

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 06-PM-10546-RAH
)	
DAVID E. FETTERMAN,)	ORDER GRANTING MOTION TO
)	REVOKE PROBATION AND ORDER OF
Member No. 189990,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

Based upon alleged probation violations, the State Bar of California, Office of Probation (“Office of Probation”) filed a motion to revoke the probation of respondent David E. Fetterman (“respondent”) imposed by the Supreme Court in its order filed on January 31, 2005, in Supreme Court matter S129198 (State Bar Court Case No. 03-N-04421).

The Office of Probation requests that respondent’s probation be revoked, and that respondent be actually suspended for the entire period of suspension previously stayed: to wit, two years and 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) of the Standards for Attorney Sanctions for Professional Misconduct. The Office of Probation also requests that respondent remain on suspension until he makes restitution. The Office of Probation further requests that respondent be ordered to comply with rule 955 of the California Rules of Court (“rule 955”), and that respondent be involuntarily enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007(d).¹

For the reasons stated below, the Office of Probation’s motion to revoke respondent’s

¹Unless otherwise indicated, all further references to sections refer to provisions of the California Business and Professions Code.

probation is hereby granted, as is its request to involuntarily enroll respondent to inactive status. The court therefore recommends that respondent be actually suspended from the practice of law for two years and 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) of the Standards for Attorney Sanctions for Professional Misconduct. It will also be recommended that respondent remain actually suspended until he makes specified restitution and until he provides to the Office of Probation satisfactory proof of attendance at a session of the State Bar's Ethics School and passage of the test given at the end of that session. It will further be recommended that respondent be ordered to comply with rule 955. The court will also involuntarily enroll respondent as an inactive member of the State Bar pursuant to section 6007(d).

II. PERTINENT PROCEDURAL HISTORY

On February 1, 2006, the Office of Probation filed with the State Bar Court a motion to revoke respondent's probation, accompanied by the declaration of Cheryl Chisholm and Exhibits 1-4 in support of said motion. A copy of the motion, the declaration of Cheryl Chisholm and Exhibits 1-4, as well as a Probation Revocation Response form, was properly served upon respondent on February 1, 2006, by certified mail, return receipt requested, addressed to respondent at his latest address shown on the official membership records of the State Bar ("official address") pursuant to section 6002.1(c) and rules 60 and 563(a) of the Rules of Procedure of the State Bar of California ("Rules of Procedure").² There is no evidence as to whether the copy of the motion and supporting documents served upon respondent was returned to the Office of Probation by the U.S. Postal Service as undeliverable or for any other reason.

On February 6, 2006, a Notice of Assignment was filed and a copy was served upon

²The certified copy of respondent's address history dated January 12, 2006, which is attached as part of Exhibit 1, is not competent evidence to establish that documents served after January 12, 2006, were properly served upon respondent. The court therefore takes judicial notice of the State Bar's official membership records pursuant to Evidence Code section 452, subdivision (h), which indicate that effective July 29, 2004, respondent's official address became, and remains as of the date of this order granting the Office of Probation's motion to revoke respondent's probation, 971 Hawthorn Dr., Lafayette, CA 94549.

respondent by first-class mail, postage fully prepaid, addressed to respondent at his official address. The copy of said notice was returned to the State Bar Court by the U.S. Postal Service bearing a label which read as follows:

FORWARD TIME EXP RTN TO SEND
FETTERMAN
2339A BUENA VISTA AVE
WALNUT CREEK CA 94597-3017

RETURN TO SENDER

On February 6, 2006, an Order of Consolidation was filed setting forth that unless an objection was filed within 10 days of service of this order, Case No. 06-PM-10545 and Case No. 06-PM-10546 would be consolidated effective February 22, 2006. A copy of said order was properly served upon respondent by first-class mail, postage fully prepaid, addressed to respondent at his official address. The copy of said order was not returned to the State Bar Court by the U.S. Postal Service as undeliverable or for any other reason.

