

# PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

FILED

NOV 17 2016

STATE BAR COURT  
CLERK'S OFFICE  
LOS ANGELES



In the Matter of ) Case No.: 16-V-15728 YDR  
)  
MARK STEPHEN SMITH, )  
)  
Member No. 158734, )  
)  
A Member of the State Bar. )

**DECISION GRANTING PETITION FOR  
RELIEF FROM ACTUAL SUSPENSION**

## Introduction

In this matter the issue is whether petitioner Mark Stephen Smith (Petitioner) has established, by a preponderance of the evidence, his rehabilitation, fitness to practice law, and present learning and ability in the general law so that he may be relieved from his actual suspension from the practice of law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1)<sup>1</sup>; *In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 575.) Seeking to be restored to eligible status, Petitioner withdrew three of the four prior petitions he filed for relief from actual suspension after participating in settlement conferences and before a hearing was held. A hearing was held in connection with Petitioner's fourth petition, and on December 29, 2015, the hearing judge filed a decision which denied Petitioner's petition for relief from actual suspension.

In the hearing on Petitioner's fifth and current petition, he was represented by Edward Lear of Century Law Group LLP. Senior Trial Counsel Charles Calix appeared for the Office of Chief Trial Counsel (OCTC).

<sup>1</sup> All further references to standards are to this source.



For the reasons set forth below, this court finds that Petitioner has established by a preponderance of the evidence that he meets the requirements outlined in standard 1.2(c)(1). Therefore, this court grants Petitioner's petition for relief from actual suspension.

### **Procedural History**

On August 22, 2016, Petitioner filed the instant verified petition for relief from actual suspension. On October 3, 2016, the parties entered into a stipulation to continue the time for the OCTC to file its response to October 10, 2016. The OCTC filed its opposition October 12, 2016, and on October 17, 2016, the parties were given notice that the petition hearing would be held on November 8, 2016.

Petitioner testified on his behalf at the November 8, 2016 hearing. At the conclusion of the hearing, the court took the petition under submission.

### **Findings of Fact**

#### **Jurisdiction**

Petitioner was admitted to the practice of law in California on June 8, 1992, and has been a member of the State Bar since that time.

#### **Petitioner's Record of Prior Discipline<sup>2</sup>**

Petitioner has a history of two prior disciplines. Petitioner's first discipline was in October 2001, when he was privately reprovved for violations of rules 3-110(A) (failure to perform with competence) and 1-311(B) (improper association with ineligible or disbarred attorney), of the Rules of Professional Conduct.<sup>3</sup>

In connection with his second discipline, the Supreme Court of California suspended Petitioner pursuant to Order No. S200834, effective August 9, 2012. The Court suspended

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<sup>2</sup> Here, the discussion regarding Petitioner's prior discipline record is based on evidence presented during the November 8, 2016 hearing and as outlined in the December 29, 2015 decision on Petitioner's fourth petition seeking relief from actual suspension.

<sup>3</sup> All further references to rules are to this source.

Petitioner from the practice of law for three years, with execution of that period of suspension stayed, and he was placed on probation for five years with conditions including that he be actually suspended for two years and until he provides proof to the State Bar of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to then standard 1.4(c)(ii).

Petitioner's misconduct giving rise to the second discipline included commingling personal funds in his client trust account (CTA), in violation of rule 4-100(A) of the Rules of Professional Conduct and misappropriating funds received for the benefit of clients in five separate matters, in willful violation of both rule 4-100(A) (failure to maintain client funds in client trust account) and section 6106 of the Business and Professions Code (moral turpitude). The facts and conclusions of law establishing Petitioner's misconduct, as well as the recommended disposition of the disciplinary matter, were set forth in a stipulation signed by Petitioner on December 19, 2011, and approved by the hearing judge on January 10, 2012. That stipulation was explicit in attributing Petitioner's mishandling of his clients' funds to gross negligence on his part, rather than intentional misconduct. While Petitioner had previously made restitution to two of the five clients, he agreed in the stipulation to make restitution, totaling approximately \$6,915 plus accrued interest, to the other three clients.

### **Rehabilitation and Present Fitness to Practice**

#### **Character References**

Petitioner submitted three favorable character witness letters in support of his petition. Petitioner's character witnesses include two lawyers and his pastor who has known him for over 36 years. These character witnesses all demonstrated an understanding of Petitioner's misconduct and the measures he has taken to achieve rehabilitation. Each character witness praised Petitioner's legal skills, honesty, dedication to the legal profession and passion for

helping the indigent and others. All urged that Petitioner be returned to the practice of law as an active member of the State Bar.

