

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of) Case No.: **11-V-12603-PEM**
)
ERNEST SCOTT KINNEY,) **DECISION**
)
Member No. 207234,)
)
A Member of the State Bar.)

I. INTRODUCTION

The issue in this case is whether petitioner Ernest Scott Kinney has established his rehabilitation, present fitness to practice, and present learning and ability in the general law so that he may be relieved from his actual suspension from the practice of law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)¹

The court finds that petitioner has shown, by a preponderance of the evidence, that he has satisfied the requirements of standard 1.4(c)(ii) and, therefore, that his actual suspension should be terminated. Accordingly, the court **GRANTS** petitioner’s petition for relief from actual suspension from the practice of law.

II. SIGNIFICANT PROCEDURAL HISTORY

On April 25, 2011, petitioner filed a petition for relief from actual suspension. Thereafter, on May 24, 2011, the State Bar filed a statement of non-opposition to petitioner’s

¹ All further references to standard(s) or std. are to this source.

request for relief from actual suspension. As the State Bar did not oppose petitioner's request to be relieved of his actual suspension, no hearing was held in this matter. On May 31, 2011, this matter was submitted for decision.

III. FINDINGS OF FACT

The following findings of fact are based on the April 25, 2011 petition and the exhibits attached thereto, including the Stipulation Re Facts, Conclusions of Law and Disposition and Order Approving filed July 20, 2010, in State Bar Court case no. 08-C-14328; 08-C-14555; 09-C-10667 (Cons.).

Petitioner was admitted to the practice of law in California on June 5, 2000, and has been a member of the State Bar since that time.

A. Petitioner's Prior Disciplinary Proceeding

Respondent has one prior record of discipline. On November 10, 2010, the Supreme Court filed an order in Supreme Court matter S185990 (State Bar Court case no. 08-C-14328; 08-C-14555; 09-C-10667 (Cons.)). The Supreme Court ordered that petitioner be suspended from the practice of law for three years; that execution of that suspension be stayed; and that petitioner be placed on probation for four years, subject to certain conditions, including that he be suspended from the practice of law for the first 18 months of probation (with credit given for his period of interim suspension which commenced on November 6, 2009) and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law.

Discipline was imposed by the Supreme Court based on a Stipulation Re: Facts, Conclusions of Law and Disposition filed on July 20, 2010, regarding three separate acts of misconduct committed by petitioner. Case no. 08-C-14328 involved petitioner's conviction on October 29, 2008, after a jury trial, of a violation of Vehicle Code section 23152(a) [DUI] and

Vehicle Code section 23152(b) [DUI with a blood alcohol content of more than .08 percent] on May 3, 2008. Petitioner's sentence included a three-year suspended sentence and three years' probation.

Case no. 08-C-14555 involved petitioner's July 28, 2009 plea of nolo contendere to a felony violation of Penal Code section 173.5 [spousal battery] as a result of a quarrel with his former wife which led to physical violence on August 7, 2008. The injuries suffered by his former wife included swelling on her forehead, scratches on her left thigh, and bruises on her upper legs and buttocks. Petitioner's sentence included a three-year suspended sentence and three years' probation.

Case no. 09-C-10677 involved petitioner's nolo contendere plea to a misdemeanor violation of Penal Code section 245(a)(1) [assault with a deadly weapon] based on petitioner hitting David Jones on the forehead with a hammer on the morning of November 28, 2008. Mr. Jones was treated for small cuts, redness and swelling on his forehead. Petitioner's sentence included a one-year suspended sentence and one years' probation.

Petitioner stipulated that the acts which led to his criminal convictions constituted misconduct warranting discipline.

In aggravation, petitioner's misconduct involved multiple acts of wrongdoing; his misconduct significantly injured his former wife and Mr. Jones; and petitioner failed to comply with his probation in his DUI matter by going to a place where the primary items for sale are alcoholic beverages and by assaulting Mr. Jones which constitutes violations of sections 6068, subdivision (a) and 6103 of the Business and Professions Code.

In mitigation: (1) petitioner's nearly eight years of unblemished practice prior to his misconduct was given limited weight in mitigation; (2) petitioner was cooperative and candid with the State Bar during the disciplinary proceeding; (3) petitioner's alcohol problems and

bipolar condition contributed to his misconduct;² (4) at the time of the misconduct, petitioner was grieving his father's death and suffering from the emotional hardships resulting from the dissolution of his marriage; and (5) letters from eight attorneys commended petitioner's professional abilities and character.

B. Petitioner's Learning and Ability in the General Law

Since July 15, 2010, petitioner has been active in the legal profession in a non-attorney capacity, working 30 hours a week as a law clerk for the Law Office of J.M. Irigoyen. Under the direct supervision of J.M. Irigoyen, petitioner has conducted legal research, drafted pleadings and motions, summarized records and discovery, and assisted in trial preparation. Moreover, petitioner has completed more than 44.75 hours of minimum continuing legal education (MCLE) credit in areas including legal ethics, copyrights and trademarks, special needs trusts, substance abuse, legal writing, bias and discrimination in the legal profession, law practice management, and employment law. Petitioner completed State Bar Ethics School on March 3, 2011, and has taken and passed the Multistate Professional Responsibility Examination (MPRE) administered on November 10, 2010. The State Bar does not challenge petitioner's present learning and ability in the general law.

