

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 08-O-10983-RAH
)	
EVAN LLEWELLYN SMITH,)	
)	DECISION AND ORDER SEALING
Member No. 101369,)	CERTAIN DOCUMENTS
)	
<u>A Member of the State Bar.</u>)	

Introduction

In this original disciplinary proceeding, respondent **Evan Llewellyn Smith**¹ was accepted for participation in the State Bar Court’s Alternative Discipline Program (ADP). Respondent successfully completed the ADP. Accordingly, the court recommends, below, that respondent be placed on three years’ stayed suspension and three years’ probation on conditions, including a one-year suspension with credit given for the one-year period during which he was involuntarily enrolled as an inactive member of the State Bar of California under Business and Professions Code section 6233.²

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¹ Respondent was admitted to the practice of law in this state on December 1, 1981, and has been a member of the State Bar of California since that time. He has three prior records of discipline.

² Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

Pertinent Procedural History

Respondent's Acceptance into the ADP

The State Bar of California, Office of the Chief Trial Counsel (State Bar) filed the notice of disciplinary charges (NDC) in this case on February 20, 2009. Respondent filed a response to the NDC on March 27, 2009. Soon thereafter, respondent contacted the State Bar's Lawyer Assistance Program (LAP) and sought its assistance with mental health issues with which respondent was then suffering.

The present disciplinary case was initially assigned to State Bar Court Judge Pat E. McElroy. On her own motion at a status conference on April 6, 2009, Judge McElroy referred this case to the ADP for an evaluation of respondent's eligibility for participation in that program. Furthermore, in an order filed on April 21, 2009, Judge McElroy reassigned the case to the undersigned State Bar Court Judge for "ADP purposes only."

On September 8, 2009, respondent submitted, to the court, a Nexus Statement, which respondent executed under penalty of perjury. Thereafter, on November 18, 2009, at the direction of the court, respondent submitted an Amended Nexus Statement, which respondent also executed under penalty of perjury. And, on April 13, 2010, respondent submitted, to the court, a Medical Report from a clinical psychologist regarding her evaluations of respondent in December 2009, February 2010, and April 2010.

Respondent's Nexus Statement, respondent's Amended Nexus Statement, and the psychologist's Medical Report established the existence of a nexus between respondent's mental health issues and the stipulated misconduct in this case.

Respondent signed his LAP Participation Plan on October 6, 2009.

On December 16, 2009, each party submitted a brief on the level of discipline. On December 17, 2008, respondent also submitted a reply to the State Bar's discipline brief.

The parties executed and submitted, to the court for approval, a Stipulation Re Facts and Conclusions of Law (Stipulation). On March 15, 2010, the court approved and filed the Stipulation, which sets forth the factual findings, legal conclusions, and mitigating and aggravating circumstances in this case.

Also, on March 15, 2010, the court lodged a Confidential Statement of Alternative Dispositions and Orders (Confidential Statement), in which the court set forth (1) the level of discipline that the court will recommend to the Supreme Court if respondent successfully completes the ADP and (2) the level of discipline that the court will recommend if respondent does not successfully complete the ADP. After respondent agreed to those alternative dispositions, respondent signed a Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program (Contract) on March 15, 2010.

On March 23, 2010, the court filed an order accepting respondent into the ADP beginning on March 15, 2010.

Respondent's Completion of the ADP

Since March 15, 2010, respondent has participated in both the ADP and the LAP. On May 6, 2010, the court filed an order involuntarily enrolling respondent as an inactive member of the State Bar of California beginning on July 1, 2010. (§ 6233.) Respondent was continuously on involuntary inactive enrollment under the court's May 6, 2010 order for one year from July 1, 2010, through July 1, 2011.

On September 7, 2011, the court received, from the LAP, a Certificate of One Year of Participation in the Lawyer Assistance Program – Mental Health, certifying that, for at least the one-year period preceding September 2, 2011, respondent maintained his mental health stability and successfully participated in the LAP.

On September 8, 2011, the court filed an order finding that respondent successfully completed the ADP no later than September 6, 2011. On September 19, 2011, the parties jointly lodged an ADP Graduation Checklist, and the court took the case under submission for decision later that same day.

Findings of Fact and Conclusions of Law

The court adopts the facts and conclusions of law set forth in the Stipulation as the court's findings of fact and conclusions of law.³ Briefly, those facts and conclusions establish the following misconduct, aggravation, and mitigation.

Misconduct

On November 25, 2003, the Supreme Court filed an order in *In re Evan Llewellyn Smith on Discipline*, case number S118758 (State Bar Court case numbers 02-O-12713 and 02-O-12751 (consolidated)) (*Smith III*) placing respondent on one year's stayed suspension and three years' probation on conditions (but no "actual" suspension).

