

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of) Case No.: 13- O-17515-PEM
)
BRIAN WAYNE PLUMMER,) DECISION AND ORDER
)
Member No. 240210,)
)
A Member of the State Bar.)

Introduction¹

In this disciplinary proceeding, respondent Brian Wayne Plummer, is charged with two counts of misconduct stemming from a single matter. The alleged misconduct included representing multiple clients with potential and actual conflicts without notice and written consent, in violation of rules 3-310(C)(1) & (2). This court finds, by clear and convincing evidence, that respondent is culpable of failing to comply with the requirements of these rules.

After carefully considering all issues and evidence set forth during the trial, including the unique circumstances of this case and limited scope, as well as respondent's good faith belief that he was in compliance with his ethical duties, the court orders that he be privately reprovved.

Significant Procedural History

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.

On November 3, 2014, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC). Respondent filed a response on November 25, 2014.

Trial was held on March 3, 4, and 5, 2015, the State Bar was represented by Supervising Senior Trial Counsel Sherrie McLetchie and Deputy Trial Counsel Catherine Taylor. Respondent was represented by Daniel Kohls. On March 16, 2015, following the filing of closing briefs, the court took this matter under submission.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 7, 2005, and has been a member of the State Bar of California at all times since that date.

Case No. 13-O-17515 – The Yanez Matter

Facts

On September 6, 2008, Michael Yanez (Yanez) worked with another Union Pacific machinist, Robert Garcia (Garcia), replacing locomotive engines. Yanez was operating the drop table when Garcia went into the drop pit to retrieve a tool. While in the drop pit, Garcia fell and was injured. Yanez was told by a Union Pacific day shift manager to write a description of Garcia's accident (first written statement). Yanez wrote, "....while I was raising motor outside I was watching motor come up while Bobby went downstairs & went to retrieve tool had [*sic*] slipped [*sic*] & fell on concrete floor, soaked in oil and grease." [Exh. 1007.]

Within an hour of writing the first written statement, a Union Pacific senior manager told Yanez that he did not provide enough details and that he must write another more detailed statement (second written statement). Yanez complied and wrote, "....I was looking down at motor coming up, but I could see Bobby going downstairs & he walked out on concrete floor, I saw Bobby slip & fall down on oil soaked floor, he was lying on his back when I came

downstairs to help him up, he complained [*sic*] of his knee and back hurt. I called for help....”
[Exh. 1006.]

Garcia sued Union Pacific for the injuries he sustained under the Federal Employer Liability Act (FELA). Union Pacific assigned respondent, an in-house attorney, to defend it against Garcia’s FELA lawsuit. Garcia’s attorney noticed the deposition of Yanez and another employee, William Faloney (Faloney).

On June 17, 2009, Yanez and Faloney met with respondent for the first time an hour before their depositions. In that pre-deposition meeting, respondent prepared Yanez and Faloney for questions that might be asked by opposing counsel. Respondent also made it clear that he was only representing them for the deposition. Both Yanez and Faloney were concerned that their testimony at the deposition might jeopardize their jobs.² Respondent gave assurances that their jobs would not be in jeopardy if they told the truth. At the time, respondent did not obtain a conflict waiver from Yanez or Faloney.

In the pre-deposition meeting, Yanez told respondent that he did not see Garcia slip and fall. The only written statement respondent had at the meeting from Yanez was the second written statement where Yanez said he saw Garcia slip and fall.³ Yanez did not tell respondent about the first written statement because he had forgotten about it. Also, Yanez, who has only a high school education, did not believe that there was a significant difference between the two written statements, other than the fact that they were worded differently. He never told any of

² Yanez was worried that no one at the deposition was going to protect him. Moreover, Yanez had reason to believe that his job could be at risk, as he was aware of several unsafe work conditions that may have contributed to Garcia’s injuries at Union Pacific.

