

**STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO**

In the Matter of	)	<b>Case No. 99-O-13577-PEM</b>
	)	<b>(01-O-00035; 01-O-00143)</b>
<b>ARLO HALE SMITH,</b>	)	
	)	
<b>Member No. 96971,</b>	)	<b>DECISION AND ORDER SEALING</b>
	)	<b>DOCUMENTS</b>
A Member of the State Bar.	)	
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**I. Introduction**

In this disciplinary proceeding, respondent **Arlo Hale Smith** stipulated to professional misconduct in two client matters, including failing to perform services competently, failing to communicate with client, failing to properly withdraw from employment, and maintaining unjust actions.

Respondent has successfully completed the State Bar Court's Alternative Discipline Program (ADP).<sup>1</sup> (Rules Proc. of State Bar, rules 800-807.) The court recommends that respondent be suspended from the practice of law for two years, that execution of such suspension be stayed and that respondent be placed on probation for three years with conditions, including restitution. (Rules Proc. of State Bar, rule 803.)<sup>2</sup>

**II. Significant Procedural History**

After the 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

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<sup>1</sup>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.

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

Assistance Program (LAP) and the State Bar Court's ADP.

On May 5, 2003, 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 February 2, 2004, the court lodged its Decision Re Alternative Recommendations for Degree of Discipline (February 2004 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 Pilot Program for Respondents with Substance Abuse or Mental Health Issues; the parties' stipulation was lodged with the court; and respondent was accepted as a participant in the ADP.

On June 2, 2005, a second stipulation was lodged with the court – Stipulation to Modify Restitution Condition (second stipulation). It modified the restitution condition in the Cardinale case set forth in the February 2, 2004 stipulation. The court approved the second stipulation in its Program Status Conference Order filed June 2, 2005. On February 27, 2007, the court ordered that respondent's restitution payment to Noreen Cardinale be increased to a minimum of \$3,000 per quarter.

On January 31, 2008, the LAP issued a Certificate of One Year Participation in the Lawyer Assistance Program (certificate), setting forth that respondent has complied with the requirements of the LAP Participation Agreement/Plan for one year prior to the date of this certificate, and that during this period, respondent has maintained mental health and stability and has participated successfully in the LAP.

On February 4, 2008, the court found that respondent successfully completed the ADP

and ordered the stipulation lodged February 2, 2004, be filed. The court also indicated that it would issue this decision recommending the lower level of discipline reflected in the February 2004 decision. Because the court had inadvertently omitted to order the second stipulation lodged June 2, 2005, be filed, it is hereby ordered that the second stipulation be retroactively filed as of February 4, 2008.

### **III. Findings of Fact and Conclusions of Law**

The Stipulation Re Facts and Conclusions of Law and the second stipulation to modify restitution condition (stipulation) approved by the court and filed on February 4, 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. 01-O-00143 with prejudice since respondent had paid restitution.

Furthermore, 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 2003 and has successfully completed the ADP. Respondent's successful completion of the ADP and LAP, as well as the certificate, 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. (Standard 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.)

Prior to respondent being accepted for participation in the ADP, the State Bar submitted a brief to the court on the appropriate discipline in this matter. After reviewing the State Bar's brief 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 these disciplinary proceedings and respondent's declarations regarding the nexus between his mental health issues and his misconduct in this matter, the parties were advised 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. Respondent thereafter entered into a contract to participate in the ADP and was accepted for participation in the ADP.

Thereafter, respondent successfully participated in the ADP and, as set forth in the order filed on February 4, 2008, the court found that respondent successfully completed the ADP. Accordingly, the court will recommend to the Supreme Court the lower level of discipline.

#### **V. Recommended Discipline**

Therefore, it is hereby recommended that respondent **Arlo Hale Smith** be suspended from the practice of law for two years and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, that execution of such suspension be stayed, and that respondent be placed on probation for a period of three years, on the following conditions:

1. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;

2. Respondent must make restitution to **Noreen Cardinale** in the amount of \$19,929.45, plus 4.19% interest per annum from April 2, 2001<sup>3</sup> (or to the Client Security Fund to the extent of any payment from the fund to Noreen Cardinale, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnish satisfactory proof of such restitution to the State Bar's Office of Probation pursuant to the following payment schedule: payment of \$3,000 per calendar quarter. Respondent must provide satisfactory proof of each restitution payment to the Office of Probation on each quarterly report, until proof of all restitution to Cardinale has been received by the Office of Probation. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d). Upon respondent's failure to timely make any installment payment of restitution, the unpaid balance is due and payable immediately unless relief has been granted under the Rules of Procedure of the State Bar (Rules Proc. of State Bar, rule 286);
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. Unless respondent has successfully completed the Lawyer Assistance Program, respondent must comply with all provisions and conditions of his Participation Agreement with the LAP and must execute an appropriate waiver authorizing the LAP to provide the Office of Probation and this court with information regarding the terms and conditions of his participation in the LAP and his compliance or non-compliance with LAP requirements. Revocation of the written waiver for release of LAP information is a

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<sup>3</sup>The restitution condition is based on the second stipulation. Also, the Office of Probation submitted a report indicating that respondent still owes \$5,179.45 in principal and \$5,285 in accrued interest to Noreen Cardinale as of January 30, 2008.

violation of this condition. If respondent has successfully completed the LAP, respondent must provide the Office of Probation with satisfactory certification of completion of the LAP;

5. 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;
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 Supreme Court's final disciplinary order 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;
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 two years that is stayed will be satisfied and that suspension must be terminated.

This court does not recommend that respondent be required to take and pass the Multistate Professional Responsibility Examination (MPRE) because he has previously been ordered to do so as part of the discipline imposed in Supreme Court case No. S095024 (State Bar Court case No. 97-O-10805).

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: April \_\_, 2008

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**PAT McELROY**  
Judge of the State Bar Court