STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of JOSEPH DARRELL PALMER, A Member of the State Bar, No. 125147.	)	Case No. 18-O-10812-YDR DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

Introduction[1]

Respondent Joseph D. Palmer (Respondent) is charged with a single count of misconduct: failing to comply with probation conditions. The Office of Chief Trial Counsel of the State Bar of California (OCTC) has the burden of proving these charges by clear and convincing evidence.[2] Based on the stipulated facts and the evidence admitted at trial, this court finds by clear and convincing evidence, that Respondent is culpable of violating Business and Professions Code section 6068, subdivision (k), and recommends that Respondent be disbarred.

Significant Procedural History

On April 9, 2018, OCTC initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) in case number 18-O-10812. Respondent filed a response to the NDC on

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

[2] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

May 14, 2018. OCTC was represented by Deputy Trial Counsel Joseph A. Silvoso, III. Respondent was represented by Kenneth C. Kocourek, Esq. Although Respondent failed to appear at trial[3] in person, his counsel appeared on his behalf at the half-day trial, held on October 26, 2018. During the trial, the parties filed a Stipulation as to Facts and Admission of Documents (stipulation).

The case was submitted for decision on November 15, 2018. OCTC timely filed its closing argument brief on November 15, 2018, and Respondent filed his closing brief on November 19, 2018.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 15, 1986, and has been a member of the State Bar of California at all times since that date.

These findings of fact and conclusions of law are based on evidence admitted at trial, and facts set forth by the parties in their stipulation, which this Court approved.

In 2014, as a result of a stroke, Respondent suffered some physical weakness and incapacity. As of August 2018, Respondent did not appear to have any residual mental effects from his 2014 stroke. Respondent presented a report from his doctor, Gary T. Evans, M.D.,

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[3] At a status conference prior to trial, Respondent raised the issue of appearing telephonically at trial due to an unsubstantiated claim of a medical condition that would not allow him to appear in person. This court advised Respondent to arrange for his participation via videoconference, Skype or another similar medium. Respondent failed to do so. At the beginning of trial, OCTC argued that this court should take Respondent's default in light of Respondent's failure to appear at trial in person after OCTC had served Respondent (through Respondent's counsel) with a notice of subpoena on August 9, 2018, "or as otherwise scheduled by the Court . . . ." Instead of appearing in person, Respondent attempted to participate telephonically.

This court took OCTC's request under submission and determined that it would be inappropriate to enter Respondent's default since Respondent's counsel appeared on his behalf. (See Rules of Proc. of State Bar, rule 5.81 [the court must order entry of member's default if "the member fails to appear in person or by counsel at trial"].)

which provided, "It is likely that [Respondent] suffered short term memory and attention deficits from the stroke that would have affected his ability to organize, complete and submit reports."[4]

Pursuant to a Supreme Court order filed May 18, 2016, Respondent was suspended from the practice of law for two years, execution of that period of suspension was stayed, and he was placed on probation for two years subject to a 90-day actual suspension and other probation conditions (Supreme Court case No. S232812; State Bar Court case No. 12-O-16924). Respondent's probation conditions included the following.

- Submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10. Under penalty of perjury, Respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

- Within 30 days after the effective date of the Supreme Court order, 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. Respondent must promptly meet with the probation deputy as directed and upon request.

- Within one year after the effective date of the Supreme Court order, Respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and of 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 is orderd not to claim any MCLE credit for attending Ethics School. (Accord, Rules Proc. of State Bar, rule 3201.)

In addition to the probation conditions, Respondent was required to provide proof of passage of the Multistate Professional Responsibility Exam (MPRE) within one year of the effective date of Supreme Court order and comply with the California Rules of Court, rule 9.20.

[4] The statements in Dr. Evans's report are inadmissible hearsay because they do not supplement or explain any trial testimony or any other admissible evidence. (Rules Proc. of State Bar, rule 5.104(D) ["Hearsay evidence may be used for the purpose of supplementing or explaining other evidence"].) No witnesses testified at trial, including Dr. Evans.

On June 17, 2016, Respondent contacted Probation. That day, Probation Deputy Maricruz Farfan (Farfan) emailed Respondent and informed him that a packet of information detailing the terms and conditions of his probation was forthcoming. Farfan also informed Respondent it was his responsibility to comply with the terms and conditions of his probation.

On June 30, 2016, Farfan mailed to Respondent at his membership records address, a copy of the Supreme Court Order and a courtesy reminder setting forth the terms of his probation and reciting applicable deadlines. Farfan further advised Respondent that the first quarterly report was due on October 10, 2016, and that quarterly reports must cover the entire applicable reporting period. Probation also informed Respondent that quarterly report forms must be signed under penalty of perjury and dated the same day that Respondent signed the report. If Respondent sent reports electronically, he must sign the report with an original signature, keep the original copy of the report, and provide the original copy of the report upon Probation's request. Accompanying the letter, Probation included a blank quarterly report form.

