Respondent has had repeated incidents of misconduct similar to the instant criminal misconduct, all of which has been part and parcel of the practice of law. His misconduct demonstrates a lack of respect for the law and the judicial system. He was under the influence of illegal drugs during court appearances. The evidence does not indicate that clients were actually harmed, but his behavior exposed his clients who were facing criminal charges to harm, including incarceration. He was on criminal probation for a prior driving under the influence charge from 2010 when he committed the present offense. He was cited for driving with a suspended license and for talking on a cell phone while driving the day after pleading guilty to the instant charges.

Having considered these issues, the court also recognizes that respondent's misconduct is the direct result of his addiction. Respondent is addressing the previously undiagnosed mental health issue and the substance abuse by treating with Dr. Akalin and by attending NA meetings. He has consistently tested negative for illegal drugs since June 2013. The court will recommend that respondent be ordered to continue on this path to recovery for his own well-being and for that of his clients, the courts and the legal profession.

Accordingly, having considered the facts and the law, the court believes that two years' stayed suspension with two years' probation on conditions, including 90 days' actual suspension and compliance with certain substance abuse-related conditions[3] will be sufficient to protect the public in this instance.

Recommendation

It is recommended that respondent Gerard Brennan Harvey, State Bar Number 152669, 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[4] for a period of two years subject to the following conditions:

1. Respondent is suspended from the practice of law for the first 90 days of probation.

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. 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.

[3] Respondent's criminal probation conditions include making restitution to specified clients.

[4] 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.)

5. 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.

6. Respondent must comply with all conditions of any applicable criminal probation and must so declare under penalty of perjury in any quarterly report required to be filed with the Office of Probation. If respondent has completed probation in the underlying criminal matter, or completes it during the period of his disciplinary probation, respondent must provide to the Office of Probation satisfactory documentary evidence of the successful completion of the criminal probation in the quarterly report due after such completion. If such satisfactory evidence is provided, respondent will be deemed to have fully satisfied this probation condition.

7. Respondent must obtain psychiatric or psychological treatment from a duly licensed psychiatrist, psychologist or clinical social worker, at respondent's own expense, a minimum of one time per month and must furnish satisfactory evidence of compliance to the Office of Probation with each quarterly report. Treatment should commence immediately and, in any event, no later than 30 days after the effective date of the Supreme Court's final disciplinary order in this proceeding. Treatment must continue for the period of probation or until a motion to modify this condition is granted and that ruling becomes final. If the treating psychiatrist, psychologist or clinical social worker determines that there has been a substantial change in respondent's condition, respondent or the State Bar may file a motion for modification of this condition with the State Bar Court Hearing Department pursuant to rule 5.300 of the Rules of Procedure of the State Bar. The motion must be supported by a written statement from the psychiatrist, psychologist or clinical social worker, by affidavit or under penalty of perjury, in support of the proposed modification.

8. At the Office of Probation's request, respondent must provide the Office of Probation with medical waivers and access to all of respondent's medical records. Revocation of any medical waiver is a violation of this condition. Any medical records obtained by the Office of Probation are confidential and no information concerning them or their contents will be given to anyone except members of the Office of Probation, the Office of the Chief Trial Counsel, and the State Bar Court who are directly involved with maintaining, enforcing or adjudicating this condition.

9. Respondent must abstain from using alcoholic beverages and must not use or possess any narcotics, dangerous or restricted drugs, controlled substances, marijuana, or associated paraphernalia, except with a valid prescription.

10. Respondent must attend at least four meetings per month of a 12-step, abstinence based program acceptable to the Office of Probation and must provide to the Office of Probation satisfactory proof of attendance with each quarterly report.

11. 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.)

At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multistate Professional Responsibility Examination

It is recommended that respondent 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 further recommended that respondent 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 this order.

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: June _____, 2014

RICHARD A. HONN
Judge of the State Bar Court