³ Respondent testified that he was unaware of Yanez’s first written statement until the deposition; however, the two written statements were in the possession of Union Pacific for at least nine months prior to the deposition. That said, there is no evidence that respondent knew about the first written statement before it was discussed in Yanez’s deposition.

his supervisors that he “actually” saw Garcia fall. At the pre-deposition meeting, nothing was said regarding the two statements Yanez had written on the day of Garcia’s accident.⁴

Dennis Magures (Magures), as director of the Union Pacific locomotive facility, attended Yanez’s deposition. At the deposition, counsel for Garcia elicited testimony from Yanez about the unsafe working conditions that may have contributed to Garcia’s injuries. Yanez testified adversely to Union Pacific regarding the working conditions. Yanez also testified that he had not actually seen Garcia fall, but that he became aware of the fall after it happened. [See Exh. 2, pp. 35 & 40-47.]

When respondent examined Yanez, respondent highlighted Union Pacific’s safety culture and tried to distance Union Pacific management from allegedly unsafe work conditions. After confirming Yanez’s testimony that he had not actually seen Garcia fall, respondent introduced the second written statement wherein Yanez stated that he saw Garcia fall. When asked about the second written statement, Yanez mentioned that there was another witness statement. Yanez also testified that he had worded the second written statement incorrectly. Respondent then dropped that line of questioning without giving Yanez an opportunity to explain the discrepancies between his two written statements.

Respondent credibly explained at the hearing in this matter that at the time of Yanez’s deposition he thought the contradiction between Yanez’s deposition testimony and his second written statement was not a big deal due to Yanez’s explanation that he misworded the second written statement. Respondent did not think the second written statement was a significant part

⁴ The key difference between the two written statements is the distinction between Yanez seeing Garcia actually slipping and falling rather than seeing him right before and then right after the fall. As noted below, Yanez credibly testified that he misworded the second written statement.

of the litigation. The Garcia litigation settled a week after the deposition and, as such, there was no point in respondent reviewing Yanez's deposition transcript.

Following Yanez's deposition, Magures obtained a copy of the deposition transcript. The deposition transcript confirmed that Yanez's deposition testimony seemingly conflicted with his second written statement. This confirmation led to a Union Pacific disciplinary hearing against Yanez in August 2009. At the disciplinary hearing, lawyers were not allowed to be present.⁵ After the hearing Yanez was terminated from Union Pacific for violating the company policy against dishonesty.

Respondent was not aware that Yanez had been terminated, as Yanez did not contact respondent about the disciplinary hearing. Respondent credibly testified that had Yanez contacted him, he would have contacted management at Union Pacific and told them that his view was that the two statements were not contradictory and that Yanez had explained that he just worded the second statement wrong. The first respondent heard of Yanez's termination was when he was served with a complaint wherein Yanez sued him for legal malpractice, breach of fiduciary duty, and fraud (*Yanez v. Plummer*).

In *Yanez v. Plummer*, respondent filed a motion for summary judgment. The trial court granted the motion. The Court of Appeal subsequently reversed the summary judgment, concluding that Yanez raised a triable issue of material fact that but for respondent's alleged malpractice, breach of fiduciary duty, and fraud, Union Pacific would not have fired Yanez.

On November 20, 2013, respondent filed a petition for rehearing, and, on December 16, 2013, the petition for rehearing was denied by the Court of Appeal. On December 16, 2013, respondent filed a petition for review in the California Supreme Court, and, on January 6, 2014, the Supreme Court received respondent's request for de-publication of *Yanez v. Plummer*. By

⁵ In-house litigation lawyers are typically unaware of disciplinary hearings.

order filed February 19, 2014, the Supreme Court denied the petition for writ of review and request for de-publication.

