

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO**

In the Matter of)	Case No. 05-O-04536-PEM
)	
DAVID EUGENE ROBERTS,)	
)	
Member No. 51430,)	DECISION
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this default matter, respondent **David Eugene Roberts** is found culpable, by clear and convincing evidence, of violating his probation conditions imposed by the California Supreme Court and of failing to notify the State Bar of the bringing of an information charging him with a felony violation of possession of a controlled substance.

In view of respondent's misconduct and two prior disciplinary records, the court recommends, among other things, that respondent be actually suspended from the practice of law for eight months and until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules Proc. of State Bar, rule 205.)

II. Pertinent Procedural History

On November 7, 2005, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a Notice of Disciplinary Charges (NDC) at his official membership records address. The NDC was returned as undeliverable.

On November 21, 2005, respondent appeared by telephone at the status conference. A courtesy copy of the NDC was then sent to respondent's official address by regular first class mail. It was not returned as undeliverable.

Nevertheless, he did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

On the State Bar's motion, respondent's default was entered on February 14, 2006, and respondent was enrolled as an inactive member on February 17, 2006, under Business and Professions Code section 6007, subdivision (e).¹ An order of entry of default was sent to respondent's official address by certified mail, but was returned to the court as undeliverable. Respondent did not participate in the disciplinary proceedings. The matter was deemed submitted on March 6, 2006.

On March 29, 2006, the court denied respondent's motion to set aside his default on the grounds that no evidence of mistake, inadvertence, surprise or excusable neglect was presented.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

Respondent was admitted to the practice of law in California on January 5, 1972, and has since been a member of the State Bar of California.

A. Failure to Report Felony Information to the State Bar (Case No. 05-O-04536)

On June 28, 2005, the Office of the District Attorney of Fresno County, filed an information charging respondent with a felony violation of Health and Safety Code section 11377, subdivision (a), unauthorized possession of a controlled substance, in *People v. David Eugene Roberts*, Fresno County Superior Court, case No. F05902615-4. Respondent was specifically charged with the possession of methamphetamine.

The following day, respondent appeared in court with his counsel, John P. Moore, and received a copy of the information.

At no time did respondent report to the State Bar of the bringing of an information against him.

¹All references to section (§) are to the Business and Professions Code, unless otherwise indicated.

Count 1: Failure to Report Information (§ 6068, Subd. (o)(4))

Section 6068, subdivision (o)(4), requires an attorney to report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of the bringing of an indictment or information charging a felony against him.

The purpose of section 6068, subdivision (o), is to inform the State Bar promptly of events which could warrant disciplinary investigation. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862.) The wilful violation of the reporting requirement does not require a bad purpose or an evil intent. All that is required is a general purpose of willingness to commit the act or omission. (*Ibid.*)

Therefore, by failing to report to the State Bar, in writing, within 30 days after June 29, 2005, when respondent appeared in court and received a copy of the information, respondent wilfully failed to report the bringing of an information charging a felony against him in wilful violation of section 6068, subdivision (o)(4).

B. Failure to Comply With Probation Conditions

On December 23, 2004, the California Supreme Court ordered respondent suspended from the practice of law for one year, that execution of the suspension be stayed, and that he be placed on probation for two years subject to the conditions of probation, including an actual suspension of 120 days, as recommended by the Hearing Department of the State Bar Court in its order approving stipulation filed August 18, 2004. (Supreme Court case No. S128322, State Bar Court case No. 01-O-04182 et al.)

Pursuant to the Supreme Court Order (SCO), effective January 22, 2005, respondent was to comply with certain terms and conditions of probation, including, but not limited to, submitting quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period of probation.

On January 10, 2005, the Office of Probation sent respondent a letter at his official address, reminding him of the probation conditions. A copy of the SCO was also enclosed. The letter was not returned as undeliverable. Although respondent received the letter, he did not respond.

On October 12, 2005, respondent admitted that he did not timely file the probation report due

April 10, 2005, and had not filed the report due July 10, 2005. He also failed to file the report due October 10, 2005.

