FILED JULY 11, 2014

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **JOSEPH DARRELL PALMER,** **Member No. 125147,** A Member of the State Bar.	)	Case No.: **12-O-16924-LMA** **DECISION**

Introduction[1]

In this contested disciplinary proceeding, respondent **JOSEPH DARRELL PALMER** is charged with three counts of willfully violating section 6106's proscription of acts involving moral turpitude, dishonesty, or corruption. Each count is based on the false statement, that respondent made on or with respect to three applications to appear pro hac vice that he filed in various federal-court, class-action lawsuits, to the effect that he had never been disciplined by a court or state bar.

Respondent admits that he made these three statements and that they are false, but asserts that he did not deliberately make the statements and that he made them inadvertently as a result of negligence. Even though the record fails to establish, by clear and convincing evidence, that respondent deliberately made the false statements or that he made them with the intent to mislead, the record does clearly establish that the false statements were not the results of

[1] Unless otherwise indicated, all references to rules are to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code unless otherwise indicated.

respondent's mere carelessness or negligence, but were the results of respondent's gross negligence. As discussed *post*, the court finds that respondent is culpable as charged in each of the three counts because, even in the absence of an intent to mislead, a false statement made through or as a result of gross negligence involves moral turpitude in willful violation of section 6106.

In light of the found misconduct and the aggravating and mitigating circumstances, the court recommends that respondent be placed on two years' stayed suspension and two years' probation on conditions, including a 90-day actual suspension.

Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar or California State Bar) initiated this proceeding by filing a notice of disciplinary charges (NDC) against respondent on December 6, 2013. Respondent thereafter filed his response to the NDC on January 17, 2014.

On April 15, 2014, the parties filed a partial stipulation as to facts and admission of documents. Also, on April 15, 2014, a one-day trial was held. The court took the case under submission for decision after the parties made their closing arguments on April 15, 2014.

The State Bar was represented by Senior Trial Counsel Michael J. Glass. Respondent was represented by Attorney Kenneth C. Kocourek.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 15, 1986, and has been a member of the State Bar of California since that time. In addition, respondent has been admitted to practice in the State of Colorado since December 1993. Respondent has also been admitted to practice in the State of Arizona since at least February 2003.

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Facts

Respondent's Criminal Conviction

For about three or four years in the early to mid-1990's, respondent lived in Colorado where he owned and operated both American Family Homes, Inc. (AFH), which built and sold homes, and Tri-County Supply, LLC (Tri-County), which sold construction materials to home builders, including AFH. During that time, respondent rarely practiced law.

In 2001, in a Colorado state court, respondent was charged with, pleaded guilty to, and was convicted on one felony count of violating Colorado sales-tax laws (Colorado Revised Statutes 39-21-118(2) and 39-26-120). Respondent's conviction was based on Tri-County's failure to report and pay over to the Colorado Department of Revenue about $4,000 in sales taxes that it charged (and presumably collected from) AFH for construction supplies that it sold to AFH in 1995 and 1996 (Colorado Revised Statutes 39-26-104, 105, and 106).

Respondent did not deliberately violate the sales-tax laws or personally profit from Tri-County's failure to report and pay the sales taxes to Colorado. In fact, a significant cause of this failure was a turnover in Tri-County's full-time accountants and accounting assistants.

Following respondent's conviction, the Colorado state court sentenced respondent to two years of unsupervised probation and ordered respondent to perform 200 hours of community service in Colorado. Respondent thereafter successfully completed his probation and community service.

Respondent's Discipline in Three States

Colorado

Based on respondent's criminal conviction and on a stipulation that respondent and the Colorado Office of Attorney Regulation Counsel entered into in June 2002, the Colorado

Supreme Court entered an order on July 1, 2002, suspending respondent "from the practice of law [in Colorado] for a period of sixty days with all but thirty days stayed during a one-year period of probation [with conditions]." The Colorado Supreme Court imposed that discipline on respondent under Colorado Rules of Civil Procedure, rule 251.5(b), which provides that any act or omission that violates, inter alia, Colorado's criminal laws is grounds for disciplining an attorney regardless of whether the attorney is ever charged with or convicted or acquitted of the violation in a criminal proceeding and regardless of whether the attorney committed the act or omission in the course of an attorney-client relationship. In respondent's Colorado disciplinary proceeding, there were no findings of moral turpitude of dishonesty. Nor were any aggravating circumstances found. In mitigation, respondent did not have a prior disciplinary record, made full and free disclosure, had a cooperative attitude towards the proceeding, and was remorseful.