During respondent's three-year probation in *Smith III*, staff members in the State Bar's Office of Probation sent respondent at least four letters and spoke with respondent on the telephone on at least five occasions. In each of those letters and telephone conversations, the staff member reminded respondent of his probation conditions in *Smith III*, solicited respondent's compliance with those conditions, or both.

Under respondent's probation conditions in *Smith III*, respondent was required, among other things, to: (1) prepare and submit a total of 12 probation reports to the Office of Probation; (2) complete 6 hours of minimum continuing legal education courses (MCLE courses) and provide proof of completing those 6 hours to the Office of Probation no later than December 25,

³ A copy of the Stipulation is attached to this decision and incorporated by reference as if it were fully set forth herein.

2004; and (3) promptly notify the Office of Probation of any change in his Membership Records address.

Respondent submitted only 8 of the 12 required probation reports to the Office of Probation. Respondent never submitted 4 of the 12 required reports. Moreover, of the 8 reports that respondent submitted to the Office of Probation, 7 were submitted late. In addition, 3 of the 7 late reports were also defective because they do not contain respondent's original handwritten signature.

Respondent failed to submit his proof of completing 6 hours of MCLE courses to the Office of Probation before the December 25, 2004 deadline. Respondent did not submit his proof to the Office of Probation until February 8, 2005, which was 45 days past the deadline.

In 2006 or 2007, respondent notified Membership Records that he had a new office address, but failed to provide the Office of Probation with a change of address in accordance with his probation conditions in *Smith III*.

When respondent failed to comply with three of his probation conditions in *Smith III* as set forth above, respondent willfully violated his duty, under section 6068, subdivision (k), to comply with all conditions of any disciplinary probation imposed on him.⁴

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⁴ In the Stipulation, the parties stipulate that, when respondent failed to comply with his probation conditions in *Smith III*, respondent willfully violated both section 6068, subdivision (k) and section 6103 (comply with court orders). The stipulated section 6103 violation, however, is clearly duplicative of the stipulated section 6068, subdivision (k) violation, which more directly and appropriately addresses respondent's misconduct (accord, Rules Proc. of State Bar, rule 5.310 [formerly rule 560]). In short, the stipulated section 6103 violation is immaterial to the proper disposition of this case. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 451-452.) The "appropriate level of discipline for an act of misconduct does not depend upon how many rules . . . or statutes proscribe the misconduct." (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 128, 148.)

Aggravation

In aggravation, respondent has three prior records of discipline. (Rules Proc. of State Bar, tit. IV, Stds. For Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i).)⁵ First, in 1999, respondent was privately reprovved (with conditions attached for one year) in State Bar Court case number 98-O-00580 (*Smith I*) because he willfully violated the Rules of Professional Conduct governing client trust funds when he wrote an insufficiently funded check on his client trust account.

Second, in 2001, respondent was placed on thirty days' stayed suspension and one year's probation in Supreme Court case number S099259 (State Bar Court case number 00-H-14843) (*Smith II*) because he failed to comply with the conditions attached to his private reprovral *Smith I*.

Third, in 2003, respondent was placed on one year's stayed suspension and three years' probation in *Smith III* because he failed to comply with the probation conditions imposed on him in *Smith II*, failed to perform legal services with competence in a single client matter, and failed to cooperate in a State Bar disciplinary investigation.

In further aggravation, the Stipulation provides that respondent failed to cooperate with the State Bar in this proceeding. (Std. 1.2(b)(vi).)

Mitigation

Immediately before and at the time respondent engaged in the misconduct in the present case, respondent suffered from a series of serious medical conditions that significantly impacted his personal life and his ability to work, eventually leading to severe financial stress and bankruptcy.

⁵ All further references to standards are to this source.

In addition, respondent was suffering from mental health issues at the time of the misconduct. Respondent's mental health issues directly caused or contributed to the foregoing misconduct. Case law holds that extreme emotional difficulties are a mitigating factor where expert testimony establishes that the emotional difficulties were directly responsible for the misconduct, provided that the attorney also establishes, by clear and convincing evidence, that he or she no longer suffers from the 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.) Moreover, the Supreme Court has held that, absent a finding of rehabilitation, emotional difficulties are not a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney, supra*, 51 Cal.3d at p. 197.)

As noted above, respondent successfully completed the ADP no later than September 6, 2011. Respondent's successful completion of the ADP required his successful participation in the LAP. Moreover, as noted above, this court was presented with a Certificate of One Year of Participation in the Lawyer Assistance Program – Mental Health, which evidences respondent's mental health stability for at least the past year. In short, the record contains clear and convincing evidence that respondent no longer suffers from the mental health issues that led to his misconduct. Accordingly, respondent is entitled to significant mitigation for his successful completion of the ADP. (Std. 1.2(e)(iv).)