### **Probation Compliance**

It is undisputed that during the first two years of his probation, Petitioner did not strictly comply with his probation conditions. In a nutshell, Petitioner did not timely pay restitution to three of his former clients, he did not submit proof that he had paid restitution, he did not timely submit quarterly reports to the Office of Probation, or provide proof that he completed the law management classes he was ordered to take by August 9, 2014.<sup>4</sup> The history of Respondent's non-compliance is set forth in great detail in the Decision Denying Petition For Relief From Actual Suspension, case number 15-V-15034, filed December 29, 2015, pages 5-12.

Pursuant to the Supreme Court order in Petitioner's second discipline, Petitioner was required to submit quarterly reports to the Office of Probation on January 10, April 10, July 10, and October 10 of each year of his probation. An attorney probationer's filing of quarterly probation reports is an important step towards the attorney's rehabilitation. (*In the Matter of Weiner* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763; *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 705.) "At a minimum, quarterly probation reporting is an important step towards an attorney probationer's rehabilitation because it requires the attorney, four times a year, to review and reflect upon his professional conduct. . . .In addition, it requires the attorney to review his conduct to ensure that he complies with all of the conditions

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<sup>4</sup> On August 25, 2014, Petitioner submitted to the Office of Probation evidence of his completion of nine hours of MCLE courses. However, on August 28, 2014, the Office of Probation notified Petitioner that it had approved only one hour of these courses because: (1) four of the one-hour courses were not approved courses; (2) he did not sign the certificate for a three-hour course; and (3) he needed to provide additional information for one of the one-hour courses. Respondent then took additional classes in September 2014 to fulfill the eight-hour requirement, but that information was not submitted to the Office of Probation until January 2015.

of his disciplinary probation.” (*In the Matter of Weiner, supra*, 3 Cal. State Bar Ct. Rptr. at p. 763.)

Five of Petitioner’s eight 2013-2014 quarterly reports were deficient and/or submitted late. However, in 2015, Petitioner demonstrated his appreciation for the need to improve his timely submission of quarterly reports. Petitioner’s January, April, July and October 2015 quarterly reports were timely submitted. Petitioner’s January 2016 report appeared to have been forwarded in the U. S. mail over the Dr. Martin Luther King, Jr. weekend, and it was not received by the Office of Probation until January 19, 2016.<sup>5</sup> From January 2016 on, Petitioner changed his method of transmission of his reports to the Office of Probation to ensure timely receipt. After January 2016, Petitioner either submitted his quarterly reports by priority certified mail or hand delivery. Notably, since that date, Petitioner’s remaining 2016 reports for April, and July 2016, were timely submitted and compliant.<sup>6</sup>

Well-established case law makes clear that “near compliance” and “substantial compliance” are viewed as non-compliance. (See, e.g., *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 652; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 150; *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536-537.) However, in the past two years, Petitioner has accepted full responsibility for the late submission of the January 2016 quarterly report. While its late submission was inexcusable, considering Petitioner’s prior history, submission of one late quarterly report marked substantial rehabilitative progress.

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<sup>5</sup> Petitioner credibly testified that because he was suffering from a viral infection, he gave the January 2016 quarterly report to the secretary in the office where he works to send it by certified or a tracking method form of delivery, but she instead put the quarterly report in the U. S. mail.

<sup>6</sup> Petitioner filed his petition in August 2016, before his October 2016 quarterly report was due. Neither Petitioner nor the OCTC offered supplemental evidence as to whether Petitioner timely submitted the October 2016 quarterly report.

### **Petitioner's Present Learning and Ability in the General Law**

The State Bar contends that Petitioner's present learning and ability in the law is deficient. However, Petitioner testified that during his actual suspension, he has completed about 13 hours of continuing legal education, drafted pleadings and performed legal research on varied civil and criminal law issues while working 30 to 40 hours a week at a law firm under the supervision of an attorney.<sup>7</sup> In addition, Petitioner has reviewed Daily Journal articles and appellate cases in his efforts to stay abreast of trending legal issues. This court finds Petitioner's testimony to be credible. It is also noteworthy that, as ordered, Petitioner completed the State Bar Client Trust Accounting and the State Bar Ethics School courses. In March 2014, Petitioner took and passed the Multistate Professional Responsibility Exam.

On this record, the court finds that Petitioner has demonstrated by a preponderance of the evidence that he possesses present learning and ability in the general law.