California

Based on respondent's criminal conviction and a stipulation regarding facts, conclusions of law, and disposition that respondent and the California State Bar entered into in October 2002, the State Bar Court of California filed an order on November 4, 2002, in case number 02-C-11878 (California *Palmer* I) imposing on respondent a public reproval with conditions attached for 12 months that required respondent to complete his unsupervised criminal probation and community service; to keep the California State Bar apprised of his office address; to file quarterly reports; and to attend the California State Bar's Ethics School. In California *Palmer* I, the parties stipulated that neither respondent's criminal conviction nor the facts and circumstances surrounding his conviction involved moral turpitude, but that respondent's conviction involved other misconduct warranting discipline. In addition, the parties stipulated that there were no aggravating circumstances and that in mitigation respondent did not have a prior record of discipline, promptly reported his conviction and Colorado discipline to the

California State Bar, and cooperated extensively with the California State Bar. Moreover, the parties stipulated that, even though respondent was convicted of a felony in Colorado, the crime of which respondent was convicted does not, as a matter of law, rise to a felony in California. Under California law, it is a felony to evade reporting, assessment, or payment of a tax only if the tax liability aggregates at least $25,000 in a consecutive 12-month period. (Cal. Rev. & Tax. Code, § 7153.5.) Respondent's conviction involved only about $4,000 in unpaid taxes over a 24-month period.

Arizona

Based on the Colorado Supreme Court's July 1, 2002, disciplinary order, the Arizona Supreme Court filed an order February 13, 2003, suspending respondent "from the practice of law [in Arizona] for a period of sixty (60) days, thirty (30) days stayed, to run concurrent with Respondent's Colorado discipline…" and placing respondent "on probation for a period of one (1) year, under the same terms as and to run concurrent with Respondent's Colorado discipline."

Respondent's False Statements

Notwithstanding the July 1, 2002, Colorado disciplinary order, the November 4, 2002, California disciplinary order, and the February 13, 2003, Arizona disciplinary order, respondent filed, on June 20, 2006, in a civil lawsuit styled *Ingolf R. Dinklage v. Holland America Line-Westours, Inc.* in the United States District Court for the Western District of Washington (*Dinklage*), an application for leave to appear pro hac vice in which respondent falsely declared under penalty of perjury: "I have not been disbarred or formally censured by a court of record or by a state bar association…."[2]

[2] In the present proceeding, respondent is not charged with making this false statement in his June 20, 2006, application in *Dinklage*. Nonetheless, the court admitted that false statement into evidence because it is relevant on the issues of respondent's intent to mislead, negligence, and gross negligence. (Cal. Evid. Code, § 1101, subd. (b).) Moreover, the court considers that

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In addition, respondent made the same or a similar false statement in or in support of each of the following applications to appear pro hac vice that respondent filed in three separate federal-court lawsuits between 2010 and 2012 as charged in the NDC.

On June 2, 2010, respondent filed, in a class action lawsuit styled *James Gemelas v. The Dannon Company, Inc.* in the United States District Court for the Northern District of Ohio (*Dannon*), an affidavit in support of a motion for admission of counsel pro hac vice in which respondent falsely stated under oath: "I have never been the subject of disciplinary action of any kind before any bar or court."

On January 7, 2011, respondent filed, in a class-action lawsuit styled *Mark A. Arthur, et al. v. Sallie Mae, Inc*. in the United States District Court for the Western District of Washington (*Sallie Mae*) an application for leave to appear pro hac vice in which respondent falsely declared under penalty of perjury: "I have not been disbarred or formally censured by a court of record or by a state bar association…."

On July 5, 2012, respondent filed, in a class-action lawsuit styled *Alyson Herfert, et al. v. Crayola, LLC* in the United States District Court for the Western District of Washington (*Crayola*), an application for leave to appear pro hac vice in which respondent falsely declared under penalty of perjury: "I have not been disbarred or formally censured by a court of record or by a state bar association…." On August 10, 2012, the district court in *Crayola* filed an order to show cause (OSC) directing respondent to show cause why he should not be sanctioned for submitting a pro hac vice application that contained a false statement. Thereafter, on August 15, 2012, respondent filed an amended application for leave to appear pro hac vice in *Crayola* in

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uncharged false statement only for the limited purpose of determining respondent's intent, negligence, and gross negligence with respect to the three charged false statements.

which he disclosed his prior discipline in Colorado, California, and Arizona. Respondent did not, however, file such an amended application in *Sallie Mae* on August 15, 2012. As noted

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post, respondent did not file an amended application in *Sallie Mae* until August 27, 2012. Moreover, respondent never filed an amended application in *Dannon*.

