

**FILED**

DEC 22 2003

*YAC*

STATE BAR COURT  
CLERKS OFFICE  
LOS ANGELES

**PUBLIC MATTER**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**THE STATE BAR COURT  
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of	)	Case No. 03-PM-00559-AIN
<b>JAMES KASMIR O'BRIEN,</b>	)	<b>DECISION</b>
<b>Member No. 168485,</b>	)	
<u>A Member of the State Bar.</u>	)	

**INTRODUCTION**

Based upon alleged probation violations, the Office of Probation ("OP"), represented by Jayne Kim, filed a motion pursuant to Business and Professions Code sections 6093(b) and 6093(c)<sup>1</sup> and rules 560 et seq. of the Rules Proc. of State Bar ("rule(s)") to revoke the probation of James Kasmir O'Brien imposed by the Supreme Court in its July 18, 2002, order in Supreme Court matter S106727 (State Bar Court case nos. 98-O-02697; 99-O-10142; 00-O-10240; 00-O-10493; 00-O-14082; 00-O-10532; 00-O-13202; 01-N-02329 (Cons.)). Respondent did not participate in this proceeding although he was properly served with the motion by certified mail, return receipt requested, at his State Bar membership records address..

For the reasons stated below, this Court finds by a preponderance of the evidence that Respondent wilfully failed to comply with the terms of his probation. (Section 6093(c).) As a result, the Court grants OCTC's motion to revoke Respondent's probation and its request to involuntarily enroll his as an inactive member of the State Bar pursuant to section 6007(d). The Court

---

<sup>1</sup>Unless otherwise indicated, all further references to "section" refer to provisions of the Business and Professions Code.



1 recommends that Respondent's probation be revoked, that the previously-ordered stay be lifted and  
2 that he be actually suspended from the practice of law for 24 months, among other things.

### 3 **FINDINGS OF FACT**

#### 4 **Jurisdiction**

5 Respondent was admitted to the practice of law in the State of California on December 20,  
6 1993, was a member at all times pertinent to the allegations herein, and is currently a member of the  
7 State Bar of California.

#### 8 **Probation Violations**

9 On September 28, 2001, the State Bar Court approved the stipulation of the parties in case  
10 nos. 98-O-02697; 99-O-10142; 00-O-10240; 00-O-10493; 00-O-14082; 00-O-10532; 00-O-13202;  
11 01-N-02329 (Cons.), recommending discipline consisting of 24 months stayed suspension and 36  
12 months probation on conditions including actual suspension of 10 months and until he made  
13 specified restitution and complied with standard 1.4(c)(ii), Standards for Attorney Sanctions for  
14 Professional Misconduct ("standards"), among other things. A copy of the stipulation and the State  
15 Bar Court's order approving same were properly served upon Respondent's counsel, John Patrick  
16 Murphy, on September 28, 2001, at his then-State Bar membership records address by first-class  
17 mail, postage prepaid.

18 On July 18, 2002, the California Supreme Court filed an order in case no. S106727  
19 ("Supreme Court order") accepting the State Bar Court's recommendation and ordering Respondent  
20 to comply with the conditions of probation recommended.

21 Pursuant to the Supreme Court order, Respondent was ordered to comply with the following  
22 terms and conditions of probation, among others:

23 (a) During the period of probation, to submit a written report on January 10, April  
24 10, July 10 and October 10 of each year or part thereof during which the probation is in effect to the  
25 Probation Unit, stating under penalty of perjury that he has complied with all provisions of the State  
26 Bar Act and Rules of Professional Conduct during said period;

27 (b) With each quarterly report, provide evidence of attendance at eight meetings of  
28 Alcoholics Anonymous ("AA"), Narcotics Anonymous ("NA") or The Other Bar per month; and

1 (c) Submit to random drug testing within 48 hours as requested by the OP and to  
2 provide the lab results to the OP.