### **Discussion**

To determine whether a petitioner has established his rehabilitation and present fitness to practice law, the court first looks to the nature of the prior misconduct underlying the actual suspension, as well as the aggravating and mitigating circumstances surrounding the misconduct, to determine the amount of rehabilitation required to demonstrate that an individual has been sufficiently rehabilitated. (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. 571 at 578.) The amount of evidence required to justify the termination of an attorney's actual suspension varies according to the seriousness of the misconduct underlying the suspension. (*Ibid.*)

Next, the court examines the petitioner's actions since the prior discipline to determine whether the person's actions, in light of the prior misconduct, sufficiently demonstrate

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<sup>7</sup> In addition to the paralegal-type tasks Petitioner performed, about 50% of his time at the law firm was allotted to performing administrative tasks including organizing and filing cases, answering the phones, and managing the office.

rehabilitation by a preponderance of the evidence. (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 581.) As expressly stated by this court in the *Murphy* decision, the petitioner must show at a minimum: (1) that he has strictly complied with the terms of probation imposed on him under the Supreme Court's disciplinary order; (2) that he has engaged in exemplary conduct since being suspended; and (3) that the misconduct by the petitioner is not likely to recur. (*Ibid.*)

Here, in assessing whether Petitioner has demonstrated his rehabilitation and present fitness to practice, this court notes Petitioner's prior misappropriation of funds and other misconduct resulted from gross negligence – which can be the product, *inter alia*, of a lack of knowledge, lack of judgment, indifference, or even an unwillingness to comply with professional obligations. As a result, for Petitioner to show his rehabilitation and present fitness to practice, it is especially important that he demonstrate both his present ability to comply with his professional and personal obligations and his ongoing commitment to doing so.

The OCTC is critical of the fact that Petitioner has corrected many of his past probation compliance deficiencies in the context of Petitioner's filing four prior unsuccessful petitions. This court does not find that fact troubling as Petitioner withdrew three of the four prior petitions upon learning of the extent and seriousness of his noncompliance and before a hearing was conducted. With each petition withdrawal, Petitioner expressed remorse, sought to, and did, reform his conduct and rectified the noted deficiencies.

Here, while the ethical lapses that prompted the court to initially take action were serious, Petitioner has made substantial gains in the rehabilitative process. He has paid the restitution owed to his former clients, addressed his challenges with probation requirements and is remorseful for his misconduct.

### Conclusion

While it has taken him some time to get there, petitioner **Mark Stephen Smith** established by a preponderance of the evidence that he is now able to comply with his ethical responsibilities and has satisfied the standard 1.2(c)(1) requirements in order to terminate his actual suspension. Accordingly, Petitioner's current petition for relief from actual suspension is **GRANTED**. Petitioner will be entitled to resume the practice of law in this state when all of the following conditions have been satisfied:

1. The actual suspension imposed by the California Supreme Court in S200834, filed July 10, 2012, has expired;
2. This order 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 5.410);
3. Petitioner has paid all applicable State Bar fees and costs (Bus. & Prof. Code sections 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: November 17, 2016

  
YVETTE D. ROLAND  
Judge of the State Bar Court



**CERTIFICATE OF SERVICE**

**[Rules Proc. of State Bar, rule 5.400(B); Code Civ. Proc., §§ 1011, 1013]**

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Following standard court practice, in the City and County of Los Angeles, I served a true copy of the following document(s):

**DECISION GRANTING PETITION FOR RELIEF FROM ACTUAL  
SUSPENSION**

as follows:

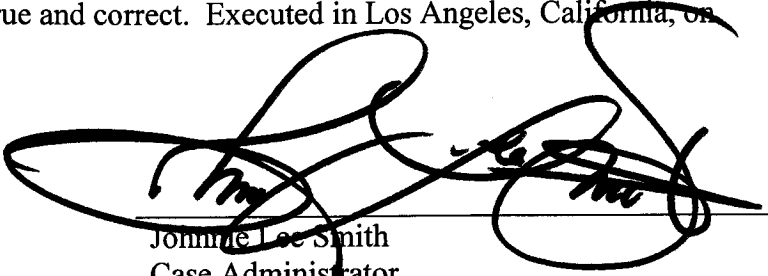
- by OVERNIGHT MAIL by enclosing the documents in a sealed envelope or package designated by an overnight delivery carrier and placing the envelope or package for collection and delivery with delivery fees paid or provided for, addressed as follows:

**EDWARD O. LEAR  
CENTURY LAW GROUP LLP  
5200 W CENTURY BLVD #345  
LOS ANGELES, CA 90045**

- By PERSONAL MAIL by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

**CHARLES CALIX  
STATE BAR OF CALIFORNIA  
OFFICE OF THE CHIEF TRIAL COUNSEL  
845 S. FIGUEROA STREET  
LOS ANGELES, CA 90017-2515**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on November 17, 2016.

  
Jommie Lee Smith  
Case Administrator  
State Bar Court