FILED May 23, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **MICHAEL EDWARD CONSIGLIO,** **Member No. 55550,** A Member of the State Bar.	)))))))	Case No.: **06-PM-11430-RMT** **ORDER GRANTING MOTION TO REVOKE PROBATION & ORDER OF INACTIVE ENROLLMENT**

This matter is before the court on the motion filed by the State Bar's Office of Probation (hereafter the State Bar) on March 17, 2006, to revoke the disciplinary probation that the Supreme Court imposed on respondent Michael Edward Consiglio[1] in its January 13, 2005, order in *In re Michael Edward Consiglio on Discipline*, case number S128821 (State Bar Court case number 04-H-11689) (hereafter the Supreme Court's January 2005 order). In its motion, the State Bar alleges that respondent violated his probation by: (1) submitting his first two probation reports late; (2) failing to submit his third and fourth probation reports; (3) failing to attend and successfully complete the State Bar's Ethics School; and (4) failing to provide proof of his attendance and completion of ethics school.

[1]Respondent was admitted to the practice of law in the State of California on June 29, 1973, and has been a member of the State Bar since that time.

As discussed in more detail below, the court finds, by a preponderance of the evidence (Bus. & Prof. Code, § 6093, subd. (c);[2] Rules Proc. of State Bar, rule 561), that respondent willfully violated the conditions of his probation. Accordingly, the court will grant the State Bar's motion. The State Bar, which was represented by Supervising Attorney Terrie Goldade, contends that respondent should be (1) actually suspended from the practice of law for one year and until he establishes his rehabilitation, fitness to practice, and learning in the law in accordance with Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii) (all further references to standards are to this source); (2) ordered to comply with California Rules of Court, rule 955; and (3) involuntarily enrolled as inactive member of the State Bar under section 6007, subdivision (d)(1). The court agrees. But the court independently concludes that respondent should also be placed on three years' probation on virtually identical conditions to those originally imposed on him under the Supreme Court's January 2005 order.

I. Procedural History

On March 17, 2006, the State Bar properly served a copy of its motion to revoke probation on respondent by certified mail, return receipt requested, at his latest address shown on the official membership records of the State Bar (hereafter official address). (§ 6002.1, subd. (c); Rule Proc. of State Bar, rules 60(a), 563(a); see also *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108 [service under section 6002.1 is deemed complete when mailed even if the respondent attorney does not receive it].) Respondent received that copy of the motion the very next day (i.e., April 18, 2006).

Respondent's response to the motion, including any opposition and request for a hearing, was to have been filed no later than April 11, 2006. (Rules Proc. of State Bar, rule 563(b); see

[2]Unless otherwise noted, all further statutory references are to this code.

also Rules Proc. of State Bar, rule 63.) However, respondent did not timely file a response. Therefore, on April 17, 2006, this court filed an order taking the State Bar's motion under submission for ruling without a hearing. The clerk of this court properly served a copy of the court's April 17, 2006, order on respondent at his official address. Respondent received that copy of the court's order. (Evid. Code, § 641 [mailbox rule].)

On April 28, 2006, respondent filed a motion for permission to appear and oppose the motion to revoke probation and for continuance. In response to a request from the court, respondent filed a supplemental statement in support of his motion on May 5, 2006. Later that same day, the State Bar filed an opposition to respondent's motion and supplemental statement. In an order filed on May 12, 2006, this court denied respondent's motion, no good cause having been shown.

Respondent's failure to timely file a response to the State Bar's motion constitutes an admission of the factual allegations contained in the motion and its supporting documents. (Rules Proc. of State Bar, rule 563(b)(3).)

II. Findings of Fact & Conclusions of Law

To establish culpability for a probation violation charged in a probation revocation proceeding, the State Bar must prove, by a preponderance of the evidence, the text of the probation condition that the attorney is charged with violating, that the attorney had notice of that probation condition, and that the attorney willfully failed to comply with it. (*In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244, 251-252.) Willfulness in this context does not require bad faith; rather it requires only a " 'general purpose or willingness' to commit an act or permit an omission." (*In the Matter of Potack* (Review Dept. 1991)1 Cal. State Bar Ct. Rptr 525, 536.)

