

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case Nos. 99-O-13007-PEM; 99-O-13008;
)	00-O-14734; 01-O-01890; and
DAVID ANDREW GROW,)	01-O-02940
)	
Member No. 119218,)	DECISION AND ORDER SEALING
)	DOCUMENTS
A Member of the State Bar.)	
_____)	

I. Introduction

After respondent **David Andrew Grow** reached a Stipulation as to Facts and Conclusions of Law (stipulation) with the Office of the Chief Trial Counsel of the State Bar of California (State Bar), this court approved the stipulation and accepted respondent as a participant in the State Bar Court’s Alternative Discipline Program (ADP).¹ (Rules Proc. of State Bar, rules 800-807.)

As set forth below in greater detail, respondent has successfully completed the ADP. Accordingly, pursuant to rule 803 of the Rules of Procedure of the State Bar of California,² the court hereby orders that respondent be publicly reprovved with conditions attached.

II. Significant Procedural History

On January 10, 2005, this court was assigned to this proceeding. The State Bar and respondent reached an agreement on the resolution of this matter prior to the filing of a notice of disciplinary charges.

Following discussions at a settlement conference, respondent’s case was referred to the ADP

¹Also known as the State Bar Court’s Program for Respondents with Substance Abuse and Mental Health Issues.

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

to evaluate whether respondent met the requirements for participation in the program. A prerequisite to participation in the ADP is an attorney's acceptance in the State Bar Lawyer Assistance Program (LAP). (Rules Proc. of State Bar, rule 802(a).) Respondent was already enrolled in that program. On September 16, 2002, after an extensive evaluation process, respondent had entered into a five-year participation agreement with the LAP to assist in his recovery process from alcoholism.

On April 28, 2005, the parties submitted the stipulation for purposes of respondent's participation in the ADP. (Rules Proc. of State Bar, rule 802(a).) At the same time, this court issued its Decision Re Alternative Recommendations for Degree of Discipline (April 2005 Decision) pursuant to rule 803(a). After considering the court's disciplinary recommendations, respondent elected to participate in the ADP. Following the execution of a Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program (contract), this court accepted respondent into the ADP on April 28, 2005.

On July 30, 2007, this court found that respondent successfully completed the ADP and ordered that the stipulation be filed. The court indicated that it would issue this decision recommending the lower level of discipline reflected in the April 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 July 30, 2007, is attached and incorporated by reference as if set forth fully herein.

In summary, respondent admitted to six violations of professional misconduct in four client matters, including failure to perform services competently, failure to communicate, improper withdrawal from employment and failure to provide an accounting.

Pursuant to the stipulation and in the furtherance of justice, the court dismissed case No. 01-O-01890 (judicial sanctions) without prejudice.

In aggravation, respondent stipulated that his misconduct evidences multiple acts of misconduct in four client matters. (Rules Proc of State Bar, tit. IV, Stds. For Atty. Sanctions for Prof. Misconduct, standard 1.2(b)(ii).)³

³All further references to standards are to this source.

In mitigation, respondent has no record of prior discipline in about 13 years of practice prior to the commencement of the misconduct upon which this proceeding is based. (Standard 1.2(e)(i).) This period of practice without discipline is entitled to substantial weight as a mitigating factor. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596.)

Respondent had extreme emotional difficulties and was suffering from a substance abuse problem at the time of his misconduct. (Standard 1.2(e)(iv).) In 1999, the health of respondent's father began to deteriorate and he was frequently hospitalized before his death in mid-2000. Respondent had been the sole source of care and comfort to his parents. Respondent has established through clear and convincing evidence that he no longer suffers from such difficulties.

Respondent was candid and cooperative with the State Bar during the investigation and resolution of these matters. (Standard 1.2(e)(v).)

Respondent made restitution to his clients: \$1,500 to Gary Lee; \$352 to the DiGiorgios; and \$2,600 to Valentine. He also paid \$1,500 to the Nevada County Superior Court. In addition, in the Caperton matter, respondent has made restitution payments of at least \$500 per calendar quarter since June 2005 and will continue to do so until he makes full restitution of \$5,066.95 plus interest. (Standard 1.2(e)(vii).)

In 2002, respondent contacted LAP to assist him with his substance abuse problem. On May 13, 2002, respondent signed an application agreement to be considered by LAP for long-term participation. Respondent cooperated with that assessment process, and entered into the long-term participation plan on September 16, 2002. He remained in full compliance with LAP since his first contact with the program. His participation requirements included attending weekly LAP group meetings, completing a 28-day residential alcohol treatment program, attending weekly AA group meetings and participating in group counseling.