On August 20, 2012, the district court in *Crayola* denied respondent's pro hac vice application not because respondent had previously been disciplined in Colorado, California, and Arizona, but because respondent failed to disclose his prior discipline and falsely stated in his application that he had never been disciplined and because respondent failed to appear at a prior hearing. Also, on August 20, 2012, the plaintiffs in *Sallie Mae* filed a motion to revoke the order granting respondent admission pro hac vice because of respondent's false statement in respondent's January 7, 2011, pro hac vice application.

On August 27, 2012, respondent finally filed an amended pro hac vice application in *Sallie Mae* disclosing his prior discipline in Colorado, California, and Arizona. However, on September 14, 2012, the district court in *Sallie Mae* revoked respondent's admission pro hac vice in that case not because respondent had previously been disciplined, but because respondent falsely stated that he had never been disciplined in his original application and because respondent did not file an amended pro hac vice application in *Sallie Mae* until August 27, 2012, instead of promptly filing one after his application in *Crayola* was challenged in August 10, 2012, OSC in that case.

Conclusions

Count One - § 6106 [Moral Turpitude]
Count Two - § 6106 [Moral Turpitude]
Count Three - § 6106 [Moral Turpitude]

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. Even though the term "moral turpitude" in section 6106 is defined very broadly (e.g., *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110), the Supreme Court has always required a certain level of improper intent or guilty knowledge before holding that an attorney's conduct involves moral turpitude. (e.g., *In the Matter of Temkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321, 330; see also *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 332.)

Respondent credibly testified both that he did not make any of the three charged false statements deliberately or with any intent to mislead or deceive and that he made each of the false statements inadvertently. Respondent disclosed his prior discipline in Colorado, California, and Arizona in his applications for admission to the bar of a number of other federal courts. Moreover, respondent did not and could not have reasonably believed that his pro hac vice applications would be denied because of his prior discipline in in Colorado, California, and Arizona because the underlying misconduct was not serious (e.g., did not involve moral turpitude or dishonesty) and was wholly unrelated to the practice of law.

The court, however, rejects respondent's claim that he made the three false statement as a result of mere negligence. Without question, respondent was grossly negligent in signing and filing his affidavit in support of his pro hac vice applications in *Dannon* and in signing and filing his pro hac vice applications in *Sallie Mae* and *Crayola*, each of which contained a false statement to the effect that respondent had never been disciplined. This conclusion of gross negligence is clearly supported by the fact that, years earlier, respondent filed a pro hac vice application that contained a virtually identical false statement in *Dinklage*.

Even in the absence of an intent to mislead, a false statement made through or as a result of gross negligence involves moral turpitude in willful violation of section 6106. (*In the Matter*

of Moriarty (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15, and cases there cited.) A finding of gross negligence will support a charge of moral turpitude, even without an evil intent behind the act committed. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 384; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 808 [finding of gross negligence in creating a false impression involves moral turpitude in violation of section 6106].) In short, just as an attorney may be discipline for a false statement made with reckless disregard for the truth (*In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 29-30), an attorney may be disciplined for a false statement made through or as a result of gross negligence.

Aggravation[3]

Prior Record of Discipline (Std. 1.5(a))

As noted *ante*, respondent has one prior record of discipline based on his criminal conviction in 2001. The weight of that prior record is diminished because it is remote in time and because the underlying misconduct was not serious.

Multiple Acts of Misconduct (Std. 1.5(b))

Respondent's present misconduct involves three acts of misconduct.

Mitigation

Recognition of Wrongdoing (Std. 1.6(g))

Respondent revised his office procedures and now more thoroughly reviews all pleadings, applications, and declarations he signs.

Good Character (Std. 1.6(f))

[3] All references to standards (stds.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Respondent presented very credible testimony from three attorneys as to his good character, honesty, and integrity. Respondent, however, is entitled to limited mitigation for this testimony because, while three attorneys is a significant range of references in the legal profession, three attorneys are not a significant range of references in the general community.

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Discussion

The purpose of the 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. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d. 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025.)