Conclusions

Count One - Rule 3-310(C)(1) [Representation of Adverse Interests, Potential Conflict]

Rule 3-310(C)(1) provides that an attorney must not, without the informed written consent of each client, accept representation of more than one client in a matter in which the clients' interests potentially conflict. Respondent represented Yanez, Faloney, and Union Pacific at depositions where a key issue was the unsafe working conditions at Union Pacific. Clearly, Yanez and Union Pacific occupied adverse positions regarding Garcia's FELA lawsuit against Union Pacific. Yanez – the only percipient witness to Garcia's accident – was aware of the unsafe working conditions at Union Pacific that may have contributed to Garcia's injury. Respondent in preparing Yanez for his deposition knew or should have known that it was reasonably foreseeable that Yanez's testimony could impair his professional obligations to represent Union Pacific and Yanez in that deposition. This was especially true considering that both Yanez and Faloney voiced their concern to respondent that their deposition testimony might jeopardize their jobs. As such, respondent should have informed Yanez of his potential conflict in representing both Yanez and Union Pacific and obtained Yanez's and Union Pacific's written consent to waive the conflict. Respondent's failure to do so constitutes a willful violation of rule 3-310(C)(1).⁶

Count Two - Rule 3-310(C)(2) [Representation of Adverse Interests, Actual Conflict]

Rule 3-310(C)(2) provides that an attorney must not, without the written consent of each client, accept or continue representation of more than one client in a matter in which the clients'

⁶ The court rejects respondent's narrow argument that no conflict existed because Yanez had no interest in the Garcia litigation.

interests actually conflict. While it was respondent's obligation to represent Yanez at the deposition, it was also his obligation to represent Union Pacific. Since Yanez testified about some of the unsafe working conditions at Union Pacific, respondent had a legal obligation to emphasize the safe working conditions at Union Pacific. As a result he necessarily had to cast Yanez's testimony in the worst possible light in order to benefit Union Pacific. In doing so, respondent presented the second written statement at the deposition, got Yanez to admit that his deposition testimony conflicted with the second written statement, and did not offer Yanez an adequate opportunity to explain this discrepancy.

It is undeniable that Magures initiated Yanez's disciplinary proceeding based on his attendance at the deposition and his reading of Yanez's deposition transcript. While respondent reasonably may not have been aware of the actual conflict between Union Pacific and Yanez prior to the initiation of Yanez's deposition, he clearly became aware of his clients' conflicting interests during the deposition. Rather than suspending the deposition to notify his clients and obtain their informed written consent, respondent continued the deposition and effectively impeached his client, Yanez, in favor of Union Pacific. In so doing, respondent willfully violated rule 3-310(C)(2).

Aggravation⁷

Significant Client Harm (Std. 1.5(f).)

Respondent's misconduct was a catalyst to Yanez's termination. While the evidence indicates that other factors were also in play – such as Union Pacific's desire to terminate Yanez for speaking out regarding unsafe working conditions – the testimony derived from respondent's

⁷ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

representation of Yanez was used by Union Pacific to justify his termination. Accordingly, the significant harm caused by respondent's misconduct warrants some consideration in aggravation.

Mitigation

Good Faith (Std. 1.6(b).)

“In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held *and* reasonable. [Citation.]” (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653, italics added.) It was not unreasonable for respondent to honestly believe that no conflict existed, as he did not see the second written statement as contradictory at the time of the deposition. Since the matter was settled within days after the deposition, respondent had no reason to conduct any subsequent investigation regarding Yanez's testimony. Moreover, at the time of the deposition respondent relied on his understanding that lawyers representing a corporation may also represent individuals of that corporation.⁸ Accordingly, the court assigns some mitigation for respondent's good faith belief.

Good Character (Std. 1.6(f).)

Respondent presented good character testimony from six lawyers, four of whom work for Union Pacific. Respondent's character witnesses attested to his honesty, work ethic, and integrity. They were familiar with the Appellate Court's decision and demonstrated an adequate understanding of the extent of respondent's misconduct. Respondent's character witnesses, however, did not come from a wide range of references in the legal and general communities. Accordingly, the court apportions only limited mitigation for respondent's good character evidence.