On February 8, 2006, the Office of Probation filed an objection to the court's consolidation of Case No. 06-PM-10545 and 06-PM-10546 for all purposes, but did not oppose consolidation for the purpose of hearing. A copy of said objection was properly served upon respondent by first-class mail addressed to respondent at his official address. There is no evidence as to whether the copy of the objection served upon respondent was returned to the Office of Probation by the U.S. Postal Service as undeliverable or for any other reason.

On February 16, 2006, a copy of the Notice of Assignment was served upon respondent by first-class mail, postage fully prepaid, addressed to respondent at 2339A Buena Vista Ave., Walnut Creek, CA 94597-3017 ("the Walnut Creek address"). This copy of the notice was not returned to the State Bar Court by the U.S. Postal Service as undeliverable or for any other reason.

On February 16, 2006, a copy of the Order of Consolidation was served upon respondent by first-class mail, postage fully prepaid, addressed to respondent at the Walnut Creek address. This copy of the order was not returned to the State Bar Court by the U.S. Postal Service as undeliverable or for any other reason.

On March 3, 2006, the court filed an order effective February 22, 2006, vacating its February

6, 2006, Order of Consolidation. A copy of said order was properly served upon respondent by first-class mail, postage fully prepaid, addressed to respondent at his official address. The copy of said order was returned to the State Bar Court by the U.S. Postal Service bearing a label similar to the one on the copy of the Notice of Assignment which was returned to the State Bar Court.

On March 8, 2006, the court filed an order that this matter stand submitted for decision as of March 3, 2006. A copy of said order was properly served upon respondent by first-class mail, postage fully prepaid, addressed to respondent at his official address. A courtesy copy of said order was also served upon respondent by first-class mail, postage fully prepaid, addressed to respondent at the Walnut Creek address. The copy of said order addressed to respondent at his official address was returned to the State Bar Court by the U.S. Postal Service bearing a label similar to the one on the copy of the Notice of Assignment and the order vacating the Order of Consolidation which were returned to the State Bar Court. The copy of said order addressed to respondent at the Walnut Creek address was not returned to the State Bar Court by the U.S. Postal Service as undeliverable or for any other reason.

III. FINDINGS OF FACT³

Jurisdiction

Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of the official membership records pertaining to respondent which are maintained by the State Bar of California. These records reflect that respondent was admitted to the practice of law in the State of California on November 4, 1997, was a member at all times pertinent to the allegations herein, and is currently a member of the State Bar of California.

Probation Violations

By order filed January 31, 2005, the Supreme Court imposed discipline on respondent in Supreme Court matter S129198 (State Bar Court Case No. 03-N-04421). The Supreme Court

³These findings of fact are based on the admitted factual allegations contained in the State Bar's motion to revoke respondent's probation, the declaration of Cheryl Chisholm and State Bar Exhibits 1-3 attached thereto. (Rules Proc. of State Bar, rule 563(b)(3).) The declaration of Cheryl Chisholm and State Bar Exhibits 1-3 are admitted into evidence pursuant to rule 563(e) of the Rules of Procedure.

suspended respondent from the practice of law for two years and until he shows 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) of the Standards for Attorney Sanctions for Professional Misconduct, stayed execution of said suspension, and placed respondent on probation for two years subject to conditions of probation including that he be actually suspended for six months. As a condition of his probation, respondent was to comply with the terms and conditions of probation imposed relating to Supreme Court matter S114424 (State Bar Court Case No(s). 01-O-01980, etc.)⁴

On March 1, 2005, Shuntinee Brinson (“Ms. Brinson”), Probation Deputy, Office of Probation, mailed a letter to respondent at his official address, confirming the terms of the Supreme Court disciplinary order entered on January 31, 2005. In the letter, Ms. Brinson reminded respondent that he was still required to comply with the conditions of probation imposed relating to Supreme Court matter S114424. The letter further set forth several such conditions and requested that respondent submit the required information forthwith. The letter also set forth that the Office of Probation had not received respondent’s quarterly report due January 10, 2005, and requested that said report be submitted forthwith. The letter also stated, “**Failure to timely** submit reports or any other proof of compliance **will result in a non-compliance referral** to the State Bar Court Review Department or referral for action by the Supervising Attorney of the Office of Probation.” (Exhibit 3, letter dated March 1, 2005, from Shuntinee Brinson to respondent; emphasis in original.)