Count 2: Business and Professions Code Section 6068, Subdivision (k)

Section 6068, subdivision (k), provides that it is the duty of an attorney to comply with all conditions attached to a disciplinary probation.

Respondent wilfully violated section 6068, subdivision (k), by failing to file the July 10 and October 10, 2005, quarterly reports under the SCO.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent has two prior records of discipline. (Std. 1.2(b)(i).) In his first prior record, on October 24, 1990, respondent was suspended for two years, stayed, placed on probation for two years and actually suspended for 80 days for his criminal conviction for failing to file two income tax returns (Supreme Court case No. S011361; State Bar Court case No. 89-C-12745). Respondent's conviction did not involve moral turpitude but did involve other misconduct warranting discipline.

In the underlying matter, respondent stipulated to one year of stayed suspension, two years of probation and 120 days of actual suspension for his misconduct involving six matters (Supreme Court case No. S128322 filed December 23, 2004; State Bar Court case No. 01-O-04182 et al.). His misconduct included aiding another in the unauthorized practice of law, failing to promptly pay a client of settlement funds, failing to perform competently, failing to appear in court, and issuing insufficiently funded checks.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct by failing to file the quarterly reports even after the NDC in the instant proceeding was filed. (Std. 1.2(b)(v).)

Respondent's failure to participate in this disciplinary matter before the entry of his default

is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

The purpose of 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. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Respondent's misconduct included violation of his probation conditions and failure to report to the State Bar of a felony information. The standards provide a broad range of sanctions ranging from suspension to disbarment, depending upon the gravity of the offenses and the harm to the victim. (Stds. 1.6, 1.7, and 2.6.)

Standard 1.7(b) provides that if a member has a record of two prior impositions of discipline, the degree of discipline in the current proceeding must be disbarment unless the most compelling mitigating circumstances clearly predominate. Respondent has two prior records of discipline and no mitigation.

The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id.* at p. 251.) The court will look to applicable case law for guidance. Nevertheless, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges eight months of actual suspension, citing *Potack v. State Bar* (1991) 54 Cal.3d 132 in support of its recommendation.

"[A] probation 'reporting requirement permits the State Bar to monitor [an attorney probationer's] compliance with professional standards.'" (*In the Matter of Weiner* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605.) In addition, "an attorney probationer's filing of quarterly probation reports is an important step towards the attorney's rehabilitation." (*In the Matter of Weiner, supra*, 3 Cal. State Bar Ct. Rptr. at p. 763.) Thus, respondent's failure to file a quarterly report warrants significant discipline.

In *In the Matter of John Henry Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81,

a probation revocation matter, an attorney violated his disciplinary probation by failing to pay restitution and by filing a tardy, incomplete quarterly probation report. He had a record of prior discipline. The attorney was actually suspended for one year and until he completes restitution.

In recommending discipline, the “paramount concern is protection of the public, the courts and the integrity of the legal profession.” (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) Failing to appear and participate in this hearing shows that respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) His failure to participate in this proceeding leaves the court without information about the underlying cause of respondent’s misconduct or of any mitigating circumstances surrounding his misconduct.

In view of respondent’s misconduct, the case law and the aggravating evidence, placing respondent on an actual suspension for eight months would be appropriate to protect the public and to preserve public confidence in the profession.

VI. Discipline Recommendation

Accordingly, the court hereby recommends that respondent **David Eugene Roberts** be suspended from the practice of law for one year, that said suspension be stayed, and that respondent be actually suspended from the practice of law for eight months and until he files and the State Bar Court grants a motion to terminate his actual suspension. (Rules Proc. of State Bar, rule 205.)

It is recommended that respondent be ordered to comply with any probation conditions hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

If the period of actual suspension reaches or exceeds two years, it is recommended that he remain actually suspended until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii).

It is also recommended that the Supreme Court order respondent to comply with rule 955, paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter. Wilful failure to comply with the

provisions of rule 955 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.²

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination as he was previously ordered to do so in S128322.

VII. Costs

The court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VIII. Order Regarding Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007(d)(3). (Rules Proc. of State Bar, rule 564.)

Dated: June 20, 2006

PAT McELROY
Judge of the State Bar Court

²Respondent is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)