



THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
AUDIT & REVIEW

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April 28, 2006

RE: Respondent: Brian Robbins
Case No.: 05-3207

Dear Mr. Robbins:

Your complaint and all supplemental information you provided in your June 19, 2005 and September 30, 2005 letters have been reexamined as part of the internal review process of the Office of the Chief Trial Counsel. After carefully analyzing the facts, the law, the high standard of proof in State Bar matters, and the likelihood of successful prosecution, we have determined that your matter will remain closed.

In your initial complaint to the State Bar, dated February 21, 2005¹, you stated that in or about March 2003, you contacted attorney Brian Robbins to discuss a press release issued by ElectroScientific Industries ("ESI"), a company in which you owned shares of stock, which reported that ESI misstated previous earnings due to faulty accounting practices. Mr. Robbins suggested to you that shareholder derivative action should be filed by you against ESI. You stated that Mr. Robbins indicated to you that you should be "lead plaintiff" in the lawsuit, and that Mr. Robbins told you he would apply for lead plaintiff compensation with the court. You stated that you agreed to be "lead plaintiff" and that Mr. Robbins then express-mailed you a retainer agreement, which you signed. Mr. Robbins thereafter filed the lawsuit, and you indicated that throughout the course of the litigation you and he had "numerous email exchanges discussing the case." You stated that on or about October 19, 2004, you emailed Mr. Robbins to inquire about any developments in the case, but Mr. Robbins "ignored the email." Thereafter, on October 24, 2004, you reached Mr. Robbins by telephone, and he informed you that the case had settled. When you asked him if you would receive any "lead plaintiff" compensation out of the settlement, Mr. Robbins stated he had never applied for lead plaintiff compensation, as you believed "we previously agreed to in our agreement." You stated that "[e]ven though the amount of compensation wasn't that significant, it's the principal [sic] of the whole matter" as you are certain that "Mr. Robbins and his firm made out quite well." You further stated that Mr. Robbins told you that the next time he was in Phoenix, Arizona, he would take you out to dinner "to make up for not applying for lead plaintiff compensation" but that "this was yet another lie by Mr. Robbins" as you have not heard from him since your last conversation with him. You expressed the opinion that Mr. Robbins "is misleading and unethical and shouldn't be allowed to practice law in the state of California."

Mr. Robbins was contacted, and he informed us of the following:

¹ We note that your complaint consisted of a letter only, and did not include any supporting documents or evidence.
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You retained Mr. Robbins, of the law firm of Robbins, Umeda & Fink LLP, in March 2003 to file a shareholder derivative action on behalf of ESI.² Mr. Robbins provided a copy of the retainer agreement you signed with him/his firm on March 31, 2003. The retainer agreement contains no mention of Mr. Robbins or his firm seeking Lead Plaintiff compensation on your behalf.

On July 7, 2003, your action was consolidated with another shareholder derivative action brought on ESI's behalf by another ESI shareholder. On September 25, 2003, Mr. Robbins's firm filed a consolidated shareholder derivative complaint, in which you were one of the named plaintiffs.

Mr. Robbins stated that the ESI litigation was hotly contested, but that after extensive negotiations, the parties entered into a Stipulation of Settlement ("Settlement") on September 17, 2004. On or about October 15, 2004 the court approved the Settlement, and dismissed the litigation with prejudice. Mr. Robbins submitted a copy of a letter he wrote to you, dated March 23, 2004, following a conversation he had had with you, and enclosing a 32-page "copy of the settlement demand letter sent to the Special Litigation Committee of the Board of Directors of Electros Scientific on February 17, 2004." We note that this settlement demand letter makes no mention of demanding a Lead Plaintiff or incentive award for you. Mr. Robbins asserted that the terms contained in the settlement demand letter were acceptable to you.

The State Bar is *limited by law* to disciplining attorneys for willful violations of the Rules of Professional Conduct of the State Bar ("Rules") and the State Bar Act ("Act"), which the State Bar must prove by "clear and convincing" evidence, a much higher standard (closer to "beyond reasonable doubt") than mere "preponderance" of evidence, which is the usual standard of proof in civil matters. The State Bar shall have more than a mere probable cause belief that disciplinary charges should be filed against any attorney. The State Bar's Deputy Trial Counsel shall believe that the evidence is sufficient to support a finding of culpability of all violations alleged under the standard of *clear and convincing evidence to a reasonable certainty* burden of proof.

State Bar disciplinary hearings are held before the State Bar Court. They are actual trials, and are conducted in much the same way any other trial in this country is conducted. The rules of evidence, as codified in the California Evidence Code, apply in these disciplinary proceedings. If an attorney is found culpable of willful violations of the Rules or the Act, only the California Supreme Court has the authority to issue an Order of Discipline, suspending the attorney from the practice of law, disbarring the attorney, etc.

We find no clear and convincing evidence of any disciplinable violations on Mr. Robbins's part.