⁴On July 2, 2003, the Supreme Court filed an order in Supreme Court matter S114424 (State Bar Court Case No(s). 01-C-01980; 01-O-03732; 02-O-12711 (Cons.)) suspending respondent from the practice of law for two years and until he shows 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) of the Standards for Attorney Sanctions for Professional Misconduct, the execution of said suspension was stayed, and respondent was placed on probation for two years on conditions including that he be actually suspended for one year.

On October 4, 2004, the State Bar Court approved a stipulation filed by the parties in Supreme Court matter S114424 (State Bar Court Case No(s). 01-C-01980; 01-O-03732; 02-O-12711 (Cons.) which, among other things, modified certain conditions of respondent’s probation in Supreme Court matter S114424. Therefore, in Supreme Court matter S129198 (State Bar Court Case No. 03-N-04421) respondent was to comply with the probation conditions in Supreme Court matter S114424, as such conditions were modified by the order approving stipulation filed on October 4, 2004, in Supreme Court matter S114424.

Enclosed with the letter, among other things, was a copy of the Supreme Court order and the conditions of probation, an Ethics School schedule, an enrollment application for Ethics School, a Multi-State Professional Responsibility Examination schedule and a Notice of Counsel Representation form. Ms. Brinson's March 1, 2005, letter was not returned as undeliverable.

The Supreme Court order became effective on March 2, 2005, thirty days after it was entered. (Cal. Rules of Court, rule 953(a).)⁵

Pursuant to the Supreme Court order, respondent was to comply in Supreme Court matter S129198 (State Bar Court Case No. 04-N-04421) with the terms and conditions of probation imposed relating to Supreme Court matter S114424 (State Bar Court Case No(s). 01-O-01980, etc.), as modified by the court's order approving stipulation in Supreme Court matter S114424 filed on October 4, 2004. As such, respondent was ordered to comply with the following conditions of probation, among others:

(a) submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of his probation period and state under penalty of perjury whether he had complied with the State Bar Act, the Rules of Professional Conduct and all probation conditions during the preceding calendar quarter;

(b) provide to the Office of Probation satisfactory proof of attendance at Ethics School and passage of the test given at the end of that session by December 31, 2004;

(c) make minimum quarterly restitution payments in the amount of \$250 first to the Client Security Fund ("CSF"), then to Molly Stecker, then to Lou and Deborah Olivieri until

⁵No proof was offered to establish that respondent had notice of the Supreme Court's January 31, 2005, order. However, the clerk of the Supreme Court was required to promptly send a copy of the order to respondent once it was filed. (Cal. Rules of Court, rule 29.4(a).) Also, except with respect to arrests, it is presumed that official duties have been regularly performed unless the party against whom the presumption operates *proves* otherwise. (Evid. Code, §§ 606, 660, 664; *In re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Thus, because respondent has not proved otherwise, the court must find the Supreme Court Clerk properly sent respondent a copy of the order promptly after it was filed. (*Ibid.*) Also, as there is no evidence in the record that would support a finding to the contrary, the court finds that respondent actually received that copy of the order. (Cf. Evid. Code, §§ 604, 630, 641 [correctly addressed and properly mailed letter is presumed to have been received in the ordinary course of mail].)

restitution is paid in full. Respondent owed to Molly E. Stecker, or the CSF if it had paid, the principal amount of \$700 plus interest at the rate of 10% per annum accruing from May 7, 2001. Respondent owed to Lou and Deborah Olivieri, or the CSF if it had paid, the principal amount of \$500 plus 10% interest per annum accruing from October 26, 2001. Respondent was to provide proof of such restitution, beginning with his October 10, 2004, quarterly report. Respondent acknowledged that he owed the CSF for the principal paid, interest accrued and processing costs;

(d) obtain psychiatric or psychological help/treatment from a duly licensed psychiatrist, psychologist, or clinical social worker at respondent's expense a minimum of two times per month and furnish evidence of such with each quarterly report. Respondent was to start no later than 30 days after the effective date of his discipline and continue for one year or until a motion to modify this condition was granted and that ruling became final.⁶

(e) comply with all conditions of probation or parole imposed in his criminal matter and so declare under penalty of perjury in conjunction with his quarterly reports.