On July 12, 2016, Farfan and Respondent timely held their required telephonic meeting and discussed the terms and conditions of his probation. These terms and conditions included the requirement that Respondent submit timely quarterly reports which must be received by Probation on or before their due date. Probation emailed Respondent a copy of Probation's Required Meeting Record.

On October 9, 2016, Respondent successfully and timely submitted his October 10, 2016 quarterly report.

On January 10, 2017, Respondent emailed Probation three times. The first two emails included identical copies of the first page of his January 10, 2017 quarterly report. The third email included an illegible second page of his January 10, 2017 quarterly report.

On January 12, 2017, Farfan emailed Respondent advising him that his January 10, 2017 quarterly report was not compliant for the following reasons: (1) multiple reporting periods were checked off; (2) the document was incomplete; and (3) page two was not legible. Farfan further advised Respondent that if he wanted to submit a new and complete document, he should do so immediately. Respondent was also advised to check only one reporting period and to date the report on the day he actually signed it.

On January 13, 2017, Respondent submitted a second version of his January 10, 2017 quarterly report (second January 10, 2017 report). The second January 10, 2017 report was not compliant for the following reasons: (1) Respondent did not sign the report; (2) the report was a copy of the report Respondent signed and sent by email to Probation on October 9, 2016; (3) Respondent used white out to strike the previous date of his signature and re-dated the report January 10, 2017; and (4) Respondent did not sign the report on the same day he dated the document.

Farfan emailed Respondent on January 19, 2017, to inform him that his second January 10, 2017 report was not compliant. Respondent responded to Farfan on January 21, 2017, stating that he signed his report on January 10, 2017 and that he had the original copy of the January 10, 2017 quarterly report. However, Respondent did not provide Farfan with the original copy of the January 10, 2017 quarterly report.

On March 24, 2017, Respondent submitted an early quarterly report for April 10, 2017. This report was non-compliant because it did not cover the entire quarterly reporting period from January 1, 2017, through March 31, 2017. The April 10, 2017 quarterly report received on March 24, 2017, was also another altered version of the quarterly report Respondent sent on October 9, 2016. Once again, Respondent had changed the date line of the report by "whiting out" the previously checked box for the January 10, 2017 quarterly report. Respondent also

failed to sign the report on the day it was dated as Respondent's signature was the same signature from the October 10, 2016 quarterly report.

On March 30, 2017, Farfan emailed Respondent to inform him that his April 10, 2017 quarterly report was non-compliant because it failed to cover the entire reporting period.

On May 5, 2017, Farfan emailed and mailed a noncompliance letter to Respondent's membership records address. This letter included Farfan's previous emails to Respondent concerning noncompliance.

On July 26, 2017, Respondent submitted quarterly reports for April 10, 2017, and July 10, 2017. These quarterly reports were non-compliant for the following reasons: (1) they were late; (2) Respondent did not actually sign these reports; (3) the reports were copies of the signed report Respondent sent by email to Probation on October 9, 2016; (4) Respondent used white out to strike out the previous date of his signature and then re-dated the reports April 10, 2017 and July 10, 2017; and (5) Respondent did not resign the reports on the same day he dated the document.

On August 25, 2017, Farfan emailed Respondent a timeline of events, informed him why his quarterly reports were noncompliant, and requested original signed copies of the noncompliant reports. Respondent did not provide the original copies of the noncompliant reports as Farfan requested.

Respondent failed to file his October 10, 2017 quarterly report on or before October 10, 2017. On October 18, 2017, Farfan mailed and emailed a non-compliance letter to Respondent at his membership records address. The letter included Probation's first letter advising Respondent of the terms and conditions of his probation and another blank copy of his quarterly report form. Attached to the letter was Farfan's August 25, 2017 email.

On January 10, 2018, Farfan emailed Respondent and advised him that she had uploaded a letter to his private State Bar Member Profile. This email included another blank quarterly report form. This email also reminded Respondent that he was not compliant with the Supreme Court order in case No. S232812 because he had not submitted compliant quarterly reports for January 10, 2017, April 10, 2017, July 10, 2017 and October 10, 2017. The letter also reminded Respondent that his January 10, 2018 quarterly report was due that day. Respondent failed to file his January 10, 2018 quarterly report on or before January 10, 2018.

Respondent failed to file his April 10, 2018 quarterly report on or before April 10, 2018.