The evaluation report of Michael E. Meek, M.D., dated May 28, 2002, supported the conclusion that at the time of his prior misconduct, respondent was suffering from alcohol dependency. Respondent experienced extreme emotional difficulties due to his father's serious illnesses and death. As a consequence, respondent abused alcohol that caused the charged misconduct.

On April 26, 2007, the LAP formally notified respondent of his successful completion of the LAP on April 19, 2007, and presented him with a Certificate of Successful Completion. (Rules Proc. of State Bar, rule 804.)

In addition to participating in LAP, respondent was accepted into the ADP as a result of his misconduct in this matter. Respondent fully complied with all terms and conditions of the program.

Rule 804 provides that a respondent must participate in the ADP for a period of 36 months, and that the court may shorten the time to not less than 18 months with earned incentives. Based on his compliance with all aspects of his recovery program, the court found it appropriate to reduce the length of time that respondent was required to participate in the ADP from 36 months to 27 months. Accordingly, on July 30, 2007, the court found that respondent successfully completed the ADP.

Respondent is entitled to significant mitigating credit for his successful completion of LAP and ADP.

IV. Degree of Discipline

In determining the appropriate disposition in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession and 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; Standard 1.3.) Standard 1.6(b) provides that the specific discipline for a particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions. The standards applicable to this proceeding are standards 2.2(b), 2.4(b) and 2.10.

The State Bar recommended that if respondent successfully completes the ADP, he should be publicly reprovved with a two-year probation, citing *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509 in support of its recommendation.

Respondent, on the other hand, recommended that this matter be dismissed or resolved with an agreement in lieu of discipline if he successfully completes the ADP, citing *Colangelo v. State Bar* (1991) 53 Cal.3d 1255; *Hartford v. State Bar* (1990) 50 Cal.3d 1139; *In the Matter of Kopinski* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 716; and *In the Matter of Aguiluz* (Review Dept.

1992) 2 Cal. State Bar Ct. Rptr. 32, in support of his recommendation.

The court does not find *Kaplan* to be analogous to the present case. In *Kaplan*, the attorney received a two-year stayed suspension, two years probation, and a three-month actual suspension for numerous instances of misconduct in nine client matters caused primarily by his failure to supervise his office staff properly. Namely, the attorney failed to communicate, failed to forward files, failed to perform services, failed to return settlement drafts, and failed to pay sanctions. The attorney had practiced law for nine years without prior discipline and was experiencing severe marital difficulties at the time of the misconduct.

Here, unlike *Kaplan*, respondent's misconduct involved four client matters and was not a result of any negligent law office management practices.

The court finds the cases cited by respondent to be more analogous to respondent's misconduct in the current proceeding. For instance, in *Colangelo*, the attorney was found culpable of misconduct in four client matters, including failure to perform services, failure to refund unearned fees and failure to communicate. The Supreme Court imposed a stayed suspension of one year and 18 months probation, with no period of actual suspension.

In *Hartford*, the Supreme Court found the attorney culpable of the failure to perform legal services, failure to communicate and failure to return unearned fees in three client matters and of selling property that had been pledged to secure payment of his fees without notice or consent. The Court imposed a six-month stayed suspension, one year probation and 30 days actual suspension.

In *Kopinski*, the Review Department found an attorney culpable of failure to communicate with two clients, failure to promptly return a file in one matter and improper withdrawal from employment in one matter. The attorney had only been admitted to practice for about five years at the time of his misconduct. The Review Department recommended a six-month stayed suspension, two years probation and no period of actual suspension.

Finally, in *Aguiluz*, the Review Department found the attorney culpable of abandoning one client and improperly refusing to return a client file until the attorney's fees were paid. The attorney had seven years of practice without discipline and been involved in a substantial amount of pro bono activities. The Review Department recommended a one-year stayed suspension, two years probation

and no period of actual suspension.

Respondent urged this court to dismiss the current disciplinary proceeding against him, either unconditionally or upon his execution of an appropriate agreement in lieu of discipline, if he successfully completes the ADP. Respondent argued that, by his willingness to be one of the first participants in the Program, he took a "leap of faith" at a time when the Program was new and untested. Respondent further argued that, through no fault of his own, he had already been in the LAP for approximately two and one-half years by the time he was accepted into the ADP.