On April 11, 2005, a telephonic message was left for respondent asking that he return the call as soon as possible. No such response was made.

On April 28, 2005, Ms. Brinson mailed respondent a letter to his official address reminding him of certain terms and conditions of his probation in Supreme Court matter S114424 and Supreme Court matter S129198. The letter also advised respondent that the Office of Probation had not

⁶The motion to revoke respondent's probation and the declaration of Cheryl Chisholm allege that treatment was to "continue for one year or the period of probation or until a motion to modify this condition was granted and that ruling became final." Although the Stipulation Re Facts, Conclusions of Law and Disposition filed on December 24, 2002, in State Bar Court Case No. 01-C-01980 originally provided that "[t]reatment shall continue for . . . 1 years [sic] or, the period of probation or until a motion to modify this condition is granted and that ruling becomes final," on February 4, 2003, the court filed a Modification Order deleting "or, the period of probation." Thus, pursuant to the Stipulation, treatment was to continue for one year or until a motion to modify that condition was granted and that ruling became final. The court takes judicial notice of its records pursuant to Evidence Code section 452, subdivision (d), which indicate that no such motion to modify this condition was filed in either State Bar Court Case No. 01-C-01980, etc. or 03-N-04421. Furthermore, this condition was not modified by the parties' Stipulation for Extension of Time Re: MPRE and Modification of Probation in Supreme Court matter S114424 (State Bar Court Case No. 01-C-01980, etc.) which was approved by order of the court filed on October 4, 2004.

received certain documents from respondent, including quarterly reports due July 10 and October 10, 2004, and January and April 10, 2005; proof of completion of State Bar Ethics School due December 31, 2004; proof of quarterly restitution payments due October 10, 2004, and January 10 and April 10, 2005; proof of treatment from a duly licensed psychologist, psychiatrist or clinical social worker at a minimum of twice per month since August 1, 2003; and statements regarding his underlying criminal matter due July 10 and October 10, 2004, and January 10 and April 10, 2005. Respondent was advised to submit his delinquent reports forthwith. Moreover, Ms. Brinson warned respondent that failure to timely submit reports or any other proof of compliance would result in a non-compliance referral to the State Bar Court Review Department or the Office of Probation for further proceedings. Enclosed with the letter was a quarterly report form and instructions, Proof of Payment Instructions regarding restitution, an Ethics School schedule, enrollment information for Ethics School, an enrollment application for Ethics School, and information regarding the Multi-State Professional Responsibility Examination. The letter was not returned as undeliverable.

On November 1, 2005, Probation Deputy Cheryl Chisholm telephoned respondent at his membership records telephone number and was told by the lady who answered that it was a new number for her and she did not know who respondent was.

Respondent has failed to comply with certain conditions of probation imposed by the Supreme Court in Supreme Court matter S114424 (State Bar Court Case No(s). 01-C-01980; 01-O-03732; 02-O-12711). Specifically, respondent has failed to: (1) submit his quarterly reports due July 10 and October 10, 2004, January 10, April 10, July 10 and October 10, 2005, and January 10, 2006; (2) complete Ethics School by December 31, 2004, and to provide proof of such; (3) make any restitution and has failed to provide proof of any restitution to the Office of Probation, although respondent acknowledged that he owed the CSF for the principal paid, interest accrued, and processing costs; (4) provide proof of any psychiatric or psychological treatment from August 2003 through August 2004;⁷ and (5) report his compliance with all conditions of probation or parole

⁷See footnote 6. As such, respondent can only be found culpable of failing to comply with this condition from August 2003 through August 2004.

imposed in his criminal matter in conjunction with his quarterly reports due from July 10, 2004 through January 2006.