DECISION

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. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

After reviewing and considering (1) respondent's and the State Bar's briefs on the issue of discipline, (2) the standards, (3) the Stipulation (which sets forth the facts, conclusions of law, aggravation, and mitigation), and (4) respondent's original and amended declarations regarding the nexus between his mental health issue and his misconduct, the court signed and lodged the Confidential Statement, which advised the parties of the discipline that the court would recommend to the Supreme Court if respondent successfully completed the ADP and if respondent failed to successfully complete the ADP. In determining the appropriate discipline to recommend if respondent successfully completed the ADP, the court considered the discipline recommended by the parties, the standards, and case law. In particular, the court considered standards 1.2, 1.3, 1.4, 1.5, 1.6, 1.7(a), 1.7(b), and 2.6 and the case law cited in the parties' briefs, including *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63. The court also notes that the misconduct involved in respondent's three prior records of discipline neither warranted nor resulted in respondent's actual suspension from the practice of law. That alone strongly counsels against the strict application of standard 1.7(b) in the present case.

After agreeing to the discipline which the court would recommend to the Supreme Court if respondent successfully completed or if he failed to successfully complete the ADP, respondent executed the Contract to participate in the ADP and began his period of participation in the ADP.

Respondent thereafter participated in and successfully completed the ADP. Accordingly, the court will recommend to the Supreme Court the imposition of the discipline set forth in the court's Confidential Statement if respondent successfully completed the ADP.

The Confidential Statement provides that respondent will be required to comply with California Rules of Court, rule 9.20. Respondent's compliance with rule 9.20 is no longer

required or recommended because in light of the court's recommendation that respondent be given credit for his one-year inactive enrollment towards his one-year suspension. (§ 6233.)

Discipline Recommendation

The court recommends that respondent **Evan Llewellyn Smith**, State Bar Number 101369, be suspended from the practice of law in California for three years, that execution of that period of suspension be stayed, and that he be placed on probation for a period of three years subject to the following conditions:

1. Smith is suspended from the practice of law for the first year of probation (with credit given for inactive enrollment, which was effective July 1, 2010, through July 1, 2011 (Bus. & Prof. Code, § 6233)).
2. Smith must comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California.
3. Within 10 days of any change, Smith 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.
4. Within 30 days after the effective date of discipline, Smith must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss these terms and conditions of probation. At the direction of the Office of Probation, Smith must meet with the probation deputy either in person or by telephone. Smith must promptly meet with the probation deputy as directed and requested.
5. Smith must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10. Under penalty of perjury, Smith must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Smith 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.

6. Subject to the assertion of applicable privileges, Smith must answer fully, promptly and truthfully, any inquiries of the Office of Probation which are directed to him personally

or in writing relating to whether he is complying or has complied with the probation conditions.

7. Within one year of the effective date of the discipline herein, Smith must provide to the Office of Probation satisfactory proof of his attendance at a session of the State Bar's Ethics School and of his passage of the test given at the end of that session. The school is offered periodically at 180 Howard Street, San Francisco, California 94105-1639 and at 1149 South Hill Street, Los Angeles, California 90015-2299. Arrangements to attend the school must be made in advance by calling (213) 765-1287 and by paying the required fee. This condition of probation is separate and apart from Smith's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this school. (Accord, Rules Proc. of State Bar of Cal., rule 3201.)
8. Smith must comply with all provisions and conditions of his Participation Agreement/Plan with the Lawyer Assistance Program (LAP) and must provide the Office of Probation with certification of completion of the LAP. Smith must immediately report any non-compliance with any provision(s) or condition(s) of his Participation Agreement/Plan to the Office of Probation. Smith 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 Smith'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. Smith will be relieved of this condition after he provides the Office of Probation with satisfactory certification of his successful completion of the LAP.
9. The three-year probation will begin on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.) And, at the expiration of the period of probation, if Smith has complied with all the terms of probation, the order of the Supreme Court suspending him from the practice of law for three years will be satisfied and that suspension will be terminated.

Professional Responsibility Examination

The court further recommends that **Evan Llewellyn Smith** be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court's disciplinary order in this matter and to provide satisfactory proof of his passage to the State Bar's Office of Probation in Los Angeles within the same time period. Failure to do so may result in Smith's suspension without a hearing. (Cal. Rules of Court, rule 9.10(b).)

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Costs

Further, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10; that the costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment; and that the costs are to be paid with Smith's membership fees for the year 2013. If he fails to pay costs as described, or as may be modified by the State Bar Court, costs are due and payable immediately.

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) of the Rules of Procedure of the State Bar of California (Rules of Procedure), all other documents not previously filed in this matter are ordered sealed pursuant to rule 5.12 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 duties. Protected material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosures. All persons to whom protected material is disclosed must be given a copy of this order sealing the documents by the person making the disclosure.

IT IS SO ORDERED.

Dated: October 21, 2011.

RICHARD A. HONN
Judge of the State Bar Court