

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 13-V-16017-RAH
)	
MICHAEL LEWIS DUNCAN,)	DECISION GRANTING PETITION FOR
)	TERMINATION OF INACTIVE STATUS
Member No. 93385,)	AND FOR RETURN TO ACTIVE STATUS
)	
<u>A Member of the State Bar.</u>)	

Introduction

The issue in this matter is whether Michael Lewis Duncan (petitioner) has demonstrated, to the satisfaction of this court, his rehabilitation and fitness to practice, so that he may be relieved from his inactive enrollment under Business and Professions Code section¹ 6233 and returned to active status.

For the reasons set forth in this decision, the court finds that petitioner has shown, by a preponderance of the evidence, his rehabilitation and present fitness to practice law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.²

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¹ Unless otherwise indicated, all further references to section(s) are to the Business and Professions Code.

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

Pertinent Procedural History

In late May 2012, the State Bar of California, Office of the Chief Trial Counsel (State Bar), filed and served on petitioner a notice of disciplinary charges (NDC) in case No. 12-H-11014.³ Petitioner filed a response to the NDC on June 13, 2012.

Thereafter, case No. 12-H-11014 was referred to the State Bar Court's Alternative Discipline Program (ADP) before the undersigned.

The parties entered into a Stipulation Re Facts and Conclusions of Law in case No. 12-H-11014 which was received by the court on October 30, 2012.⁴

On November 7, 2012, the court advised the parties that it would recommend to the Supreme Court that petitioner be suspended for 90 days if respondent successfully completed the ADP, and that it would recommend to the Supreme Court that respondent be suspended for a minimum of two years if he was terminated from, or failed to successfully complete, the ADP. Respondent agreed to these levels of discipline; executed the ADP Contract; and was admitted to the ADP as of January 31, 2013. The State Bar objected to petitioner's admission to the ADP, but the court overruled the State Bar's objection.

Thereafter, on February 21, 2013, the State Bar filed a petition for interlocutory review of (1) the court's determination that petitioner was eligible for the ADP; and (2) the court's recommended alternative dispositions. The review department granted review of the petition, but only as to the recommended alternative dispositions. On interlocutory review, the review department found that the recommended alternative dispositions were too lenient. The review department found the appropriate recommended alternative dispositions to include disbarment if petitioner was terminated from the ADP, and included a six-month actual suspension if petitioner

³ Pursuant to Evidence Code section 452, subdivision (d), the court takes judicial notice of its records in case No. 12-H-11014.

⁴ The Stipulation was approved by the court and thereafter filed on February 7, 2013.

successfully completed the ADP. The review department also set forth that petitioner's ADP participation must be based on his agreement to immediately be placed on suspension for a minimum of six months and until he shows proof to the State Bar Court of his rehabilitation and present fitness to practice pursuant to standard 1.4(c)(ii).⁵ The matter was remanded to the hearing department for further proceedings consistent with the order, including giving petitioner the opportunity to decline to participate in ADP based on the modified recommended discipline. Petitioner subsequently agreed to the modified discipline recommendations.

On July 11, 2013, the court filed an order enrolling petitioner as an inactive member of the State Bar of California effective May 1, 2013, for a minimum of six months and until he shows proof satisfactory to the State Bar Court of his rehabilitation and present fitness to practice. That same date, the court also issued an order setting forth the procedure for petitioner's return to active status. The State Bar sought reconsideration of these orders which was opposed by petitioner. The court filed an order denying the State Bar's motion on July 29, 2013.

Thereafter, the State Bar filed a petition for interlocutory review of the order regarding the procedure to return to active status. The review department granted interlocutory review, and petitioner filed his response to the petition on August 23, 2013. On September 23, 2013, the review department filed an order finding the hearing department's proposed procedure to determine whether respondent has satisfied his burden and should be returned to active status during his participation in the ADP to be insufficient and inconsistent with the review department's prior order. The review department clarified that as a condition of petitioner's ADP participation, he should remain on inactive status and not entitled to practice law for a minimum of six months and until he shows proof satisfactory to the State Bar Court of his

⁵ The review department noted that it was not requiring that petitioner show present learning and ability in the law.

rehabilitation and present fitness to practice law pursuant to standard 1.4(c)(ii). The review department noted in its order that the procedure to follow is set forth in rules 5.400 to 5.411 of the Rules of Procedure of the State Bar.

