

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No. 97-O-15614-PEM (04-O-15133)
)	
ERNEST ROY KRAUSE,)	
)	DECISION AND ORDER SEALING
Member No. 56343,)	DOCUMENTS
)	
A Member of the State Bar.)	
_____)	

I. Introduction

In this disciplinary proceeding, respondent **Ernest Roy Krause** stipulated to professional misconduct in two client matters, including forming a partnership with a non-lawyer, sharing legal fees with a non-lawyer, failing to perform competently and failing to communicate with a client.

Respondent has successfully completed the State Bar Court’s Alternative Discipline Program (ADP).¹ (Rules Proc. of State Bar, rules 800-807.) The court recommends that respondent be suspended from the practice of law for three years, that execution of such

¹ The ADP was formerly known as the State Bar Court’s Pilot Program for Respondents with Substance Abuse or Mental Health Issues and the State Bar Court’s Program for Respondents with Substance Abuse or Mental Health Issues.

suspension be stayed and that respondent be placed on probation for three years with conditions, including an actual suspension of 30 days. (Rules Proc. of State Bar, rule 803.)²

Because respondent was placed on inactive status for a total of 30 days from March 26 through April 9, 2008, and from August 16 through August 31, 2008, it is also recommended that he receive credit for the period of inactive enrollment towards any period of actual suspension to be imposed by the Supreme Court. (Bus. & Prof. Code, § 6233.)

II. Significant Procedural History

Before any filing of formal disciplinary charges by the Office of the Chief Trial Counsel of the State Bar of California (State Bar), respondent sought to participate in the State Bar's Lawyer Assistance Program (LAP) and the State Bar Court's ADP.

On April 5, 2004, respondent executed a Participation Agreement with the LAP.

Respondent submitted a declaration to the court which established that at the time of his misconduct, he was suffering from mental health issues. Respondent also executed a stipulation regarding facts and conclusions of law in this matter. Respondent's declaration and the stipulated facts, as well as the opinion of a medical professional, establish a causal connection between respondent's mental health issues and the misconduct found in this disciplinary proceeding. As such, the court found that respondent had adequately established a nexus between his mental health issues and his misconduct in this matter, i.e., that his mental health issues directly caused the misconduct set forth in this matter.

On May 2, 2005, the court lodged its Decision re Alternative Recommendations for Degree of Discipline (May 2005 Decision), setting forth the recommended discipline if respondent successfully completed or was terminated from the court's ADP. On that same day, respondent entered into a Contract and Waiver for Participation in the State Bar Court's

²References to rule are to the Rules of Procedure of the State Bar, unless otherwise noted.

Alternative Discipline Program; the parties' stipulation was lodged with the court; and respondent was accepted as a participant in the ADP.

On December 9, 2008, the LAP closed respondent's case because respondent had successfully completed LAP.

On December 19, 2008, the court found that respondent successfully completed the ADP and subsequently ordered the stipulation lodged May 2, 2005, be filed. The court also indicated that it would issue this decision recommending to the Supreme Court the imposition of the lower level of discipline reflected in the May 2005 Decision.

III. Findings of Fact and Conclusions of Law

The Stipulation Re Facts and Conclusions of Law (stipulation) approved by the court and filed on December 19, 2008, are incorporated by reference as if set forth fully herein. The stipulation sets forth the factual findings, conclusions of law and certain aggravating and mitigating circumstances in this matter.

Pursuant to the stipulation, the court dismissed case No. 04-O-12659 without prejudice in the interests of justice.

At the time respondent engaged in the misconduct for which he has been found culpable, respondent was suffering from mental health issues which directly caused the misconduct in this proceeding. Supreme Court and Review Department case law establish that extreme emotional difficulties are a mitigating factor where expert testimony establishes that those emotional difficulties were directly responsible for the misconduct, provided that the attorney has also established, through clear and convincing evidence, that he or she no longer suffers from such difficulties. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 527; *In re Naney* (1990) 51 Cal.3d 186; 197; *In re Lamb* (1989) 49 Cal.3d 239, 246; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.) However, the Supreme Court has also held that, absent a

finding of rehabilitation, emotional problems are not considered a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney, supra*, 51 Cal.3d at p. 197.)