⁸ While this concept is generally correct, it does not trump the principles and rules relating to conflicts of interest.

No Prior Record of Discipline (Std. 1.6(a).)

Respondent has no prior record of discipline; however, he was entitled to practice law in this state for less than four years prior to the misconduct in this matter. Accordingly, this court assigns nominal weight in mitigation for respondent's lack of a prior record of discipline. (*Howard v. State Bar* (1990) 51 Cal.3d 215, 222 [three-year blemish-free record is relatively short duration and entitled to little weight in mitigation].)

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to 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. 1.1.)

In determining the level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d. 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628). Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d. 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors.

Standard 2.15 is applicable to the misconduct in this matter. Standard 2.15 provides that suspension (not to exceed three years) or reprobation is appropriate for violation of a provision of the Business and Professions Code or the Rules of Professional Conduct not specified in the standards.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety.

(*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) The standards are not mandatory; they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

While the court would normally also consider case law for guidance, there is no relevant case law involving a similar violation of rule 3-310(C).⁹ Accordingly, the court considers the standards and balances them with the facts and circumstances of the present case.

Here, respondent has been found culpable of violating rule 3-310(C)(1) & (2). While these violations were willful, the court concludes that they were not intentional, and respondent was acting upon a reasonable good faith belief. What is more, as demonstrated by the lack of relevant case law, this is not a well-defined area of the law and respondent's confusion regarding his ethical responsibilities is somewhat understandable. Further, the present matter had an extremely short duration and did not involve dishonesty, moral turpitude, or corruption.

While the court only afforded respondent's lack of a prior record of discipline nominal weight in mitigation, the present matter appears to be an anomaly and there is no indication that respondent will commit future misconduct. Therefore, having considered the parties' contentions, the facts, the lack of relevant case law, and the mitigating and aggravating factors, the court determined that, among other things, a private reproof is the appropriate level of discipline to protect the public and preserve public confidence in the profession.

⁹ In its closing brief, the State Bar addressed and distinguished *Kapelus v. State Bar* (1987) 44 Cal.3d 179, and *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798.) These two matters, however, are so distinct from the present matter that they provide no appreciable guidance.

Discipline Order

It is ordered that respondent **Brian Wayne Plummer**, State Bar Number 240210, is privately reprovved. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, the private reprovval will be effective when this decision becomes final. Furthermore, pursuant to rule 9.19(a) of the California Rules of Court and rule 5.128 of the Rules of Procedure, the court finds that the interests of respondent and the protection of the public will be served by the following specified conditions being attached to the private reprovval imposed in this matter. Failure to comply with any condition(s) attached to the private reprovval may constitute cause for a separate proceeding for willful breach of rule 1-110 of the State Bar Rules of Professional Conduct. Respondent is ordered to comply with the following conditions attached to his private reprovval for one year following the effective date of the private reprovval:

1. During the one-year period in which these conditions are in effect, respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.
2. Within 10 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 respondent's current office address and telephone number, 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 and the State Bar's Office of Probation.
3. 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 attached to his private reprovval. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the one-year period in which these conditions are in effect, respondent must promptly meet with the probation deputy as directed and upon request.
4. During the period in which these conditions are in effect, respondent must report in writing quarterly to the Office of Probation. The reports must be submitted to the Office of Probation no later than each January 10, April 10, July 10, and October 10 of the period in which these conditions are in effect. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions attached to his reprovval during the preceding calendar quarter or applicable reporting period. If the

first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of the reprobation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the period in which these conditions are in effect and no later than the last day of that period.

5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions attached to this reprobation.
6. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)
7. The period during which these conditions are in effect will commence upon the date this decision imposing the private reprobation becomes final.

In light of the level of discipline imposed, it is not ordered that respondent take and pass the Multistate Professional Responsibility Examination.

IT IS SO ORDERED.

Dated: June _____, 2015

Pat McElroy
Judge of the State Bar Court