Accordingly, on September 30, 2013, petitioner filed his verified petition for termination of his inactive status and for his return to active status. The State Bar filed its response to petitioner's verified petition on November 14, 2013. The State Bar opposes petitioner's request to return to active status, contending that due to various unpaid tax liens filed against him, petitioner lacks financial responsibility which reflects on his present fitness to practice law.⁶ Petitioner filed a reply to the State Bar's response on November 15, 2013. The parties agreed to jointly waive the hearing in this matter, and this matter was submitted on the pleadings. This matter was submitted for decision on November 15, 2013.

Findings of Fact and Conclusions of Law

Background of Misconduct and Disciplinary Matters

Petitioner has four prior records of discipline matters, including two private reprovls and two stayed suspensions.⁷ His first discipline was imposed over thirty years ago. The most recent prior discipline was a private reprovl. In the pending disciplinary matter which underlies this standard 1.4(c)(ii) proceeding, petitioner stipulated that he failed to comply with conditions

⁶ The State Bar concedes, however, that petitioner is rehabilitated from the depression that caused his underlying misconduct.

⁷ In 1982, respondent was privately reprovled for violations of Business and Professions Code sections 6103, 6106, 6125, 6126 and 6127. Effective November 15, 1991, respondent was suspended for one year; the execution of which was stayed; and he was placed on probation for one year with conditions for violating the predecessor to rule 3-110(A) of the State Bar Rules of Professional Conduct in four matters; (2) rule 3-700(A)(2) of the Rules of Professional Conduct in three matters; section 6106 in two matters; and section 6068, subdivision (m), in two matters. Thereafter, respondent violated the terms of his probation, and his probation was modified to include an additional six-months of stayed suspension and probation with conditions. Lastly, effective August 24, 2010, respondent was privately reprovled for violating Business and Professions Code sections 6068, subdivision (o)(3) and 6103 and rule 3-110(A) of the Rules of Professional Conduct.

attached to his 2010 private reproof in willful violation of rule 1-110 of the State Bar Rules of Professional Conduct. Specifically, petitioner stipulated that he failed to (1) timely submit quarterly reports; (2) timely submit a final report; (3) contact his probation deputy to discuss the reproof conditions; and (4) timely attend and complete State Bar Ethics School. In aggravation, the parties stipulated that (1) petitioner's prior record of discipline and the nature and extent of that prior record of discipline is an aggravating circumstance; (2) petitioner demonstrated indifference toward rectification of or atonement for the consequences of his misconduct by failing to timely comply with conditions of his reproof after having been referred for prosecution of his reproof condition violations and having met with a State Bar attorney and his probation deputy to discuss violations of his conditions of reproof; and (3) his misconduct evidences multiple acts of wrongdoing. The parties did not stipulate to any mitigating circumstances.⁸

Petitioner's Rehabilitation and Present Fitness to Practice Law

Since the 1980's, petitioner has experienced periodic, brief bouts of depression. Petitioner's depression manifested itself in very severe insomnia. At the time of his violation of the terms of his private reproof, petitioner was suffering from severe depression.

Petitioner received ongoing treatment for his depression over the years, including various types of medication. He used medication off and on for approximately 10 years, but in the mid-1990's, he discontinued its use due to intolerable side effects.

In 2009, petitioner was prescribed the anti-depressant Zoloft. He experienced some benefits from this medication, but in 2011 his insomnia worsened, as his trial caseload increased. It was during this time that he was required to file his final quarterly probation report and to enroll in ethics school.

⁸ However, if petitioner successfully completes the ADP, he will receive mitigating credit for his successful completion of the ADP and his mental health stability.

Petitioner was engaged for several months in multiple, back-to-back trials, including a capital case. For the several weeks prior to the trial, he had not slept more than an hour or two a day. Despite petitioner's effort to have the trial continued, he was compelled to try the matters while mentally and physically exhausted. By August 2011, petitioner was incapacitated by depression, experiencing suicidal thoughts, and not capable of complying with the terms of his reproval.

Petitioner enrolled in the State Bar's Lawyer Assistance Program (LAP) in 2012 and was referred to psychiatrist Paul Brown, M.D. When he began seeing Dr. Brown, petitioner's presenting history was significant for longstanding depression marked by chronic insomnia, anhedonia, severe anergia, and decreased libido. Petitioner is currently under Dr. Brown's care. Dr. Brown changed petitioner's medication to one which does not interfere with sleep, as Dr. Brown found that Zoloft was not appropriate for petitioner given his sleep problems. After examining the results of a blood test panel, Dr. Brown informed petitioner that he likely had borderline Type 2 diabetes which can cause or greatly exacerbate clinical depression. Since treating with Dr. Brown, taking the new medication, and enrolling in LAP, the conditions of petitioner's depression have markedly improved.

