

STATE BAR COURT OF CALIFORNIA

FILED NOVEMBER 7, 2012

REVIEW DEPARTMENT

In the Matter of)	Case No. 09-H-13385
)	
PAUL HAROLD OTTOSI,)	OPINION
)	
A Member of the State Bar, No. 69250.)	
_____)	

A hearing judge determined that respondent Paul Harold Ottosi did not comply with the conditions of his private reproof and recommended that he be placed on one year's stayed suspension conditioned on two years' probation. Both Ottosi and the Office of the Chief Trial Counsel of the State Bar (State Bar) appealed.

Ottosi contends the hearing judge erred by improperly admitting confidential information and excluding evidence that exonerates him. He also contends the State Bar failed to prove any misconduct and requests we dismiss the disciplinary charges. The State Bar seeks additional findings of culpability and aggravation, and requests a 60 to 90-day actual suspension.

We have independently reviewed the record under California Rules of Court, rule 9.12, and we adopt the hearing judge's culpability finding that Ottosi violated the conditions of his reproof. We also find additional acts of misconduct to support the culpability finding and one additional factor in aggravation. Overall, Ottosi violated multiple reproof conditions and has failed to accept responsibility for his misconduct. Since the aggravating factors outweigh those in mitigation, we conclude that the recommended discipline should be increased to include a 60-day actual suspension.

I. FACTUAL FINDINGS AND LEGAL CONCLUSION

We adopt the hearing judge's factual findings and augment them based on the parties' stipulation and the trial record.

A. Factual Findings

1. Underlying Discipline Case

In 2003, the State Bar filed a Notice of Disciplinary Charges against Ottosi for misconduct he committed in two matters between 1997 and 1998. During the disciplinary proceeding, Ottosi submitted a declaration that established a nexus between mental health issues he was experiencing and his misconduct. The hearing department admitted Ottosi into the Alternative Discipline Program (ADP) to assist him with his mental health issues. As required under the ADP, Ottosi stipulated to culpability in the two matters and agreed to participate in the Lawyer Assistance Program (LAP).

After over three years of participation, the hearing judge found that Ottosi successfully completed the ADP. On October 29, 2008, as a result of his success in the ADP, the hearing judge imposed a lower level of discipline and ordered Ottosi privately reprovved for his stipulated misconduct in the two matters. Ottosi admits he received the reprovral order, which took effect November 19, 2008. The order required Ottosi to comply with certain reprovral conditions for one year, which included:

- 1) Answer fully, promptly, and truthfully, any inquiries of the Office of Probation which were directed to him personally or in writing relating to whether he was complying or had complied with the conditions of the reprovral; and
- 2) Comply with the following provisions and conditions of his Lawyer Assistance Program Participation Agreement (LAP Plan):

- a. Continue individual therapy and arrange to have his therapist submit quarterly written therapy progress reports to the LAP, due in December, March, June, and September;
- b. Obtain five hours annually of substance abuse/mental health education credits approved by the LAP and provide copies of certificates of completion;
- c. Submit written semi-annual reports regarding his recovery progress to the LAP, due in March and September annually.¹

In addition to the reprobation order, Ottosi also received a letter from the Office of Probation in November 2008, summarizing his obligations.

2. Violations of Reprobation Conditions

Ottosi did not comply with several of the reprobation conditions as follows:

- 1) On February 11, 2009, a probation deputy from the Office of Probation called Ottosi and left a voicemail for him, requesting that he call back to explain illegible handwriting on a quarterly report Ottosi submitted on January 9, 2009. Ottosi received the voicemail message, and although he testified that he returned the call in late March or early April 2009, the Office of Probation does not have any record of it. Even accepting his testimony, Ottosi failed to timely respond.
- 2) He did not comply with his LAP Plan requirements after the reprobation order's effective date. Specifically;
 - a. Ottosi failed to comply with his individual therapy requirement by failing to attend therapy and timely submit the quarterly therapy reports for the periods:

¹ On February 11, 2009, Ottosi's LAP Plan was amended as follows: 1) quarterly reports from therapists were due January 10, April 10, July 10 and October 10 for preceding quarters; 2) education verification was required per calendar year and was due no later than January 10 of the following year; and 3) semi-annual reports were due January 10 and July 10.

(i) November 19, 2008 to the end of 2008; and (ii) January 1, 2009 to April 28, 2009. His therapist never submitted the quarterly therapy report to the LAP that was due by December 31, 2008, and submitted the April 10, 2009 quarterly report late on June 8, 2009.

- b. Ottosi failed to timely complete the minimum number of educational credits required under his LAP Plan by the end of 2008.
- c. Ottosi failed to timely file a semi-annual progress report with the LAP, which was due September 2008 and not filed until April 2009. Although this obligation preceded the reapproval order's effective date, Ottosi remained out-of-compliance with his LAP Plan for at least seven months after the effective date. Ottosi's ongoing failure to comply during his reapproval period, despite repeated reminders from his LAP case manager, renders it a proper basis for a reapproval violation.