On May 11, 2018, Farfan reminded Respondent, via email, that she sent him a blank copy of his quarterly report form. Farfan also informed Respondent he could find blank copies of a quarterly report form on his member profile on the State Bar website. That same day, Respondent replied stating he overlooked the email attachment.

On May 15, 2018, following the commencement of this case, Respondent sent three emails. In the first email, Respondent submitted an untimely copy of his October 10, 2017 quarterly report. Respondent also submitted a quarterly report with two reporting periods checked off – January 10, 2017 and July 10, 2018. In the second email, Respondent sent the first page of his July 10, 2017 quarterly report. Respondent also included untimely copies of his April 10, 2017 and January 10, 2017 quarterly reports. The third email included identical attachments as found in the second email.

On May 18, 2018, Farfan contacted Respondent and informed him that his July 10, 2017 quarterly report, submitted on May 15, 2018, only included the first page. On the same day, Respondent submitted untimely copies of his April 10, 2018 quarterly report.

On May 23, 2018, Farfan notified Respondent he had yet to submit a compliant copy of his January 10, 2018 quarterly report because his January 10, 2018 quarterly report, submitted on

May 15, 2018, had two reporting periods checked: January 10, 2018 and July 10, 2017. That same day, Respondent responded to Farfan's email by apologizing for the oversight and emailing Farfan a document which Respondent altered by "whiting out" the July 10, 2017 check mark and the "17" in July 10, 2017. Probation considered the report to be untimely because Respondent did not sign the form on the date he altered it.

On May 24, 2018, Farfan emailed Respondent and notified him that his signature on the modified January 10, 2017 quarterly report received on May 23, 2017, was dated May 11, 2018.

On May 30, 2018, Respondent submitted another copy of his January 10, 2018 quarterly report.

Conclusions

Count One - (§ 6068, subd. (k) [Failure to Comply with Probation Conditions])

Respondent is charged with willfully violating section 6068, subdivision (k), by failing to comply with the conditions attached to his disciplinary probation in Supreme Court case No. S232812. Section 6068, subdivision (k), provides that an attorney has a duty to comply with all conditions attached to any disciplinary probation. Respondent submitted six quarterly reports that were noncompliant – January 10, 2017, April 10, 2017, July 10, 2017, October 10, 2017, January 10, 2018, and April 10, 2018. The six reports were deficient in form, substance, and untimely.

Respondent did attempt to comply with his quarterly report requirements, but even after Farfan's repeated letters and emails explaining the reports' deficiencies, Respondent did not cure those defects. (See e.g., *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 537 [substantial compliance with a probation condition is insufficient to avoid culpability of violating that condition].) As such, Respondent is culpable of willfully violating section 6068, subdivision (k).

Aggravation[5]

OCTC bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5.) The court finds clear and convincing evidence of two aggravating factors.

Prior Record of Discipline (Std. 1.5(a).)

Respondent has two prior discipline records.

Palmer I

On November 4, 2002, Respondent received a public reproval with conditions based on a felony conviction in the state of Colorado (*Palmer I*). Respondent stipulated that in 1999, he pleaded guilty to violating Colorado Revised Statutes 39-21-118(2) and 39-26-120 (failing to collect, account for, and pay sales taxes), a Class V felony.[6] The Colorado State Bar suspended Respondent from the practice of law for 30 days with conditions. The Hearing Department of the State Ba. ourt determined that Respondent's misconduct did not involve moral turpitude but did involve other misconduct warranting discipline. The mitigating circumstances consisted of the lack of a prior discipline record, candor and cooperation, remorse, severe financial stress, and Respondent's prompt reporting of his Colorado conviction to the State Bar of California. There were no aggravating circumstances.

Palmer II

In his second prior record of discipline, on May 18, 2016, the Supreme Court ordered Respondent suspended from the practice of law for two years, stayed, and placed him on probation for two years, subject to conditions, including a 90-day actual suspension (*Palmer II*). Respondent was found culpable of three counts of moral turpitude (§ 6106) for the grossly

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

[6] Though the violations to which Respondent pleaded guilty to in Colorado were deemed a felony, the violations involved a sum of approximately $4,000 in unpaid taxes over a 24-month period, which does not rise to a felony in California.

negligent making of false statements in sworn affidavits filed in federal class actions. Respondent had executed and filed three sworn affidavits, between June 2010 and July 2012, in which he declared that he had never been subject to attorney discipline. He filed each of the affidavits in support of applications to proceed *pro hac vice* in class action cases. *Palmer I* was an aggravating factor, but its weight was diminished because it was remote in time – the misconduct occurred in the mid-1990s, roughly 15 years before he filed the first false affidavit. Respondent also committed multiple acts of misconduct. Respondent's recognition of wrongdoing and good character were mitigating circumstances.

Multiple Acts (Std. 1.5(b).)