In the Supreme Court’s January 2005 order, which became effective February 12, 2005 (Cal. Rules of Court, rule 953(a)), respondent was placed on (1) one year's stayed suspension and until he complies with standard 1.4(c)(ii) and (2) two years' probation on various conditions, but no actual suspension. Notably, the Supreme Court imposed this discipline, including the one-year suspension with a standard 1.4(c)(ii) condition,[3] on respondent in accordance with a stipulation as to facts, conclusions of law, and disposition that respondent and the State Bar entered into and that the State Bar Court approved in an order filed on September 14, 2004, in case number 04-H-11689 (hereafter the parties' September 2004 stipulation).

The admitted factual allegations in the State Bar's motion to revoke probation establish that the Clerk of the Supreme Court promptly mailed a copy of the Supreme Court's January 2005 order to respondent after it was filed. (Accord, Cal. Rules of Court, rule 29.4(a);[4] Evid. Code, § 644.) Even though there is no allegation or direct evidence establishing that respondent received that copy of the Supreme Court's January 2005 order, the court finds that respondent received it. (Evid. Code, § 641 [mailbox rule].)

Moreover, on February 3, 2005, as a courtesy to him, the State Bar mailed a letter to respondent in which it confirmed each of the probation conditions imposed on him under the Supreme Court's January 2005 order and which included a copy of the Supreme Court's January 2005 order. Respondent received that letter and the enclosed copy of the Supreme Court's order. (Evid. Code, § 641).

The probation conditions imposed on respondent under the Supreme Court's January 2005 order require, inter alia, that respondent (1) submit, on every January 10, April 10, July 10,

[3]Respondent's stipulation to the imposition of a one-year suspension with a standard 1.4(c)(ii) condition is notable because a standard 1.4(c)(ii) condition is ordinarily imposed only with actual suspensions of two or more years in length (see std. 1.4(c)(ii)).

[4]The State Bar erroneously cites to former California Rules of Court, rule 24(a), which was repealed in 2003

and October 10, a written probation report to the State Bar stating, under penalty of perjury, whether he has complied with the Rules of Professional Conduct and the State Bar Act during the preceding calendar quarter; and (2) attend and successfully complete ethics school and provide proof of his attendance and completion of that school to the State Bar by February 12, 2006.

The court finds that, as charged, respondent violated his probation because he (1) failed to submit his first two probation reports, which were due April 10, and July 10, 2005, respectively, until September 14, 2005; (2) never submitted his third and fourth probation reports, which were due October 10, 2005, and January 10, 2006, respectively; and (3) failed to even attend ethics school. Because respondent violated his probation by failing to attend ethics school, it is axiomatic that he *cannot* provide proof to the State Bar that he did. Accordingly, the court declines to find a probation violation based on respondent's failure to provide proof that he attended and completed ethics school and dismisses that charged violation with prejudice. Even if such a violation is not duplicative, it adds nothing to the level of discipline, even as makeweight.

Without question, respondent's willful probation violations warrant the revocation of his probation. (§ 6093, subd. (b).)

III. Aggravating Circumstances

The State Bar has the burden of proving all aggravating circumstances, including prior records of discipline, by clear and convincing evidence. (Std. 1.2(b); *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 932-933.)

A. Prior Records of Discipline

Respondent has three prior records of discipline. (Std. 1.2(b)(i).)

1. First and Second Prior Records

Respondent's first prior record of discipline is the private reproval with conditions (including ethics school) that was imposed on him effective June 9, 2001, in State Bar Court case number 01-O-00896. That reproval was imposed on respondent because he violated section 6068, subdivision (a) in some manner not specified in the record now before the court. Respondent's second prior record of discipline is the public reproval with conditions (including passing the Multistate Professional Responsibility Examination [hereafter MPRE]) that was imposed on him effective April 16, 2003, in State Bar Court case number 02-H-13222. That reproval was imposed on respondent because he violated rule 1-110 of the Rules of Professional Conduct of the State Bar in some manner not specified in the record now before the court.