IV. CONCLUSIONS OF LAW

Bad faith is not a requirement for a finding of culpability in a probation violation matter; “instead, a ‘general purpose or willingness’ to commit an act or permit an omission is sufficient. (Citations.)” (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.) Pursuant to section 6093(c) and rule 561 of the Rules of Procedure, the court concludes that the Office of Probation has demonstrated by a preponderance of the evidence that respondent wilfully violated certain conditions of probation ordered by the Supreme Court in Supreme Court matter S129198. However, for the reasons set forth below, the court will not find respondent culpable of all the violations alleged in the Office of Probation’s motion to revoke respondent’s probation.

According to the Stipulation Re Facts, Conclusions of Law and Disposition entered into by the parties in Supreme Court matter S129198, as a condition of probation, “[r]espondent [was] to comply with the terms and conditions of probation imposed relating to case no. S114424 (State Bar Court case nos. 01-C-0190 et al[.]).” The Office of Probation contends that respondent failed to comply with this probation condition by failing to comply with certain conditions of probation imposed in Supreme Court matter S114424, even those conditions requiring compliance prior to the effective date of the Supreme Court order in Supreme Court matter 129198. For example, the Office of Probation contends that respondent violated his probation in Supreme Court matter 129198 by failing to complete Ethics School by December 31, 2004, as required by the Supreme Court in Supreme Court matter 114424, although it would be impossible to comply with this condition in Supreme Court matter S129198, as the compliance date would have already past by the time the Supreme Court order imposing probation in Supreme Court matter S129198 became effective. Similarly, if respondent had not already obtained psychiatric or psychological treatment between August 2003 and August 2004, it would be impossible for respondent to provide proof of such

treatment after March 2, 2005, the effective date of the Supreme Court order in this matter.⁸ As such, the court will only find respondent culpable in this matter with respect to acts for which the compliance date was after (not before) the effective date of the discipline imposed in Supreme Court matter 129198.

Accordingly, the court concludes that the Office of Probation has demonstrated by a preponderance of the evidence that respondent wilfully violated certain conditions of his probation by failing to: (1) submit his quarterly reports due July 10 and October 10, 2005, and January 10, 2006; (2) make any restitution since the effective date of the Supreme Court order in this matter and failing to provide proof of any restitution to the Office of Probation, although respondent acknowledged that he owed the CSF for the principal paid, interest accrued, and processing costs; and (3) report his compliance with all conditions of probation or parole imposed in his criminal matter in conjunction with his quarterly reports due from July 10, 2005 through January 2006. These conclusions warrant the revocation of probation as provided by section 6093(b).

V. AGGRAVATING CIRCUMSTANCES

In aggravation, respondent has a record of two⁹ prior impositions of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b)(i) (“standard”).¹⁰

1. On July 2, 2003, the Supreme Court filed an order in Supreme Court matter S114424 (State Bar Court Case No(s). 01-C-01980; 01-O-03732; 02-O-12711 (Cons.)) suspending respondent from the practice of law for two years and 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

⁸Furthermore, the court notes that it has already recommended to the Supreme Court that respondent be disciplined for this misconduct in State Bar Court Case No. 06-PM-10545.

⁹Concurrently with the filing of this Order Granting Motion to Revoke Probation and Order of Involuntary Inactive Enrollment, the court is also filing an Order Granting Motion to Revoke Probation and Order of Involuntary Inactive Enrollment in State Bar Court Case No. 06-PM-10545-RAH. However, as the violations found in Case No. 06-PM-10545-RAH encompass those found in this matter, Case No. 06-PM-10545-RAH will not be considered a prior record of discipline.

¹⁰Pursuant to Evidence Code section 452, subdivision (d), the court takes judicial notice of respondent’s prior record of discipline.

pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct; staying execution of said suspension; and placing respondent on probation for two years subject to certain conditions of probation, including a one year period of actual suspension. In this prior disciplinary matter, respondent stipulated to culpability in two client matters and one criminal conviction matter. In one of the client matters, respondent failed to return unearned fees, failed to provide an accounting of fees and failed to cooperate in a disciplinary investigation. In the other client matter, respondent failed to respond promptly to reasonable client status inquiries, failed to perform legal services with competence, improperly withdrew from employment, failed to refund unearned fees and failed to cooperate in a disciplinary investigation. In the criminal conviction matter, respondent's criminal conduct involved moral turpitude. Respondent was convicted of one count of Penal Code section 311.11 (possession or control of child pornography), a misdemeanor. In aggravation, the parties stipulated that respondent's misconduct significantly harmed a client, the public or the administration of justice. In mitigation, respondent cooperated with the State Bar throughout the proceedings.