B. Legal Conclusion

The State Bar charged Ottosi with violating rule 1-110 of the State Bar Rules of Professional Conduct, which requires attorneys to “comply with conditions attached to public or private reapprovals” As set forth above, Ottosi did not comply with his reapproval conditions and therefore violated this rule as charged.

C. None of Ottosi's Claimed Defenses Exonerate Him

Ottosi asserts that he is not culpable because: (1) the hearing judge improperly relied on confidential information; (2) the LAP waived strict compliance with his LAP Plan and therefore the State Bar is estopped from disciplining him; and (3) the hearing judge improperly denied his motion to compel the LAP's compliance with a subpoena duces tecum. We find these arguments unpersuasive.

1. The Hearing Judge Did Not Improperly Rely on Confidential Information

Absent a waiver, information an attorney provides to the LAP is confidential. (Bus. & Prof. Code, § 6234, subd. (a).) On June 23, 2004, Ottosi signed a waiver that authorized the LAP to disclose information to the State Bar and the State Bar Court regarding compliance with his LAP Plan, including files or records concerning treatment. The waiver authorized disclosure of information concerning Ottosi's compliance with his LAP Plan *without limitation*. On December 12, 2008, Ottosi signed a separate waiver that authorized his treating therapist to disclose to the State Bar information about "treatment ... and other personal or privileged information..." Therefore, we reject Ottosi's claim that he did not waive confidentiality with respect to disclosing specific acts of noncompliance with his LAP Plan and disclosing information regarding his attendance at therapy sessions.

We also reject Ottosi's argument that these waivers either expired or were invalid. If either were true, then Ottosi would be in violation of the reproof condition that required him to provide an appropriate waiver authorizing the LAP to give information to the Office of Probation and the State Bar Court. Ottosi never sought to modify or delete this reproof condition, and remained bound by it.

2. Estoppel Does not Apply

Ottosi contends the State Bar is estopped from disciplining him because the LAP waived strict compliance with his LAP Plan. Specifically, he asks us to consider "whether it was fair for the [LAP] to lead [him] to believe that compliance with participating agreements was not mandatory, and then suddenly shift its policies to insist on full and complete satisfaction of all contractual terms." It is unclear whether estoppel is germane to attorney disciplinary proceedings. (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309 ["goals of attorney discipline – protection of the public, courts, and legal profession – are strong public policy considerations that militate against applying the doctrine"].) However, it is

unnecessary for us to resolve this issue because the facts of this case do not support a basis for an estoppel claim.

The State Bar concedes that from 2005 to early 2008 the LAP conducted “lax compliance monitoring” and failed to enforce strict compliance with the LAP Plans.² However, these practices changed by early 2008 when the program began to more closely monitor and enforce compliance. In Ottosi’s case, no later than April 2008, he was notified by his LAP case manager that he was out of compliance with his LAP Plan. Then, in July 2008, the LAP Evaluation Committee met with Ottosi regarding his participation, focusing on his lack of contact with his case manager and his resistance to resolving his individual therapy requirement. The LAP Evaluation Committee told Ottosi he must comply with his LAP Plan’s individual therapy requirement immediately. Thereafter, both Ottosi’s LAP case manager and group facilitator reiterated this requirement. He also was advised that if he believed he no longer needed individual therapy he must seek a modification to his LAP Plan, which he never did. These multiple communications should have made it clear to Ottosi that despite past practices, as of early 2008, the LAP was monitoring and enforcing strict compliance with his LAP Plan. And although the LAP afforded Ottosi time to come into compliance, he did not.

For our purposes, it is significant to note that the LAP notified Ottosi of the need for strict compliance *before* November 19, 2008 – the effective date of his reprobation conditions. Once his reprobation period began, the Office of Probation also sent Ottosi notice of his need to strictly comply with all of his reprobation conditions, including his LAP Plan. Thereafter, both his LAP case manager and the Office of Probation notified Ottosi of his non-compliance and his need to take immediate corrective action. We conclude that by the effective date of the reprobation order,

² We note that Ottosi benefitted from the earlier lax compliance monitoring when he received a one-year certificate of compliance from the LAP in April 2008, even though he had not been in full compliance with his LAP Plan for *over four years*. At the time, the LAP determined he was in compliance with the “spirit” of the plan, and issued the one-year certificate that Ottosi needed to successfully complete ADP and receive the lower level of discipline.

Ottosi could no longer reasonably believe the LAP, or the Office of Probation, either waived or was lax in enforcing strict compliance with his LAP Plan. Accordingly, the State Bar is not estopped from seeking discipline for his failure to comply. (*Bib'le v. Committee of Bar Examiners* (1980) 26 Cal.3d 548, 552 [party invoking estoppel against agency must show he was ignorant of the true state of facts and agency intended for him to act on conduct to his injury].)