Petitioner is in regular therapy with Dr. Brown. He has experienced no depressive episodes or problems with sleep since he began treating with Dr. Brown. Regular LAP meetings have also enormously helped petitioner.

Petitioner is in full compliance with his LAP contract. He is currently on a regimen of therapy, medication, LAP participation and working to improve his physical health.

Aside from the disciplinary matter underlying this standard 1.4(c)(ii) proceeding, there are no criminal proceedings, civil actions, license revocation proceedings or other disciplinary

matters currently pending against petitioner. To his knowledge, there have been no client-related complaints made against him since 2009.

Kirby Palmer, LCSW, stated, in regards to petitioner's participation in the LAP support group, his "attendance has been excellent and he is consistently active in supporting and giving feedback to other members. Group members have come to value and respect his ideas and opinions. When he needs it he asks for help and support from the group. It has become clear that he has learned skills that help him manage his depression and keep him focused and on the task at hand. He is much more resilient and better able to cope with life challenges. Clearly, he has made excellent use of the Lawyer Assistance Program and is ready to return to the practice of law."⁹

In the declaration of Paul Brown, M.D., dated September 26, 2013, he noted that in his professional opinion as a physician, petitioner's failure to meet deadlines established by the State Bar in timely enrolling in Ethics School and submitting his quarterly reports was secondary to his primary depressive condition and not related to a characterological defect or flaw.

Petitioner's current medication has been effective in improving his mood state and normalizing his sleep pattern. His current diagnoses are major depressive disorder, chronic, with sleep disturbance, obesity, hypertension, adult-onset diabetes mellitus, and alcohol dependence in sustained full remission. According to Dr. Brown, petitioner is totally recovered from his depressed state and remains stable with his medication regimen. He has not suffered from a relapse since his recovery in July 2012. Dr. Brown notes that the risk of petitioner suffering a relapse or a further disability in the future is remote. Petitioner is going to remain in Dr. Brown's care and continue with regular follow-up medical appointments.

Outstanding Tax Liens

⁹ Letter from Kirby Palmer, LCSW, to Ellen Pansky, Esq., dated September 24, 2013.

Petitioner has outstanding federal tax liens totaling \$283,875.53 for unpaid taxes for the years 2005 through 2011. He also has an outstanding State of California tax lien in the amount of \$34,445 for unpaid state taxes for the years 2007, 2008, and 2009. In addition, petitioner has outstanding liens totaling \$8,494.94 for unpaid county taxes for the fiscal years 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, and 2012-2013.

As a result of his incapacitating depressive illness which he suffered prior to mid-2012, petitioner has been limited in his ability to engage in professional activities. He has been severely adversely impacted in his ability to earn a living since May 1, 2013, when he was placed on inactive status with the State Bar. However, petitioner has undertaken steps to address the tax liens. Petitioner has contacted the Internal Revenue Service (IRS) on several occasions. Most recently, petitioner contacted the IRS in May 2013 to negotiate a payment plan for his outstanding tax liens. Petitioner explained to the IRS agent that his license to practice law was suspended and that his inability to work and earn an income has substantially worsened his financial situation. The IRS advised petitioner that due to his current inability to pay the tax liens, his file regarding the liens is closed as presently uncollectible. The IRS agent advised petitioner that the IRS would be contacting him in May or June 2014, in the hope that he would then be practicing law and earning a steady income, to finalize a payment plan to pay off his tax liens.

Discussion

In this proceeding, petitioner has the burden of proving, by a preponderance of the evidence, that he is rehabilitated and has present fitness to practice law pursuant to standard 1.4(c)(ii). The court looks to the nature of the underlying misconduct to determine the point from which to measure petitioner's rehabilitation and present fitness to practice. (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 578.)

Regarding the issue of rehabilitation, “[i]t is appropriate to consider the nature of the misconduct, as well as the aggravating and mitigating circumstances surrounding that misconduct . . . in determining the amount and nature of rehabilitation that may be required to comply with standard 1.4(c)(ii).” (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 578.)

Furthermore, in determining whether petitioner’s evidence sufficiently establishes his rehabilitation, the hearing department must first consider the prior misconduct from which petitioner seeks to show rehabilitation. The amount of evidence of rehabilitation varies according to the seriousness of the misconduct at issue. Second, the court must examine petitioner's actions since the imposition of his discipline to determine whether his actions, in light of the prior misconduct, sufficiently demonstrate rehabilitation by a preponderance of the evidence. (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 581.)