2. On January 31, 2005, the Supreme Court filed an order in Supreme Court matter S129198 (State Bar Court Case No. 03-N-04421) suspending respondent from the practice of law for two years and 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) of the Standards for Attorney Sanctions for Professional Misconduct; staying execution of said suspension; and placing respondent on probation for two years subject to certain conditions of probation, including a six month period of actual suspension. In this prior disciplinary matter, respondent stipulated to a wilful violation of Business and Professions Code section 6103 based on his failure to file with the Clerk of the State Bar Court a declaration of compliance with rule 955 of the California Rules of Court as required by the Supreme Court's July 2, 2003, order in Supreme Court matter S114424. In aggravation, the parties stipulated that respondent had a prior record of discipline (see paragraph 1, above), and that respondent's misconduct significantly harmed a client, the public or the administration of justice. It was also noted that respondent had not complied with certain terms of his earlier probation. In mitigation, respondent displayed spontaneous candor and

cooperation. It was also noted that respondent was diagnosed with Hodgkin's disease in July 2003, and immediately commenced chemotherapy which continued through January 2004. Thereafter, respondent had radiation therapy which was completed in April 2004.

Respondent's violation of multiple probation conditions in this present matter is also an aggravating circumstance. (Standard 1.2(b)(ii).)

VI. MITIGATING CIRCUMSTANCES

Respondent did not participate either in propria persona or through counsel in this disciplinary proceeding. No mitigating evidence was therefore offered on respondent's behalf or received into evidence, and none can be gleaned from this record.

VII. DISCUSSION

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

Section 6093 authorizes the revocation of probation for a violation of a probation condition, and standard 1.7 requires that the court recommend a greater discipline in this matter than that imposed in the underlying disciplinary proceeding. However, the extent of the discipline to recommend is dependent, in part, on the seriousness of the probation violation and respondent's recognition of his misconduct and his efforts to comply with the conditions. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.) Furthermore, "[t]he violation of a probation condition significantly related to the attorney's prior misconduct merits the greatest discipline, especially if the violation raises a serious concern about the need to protect the public or shows the attorney's failure to undertake steps toward rehabilitation." (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 151.)

In this matter, the court is concerned about respondent's failure to comply with the above-

mentioned conditions of his probation, as well as his failure to participate in this disciplinary proceeding. The court notes that respondent participated in his prior disciplinary proceeding and entered into a stipulation in the underlying disciplinary matter. Respondent was therefore well aware of the terms and conditions of his probation, yet he failed to comply with several important conditions of his probation. In particular, the court notes that respondent has failed to file any quarterly reports since the effective date of the discipline imposed in this matter. “[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.)

In the disciplinary matter which underlies this probation revocation proceeding, respondent was suspended from the practice of law for two years and 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) of the Standards for Attorney Sanctions for Professional Misconduct; the execution of said suspension was stayed; and respondent was placed on probation for two years on conditions including that he be actually suspended from the practice of law for six months. In addition, the court notes that respondent’s misconduct in the disciplinary matter underlying this probation revocation proceeding involved respondent’s failure to file a declaration in compliance with rule 955 of the California Rules of Court as required by an order of the Supreme Court. Disbarment is generally the appropriate sanction imposed for a wilful violation of rule 955 (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.)

As a result of respondent’s probation violations, the Office of Probation recommends in this matter, inter alia, that respondent be actually suspended for two years and 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) of the Standards for Attorney Sanctions for Professional Misconduct and until he makes specified restitution. The court generally concurs. Given the nature of the probation conditions which were violated and respondent’s failure to

participate in this proceeding, the court finds that substantial discipline is warranted.

Accordingly, the court finds good cause to GRANT the Office of Probation's motion to revoke respondent's probation, and the court will recommend that respondent be actually suspended in this matter for the full period of suspension previously stayed. In addition, the court will recommend that respondent remain actually suspended until he makes restitution as set forth below (cf. *In the Matter of Luis* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 737) and until he provides satisfactory proof of attendance at a session of Ethics School and passage of the test given at the end of that session.