3 The Supreme Court order became effective on August 17, 2001, thirty days after it was  
4 entered. (Rule 953(a), California Rules of Court.) It was properly served on Respondent.<sup>2</sup>

5 On July 29, 2002, the OP wrote a letter to Respondent reminding him of certain terms and  
6 conditions of his suspension and probation imposed pursuant to the Supreme Court's order. The  
7 letter reminded Respondent of his obligations to file quarterly reports; to submit proof of compliance  
8 with the requirement of attendance at AA, NA or The Other Bar meetings; and to comply with the  
9 OP's requests for random drug testing, among other things. The letter also warned Respondent that  
10 failure to comply with the probation conditions could lead to further disciplinary proceedings.  
11 Enclosed with the letter were copies of the Supreme Court's order, the probation conditions portion  
12 of the stipulation and an instruction sheet and form to use in submitting quarterly reports.

13 The July 29 letter was mailed on that same date to Respondent's then-official State Bar  
14 membership records address via the United States Postal Service with first-class postage prepaid.  
15 This is the only correspondence from OP to Respondent that was returned as undeliverable.

16 A copy of the July 29 letter with attachments was sent to Respondent at his now-official  
17 address<sup>3</sup> on October 2, 2002. This letter was not returned as undeliverable.

18 On October 22, 2002, Respondent called the OP and left a message regarding the reports he  
19 needed to file and left two telephone numbers. The OP left him a message in return addressing his  
20 concerns.

21 The quarterly reports Respondent did file were late. The report due on October 10, 2002, was  
22

---

23 <sup>2</sup>Although no proof was offered that the Clerk of the Supreme Court served the Supreme  
24 Court's order upon Respondent, rule 24(a) of the California Rules of Court requires clerks of  
25 reviewing courts to immediately transmit a copy of all decisions of those courts to the parties  
26 upon filing. Moreover, it is presumed pursuant to Evidence Code section 664 that official duties  
27 have been regularly performed. (*In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Therefore, in  
the absence of evidence to the contrary, this Court finds that the Clerk of the Supreme Court  
performed his or her duty and transmitted a copy of the Supreme Court's order to Respondent  
immediately after its filing.

28 <sup>3</sup>Respondent changed his official address on August 9, 2002.

1 not filed until November 14, 2002. The report due on January 10, 2003, was not filed until February  
2 14, 2003. The report due on April 10, 2003, was not filed until May 6, 2003.

3 On January 31, 2003, the OP contacted Respondent to submit to a blood/urine test that day.  
4 He said he would do it that day. He did not submit evidence to the OP that he had take the test as  
5 requested.

6 Respondent has not submitted quarterly reports due on July 10 and October 10, 2003 or  
7 evidence of attendance at eight AA, NA or The Other Bar meetings per months for the period April  
8 through September 2003. Moreover, Respondent did not submit to random drug testing as requested  
9 by his probation deputy on January 31, 2003.

10 As of October 23, 2003, Respondent has not complied with the aforementioned provisions  
11 of the Supreme Court's order.

#### 12 CONCLUSIONS OF LAW

13 Bad faith is not a requirement for a finding of culpability in a probation violation matter;  
14 “instead, a ‘general purpose or willingness’ to commit an act or permit an omission is sufficient.  
15 (Citations.)” (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.)

16 Pursuant to Business and Professions Code section 6093(b) and (c) and rule 561, the Court  
17 concludes that OCTC has demonstrated by a preponderance of the evidence that Respondent wilfully  
18 violated the conditions of probation ordered by the Supreme Court in its July 18, 2002, order in  
19 Supreme Court case number S106727 by failing to submit to the OP the various reports as set forth  
20 above and to submit to random drug testing as requested on January 31, 2003..

#### 21 AGGRAVATING CIRCUMSTANCES

22 In aggravation, Respondent has a prior record of discipline. (Standard 1.2(b)(i).) As  
23 previously discussed, discipline was imposed in Supreme Court case number S106727 for  
24 misconduct including: trust accounting violations (Rules of Professional Conduct (“RPC”) 4-100(A)  
25 and section 6106); misrepresentations and engaging in the unauthorized practice of law in five client  
26 matters (sections 6106, 6126, 6126 and 6068(a)); failing to perform competently in two client  
27 matters (RPC 3-110(A)); failing to return unearned client funds in one client matters (RPC 3-  
28 700(D)(2)); and not timely complying with rule 955, Cal. Rules of Court (section 6103).