Unfortunately, the State Bar failed to proffer into evidence, copies of the relevant pleadings, orders, and decisions from respondent's first and second prior records of discipline. The State Bar's failure to fulfill its evidentiary obligations to establish the nature and extent of respondent's misconduct in his first and second prior records by proffering copies of such relevant documents has deprived this court and the Supreme Court of evidence relevant to the appropriate level of discipline in this proceeding.

2. Third Prior Record

Respondent's third prior record of discipline is the Supreme Court's January 2005 order in which, as noted *ante*, respondent was placed on one year's stayed suspension and two years' probation. As established by the parties' September 2004 stipulation, that discipline was imposed on respondent because he repeatedly violated rule 1-110 of the Rules of Professional Conduct by failing to comply with the conditions attached to his 2003 public reproval. Specifically, respondent failed to take and pass the MPRE and failed to submit both his third quarterly reports, which was due April 10, 2004, and his final report, which was due April 16,

2004. In aggravation, respondent had, at that time, two prior records of discipline. (Std. 1.2(b)(i).) In mitigation, respondent cooperated with the State Bar. (Std. 1.2(e)(v).)

B. Multiple Acts of Misconduct

The fact that respondent has been found culpable of five separate probation violations is an aggravating circumstance. (Std. 1.2(b)(ii).)

C. Indifference Towards Rectification of Misconduct

Respondent's failure to promptly file his third and fourth probation reports in response to the State Bar's motion to revoke probation not only defies understanding, but it also clearly establishes his indifference towards rectification, which is a very serious aggravating circumstance. (Std. 1.2(b)(v); *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 702.)

IV. Mitigating Circumstances

There is no evidence of any mitigating circumstance in the record.

V. Discipline Discussion

Since 1963, the use of attorney disciplinary probation has increased with such frequency that probation is now imposed in almost every disciplinary proceeding in which either actual or stayed suspension is ordered. (*In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 298.) The review department has repeatedly held that the primary goals of attorney disciplinary probation are protection of the public and rehabilitation of the attorney. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452; *In the Matter of Marsh, supra*, 1 Cal. State Bar Ct. Rptr. at p. 298.) What is more, because an attorney has an independent statutory duty "To comply with all conditions attached to any disciplinary probation. . ." (§ 6068, subd. (k)), an attorney's violation of a disciplinary probation condition is grounds for both (1) revoking the attorney's probation and (2) disciplining the attorney (§ 6093,

subd. (b); see also Rules Proc. of State Bar, rule 562). Therefore, unlike criminal defendants who have a clear right to refuse criminal probation (which is a privilege and an act of grace or clemency) and to receive only a sentence of imprisonment (*In re Osslo* (1958) 51 Cal.2d 371, 377, 381), respondent attorneys in disciplinary proceedings do not have a right to refuse disciplinary probation and to receive only actual suspension as discipline. Moreover, for the reasons discussed *post*, this court declines to effectively give respondent such a right by merely recommending that his probation be revoked and that he be suspended for one year.

The importance of attorney disciplinary probation is reflected in the substantial discipline that is often imposed for probation violations. (*In the Matter of Laden* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 678, 686.) In addition, because disciplinary probation is fundamental to rehabilitation, an attorney cannot establish rehabilitation and fitness to practice in a standard 1.4(c)(ii) proceeding to terminate actual suspension without first showing that he or she has strictly complied with all the conditions of his or her probation. (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 581.)

Ordinarily, disciplinary probation is effective "only when the attorneys placed on probation are effectively monitored to ensure (1) that they do not again engage in misconduct and (2) that they are undertaking to conform their conduct to the ethical strictures of the profession. (Citations.)" (*In the Matter of Weiner* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763.) Consequently, the review department has repeatedly held "an attorney probationer's filing of quarterly probation reports is an important step towards the attorney's rehabilitation" (*ibid.*, and cases there cited) and an important means of protecting the public because it permits "the State Bar to monitor [the attorney's] compliance with the State Bar Act and the Rules of Professional Conduct" (*In the Matter of Meyer, supra*, 3 Cal. State Bar Ct. Rptr. at p. 705, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605). In light of the foregoing, the

court concludes that respondent's continued unwillingness or inability to comply with his quarterly reporting probation condition alone raises serious public protection concerns.