C. Petitioner's Rehabilitation and Present Fitness to Practice Law

1. Petitioner's Compliance with the Supreme Court's Disciplinary Order

As required by the Supreme Court order imposing discipline in the underlying disciplinary matter, petitioner completed State Bar Ethics School, took and passed the MPRE, and made his first installment payment of disciplinary costs. There is no evidence that petitioner

² At the time petitioner entered into the Stipulation, he was regularly attending Alcoholics Anonymous; his bipolar condition was under control with proper medication; and he was participating in the Lawyer Assistance Program (LAP) and had complied with LAP requirements.

has not complied with other requirements of the Supreme Court's disciplinary order, including quarterly reports and compliance with rule 9.20 of the California Rules of Court.

2. Therapy

In 1992, petitioner was diagnosed with a bipolar condition. From 1992 until 2008, petitioner was prescribed lithium carbonate, which kept his bipolar condition under control. In 2008, however, under medical supervision, petitioner's medication was changed to Abilify. This new medication caused petitioner's condition to deteriorate. This deterioration was a contributing cause of petitioner's assaults on his wife and Mr. Jones. In 2009, petitioner was put back on lithium carbonate, and he has remained on this medication to the present time. At present, petitioner sees his psychiatrist monthly. According to petitioner's treating physician, petitioner has been stable and doing well since September 2009, when petitioner came to the Fresno County Department of Behavioral Health. According to his physician, petitioner is competent to practice law, as he is properly medicated and stable.

In August 2009, petitioner committed himself to the Lawyer Assistance Program (LAP). Terms of his participation plan include, but are not limited to, self-help meeting attendance, professionally facilitated LAP group meetings, random drug testing, and psychiatric medication management. Petitioner is currently in compliance with his Participation Plan.

Since his commitment to LAP, respondent has attended Alcoholics Anonymous meetings and has been randomly tested for the presence of alcohol on a weekly basis.

Furthermore, petitioner has completed a 52-week batterer's treatment program, as well as a nine-month first offender DUI class. Petitioner is in compliance with his criminal probation, and on November 17, 2010, petitioner's felony violation of Penal Code section 275.5(a) was reduced to a misdemeanor by the superior court.

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3. Community Work

Petitioner makes a contribution to the community by his public service work. Every Tuesday night since October 12, 2010, petitioner has actively participated and organized activities with Cub Scout Den 301 at Fugman Elementary in Fresno, California.

4. Character References

Petitioner submitted 19 good character letters, most of which were from attorneys. Many of the attorneys who submitted declarations have known petitioner for more than 10 years. Each of these declarants attested to petitioner's good reputation as a litigator. They further attested to petitioner's honesty, integrity, trustworthiness, and dedication to his clients. All the witnesses strongly support his return to the practice of law. In addition, the court found a letter from petitioner's wife, who was a victim of petitioner's wrongdoing, quite instructive. In her letter, Mrs. Kinney states, in pertinent part, ". . . I feel [petitioner] has made tremendous changes in his life and truly deserves to practice law. [¶] It has been over two and a half years since my husband was arrested for domestic violence against myself. He has obeyed every Court order given to him, as well as completed the 52-week batterer's treatment program. He never violated the initial restraining order and worked very hard to make positive changes in his life. . . . [¶] My husband is and has been sober and focused on all facets of his recovery. He regularly attends A/A meetings and LAP meetings and is doing everything he can to be a better person. I am very proud of him and his determination to succeed in his family life as well as in his professional life."

5. Remorse/Recognition of Wrongdoing

Petitioner is remorseful for his misconduct and has undertaken actions to change his life and ensure such misconduct will not happen again. The loss of his law license caused petitioner to make life-long changes. Upon his release from jail in 2009, petitioner committed himself to

living a clean and sober life. Before he started attending Alcoholics Anonymous, petitioner was selfish and cared only about himself. Once he ran out of alcohol, he was always thinking about his next drink. Petitioner has now started over and lives an honest life.

IV. CONCLUSIONS OF LAW AND DISCUSSION

In order to be relieved of his actual suspension, petitioner has the burden of proving in this proceeding, by a preponderance of the evidence, that he is rehabilitated, has present fitness to practice and present learning and ability in the general law. (Rules Proc. of State Bar, rule 5.404; *In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 578. (check)) The court looks to the nature of the underlying misconduct to determine the point from which to measure petitioner's rehabilitation, present learning and ability in the general law, and present fitness to practice before being relieved from his actual suspension. (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 578.)