We find no clear and convincing evidence that Mr. Robbins falsely represented to the State Bar that he never said he would seek to have you named Lead Plaintiff in the derivative lawsuit. You assert that

² As Mr. Robbins explained, under corporate law shareholders have a narrow right to assert a claim derivatively on behalf of a corporation. A derivative claim does not belong to the shareholder attempting to assert it, but rather to the corporation. A derivative lawsuit is really two lawsuits in one: the first, to compel the corporation to sue certain individuals, usually the directors and officers of the company; the second, a lawsuit *by the corporation* against those parties.

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Mr. Robbins agreed or promised to file papers with the court naming you Lead Plaintiff.³ Mr. Robbins denies your assertions. Certainly, both statements cannot concurrently be true. However, “he said—he said” is well below the requisite “clear and convincing” evidence we are required to present to prove willful falsehood on the part of Mr. Robbins. Moreover, as we previously noted, there is no mention, either in your retainer agreement with Mr. Robbins or in the settlement demand letter (a copy of which was mailed to you long before any formal settlement was reached) of you being Lead Plaintiff or receiving any other “incentive” of any kind.

As for Mr. Robbins’s alleged promise to take you out to dinner to “make up” for “not applying for lead plaintiff compensation,” if Mr. Robbins denies he ever discussed applying for lead plaintiff on your behalf, it logically follows he would not issued a dinner invitation to “make up” for that alleged omission. If he did invite you to dinner, but has not yet done so, it may be that he has not been in Phoenix, Arizona to date.⁴ In any event, broken promises of dinner are not willful violations of the Rules or the Act, and thus not disciplinable by the State Bar.

Mr. Robbins informed us that he *did* discuss with you the issue of a possible incentive award request in connection with your role in the shareholder derivative litigation, and went as far as drafting a declaration for you in connection with such a request. However, Mr. Robbins stated that he explained to you the potential prejudice that seeking such an incentive award might cause to the ESI litigation, and that you both decided it was not in ESI’s best interests for you to seek such an award as you had devoted little time to the litigation, were never deposed, and were never required to participate in discovery. Mr. Robbins stated that he learned, after the case settled, that you filed a declaration with the court on your own initiative, but that the court apparently took no action on it.

Mr. Robbins’s *legal opinions and decisions* as to how to represent you are not disciplinable by the State Bar. A lawyer is not required to accede to every demand made by his client, if in the lawyer’s *legal opinion* the client’s demand is inadvisable, or unnecessary, or detrimental to the client, or illegal. We understand that you have no faith in Mr. Robbins’s legal acumen or abilities; however, the proper forum in which to determine whether or not an attorney’s services fell below the standards of competence is a civil court, via a legal malpractice action against the attorney. Allegations of “negligence” and “incompetence” are not subject to the State Bar’s disciplinary authority absent evidence of *willful* misconduct by the attorney that violates the Rules or the Act. If you believe that Mr. Respondent acted “incompetently” and “negligently” in representing you, your remedy properly lies in a civil lawsuit for legal malpractice.

Finally, we note, for the record, your statements to us in your letter dated September 30, 2005, namely, that “[d]ue to your failure of reviewing my complaint, I’m filing a tort claim in the amount of \$1,500.00. As you know, you have 90 days to either pay or reject my claim. If you fail to pay the claim, you will have left me no choice but to file a case against the State Bar of California. Please be advised, if this tort claim results in a sudden ‘review’ of my complaint, this review will not mitigate this claim nor will it stop me from pursuing a court action against your agency. [Paragraph] Let me know what you want to

³ In your letter to us of June 19, 2005, you refer to copies you were enclosing of some form Mr. Robbins allegedly sent you, that he said he would submit to the court; and an email. However, those documents were not enclosed with your letter.

⁴ His invitation, as you conveyed it to us, was contingent on “the next time” he would be in Phoenix.

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do as it doesn't matter to me either way." (Emphasis in original.) You are of course free to pursue whatever remedies you believe are available to you.

In order to seek review of this decision, you must file a verified accusation against the attorney with the California Supreme Court, pursuant to rule 952, subsection (d) through (f), California Rules of Court, within 60 days of the date of this letter.

The Clerk of the Supreme Court has instructed us to advise you that no specific form is used by the Supreme Court for the filing of a verified accusation against an attorney. You may obtain specific information by contacting the Clerk's office in Los Angeles or in San Francisco. The addresses and phone numbers of the respective offices are listed below.

California Supreme Court
Clerk's Office
300 South Spring Street
Second Floor, Room 2752
Los Angeles, CA 90013
(213) 830-7570

California Supreme Court
Clerk's Office
350 McAllister Street
San Francisco, CA 94102
(415) 865-7000

Please be aware that if you file a verified accusation against the attorney, the Office of the Chief Trial Counsel will only reopen its file in this matter if the California Supreme Court issues an order granting your request. Until then, however, this matter remains **closed**, and this office will not entertain any further communication or discussion about its decision. Only the Supreme Court has the authority to grant relief from this point on.

Very truly yours,



Margaret P. Warren
Deputy Trial Counsel

MPW:mw