Respondent committed multiple acts of misconduct when he submitted six deficient quarterly reports that were untimely. However, the court assigns only modest weight to this aggravating factor, as the violations arose from failing to comply with a single Supreme Court order. (*In the Matter of Carver* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 348, 355.)

Mitigation

It is Respondent's burden to prove mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds clear and convincing evidence of a single mitigating factor.

Candor/Cooperation to Victims/State Bar (Std. 1.6(e).)

Respondent entered into an extensive stipulation as to facts and admission of documents which saved OCTC time and resources. However, those facts were easily proven. As such, the court assigns moderate mitigation credit for Respondent's cooperation. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 938 [decline to afford significant weight in mitigation for stipulation to easily provable facts].)

No Mitigation Credit for Physical Disabilities (Std. 1.6(d).)

Respondent is not entitled to any mitigation credit for his alleged physical disabilities as he has offered no expert testimony or documentation that his 2017 through January 2018 probation violations arose in connection with his 2014 stroke. As discussed above, while Dr. Evans's report indicates that Respondent's stroke could have affected Respondent's "ability to organize, complete and submit reports," Dr. Evans's report is inadmissible hearsay. (Cf. *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 29 [mitigation credit given for extreme emotional or physical problems when expert establishes such problems were directly responsible for misconduct].) Moreover, even if the court considered Dr. Evans's report, there is a lack of any evidence establishing that Respondent's disabilities no longer pose a risk of further misconduct or that he will be able to comply with his probation obligations in the future. (See *In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 281[extreme emotional difficulties constitute mitigating circumstance if clear and convincing evidence establishes that attorney no longer suffers from such difficulties].)

In sum, Respondent's sole mitigating circumstance is not compelling and does not outweigh the aggravating circumstances.

Discussion

OCTC argues that disbarment is the appropriate level of discipline for Respondent's misconduct. Respondent contends that his misconduct warrants "the imposition of a portion of the stayed suspension." The court finds that disbarment is the appropriate sanction in this case.

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.) The discipline analysis begins with the standards, which promote the consistent and uniform application of disciplinary

measures and are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91 [Supreme Court will not reject recommendation arising from standards unless grave doubts as to propriety of recommended discipline].)

Since Respondent has two prior discipline records, standard 1.8(b) is most apt. Standard 1.8(b) provides "[i]f a member has two or more prior records of discipline, disbarment is appropriate in the following circumstances, unless the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time as the current misconduct." This is Respondent's third disciplinary matter, and none of the exceptions to standard 1.8(b) apply. Respondent's moderate mitigation for stipulating to facts is far from compelling, and his repeated 2017 and 2018 probation violations do not fall within the same time frame as the misconduct underlying his prior discipline, which occurred in 1999 and 2010 through 2012.

While standard 1.8(b) is not inflexible (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [applying former std. 1.7(b)]), the court can discern no reason to depart from it here, particularly given Palmer's indifference demonstrating that he does not seem to appreciate that "an attorney probationer's filing of quarterly probation reports is an important step toward rehabilitation." (*In the Matter of Wiener* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763; see also *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn.5 [requiring clear reasons for departure from standards].) As such, deviation from standard 1.8(b) is not warranted and disbarment is the appropriate level of discipline to protect the public and the courts and to maintain the integrity of the legal profession.

Recommendations

Discipline - Disbarment

It is recommended that Respondent Joseph Darrell Palmer, State Bar Number 125147, be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order Respondent to comply with the California Rules of Court, rule 9.20, subdivisions (a) and (c) within 30 and 40 days, respectively, after the effective date of its order imposing discipline in this matter.[7]

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. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

In accordance with Business and Professions Code, section 6007(c)(4), it is ordered that Joseph Darrell Palmer, Member No. 12547, be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after service of this decision and order by mail. (Rules of Proc. of State Bar, rule 5.111(D)(1).[8] Respondent's inactive enrollment will

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[7] 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.)

[8] An inactive member of the State Bar of California cannot lawfully practice law in this state. (Bus. & Prof. Code, § 6126, subd. (b); see also Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to

terminate upon (1) the effective date of the Supreme Court's order imposing discipline; (2) as provided for by rule 5.111(D)(2) of the Rules of Procedure of the State Bar, or (3) as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: February 12, 2019

YVETTE D. ROLAND
Judge of the State Bar Court

practice law, or to even hold himself or herself out as entitled to practice law. (*Ibid.*) Moreover, an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Court Specialist of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on February 12, 2019, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

KENNETH CHARLES KOCOUREK
736 CENTER DRIVE, NO. 125
SAN MARCOS, CA 92069

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

JOSEPH A. SILVOSO III, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on February 12, 2019.

Angela Carpenter
Court Specialist
State Bar Court