

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No. 06-C-10625-PEM; 06-C-11101;
)	06-C-11128; 06-C-11129;
BRIAN MALCOLM KEITH,)	08-C-10013 (Cons.)
)	
Member No. 145934,)	
)	DECISION AND ORDER SEALING
A Member of the State Bar.)	DOCUMENTS
)	

I. Introduction

In this disciplinary proceeding, respondent **Brian Malcolm Keith** stipulated to one felony and four misdemeanor convictions of various vehicle code violations of driving under the influence and other alcohol-related offenses and that circumstances surrounding his felony conviction involved moral turpitude and that circumstances surrounding his other four misdemeanor convictions did not involve moral turpitude.

In June 2008, this court accepted respondent as a participant in the State Bar Court’s Alternative Discipline Program (ADP). (Rules Proc. of State Bar, rules 800-807.)

However, respondent has recently been terminated from the State Bar Court’s ADP because of his failure to comply with its requirements.

Accordingly, pursuant to rule 803 and in light of his admitted misconduct, the court hereby recommends that respondent be suspended from the practice of law for four years and

until he has shown proof satisfactory to the State Bar Court of respondent's rehabilitation, fitness to practice and 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 the suspension be stayed, and that respondent be placed on probation for four years on conditions that include his actual suspension for three years and until he has shown proof satisfactory to the State Bar Court of respondent's rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

II. Significant Procedural History

A. Respondent's Acceptance into the Alternative Discipline Program

On June 23, 2008, the court approved a Stipulation re Facts and Conclusions of Law (Stipulation) and accepted respondent into the ADP. On the same day, respondent executed a Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program (Contract). This court also issued its Confidential Statement of Alternative Dispositions (June 2008 Statement).

Respondent's eligibility and acceptance into the ADP was based on, among other things: 1) his participation in the LAP; 2) the stipulation as to facts and conclusions of law he entered with the State Bar; 3) the nexus evidence he provided; and 4) his agreement to accept the court's low and high levels of recommended discipline set forth in the June 2008 Statement. (Rules Proc. of State Bar, rule 802.)

Respondent agreed to fulfill all of the requirements set forth by the ADP Judge as conditions for respondent's ongoing participation in the ADP.

B. Respondent's Termination from the Alternative Discipline Program

On September 15, 2008, the court held an order to show cause (OSC) hearing on whether respondent should be terminated from the ADP because he was not in compliance with the conditions of the ADP. Respondent failed to appear at the hearing and the court thus terminated respondent from the ADP based upon his noncompliance with the conditions of the ADP. Respondent had repeated unexcused missed lab tests and absences from LAP group/therapy sessions. The court also ordered the Stipulation to be filed and now issues this decision recommending the high level of discipline set forth in the June 2008 Statement.

III. Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on March 15, 1990, and has been a member of the State Bar of California at all times since.

The Stipulation is attached and hereby incorporated by reference, as if fully set forth herein. The Stipulation set forth the factual findings, legal conclusions and aggravating and mitigating circumstances in this matter.

In summary, respondent stipulated to five criminal convictions involving alcohol-related offenses. The parties also stipulated to certain aggravating and mitigating factors.

Regarding mitigation, extreme emotional difficulties or physical disabilities suffered by the attorney at the time of the professional misconduct may be considered mitigating. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(iv).) The Supreme Court has held 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.)

However, the Supreme Court also has held that, absent a finding of rehabilitation, emotional problems are not considered to be a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney, supra*, 51 Cal.3d at p. 197.)

Here, in accepting respondent into the ADP, the court found that respondent had suffered from alcoholism and that there was a sufficient connection between respondent's problem and the stipulated misconduct. (Rules Proc. of State Bar, rule 802.) Respondent was enrolled in the State Bar's Lawyer Assistance Program (LAP) in May 2007 in a five-year commitment to his recovery program but was terminated from LAP in October 2008. Respondent's conduct before this court while participating in the ADP and his termination from that program prevent the court from making a finding that respondent has established his sustained rehabilitation by clear and convincing evidence. Therefore, the court will not give respondent any mitigation credit for his participation in the LAP or the ADP.

Furthermore, although the parties stipulated that respondent was candid and cooperative with the State Bar during its resolution of these matters, the mitigating force of this factor is dramatically reduced based on respondent's termination from the ADP. (Std. 1.2(e)(v).)

