

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 08-O-12914
)	
BARRY JAY POST,)	DECISION AND ORDER SEALING
)	CERTAIN DOCUMENTS
Member No. 72286,)	
)	
<u>A Member of the State Bar.</u>)	

Introduction¹

In this original disciplinary proceeding, respondent Barry Jay Post (respondent) was accepted for participation in the State Bar Court’s Alternative Discipline Program (ADP). As the court has now terminated respondent from the ADP, the court will recommend to the Supreme Court that respondent be suspended from the practice of law in California for five years, that execution of that period of suspension be stayed, and that he be placed on probation for four years subject to certain conditions, including a three-year period of suspension which will continue until respondent shows proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law, pursuant to standard 1.4(c)(ii), Standards for Attorneys Sanctions for Professional Misconduct.

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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.

Significant Procedural History

The State Bar of California, Office of the Chief Trial Counsel (State Bar) filed a Notice of Disciplinary Charges (NDC) against respondent on August 29, 2008, in case no. 08-O-12914. The matter was originally assigned to the Honorable Donald F. Miles.

On February 10, 2009, a settlement conference was held in this matter before the undersigned judge. On February 8, 2009, the undersigned judge filed an order referring this matter to the ADP for evaluation of respondent's eligibility for participation in the State Bar Court's ADP.²

Respondent contacted the State Bar's Lawyer Assistance Program (LAP) on March 2, 2009, for assistance with his mental health issues. In furtherance of his participation in the ADP, respondent signed a long-term Participation Plan with the LAP on August 24, 2009.

Respondent submitted a declaration to the court on September 1, 2009, which established a nexus between respondent's mental health issues and his misconduct in this matter.

The parties entered into a Stipulation Re Facts and Conclusions of Law (Stipulation) in case no. 08-O-12914 on September 8, 2009. The Stipulation sets forth the factual findings, legal conclusion, and mitigating and aggravating circumstances in this matter. The Stipulation was received by the court on September 8, 2009.

Following briefing by the parties, the court advised the parties of (1) the discipline which would be recommended to the Supreme Court if respondent successfully completed the ADP and (2) the discipline which would be recommended if respondent failed to successfully complete, or was terminated from, the ADP. After agreeing to those alternative possible dispositions, respondent executed the Contract and Waiver for Participation in the State Bar Court's ADP; the court executed a Confidential Statement of Alternative Dispositions and Orders (Confidential

² On March 5, 2009, this matter was reassigned to the undersigned judge for all further proceedings.

Statement) formally advising the parties in writing of the alternative discipline recommendations in this matter; the parties' stipulation was filed; the court accepted respondent for participation in the ADP; and respondent's period of participation in the ADP began on February 4, 2010.³

Effective May 24, 2010, respondent was involuntarily enrolled inactive under section 6233.⁴ On June 22, 2010, respondent was ordered to comply with requirements set forth in rule 9.20 of the California Rules of Court, as modified by the court. Respondent filed his rule 9.20, California Rules of Court, compliance declaration on August 25, 2010.⁵

Respondent thereafter participated in both the LAP and the State Bar Court's ADP. However, on March 3, 2011, the court filed an Order to Show Cause (OSC) requiring respondent to show cause, in writing, on or before March 31, 2011, as to why respondent should not be terminated from the ADP and the high level of discipline imposed as a result of his misrepresentations to the court as to his efforts to contact the Office of Probation and the claimed failure of the Office of Probation to respond.

Pursuant to the court's order, on March 3, 2011, the Office of Probation filed the declaration of probation deputy Maricruz Farfan with attached exhibits.

Respondent filed declarations on April 1, 2011, in support of his showing of cause why he should not be terminated from the ADP and the high level of discipline imposed. On that same date, respondent filed a motion for leave to make restitution payments, according to the schedule established by the Office of Probation, into the State Bar's Client Security Fund (CSF) for certain individuals whose original addresses were apparently no longer valid.

³ The Confidential Statement and the ADP Contract were lodged on February 4, 2010.

⁴ Prior to his inactive enrollment, respondent's practice had been restricted effective April 15, 2010.

⁵ Respondent had earlier filed a compliance declaration, but the court ordered that respondent file a corrected declaration of compliance with rule 9.20, California Rules of Court.

The State Bar, on April 27, 2011, filed a response to respondent's declarations and to respondent's motion for leave to make restitution payments into the CSF.

On May 3, 2011, respondent filed objections to the State Bar's response to his declarations and to the State Bar's response to his motion for leave to make restitution payments into the CSF.