Respondent’s failures to submit his probation reports and to attend and complete ethics school clearly establish that respondent is not engaged in the rehabilitative process. Accordingly, the court concludes that respondent's present probation violations warrant one year's actual suspension, which is the greatest level of actual suspension that the court may recommend. (Rules Proc. of State Bar, rule 562; *In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 574, fn. 5.) This conclusion is supported by the fact that, when an attorney repeatedly violates the same condition of probation, as respondent did with respect to his quarterly reporting probation condition, the gravity of each violation increases and warrants greater discipline. (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 531.) This is particularly true in the present matter because respondent was previously disciplined for not submitting two reports in accordance with the conditions that were attached to his April 2003 public reproval.

The court's conclusion that one year’s actual suspension is appropriate in this proceeding is also supported by standard 1.7(a), which provides that, when an attorney has a prior record of discipline, “the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.”[5] The court's conclusion is further supported by the fact that, on March 2, 2006, the review department filed an

[5]Even though standard 1.7(b) provides for disbarment when an attorney has two or more prior records of discipline like respondent does, that standard is not applicable when probation violations are charged in a probation revocation proceeding under section 6093 instead of an original disciplinary proceeding under section 6068, subdivision (k). (*In the Matter of Carr, supra*, 2 Cal. State Bar Ct. Rptr. at p. 257, fn. 13.)

order placing respondent on actual suspension because he failed to take and pass the MPRE in accordance with the Supreme Court's January 2005 order.[6] Of course, respondent's actual suspension for not passing the MPRE is not a prior record of discipline under standard 1.2(b)(i). (*In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, 331; *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 531-532.) Nonetheless, respondent's MPRE suspension is yet another indication that he is either unwilling or unable to comply with court orders regarding his professional conduct. Therefore, his MPRE suspension is relevant to this court's determination of the appropriate level of discipline to recommend to the Supreme Court in this proceeding. (*Ibid*.; cf. std. 1.2(b)(iii).)

In addition, the court concludes that just placing respondent on actual suspension for one year as the State Bar requests is inadequate to protect the public or to effectuate respondent's rehabilitation. Without question, when the Supreme Court placed respondent on one year's stayed suspension and two years' probation in its January 2005 order, the Supreme Court implicitly held that, even though respondent's disbarment was not required (*Cain v. State* Bar (1978) 21 Cal.3d 523, 525-526), a stayed suspension with two years' probation (during which he will practice law under the watchful eye of the State Bar for two years) was required to adequately protect the public and to effectuate respondent's professional rehabilitation. (Cf. *In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 578 ["Presumptively, [an attorney's] compliance with the terms of his suspension and with the terms of his probation [will] permit him to [again] become a productive attorney."].) Thus, this court concludes that it is necessary to require respondent to demonstrate that he is now willing and capable of engaging in the rehabilitative process by complying with the probation conditions that were originally imposed

---

[6]This court sua sponte takes judicial notice of this review department order. The court further sua sponte notices that, as of the date this order is filed, respondent remains on actual suspension for failing to pass the MPRE.

on him under the Supreme Court's January 2005 order (and to which he stipulated) by imposing virtually identical conditions on him prospectively for three years.[7] (*In the Matter of Meyer, supra*, 3 Cal. State Bar Ct. Rptr. at p. 705.) To conclude otherwise would be inconsistent with the discipline imposed on respondent in the Supreme Court's January 2005 order and the foregoing authorities.

The State Bar has not addressed the issue of whether respondent should be ordered to take and pass the MPRE in the present proceeding. However, as noted above, respondent is currently on actual suspension because he failed to take and pass the MPRE in accordance with the Supreme Court's January 2005 order. Furthermore, even if the Supreme Court adopts this court's recommendation and revokes his probation in this proceeding, respondent will remain on actual suspension until he takes and passes the MPRE as previously ordered (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891 fn. 8). Accordingly, the court will not recommend that respondent be ordered to take and pass the MPRE again.