In light of these considerations, respondent argued that a dismissal is appropriate.

The court is aware of the length of respondent's participation in LAP and his exemplary commitment to his substance abuse recovery. However, he had been found culpable of misconduct in four separate client matters over a period of about three years. In the absence of his demonstrated rehabilitation from his substance abuse problem, respondent's misconduct would clearly warrant at least a stayed suspension and probation. Given the number of client matters involved and the length of time over which that misconduct occurred, this court cannot justify the dismissal of this proceeding without the imposition of discipline.

On balance, the court concludes that respondent's admitted misconduct in the current proceeding is less serious than the misconduct found in *Kaplan* and that it is similar to the misconduct found in *Colangelo* and *Hartford*.

In accordance with applicable Supreme Court case law, an attorney's rehabilitation from alcoholism or other substance abuse problems can be accorded significant mitigating weight if it is established that (1) the abuse was addictive in nature; (2) the abuse causally contributed to the misconduct; and (3) the attorney has undergone a meaningful and sustained period of rehabilitation. (*Harford v. State Bar* (1990) 52 Cal.3d 93, 101; *In re Billings* (1990) 50 Cal.3d 358, 367.) The extensive evaluation prepared by Dr. Meek substantiates the fact that respondent has a substance abuse problem involving alcohol, that his alcohol problem is addictive in nature and that it is causally related to, or that it contributed to, his misconduct.

Thus, the first two prongs of the three-part test established by the Supreme Court had been met.

Respondent's successful completion of the ADP, which required his compliance with all provisions and conditions of his Participation Agreement with the LAP, and his successful completion of the LAP, qualify as clear and convincing evidence of his rehabilitation from his alcohol dependency. He has demonstrated that he has undergone a meaningful and sustained period of rehabilitation from chemical dependency. Therefore, his rehabilitation satisfied the third prong of the Supreme Court's test.

In light of the facts and circumstances surrounding respondent's misconduct, the mitigating and aggravating factors and the analogous case law, the court concludes that a public reproof is appropriate.

V. Order of Public Reproof

IT IS ORDERED that respondent **David Andrew Grow** is hereby publicly reproofed, and for a period of two years from the effective date of this order, must comply with the following conditions:

1. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;
2. Respondent must pay restitution to Edward Caperton in the amount of \$5,066.95, plus 10% interest per annum from November 1, 2001, (or to the Client Security Fund to the extent of any payment from the fund to Edward Caperton, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation pursuant to the following payment schedule: payment of not less than \$500 per calendar quarter. Respondent must provide satisfactory proof of each restitution payment to the Office of Probation and proofs of payment to be received by the Office of Probation on each quarterly report, until proof of all restitution to Caperton has been received by the Office of Probation;
3. Within 10 calendar 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 his current office address and

telephone number, respondent must report such change in writing to both the Office of Probation and to the Membership Records Office of the State Bar;

4. Respondent must submit written quarterly reports to the Office of Probation no later than 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 these conditions 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 period and no later than the last day of said period;
5. 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 he is complying or has complied with the conditions attached to his public reproof;
6. Within one year of the effective date of the public reproof in this proceeding, respondent must provide to the Office of Probation satisfactory proof of his attendance at a session of State Bar Ethics School, and of his passage of the test given at the end of that session; and
7. The conditions attached to this public reproof will commence on the finality of this decision.

It is further recommended that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and that such costs be made payable in accordance with Business and Professions Code section 6140.7 and as a money judgment.

VI. Order Sealing Documents

In the course of determining respondent's eligibility for participation in the ADP, and while respondent was participating in the ADP, various documents were submitted to the court for review

under confidential cover, including reports and evaluations by mental health professionals and respondent's recommended treatment for participation in the LAP. Pursuant to Business and Professions Code section 6234, subdivision (a), and rule 806 of the Rules of Procedure of the State Bar of California, all information concerning the nature and extent of a respondent's treatment is absolutely confidential and is not to be disclosed to the public absent an express written waiver by the respondent.

ACCORDINGLY, 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.

FURTHERMORE, the following documents are to remain confidential and sealed:

1. All reports and evaluations by mental health professionals that were submitted to the court as part of respondent's participation in the Alternative Discipline Program;
2. All information concerning the nature and extent of respondent's treatment provided by the LAP, including, but not limited to, participation reports, application agreements and participation agreements; and
3. The Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program.

IT IS FURTHER ORDERED that the foregoing 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: July 30, 2007

PAT McELROY
Judge of the State Bar Court