The court filed an order on May 11, 2011, granting respondent's motion for an order that he be allowed to make certain restitution payments, according to the schedule established by the Office of Probation, into the CSF.

On May 12, 2011, the court filed an order terminating respondent from the ADP after finding clear and convincing evidence of misconduct during respondent's participation in the ADP. This matter was submitted for decision on May 12, 2011.

Respondent sought reconsideration of the court's decision to terminate him from the ADP; however, on June 14, 2011, the court denied respondent's motion for reconsideration of the order terminating him from the ADP.

Findings of Fact and Conclusions of Law

Case No. 08-O-12914 – Probation Violations

The parties' Stipulation, including the court's order approving the Stipulation, is attached hereto and hereby incorporated by reference, as if fully set forth herein.

In case no. 08-O-12914, respondent stipulated that he willfully violated section 6068, subdivision (k), by failing to comply with conditions attached to a disciplinary probation imposed by the Supreme Court in order no. S080580 (State Bar Court case nos. 95-O-12548, etc.) which was effective October 22, 1999.

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Aggravation⁶

Prior Record of Discipline (Std. 1.2(b)(i).)

In aggravation, respondent has a prior record of discipline. Effective October 22, 1999, respondent was suspended from the practice of law for five years and until rehabilitation; the execution of such suspension was stayed; and respondent was placed on probation for five years on conditions including an 18-month actual suspension in State Bar Court case nos. 95-O-12548, etc. (29 captioned cases). Respondent was disciplined for violating section 6068, subdivision (m), rule 3-110(A) and rule 3-700(D)(2).

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)

Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.

Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)

Respondent's misconduct significantly harmed a client, the public or the administration of justice, as for several years, he has failed to pay restitution to several client/victims and has failed to engage in fee arbitration with several client/victims.

Mitigation

Extreme Emotional/Physical Difficulties (Std. 1.2(e)(iv).)

Respondent was diagnosed with a cancerous tumor on his neck in May 2007, and underwent radiation and chemotherapy. Respondent continues to suffer from medical problems due to the radiation.

Respondent's failure to pay restitution is mitigated by respondent's severe financial stress which resulted from respondent's inability to work due to his physical and mental illnesses.

⁶ All further references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

However, as respondent did not successfully complete the ADP, he will not receive mitigating credit for his period of participation in either the ADP or the LAP.

Discussion

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

In determining the appropriate alternative discipline recommendations if respondent successfully completed the ADP or was terminated from, or failed to successfully complete, the ADP, the court considered certain standards and case law. In particular, the court considered standards 1.2, 1.3, 1.4, 1.5, 1.6, 1.7(a), and 2.6 and *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63 and *In the Matter of Broderick* (Review Dept. 1991) 3 Cal. State Bar Ct. Rptr. 138.

Because respondent has now been terminated from the ADP, this court, in turn, now recommends to the Supreme Court the imposition of the higher level of discipline, set forth more fully below.

Recommendations

It is hereby recommended that respondent Barry Jay Post, State Bar Number 72286, be suspended from the practice of law in California for five years, that execution of that period of suspension be stayed, and that he be placed on probation⁷ for a period of four years subject to the following conditions:

⁷ The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

1. Respondent Barry Jay Post is suspended from the practice of law for a minimum of the first three years of probation, and he will remain suspended until the following requirement is satisfied:

A. He must provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

2. Respondent Barry Jay Post must also comply with the following additional conditions of probation:

- a. During the probation period, respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California;
- b. Within 10 days of any change, respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California (Office of Probation), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;
- c. 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;
- d. Respondent must submit written quarterly 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 respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next quarter date, and cover the extended period.

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 period of probation and no later than the last day of the probation period;

- e. 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 the probation conditions;
- f. Within one year after the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar Ethics School, and passage of the test given at the end of that session;
- g. If respondent has not been terminated from the Lawyer Assistance Program (LAP), respondent must comply with all provisions and conditions of his Participation Plan/Agreement with the LAP and must provide the Office of Probation with certification of completion of the LAP. Respondent must immediately report any non-compliance with any provision(s) or condition(s) of his Participation Plan/Agreement to the Office of Probation. Respondent must provide an appropriate waiver authorizing the LAP to provide the Office of Probation and this court with information regarding the terms and conditions of respondent's 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 violation of this condition. Respondent will be relieved of this condition upon providing to the Office of Probation satisfactory certification of completion of the LAP.