VI. Order Granting Motion & Discipline Recommendation

The motion to revoke probation filed by the State Bar's Office of Probation on March 17, 2006, 2006, is GRANTED. The court RECOMMENDS that the probation imposed on Michael Edward Consiglio in the Supreme Court's January 13, 2005, order in *Michael Edward Consiglio on Discipline*, case number S128821 (State Bar Court case number 04-H-11689) be revoked; that the stay of execution of the one-year suspension previously imposed on Consiglio in that case be lifted; that Consiglio be actually suspended from the practice of law in the State of California for one year and until he provides proof satisfactory to the State Bar Court of his rehabilitation,

[7]It is extremely important that petitioner appreciate his duty to comply with these new probation conditions. If the Supreme Court adopts the discipline recommendation in the present proceeding, petitioner will have four prior records of discipline. And any further misconduct, even a minor probation violation, could be cause for disbarment under standard 1.7(b), which, as noted *ante*, provides for disbarment in any proceeding in which the attorney has two prior records of discipline unless the most compelling mitigating circumstances clearly predominate.

present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct; that Consiglio be given credit, towards the period of actual suspension, for the period of his involuntarily inactive enrollment under this court's order of inactive enrollment *post* (Bus. & Prof. Code, § 6007, subd. (3)); and that Consiglio be placed on a new period of probation for three years on the following conditions.

1. Consiglio is to comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the conditions of this probation.

2. Subject to the assertion of any applicable privilege, Consiglio is to fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to Consiglio, whether orally or in writing, relating to whether Consiglio is complying or has complied with the conditions of this probation.

3. Consiglio is to report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which Consiglio is on probation ("reporting dates"). However, if Consiglio's probation begins less than 30 days before a reporting date, Consiglio may submit the first report no later than the second reporting date after the beginning of Consiglio's probation. In each report, Consiglio is to state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether Consiglio has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation since the beginning of this probation; and

(b) in each subsequent report, whether Consiglio has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation during the period.

During the last 20 days of this probation, Consiglio is to submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, Consiglio is to certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

4. Consiglio is to maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, if no office is maintained, an address to be used for State Bar purposes (Bus. & Prof. Code, § 6002.1, subd. (a)(1)). In addition, Consiglio is to maintain, with the State Bar's Office of Probation, his current home address and telephone number (Bus. & Prof. Code, § 6002.1, subd. (a)(5)). Consiglio's home address and telephone number is not be made available to the general public.

(Bus. & Prof. Code, § 6002.1, subd. (d).) Consiglio is to notify the Membership Records Office and the Office of Probation of a change in any of this information no later than 10 days after the change.

5. Within one year after the effective date of the Supreme Court order in this matter, Consiglio is to: (1) attend and satisfactorily complete the State Bar's Ethics School; and (2) provide satisfactory proof of completion of the school to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from Consiglio's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Consiglio is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

6. Consiglio's probation will commence on the effective date of the Supreme Court order in this matter.

VII. RULE 955 & COSTS

The court further recommends that Consiglio be ordered to comply with California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, 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 of Inactive Enrollment

The requirements for inactive enrollment under Business and Professions Code section 6007, subdivision (d)(1) have been met – Consiglio is subject to a stayed suspension, this court has found that he violated the conditions of his probation, and this court is recommending that he be actually suspended from the practice of law because of those violations. Therefore, it is ORDERED that Michael Edward Consiglio be involuntarily enrolled as an inactive member of the State Bar of California under section 6007, subdivision (d)(1), effective upon the service of this order (Rules Proc. of State Bar, rule 564). Unless otherwise ordered by the State Bar Court

or the Supreme Court, Consiglio's involuntary inactive enrollment under this order will terminate, without the necessity of further court order, on the earlier of the effective date of the Supreme Court order in this matter or one year after his inactive enrollment under this order. (See Bus. & Prof. Code, § 6007, subd. (d)(2); Rules Proc. of State Bar, rule 564.)

Dated: May ______, 2006.

ROBERT M. TALCOTT
Judge of the State Bar Court