1 Respondent's multiple acts of misconduct were considered an aggravating factor. In mitigation, he  
2 was found to be candid, to have made restitution to one client and to have suffered from physical or  
3 emotional difficulties (substance abuse). Respondent stipulated to these matters.

4 In SO94642 (State Bar Court case nos. 96-O-07217; 96-O-07945; 97-O-13437; 97-O-13577  
5 (Cons.)), filed March 27, 2001, the Supreme Court imposed discipline of one year stayed suspension  
6 and actual suspension of 90 days and until Respondent complied with rule 205, Rules Proc. of State  
7 Bar, among other things, for failing to comply with the terms of an Agreement in Lieu of Discipline  
8 in violation of section 6068(l). Respondent did not participate in that proceeding.

9 Respondent engaged in multiple acts of misconduct. by failing to comply with multiple  
10 conditions of probation. (Standard 1.2(b)(ii).)

11 Respondent significantly harmed the administration of justice as his failure to comply with  
12 the conditions of his probation made it more much difficult for the State Bar to appropriately monitor  
13 his in seeking to insure the protection of the public and the courts. (Standard 1.2(b)(iv).)

14 Respondent's failure to comply with the probation conditions after being reminded by the  
15 OP demonstrates indifference toward rectification of or atonement for the consequences of his  
16 misconduct. (Standard 1.2(b)(v).)

#### 17 MITIGATING CIRCUMSTANCES

18 No mitigating evidence was offered on Respondent's behalf or received into evidence, and  
19 none can be gleaned from the record.

#### 20 DISCUSSION

21 Protection of the public and rehabilitation of the attorney are the primary goals of disciplinary  
22 probation. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452; *In*  
23 *the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 298.) In determining the  
24 level of discipline, the Court must consider the "total length of stayed suspension which could be  
25 imposed as an actual suspension and the total amount of actual suspension earlier imposed as a  
26 condition of the discipline at the time probation was granted." (*In the Matter of Potack, supra*, 1  
27 Cal. State Bar Ct. Rptr. at p. 540.)

28 Section 6093 authorizes the revocation of probation for a violation of a probation condition,

1 and standard 1.7 requires that the Court recommend a greater discipline in this matter than that  
2 imposed in the underlying disciplinary proceeding. However, the period of actual suspension  
3 recommended in the instant case cannot exceed the period of stayed suspension imposed in the  
4 underlying proceeding. (Rule 562.) The extent of the discipline to recommend is dependent, in part,  
5 on the seriousness of the probation violation and Respondent's recognition of his misconduct and  
6 his efforts to comply with the conditions. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr.  
7 at p. 540.)

8 OCTC requests that Respondent's probation imposed by the Supreme Court in its July 18,  
9 2002, order in Supreme Court matter S106727 be revoked, that the stay of execution of the  
10 suspension previously imposed be lifted, and that Respondent be actually suspended for 24 months,  
11 among other things. The Court agrees.

12 In this matter, the Court is concerned about Respondent's failure to comply with the above-  
13 mentioned conditions of his probation. The Court notes that Respondent participated in his prior  
14 disciplinary proceeding and entered into a stipulation to resolve it. Respondent was aware of the  
15 terms and conditions of his disciplinary probation, yet failed to comply with them.

16 "[A] probation 'reporting requirement permits the State Bar to monitor [an attorney  
17 probationer's] compliance with professional standards.'" (*In the Matter of Weiner* (Review Dept.  
18 1997) 3 Cal. State Bar Ct. Rptr. 759, 763, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605.) In  
19 addition, "an attorney probationer's filing of quarterly probation reports is an important step towards  
20 the attorney's rehabilitation." (*In the Matter of Weiner, supra*, 3 Cal. State Bar Ct. Rptr. at p. 763.)  
21 Thus, Respondent's failure to file quarterly and other reports warrants significant discipline.  
22 Moreover, he did not comply with the condition that he participate in random testing for substance  
23 abuse. There is no indication that Respondent recognized his misconduct or of his efforts to comply  
24 with the conditions.