If respondent has been terminated from the LAP prior to his successful completion of the LAP, respondent must obtain an examination of his mental and physical condition with respect to his mental health issues pursuant to rule 5.68 (former rule 184) of the Rules of Procedure of the State Bar of California from a qualified practitioner approved by the Office of Probation and must comply with any treatment/monitoring plan recommended following such examination. The examination and any further help/treatment/monitoring recommended by the examining practitioner will be at respondent's own expense. The examination must be conducted no later than 30 days after the effective date of the Supreme Court's final disciplinary order in this matter. Help/treatment/monitoring should commence immediately after said examination and, in any event, no later than 30 days after said examination. With each quarterly report, respondent must furnish to the Office of Probation sufficient evidence, as specified by the Office of Probation, that he is so complying with this condition of probation. Treatment/monitoring must continue for the period of probation or until a motion to modify this condition is granted and that ruling becomes final.

If the examining or treating practitioner determines that there has been a substantial change in respondent's condition, respondent or the State Bar's Office of Probation or the Office of the Chief Trial Counsel may file a motion for modification of this condition with the Hearing Department of the State Bar Court, pursuant to rule 5.300 (former rule 550) of the Rules of Procedure. The motion must be supported by a written statement from the examining or treating practitioner, by affidavit or under penalty of perjury, in support of the proposed modification.

Upon the request of the Office of Probation, respondent must provide the Office of Probation with medical and confidentiality waivers and access to all of respondent's medical records necessary to monitor this probation condition. Revocation of any medical/confidentiality waiver is a violation of this condition. Any medical records obtained by the Office of Probation will be confidential and no information concerning them or their contents will be given to anyone except members of the Office of the Chief Trial Counsel, the Office of Probation, and the State Bar Court, who are directly involved with maintaining, enforcing or adjudicating this condition.

- h. During his period of probation, respondent must pay restitution in the amounts set forth below to the following entity/individuals and provide satisfactory proof of such restitution to the State Bar's Office of Probation:
1. The State Bar's Client Security Fund (CSF): principal of \$50,533.00, plus interest and costs. Respondent will be given credit for any amounts previously repaid to CSF.
 2. Nina Wells: interest of \$133.01.
 3. Joyce Cross: principal of \$1,240.00, plus 10% interest per annum from January 1, 1997 (or to the CSF to the extent of any payment from the fund to Joyce Cross, plus interest and costs, in accordance with Business and Professions Code section 6140.5).
 4. CSF: interest of \$1,654.30 (as payment to Charles Butler).
 5. CSF: principal of \$500.00, plus 10% interest per annum from January 1, 1998 (as payment to Lisa Beilin, a.k.a. Lisa Beilen) (or to the CSF to the extent of any payment from the fund to Lisa Beilin, a.k.a. Lisa Beilen, plus interest and costs, in accordance with Business and Professions Code section 6140.5).
 6. CSF: interest of \$1,459.73 (as payment to Gene Basey).
 7. CSF: interest of \$239.42 (as payment to Margie Guttierrez).

8. CSF: interest of \$1,845.21 (as payment to Jacqueline Whitted, a.k.a. Jacqueline Whitted-Herring).

Respondent waives any objection to payment by the CSF upon a claim for the principal amount of restitution set forth herein.

Any restitution owed to the CSF is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d).

Unless he has previously done so, during his period of probation, respondent must submit the following matters to binding fee arbitration: Ronald Davis, Cynthia Abbey, Maria Galindo, Sandra De Leon, Gregg Chernik, Norma Flanagan, Pearl Moore and Robert Espinosa, comply with all fee arbitration determinations in these matters, and provide satisfactory proof of his compliance with this probation condition to the State Bar's Office of Probation.

To the extent that respondent has paid any restitution or fee arbitration determination prior to the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent will be given credit for such payments provided satisfactory proof of such is or has been shown to the Office of Probation.

3. At the expiration of the period of probation, if Barry Jay Post has complied with all conditions of probation, the five-year period of stayed suspension will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is further recommended that Barry Jay Post be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) during the period of his suspension and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

California Rules of Court, Rule 9.20

It is further recommended that respondent Barry Jay Post be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and perform the acts specified in

subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's final disciplinary order in this matter.

Costs

It is 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.

Direction Re Decision and Order Sealing Certain Documents

The court directs a court case administrator to file this Decision and Order Sealing Certain Documents. Thereafter, pursuant to rule 5.388(c) (former rule 806(c)) of the Rules of Procedure of the State Bar of California (Rules of Procedure),⁸ all other documents not previously filed in this matter are ordered sealed pursuant to rule 5.12 (former 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: August _____, 2011

RICHARD A. HONN
Judge of the State Bar Court

⁸ Effective January 1, 2011, new Rules of Procedure of the State Bar of California became effective.