A. Petitioner's Present Learning and Ability in the General Law

The State Bar does not challenge petitioner's present learning and ability in the general law. Nevertheless, based on the evidence presented by petitioner, including his work as a law clerk, his MCLE credit, and his successful completion of State Bar Ethics School and the MPRE, the court finds that petitioner has demonstrated, by a preponderance of the evidence, that he has present learning and ability in the general law.

B. Petitioner's Rehabilitation and Present Fitness to Practice Law

The State Bar does not contest petitioner's rehabilitation and present fitness to practice law. Nevertheless, the court will analyze the evidence submitted in this matter in determining this issue.

Regarding the issue of rehabilitation, "[i]t is appropriate to consider the nature of the misconduct, as well as the aggravating and mitigating circumstances surrounding that

misconduct . . . in determining the amount and nature of rehabilitation that may be required to comply with standard 1.4(c)(ii).” (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 578.)

Furthermore, in determining whether petitioner’s evidence sufficiently establishes his rehabilitation, the hearing department must first consider the prior misconduct from which petitioner seeks to show rehabilitation. The amount of evidence of rehabilitation varies according to the seriousness of the misconduct at issue. Second, the court must examine petitioner’s actions since the imposition of his discipline to determine whether his actions, in light of the prior misconduct, sufficiently demonstrate rehabilitation by a preponderance of the evidence. (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p 581.)

Petitioner must show strict compliance with the terms of probation in the underlying disciplinary matter; exemplary conduct from the time of the imposition of the prior discipline; and must demonstrate “that the conduct evidencing rehabilitation is such that the court may make a determination that the conduct leading to the discipline . . . is not likely to be repeated.” (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 581.)

The misconduct in the underlying disciplinary matter was serious. Petitioner committed three separate criminal acts during the period from May to November 2008. In the first criminal matter, petitioner was convicted of driving under the influence with a blood alcohol content of more than .08 percent. In his next criminal matter, petitioner was convicted of spousal battery, a felony. Finally, petitioner was convicted of assault with a deadly weapon. In aggravation, petitioner’s misconduct involved multiple acts; harm to two victims; and he committed violations of the State Bar Act by failing to comply with his probation in his DUI matter. In mitigation, petitioner had no prior disciplinary record; he was cooperative and candid

with the State Bar; (3) his alcohol problems and bipolar condition contributed to his misconduct and petitioner was taking steps towards demonstrating his rehabilitation and fitness to practice; (4) petitioner was suffering emotional difficulties; and (5) he demonstrated his good character.

As noted earlier, petitioner's bipolar condition and his alcohol problems contributed to his criminal conduct. Since 2009, petitioner has diligently sought to permanently rid himself of his addiction and to address his bipolar condition. To this end, petitioner has actively participated in the LAP, attended Alcoholics Anonymous meetings, completed a 52-week batterer's treatment program, a lengthy first offender DUI class and is in a treatment program that consists of monthly meetings with his psychiatrist and psychiatric medication management. According to his physician, petitioner is competent to practice law, as he is properly medicated and stable.

Petitioner is in compliance with his criminal probation, and his felony violation was reduced to a misdemeanor by the superior court. In addition, there is no evidence that respondent has not fully complied with his disciplinary probation and other requirements.

Furthermore, petitioner has expressed his remorse for his wrongdoing. Upon his release from jail, petitioner committed himself to living a clean and sober life. He has given his time to the community through his work with the Cub Scouts. Furthermore, several declarants attested to petitioner's honesty, integrity, trustworthiness, and dedication to his clients and strongly support petitioner's return to the practice of law.

The court therefore finds that petitioner has established that his criminal conduct is not likely to reoccur. Accordingly, the court finds that petitioner has demonstrated, by a preponderance of the evidence, that he is rehabilitated and has present fitness to practice law.

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V. DISPOSITION

The court finds that petitioner has satisfied the requirements of standard 1.4(c)(ii) by demonstrating, by a preponderance of the evidence and to the satisfaction of the court, his rehabilitation, present fitness to practice and present learning and ability in the general law. Accordingly, petitioner's petition for relief from actual suspension from the practice of law pursuant to standard 1.4(c)(ii) is hereby GRANTED. Petitioner will be entitled to resume the practice of law in this state when all of the following conditions have been satisfied:

1. The actual suspension imposed by the California Supreme Court in its Order filed on November 10, 2010, in Supreme Court matter S185990, has expired;
2. This order has become final, which includes the expiration of the time for seeking reconsideration and review (Rules Proc. of State Bar, rules 5.115, 5.150, 5.409 and 5.410);
3. Petitioner has paid all applicable State Bar fees and previously assessed costs (Bus. & Prof. Code, §§ 6086.10 and 6140.7); and
4. Petitioner has fully complied with any other requirements for his return to active membership status and is otherwise entitled to practice law.

Dated: June _____, 2011

PAT McELROY
Judge of the State Bar Court