IV. Discussion

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; std. 1.3.)

After considering the Stipulation, scope of respondent's acts of misconduct, the mitigating and aggravating circumstances, the standards, the relevant case law, and respondent's declaration regarding the nexus between his mental health/substance abuse issues and his misconduct in this matter, the court had advised respondent and the State Bar of the low and high

levels of discipline which would be recommended to the Supreme Court, depending on whether respondent successfully completed the ADP or was terminated from the ADP. The recommended discipline was set forth in the June 2008 Statement.

Accordingly, because respondent was terminated from the ADP in September 2008, the court hereby recommends the high level of discipline to the Supreme Court.

V. Recommendation

It is hereby recommended that respondent **Brian Malcolm Keith** be suspended from the practice of law in the State of California for four years and until he has shown proof satisfactory to the State Bar Court of respondent's rehabilitation, fitness to practice and 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 four years on the following conditions:

1. Respondent must be actually suspended from the practice of law for the first three years of the period of probation and until he has shown proof satisfactory to the State Bar Court of respondent's rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct;
2. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;
3. Within 10 calendar 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 or, if no office is maintained, the address to be used for State Bar purposes, respondent must report 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 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 the conditions of probation 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 such 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 that are directed to him personally or in writing, relating to whether he 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 passage of the test given at the end of that session, unless he previously completed the course within the prior two years (Rules Proc. of State Bar, rule 290);

8. Respondent must abstain from use of any alcoholic beverages, and must not use or possess any narcotics, dangerous or restricted drugs, controlled substances, marijuana, or associated paraphernalia, except with a valid prescription;
9. Respondent must select a licensed medical laboratory approved by the Office of Probation. Respondent must furnish to the laboratory such blood and/or urine samples as may be required to show that respondent has abstained from alcohol and/or drugs. The samples must be furnished to the laboratory in such a manner as may be specified by the laboratory to ensure specimen integrity. Respondent must cause the laboratory to provide to the Office of Probation, at respondent's expense, a screening report on or before the 10th day of each month of the probation period, containing an analysis of respondent's blood and/or urine obtained not more than 10 days earlier;
10. Respondent must maintain with the Office of Probation a current address and a current telephone number at which respondent can be reached. Respondent must return any call from the Office of Probation concerning testing of respondent's blood or urine within 12 hours. For good cause, the Office of Probation may require respondent to deliver respondent's urine and/or blood sample(s) for additional reports to the laboratory no later than six hours after actual notice to respondent that the Office of Probation requires an additional screening report;
11. Respondent must comply with all conditions of probation imposed in the underlying criminal matters and must so declare under penalty of perjury in conjunction with any quarterly report required to be filed with the Office of Probation;
12. The period of probation will commence on the effective date of the final disciplinary order of the Supreme Court imposing discipline in this proceeding; and

13. At the expiration of the period of this probation, if respondent has complied with all of the terms and conditions of probation, the order of the Supreme Court suspending respondent from the practice of law for four years will be satisfied and that suspension will be terminated.

It is also recommended that respondent be ordered to comply with the requirements of the California Rules of Court, rule 9.20, and that he be ordered to perform the acts specified in rule 9.20(a) and (c) within 30 and 40 calendar days, respectively, from the effective date of the Supreme Court's final disciplinary order in this proceeding. Failure to comply with rule 9.20 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) 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.)

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE), administered by the National Conference of Bar Examiners, and to provide proof of passage of the MPRE to the Office of Probation, within one year of the effective date of the Supreme Court's final disciplinary order in this proceeding. Failure to pass the MPRE, and to provide proof of such passage, within the specified time will result in actual suspension by the State Bar Court Review Department, without further hearing, until respondent provides the required proof of passage of the MPRE.

VI. Costs

It is also 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.

VII. Order Sealing Documents

In the course of determining respondent's eligibility for participation in the State Bar Court's Alternative Discipline Program, and while respondent was participating in the Program,

various documents were submitted to the court for review under confidential cover. 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.

In light of the foregoing,

IT IS HEREBY ORDERED that, pursuant to rules 23 and 806, all other documents not previously filed are to remain confidential and sealed.

IT IS FURTHER ORDERED that the 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: December ____, 2008

PAT McELROY
Judge of the State Bar Court