25 In consideration of Respondent's violation of probation conditions and of his lack of  
26 participation in these proceedings, the Court does not believe it worthwhile to recommend again  
27 placing his on probation subject to conditions.

28 The prior disciplinary order "provided [Respondent] an opportunity to reform his conduct

1 to the ethical strictures of the profession. His culpability in [the matter] presently under  
2 consideration sadly indicates either his unwillingness or inability to do so.” (*Arden v. State Bar*  
3 (1987) 43 Cal.3d 713, 728.)

4 Accordingly, the Court finds good cause to GRANT the motion to revoke Respondent’s  
5 probation and recommends the imposition of substantial discipline in this matter in the absence of  
6 evidence supporting an alternative.

7 **DISCIPLINE RECOMMENDATION**

8 The Court hereby recommends to the Supreme Court that Respondent’s probation in  
9 Supreme Court matter S106727 (State Bar Court case nos. 98-O-02697; 99-O-10142; 00-O-10240;  
10 00-O-10493; 00-O-14082; 00-O-10532; 00-O-13202; 01-N-02329 (Cons.)) be revoked, that the  
11 previous stay of execution of the suspension be lifted, and that Respondent James Kasmir O’Brien  
12 be actually suspended from the practice of law for 24 months.

13 It is also recommended that Respondent be ordered to comply with the requirements of rule  
14 955 of the California Rules of Court within 30 calendar days of the effective date of the Supreme  
15 Court order in this matter, and file the affidavit provided for in paragraph (c) within 40 days of the  
16 effective date of the order showing his compliance with said order.<sup>4</sup>

17 It is not recommended that Respondent be ordered to successfully complete State Bar Ethics  
18 School or to take and pass the Multistate Professional Responsibility Examination as he was ordered  
19 to do so in Supreme Court matter S106727 (State Bar Court case nos. 98-O-02697; 99-O-10142; 00-  
20 O-10240; 00-O-10493; 00-O-14082; 00-O-10532; 00-O-13202; 01-N-02329 (Cons.)).

21 **COSTS**

22 The Court recommends that costs be awarded to the State Bar pursuant to Business and  
23 Professions Code section 6086.10, and that those costs be payable in accordance with section 6140.7.

24 **ORDER REGARDING INACTIVE ENROLLMENT**

25 Respondent is involuntarily enrolled inactive pursuant to Business and Professions Code  
26

27  
28 

---

<sup>4</sup>Respondent is required to file a rule 955(c) affidavit even if he has no clients.  
(*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 130.)

1 section 6007(d). The requirements of section 6007(d)(1) have been met: Respondent was subject  
2 to a stayed suspension, was found to have violated probation conditions, and it has been  
3 recommended that Respondent be actually suspended due to said violations.

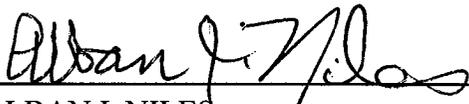
4 IT IS THEREFORE ORDERED that Respondent James Kasmir O'Brien be involuntarily  
5 enrolled as an inactive member of the State Bar of California pursuant to Business and Professions  
6 Code section 60007(d). This enrollment shall be effective three days following service of this order.

7 IT IS ALSO ORDERED that his inactive enrollment be terminated as provided by Business  
8 and Professions Code section 6007(d)(2).

9 IT IS RECOMMENDED that Respondent's actual suspension in this matter commence as  
10 of the date of his inactive enrollment pursuant to this order. (Business and Professions Code section  
11 6007(d)(3).)

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: December 19, 2003

  
ALBAN I. NILES  
Judge of the State Bar Court

**CERTIFICATE OF SERVICE**  
**[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]**

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on December 22, 2003, I deposited a true copy of the following document(s):

**DECISION, filed December 22, 2003**

in a sealed envelope for collection and mailing on that date as follows:

by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**JAMES K O'BRIEN ESQ**  
**4343 LYCEUM AVENUE**  
**MARINA DEL REY CA 90066**

by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

**JAYNE KIM, ESQ., Enforcement, Los Angeles**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **December 22, 2003**.

  
Angela Owens-Carpenter  
Angela Owens-Carpenter  
Case Administrator  
State Bar Court