Petitioner must demonstrate "that the conduct evidencing rehabilitation is such that the court may make a determination that the conduct leading to the discipline . . . is not likely to be repeated." (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 581.)

The conduct underlying this standard 1.4(c)(ii) proceeding involves petitioner’s failure to comply with conditions attached to his 2010 private reproof. Due to back-to-back trials and the insomnia resulting from his depression, by August 2011, petitioner was incapacitated by depression, experiencing suicidal thoughts, and not capable of complying with the terms of his reproof. Petitioner’s misconduct was a result of his severe depression and not related to a characterological defect or flaw. In aggravation, petitioner has an extensive prior record of discipline; demonstrated indifference toward rectification of or atonement for the consequences of his misconduct; and his misconduct evidences multiple acts of wrongdoing. No mitigating

circumstances were found, but if petitioner successfully completes the ADP, he will receive mitigating credit for his successful completion of the ADP and his mental health stability.

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The court finds, and the State Bar concedes, that petitioner is rehabilitated from the depression that caused his underlying misconduct. Petitioner enrolled in the State Bar's Lawyer Assistance Program (LAP) in 2012, and since then has been under the care of psychiatrist Paul Brown, M.D. Dr. Brown changed petitioner's medication. Since treating with Dr. Brown, taking the new medication, and enrolling in the LAP, the conditions of petitioner's depression have markedly improved. Petitioner has experienced no depressive episodes or problems with sleep since he began treating with Dr. Brown. Regular LAP meetings have also enormously helped petitioner. Dr. Brown believes petitioner is totally recovered from his depressed state and remains stable with his medication regimen. Petitioner has not suffered from a relapse since his recovery in July 2012, and the risk of petitioner suffering a relapse or a further disability in the future is remote.

Petitioner is in full compliance with his LAP contract. He has had excellent attendance at LAP support groups, and he has learned skills that help him manage his depression and keep him focused. He is much more resilient and better able to cope with life challenges. According to Kirby Palmer, LCSW, he is ready to return to practicing law.

Other than the disciplinary matter underlying this standard 1.4(c)(ii) proceeding, there are no criminal proceedings, civil actions, license revocation proceedings or other disciplinary matters currently pending against petitioner. There have been no client-related complaints made against him since 2009.

Nevertheless, the State Bar contends that petitioner's failure to resolve his outstanding tax debts evidences his lack of fitness to practice law. However, the court does not concur.

“The law looks with favor upon the regeneration of erring attorneys and should not place unnecessary burdens upon them.” (*Resner v. State Bar* (1967) 67 Cal.2d 799, 811.) Petitioner has been unable to pay his tax debt, as he has been limited in his ability to engage in professional activities due to his depression and his inactive enrollment. However, he has taken steps to address the liens by contacting the IRS to negotiate a payment plan for his outstanding tax liens. “Applicants for reinstatement are to be judged not solely on the ability to make restitution, but by their attitude toward payment of the victim.” (*In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 674.) The misconduct underlying this standard 1.4(c)(ii) proceeding was not the result of financial pressures. There is no evidence that petitioner has violated any laws, and petitioner has taken steps to address his tax liability. The court therefore finds that petitioner’s outstanding tax debts do not reflect adversely on his fitness to practice law.

Conclusion

Based on the evidence set forth above, the court finds that the misconduct which led to this standard 1.4(c)(ii) proceeding is not likely to recur. Accordingly, the court finds that petitioner has demonstrated, by a preponderance of the evidence, that he is rehabilitated and presently fit to practice law as required by standard 1.4(c)(ii). Accordingly, petitioner’s petition for termination of his inactive status and for his return to active status is hereby GRANTED. Respondent will be entitled to resume the practice of law in this state when all the following conditions have been satisfied:

1. Respondent has been inactively enrolled pursuant to Business and Professions Code section 6233 for at least six months from May 1, 2013, the date his inactive enrollment pursuant to Business and Professions Code section 6233 became effective.

2. This decision has become final, which includes the expiration of the time for seeking reconsideration and review (Rules Proc. of State Bar, rules 5.115, 5.150, 5.409 and cf. 5.410);
3. Petitioner has paid all applicable State Bar fees and costs (Bus. & Prof. Code, §§ 6086.10 and 6140.7); and
4. Petitioner has fully complied with any other requirements for his return to active membership status and is otherwise entitled to practice law.

Dated: December _____, 2013

RICHARD A. HONN
Judge of the State Bar Court