Respondent has been participating in the LAP since 2004 and has successfully completed the LAP and ADP. Respondent's successful completions of the ADP and LAP qualify as clear and convincing evidence that respondent no longer suffers from the mental health issues which led to his misconduct. Accordingly, it is appropriate to consider respondent's successful completion of the ADP as a further mitigating circumstance. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,³ std. 1.2(e)(iv).)

IV. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney but, rather, to protect the public, to preserve public confidence in the legal profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

After reviewing the parties' briefs on discipline and considering the standards and case law cited therein, the parties' stipulation setting forth the facts, conclusions of law and aggravating and mitigating circumstances with respect to this disciplinary proceeding and respondent's declaration regarding the nexus between his mental health issues and his misconduct in this matter, the court advised the parties of the discipline which would be recommended to the Supreme Court if respondent successfully completed the ADP and the discipline that would be recommended if respondent was terminated from the ADP.

After agreeing to the recommended discipline, respondent executed the contract to participate in the ADP and was accepted for participation in the ADP.

³ Future references to standard(s) or std. are to this source.

Thereafter, respondent successfully participated in the ADP and, as set forth in the order filed on December 19, 2008, the court found that respondent successfully completed the ADP. Accordingly, the court will recommend to the Supreme Court the imposition of the discipline set forth in the May 2005 Decision if respondent successfully completed the ADP.

V. Recommended Discipline

Therefore, the court recommends that respondent **Ernest Roy Krause** be suspended from the practice of law for three years, that execution of such suspension be stayed and that he be placed on probation for three years on the following conditions:

1. Respondent must be actually suspended from the practice of law for the first 30 days of the period of probation, with credit toward the period of actual suspension given for the two periods of inactive enrollment which commenced on March 26, 2008, and ended on April 9, 2008, and which commenced on August 16, 2008, and ended on August 31, 2008;
2. During the period of probation, respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;
3. Within 10 days of any change in the information required to be maintained on the State Bar's membership records pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report any such change in writing to the Membership Records Office of the State Bar and to the Office of Probation;
4. Respondent must submit written quarterly probation reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, respondent must state whether he has complied with the State Bar Act,

the Rules of Professional Conduct, and all of the conditions set forth in this Decision during the preceding calendar quarter. If the first report will cover less than 30 days, that report must be submitted on the reporting due date for the next calendar quarter and must cover the extended period. In addition to all quarterly reports, respondent must submit a final report, containing the same information required by the quarterly reports. The final report must be submitted no earlier than 20 days before the last day of the probation and no later than the last day of said period;

5. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request;
6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with these probation conditions;
7. Within one year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education

Requirement (MCLE), and respondent will not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201);

8. These probation conditions will commence on the effective date of the Supreme Court's final disciplinary order in this proceeding; and
9. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for three years that is stayed will be satisfied and that suspension must be terminated.

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination within one year. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage. (But see Cal. Rules of Court, rule 951(b), and Rules Proc. of State Bar, rule 3201(a)(1) and (3).)

Finally, it is recommended that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10, and be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VI. Order Sealing Documents

The court orders this Order Sealing Documents be filed. Thereafter, pursuant to rule 806(c) of the Rules of Procedure, all other documents not previously filed in this matter will be sealed under rule 23 of the Rules of Procedure.

It is further ordered that protected and sealed material will only be disclosed to: (1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the State Bar Court and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their official duties. Protected material will be marked and maintained by all

authorized individuals in a manner calculated to prevent improper disclosure. All persons to whom protected material is disclosed will be given a copy of this order sealing the documents by the person making the disclosure.

IT IS SO ORDERED.

Dated: March _____, 2009

PAT McELROY
Judge of the State Bar Court