3. The Hearing Judge Properly Denied Ottosi's Motion to Compel

In June 2011, Ottosi served a subpoena duces tecum on the LAP to produce all its policy and procedure manuals from 2004 to the present. In August 2011, the hearing judge denied Ottosi's motion to compel the LAP's compliance with the subpoena. Ottosi contends this was reversible error since it denied him material evidence to support his waiver and estoppel defenses. Ottosi's contention lacks merit.

The hearing judge has broad discretion to determine the admissibility and relevance of evidence. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 499.) To prevail on a claim of evidentiary procedural error, Ottosi must not only show abuse of discretion but also actual prejudice. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [absent actual prejudice, party not entitled to relief from hearing judge's evidentiary ruling].) We do not find the hearing judge abused his discretion in excluding the manuals since their relevance to Ottosi's waiver and estoppel defenses is tenuous at best. As set forth above, we have recognized the changes in the LAP's enforcement of LAP Plans from 2005 to 2008, and more importantly, Ottosi's notice of his obligations under the plan as it relates to this case. Therefore, his claim of error necessarily fails.

II. AGGRAVATION AND MITIGATION

The offering party bears the burden to prove aggravating and mitigating circumstances. The State Bar must establish aggravating circumstances by clear and convincing evidence (Rules

Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)³), while Ottosi has the same burden to prove mitigating circumstances (std. 1.2(e)).

A. Aggravation

We adopt the two aggravating factors the hearing judge found: (1) a prior disciplinary record; and (2) multiple acts of misconduct. We also find additional aggravation due to Ottosi's indifference.

1. Prior Disciplinary Record (Std. 1.2(b)(i))

Ottosi's 2008 private reproof was based on misconduct in two matters: (1) he committed an act involving moral turpitude when he made false statements to a State Bar investigator; and (2) he improperly represented multiple clients whose interests potentially conflicted. Ottosi's misconduct was aggravated by multiple acts of misconduct, and mitigated by his lack of prior discipline, pro bono work, and successful completion of the ADP.

2. Multiple Acts of Misconduct (Std. 1.2(b)(ii))

The hearing judge found that Ottosi committed multiple acts of misconduct based on three violations of his reproof (i.e., failing to respond to the Office of Probation, and failing to attend therapy and submit reports for two quarters). We found that Ottosi also failed to timely complete his educational requirements and submit his semi-annual report. These five instances of non-compliance support an aggravating factor for multiple acts under standard 1.2(b)(ii). (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 529 [failure to cooperate with probation monitor and failures to timely file probation reports constituted multiple acts of misconduct].) However, since these violations fall within one reproof order, we afford modest weight to this factor. (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177 [misappropriation, failure to pay client's funds upon request, and entering into

³ Unless otherwise noted, all further references to "standard(s)" are to this source.

improper business transaction with client in one matter coupled with failure to timely report court-ordered sanctions in another matter were *not* strong evidence in aggravation on account of multiple acts of misconduct].)

3. Indifference Towards Rectification of Misconduct (Std. 1.2(b)(v))

We agree with the State Bar that Ottosi failed to acknowledge any wrongdoing, which demonstrates an indifference towards rectification of his misconduct. Ottosi blames the LAP for his failure to comply with his reproof conditions, wrongly asserts he never authorized the LAP to disclose how he failed to comply with his LAP Plan, and incorrectly insists that the LAP informed him he was in full compliance with his LAP Plan obligations during the reproof period. His poor attitude toward his obligation to strictly comply with his reproof conditions is a significant aggravating factor.

B. Mitigation

We adopt the hearing judge's finding that Ottosi should receive some mitigation for the following factors: (1) extreme emotional difficulties; and (2) cooperation.

1. Extreme Emotional Difficulties (Std. 1.2(e)(iv))

The hearing judge found that Ottosi credibly testified that during the time he failed to comply with the reproof conditions he was under serious strain due to the declining mental and physical condition of his aging parents leading up to the time of his father's death. Although the hearing judge gave Ottosi only "some" mitigating credit, the State Bar asks that we assign very little or no mitigation because Ottosi failed to offer expert testimony to establish his stress was directly responsible for his failure to attend his therapy sessions. However, the Supreme Court has often considered lay testimony of emotional problems as mitigation. (E.g., *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1364.) It is readily understandable that Ottosi's stress from the declining health of his parents added stress to his life, which clouded his judgment and was responsible for some of his misconduct. Therefore, he is entitled to minimal mitigation for this

factor. (*In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, 59-60 [mitigation for personal stress factors accorded less weight without expert testimony].)