In determining the appropriate 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). The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Ct. Rptr. 980, 994.) It is well established that the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Even though the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The applicable sanction in this proceeding is set forth in standard 2.7, which provides: "Disbarment or actual suspension is appropriate for an act of moral turpitude, dishonesty, fraud, corruption or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct and the extent to which the misconduct harmed or mislead the victim and related to the member's practice of law."

Respondent committed three acts involving moral turpitude in three separate client matters. Thus, the magnitude of the misconduct is significant. Furthermore, the acts of moral turpitude directly relate to and involve respondent's practice of law. Thus, significant actual suspension from the practice of law is warranted under standard 2.7. In addition, actual suspension is consistent with standard 1.8(a), which provides: "If a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust."

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.) The court finds *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151 and *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269 instructive on the issue of discipline even though the misconduct and aggravation in both of those matters are greater than the misconduct and aggravation found here.

In *Downey*, the attorney signed and filed a verification in which he falsely attested under penalty of perjury that his clients were out of the county on a specific date. Even though no intent to defraud was found based on the attorney's testimony, the attorney was found culpable of violating section 6106 when he filed the false verification because he was grossly negligent in concluding that his clients were absent from the county on the date he specified in the verification. The attorney in *Downey* was also found culpable of violating section 6068, subdivision (j) because he failed to notify the State Bar's membership records office of his new office address until 28 months after he moved into the new office. In mitigation, the attorney was given limited credit for the good character testimony he presented from six witnesses (four of whom were attorneys) and for cooperating with the State Bar by entering into a pretrial

stipulation of facts, which were not difficult to prove. In aggravation, the attorney had a prior record of discipline (the attorney was previously placed on one year's stayed suspension and three years' probation on conditions, including a four-month actual suspension) and the attorney's present misconduct was followed by dishonesty and concealment. In *Downey*, the

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attorney was placed on two years' stayed suspension and two years' probation on conditions, including a 150-day actual suspension.

In *Dahlz*, the attorney was found culpable, in a single client matter, of failing to perform, improperly withdrawing from representation, and misrepresenting to a worker's compensation insurance adjuster that his client no longer wanted to pursue her claim. In aggravation, the attorney committed multiple acts of misconduct, had one prior record of discipline, caused significant client harm, and lacked candor toward the Court and the State Bar investigator. The lack of candor was egregious in that the attorney presented a false telephone log and a falsified stipulation and falsely stated that he was in court when his client's claim was settled. In mitigation, slight weight was afforded for the limited pro bono services the attorney rendered. As the review department recommended, the Supreme Court placed the attorney in Dahlz on four years' stayed suspension and four years' probation on conditions, including a one-year actual suspension

On balance, the court concludes that the appropriate level of discipline for the found misconduct in the present proceeding is two years' stayed suspension and two years' probation on conditions, including a ninety-day actual suspension. (See also *Bach v. State Bar* (1987) 43 Cal.3d 848 [60-day actual suspension imposed for misleading a judge; aggravation for prior public reproval, but no mitigation].)

Recommendations

Discipline

It is recommended that respondent **JOSEPH DARRELL PALMER,** State Bar number 125147, be suspended from the practice of law in California for two years, that execution of that

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period of suspension be stayed, and that respondent be placed on probation[4] for a period of two years subject to the following conditions:

1. Respondent Joseph Darrell Palmer is suspended from the practice of law for the first 90 days of probation.

2. 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.

3. 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.

4. Respondent 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, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation during the preceding calendar quarter. 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 probation period and no later than the last day of the probation 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 Respondent's probation conditions.

6. Within 30 days after the effective date of the Supreme Court order in this matter, 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

[4] The period of probation will begin on the effective date of the Supreme Court order in this matter. (See Cal. Rules of Court, rule 9.18.)

the probation deputy either in person or by telephone. Respondent must promptly meet with the probation deputy as directed and upon request.

7. Within one year after the effective date of the Supreme Court order in this matter, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and of 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 is order not to claim any MCLE credit for attending Ethics School. (Accord, Rules Proc. of State Bar, rule 3201.)

8. At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multistate Professional Responsibility Examination

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

California Rules of Court, Rule 9.20

It is further recommended that Respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter. Failure to do so may result in disbarment or suspension.

Costs

Finally, it is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that the costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: July ___, 2014.

LUCY ARMENDARIZ
Judge of the State Bar Court