VIII. DISCIPLINE RECOMMENDATION

The court hereby recommends to the Supreme Court that respondent's probation pursuant to the Supreme Court order in Supreme Court matter S129198 (State Bar Court Case No. 03-N-04421) be revoked, that the previous stay of execution of the suspension be lifted, and that respondent DAVID ELIAS FETTERMAN be actually suspended from the practice of law for two years and 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) of the Standards for Attorney Sanctions for Professional Misconduct and until he provides to the Office of Probation satisfactory proof of attendance at a session of the State Bar's Ethics School and passage of the test given at the end of that session. (See Rules Proc of State Bar, rule 290(a).)¹¹ It is also recommended that respondent remain actually suspended until he makes restitution to: (1) Molly E. Stecker in the amount of \$700 plus 10% interest per annum from May 7, 2001 (or to the Client Security Fund to the extent of any payment from the fund to Molly E. Stecker, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and (2) Lou and Deborah

¹¹It has also been recommended that respondent remain actually suspended in State Bar Court Case No. 06-PM-10545 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) of the Standards for Attorney Sanctions for Professional Misconduct and until he provides to the Office of Probation satisfactory proof of attendance at a session of the State Bar's Ethics School and passage of the test given at the end of that session. Compliance with these terms in State Bar Court Case No. 06-PM-10545 will satisfy those same requirements in this matter.

Olivieri in the amount of \$500 plus 10% interest per annum from October 26, 2001 (or to the Client Security Fund to the extent of any payment from the fund to Molly E. Stecker, plus interest and costs, in accordance with Business and Professions Code section 6140.5) and until he furnishes satisfactory proof of such restitution to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d).

It is further recommended that respondent be ordered to comply with rule 955 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within thirty (30) and forty (40) days, respectively, after the effective date of the Supreme Court order herein.¹²

The court also recommends that the discipline imposed in this matter run concurrently with any discipline imposed by the Supreme Court in State Bar Court Case No. 06-PM-10545.

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination as he was ordered to do so in Supreme Court matter S114424 (State Bar Court Case No(s). 01-C-01980; 01-O-03732; 02-O-12711 (Cons.)).¹³

IX. ORDER REGARDING INACTIVE ENROLLMENT

The State Bar's Office of Probation requests that respondent be involuntarily enrolled inactive pursuant to section 6007(d). The requirements of section 6007(d)(1) have been met:

¹²Respondent 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.)

It has also been recommended that respondent also be ordered to comply with rule 955 of the California Rules of Court in State Bar Court Case No. 06-PM-10545. Filing one compliance affidavit pursuant to rule 955(c) which bears both State Bar Court Case No. 06-PM-10545 and State Bar Court Case No. 06-PM-10546 will be sufficient to satisfy this requirement.

¹³Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of the State Bar's official membership records pertaining to respondent which reflect that effective February 23, 2006, respondent was suspended for failing to pass the Multistate Professional Responsibility Examination ("MPRE") as ordered by the Supreme Court in Supreme Court matter S114424. Respondent remains under said suspension as of the date of this order granting the Office of Probation's motion to revoke his probation and will remain suspended until he provides proof of passage of the MPRE.

respondent is subject to a stayed suspension, he has been found to have violated probation conditions, and it has been recommended that respondent be actually suspended due to said violations.

IT IS THEREFORE ORDERED that respondent, DAVID E. FETTERMAN, be involuntarily enrolled as an inactive member of the State Bar of California pursuant to section 6007(d). This enrollment will be effective three days after this order is filed.

IT IS ALSO ORDERED that his inactive enrollment be terminated as provided by section 6007(d)(2).

IT IS FURTHER RECOMMENDED THAT respondent's actual suspension in this matter commence as of the date of his inactive enrollment pursuant to this order. (Section 6007(d)(3).)

X. COSTS

It is recommended 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.

Dated: March 30, 2006

RICHARD A. HONN
Judge of the State Bar Court