2. Cooperation (Std. 1.2(e)(v))

Ottosi established cooperation because he stipulated to certain facts. However, those facts were easily provable, and even where Ottosi stipulated to non-compliance with the conditions of his reproof, he continues to deny culpability. Thus, we accord only limited weight to this mitigating factor. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation accorded those who admit culpability as well as facts].)

III. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession, to preserve public confidence in the profession and to maintain high professional standards for attorneys. (Std. 1.3.) Ultimately, we balance all relevant factors on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

We begin our analysis with the standards, which the Supreme Court instructs us to follow “whenever possible.” (*In re Young, supra*, 49 Cal.3d at p. 267, fn. 11.) We give them great weight to promote “the consistent and uniform application of disciplinary measures.” (*In re Silverton* (2005) 36 Cal.4th 81, 91, internal citation and quotations omitted.) Under the standards, Ottosi’s rule violation “shall result in suspension” (std. 2.9), and the discipline must be more severe than his previously imposed private reproof (std. 1.7(a)). His discipline also must be balanced with any aggravating or mitigating circumstances. (Std. 1.6(b).) As the standards call for a broad range of discipline in this case, we review relevant case law for additional guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

Attorneys who violate reproof conditions have received discipline as lenient as another reproof and as severe as a 90-day actual suspension.⁴ Under the facts unique to this case, we find guidance from the Supreme Court’s opinion in *Conroy v. State Bar* (1990) 51 Cal.3d 799, where an attorney who violated a single private-reproof condition received a 60-day actual suspension.

In *Conroy*, the attorney did not timely complete the professional responsibility exam, which was a condition of his reproof. (*Conroy v. State Bar, supra*, 51 Cal.3d at p. 804.) He showed no remorse and failed to participate in the proceedings until he filed a petition for writ of review with the Supreme Court. Combined with his prior reproof, the Court considered these factors “substantial aggravating circumstances.” (*Id.* at pp. 805-806.) The Court acknowledged Conroy’s belated passage of the exam was “extenuating,” but nevertheless found “the absence of any significant mitigation.” (*Ibid.*) Although Ottosi violated five reproof conditions, one was relatively minor (promptly return the Office of Probation’s voicemail inquiry) and the other violations all related to compliance with his LAP Plan. As in *Conroy*, Ottosi ultimately complied with the conditions of his LAP Plan. We note that neither the attorney in *Conroy* nor Ottosi presented any significant mitigation, with one notable difference: Ottosi has participated throughout this proceeding, including stipulating to underlying facts. Even so, Ottosi’s violations are more extensive than in *Conroy*. Weighing all factors, and guided by *Conroy*, we conclude that a 60-day actual suspension best serves the purposes of attorney discipline.

⁴*In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813 (public reproof for attorney who violated private reproof by not timely taking professional responsibility exam; no mitigation, however attorney participated extensively in proceedings and belatedly took the exam; misconduct aggravated only by prior reproof); *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 (90-day actual suspension for attorney who violated two reproof conditions by not filing the reports or completing continuing education credits and failed to belatedly comply; no mitigation but misconduct aggravated by multiple acts, indifference, lack of cooperation for not appearing at conferences or trial, and two prior private reprovals).

IV. RECOMMENDATION

We recommend that Paul Harold Ottosi be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for the first 60 days of the period of his probation.
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his 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 his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.
5. He 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, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his 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.
6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.
7. Within one year after the effective date of the discipline herein, he 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 he shall not receive MCLE credit for attending Ethics School.
8. He must obtain psychiatric or psychological treatment to address his mental health issues from a duly licensed psychiatrist, psychologist or clinical social worker, at his own expense, a minimum of twice per month and must furnish compliance to the Office of Probation with each quarterly report. He must provide the Office of Probation with a satisfactory written

waiver authorizing his treating mental health professional to disclose information regarding his compliance with this condition. Refusal to provide a waiver is a violation of this condition. Treatment should commence no later than 30 days after the effective date of discipline, and must continue for the period of probation or until a motion to modify this condition is granted. If the treating mental health professional determines that the condition has changed and he no longer needs treatment, he must file a motion for modification of this condition with the State Bar Court Hearing Department pursuant to rule 5.300 of the Rules of Procedure of the State Bar. The motion must include a written statement from his treating mental health professional, by affidavit or under penalty of perjury, in support of the proposed modification.⁵

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. (Cal. Rules of Court, rule 9.18.) At the expiration of the period of probation, if Ottosi has complied with all conditions of probation, the one year period of stayed suspension will be satisfied and that suspension will be terminated.

We further recommend that Ottosi be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

REMKE, P.J.

WE CONCUR:

EPSTEIN, J.

PURCELL, J.

⁵ In light of the voluntary nature of the LAP, we decline to recommend that Ottosi be ordered to participate any further. However, due to the nexus between his mental health issues and his prior misconduct, he must address any continuing mental health issues or provide proof that he no longer needs treatment.