PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

FILED JULY 1, 2010

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	No**. 08-H-10952**
	)	
KRIS PATRICK THOMPSON,	)	
	)	**OPINION ON REVIEW**
A Member of the State Bar.	)	
	)	

I. SUMMARY

Respondent Kris Patrick Thompson was convicted of misdemeanor driving under the influence of drugs or alcohol (DUI) in 2005. The conviction was referred to the hearing department for disciplinary proceedings. In 2007, Thompson stipulated to a public reproval with several conditions, but failed to comply with them. As a result, the Office of the Chief Trial Counsel (State Bar) filed a Notice of Disciplinary Charges (NDC) alleging that Thompson violated rule 1-110,[1] which requires that attorneys comply with reproval conditions. Thompson stipulated to culpability, and the trial proceeded on the issue of discipline. The hearing judge recommended that Thompson be actually suspended from the practice of law for six months, subject to a two-year stayed suspension and three years' probation.

Thompson seeks review, asserting that he is not culpable because the NDC failed to correctly charge the reproval conditions and that, even if found culpable, the actual suspension should not exceed 60 days. While the State Bar asserts that the minimum actual suspension

[1]Unless otherwise noted, all further references to "rule(s)" are to the Rules of Professional Conduct of the State Bar.

should be six months, it urges a two-year actual suspension and until Thompson demonstrates his fitness to practice according to a standard 1.4(c)(ii) proceeding.[2]

Upon our independent review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207), we agree with the hearing judge that Thompson is culpable, and that a stayed suspension and probation should be recommended. However, we find that a six-month actual suspension is too severe. Thompson's DUI conviction does not relate to the practice of law or any clients, his mitigation outweighs the aggravation and the guiding case law suggests a shorter period of actual suspension for violations of reproval conditions. We therefore recommend a 90-day actual suspension, a two-year stayed suspension and three years' probation.

II. PROCEDURAL AND FACTUAL BACKGROUND

Thompson was admitted to the bar in 1991 and did well in a litigation practice. He testified that, beginning in 2004, he tried a series of complex cases that were "out of [his] league," but resolved them successfully.

Despite these professional achievements, Thompson had problems with alcohol. In 2005, he entered a no contest plea to one count of misdemeanor DUI, and admitted he had a prior DUI conviction in 2000. On July 3, 2007, as a result of his 2005 conviction, Thompson stipulated to a public reproval with both "standard" and "special" conditions that he was required to fulfill for three years. The stipulation recited that the misconduct did not involve moral turpitude, no aggravating circumstances existed and his lack of prior discipline was a mitigating factor. The court approved the stipulation and imposed the agreed-upon discipline, which became effective August 2, 2008 (Reproval Order).

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[2]Unless otherwise noted, all further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

The "standard" conditions of the Reproval Order provided that Thompson must:

- Comply with the provisions of the State Bar Act and the Rules of Professional Conduct
- Report any change of contact information to the State Bar Office of Probation (Probation)
- Within 30 days from the effective date of discipline, contact Probation and schedule a meeting with the assigned probation deputy to discuss the conditions of probation
- Submit written quarterly reports to Probation confirming compliance with the State Bar Act, the Rules of Professional Conduct and all conditions of the reproval
- Answer truthfully Probation's inquiries about his case
- Within one year of the effective date of the discipline, provide proof to Probation of attendance at Ethics School and passage of the test
- Comply with all conditions of probation in the underlying criminal matter and so declare in his quarterly reports

The "special" conditions mandated that Thompson seek treatment for his problems. The stipulation Thompson signed required that he undergo a substance abuse evaluation by a member of the American Society of Substance Abuse Medicine (ASSAM) within 60 days of the effective date of the stipulation. However, the hearing judge's order approving the stipulation deleted these conditions, and provided new ones that called for a more general mental and physical examination regarding mental health issues. The new order broadened the type of qualified professional authorized to perform the mental health assessment, and gave Thompson more time to comply. Instead of requiring an ASSAM examiner, any qualified practitioner approved by Probation could conduct the evaluation. And the compliance date was extended to 60 days from

the date the Supreme Court imposed discipline rather than the earlier 60 days from the date of the stipulation.[3]

On August 2, 2007, the Reproval Order with the new conditions was filed and served on Thompson's attorney of record. The next day, a deputy from Probation sent Thompson a letter reminding him about the Reproval Order and included a copy of it that stated all of the conditions, including the new ones. Thompson stipulated that he received this letter. However, the letter mistakenly referenced the original requirement for an ASSAM evaluation.

Thompson failed to undergo any substance abuse or mental health evaluation, contact Probation or submit quarterly reports, even though he received written reminders from Probation. After six months, in March 2008, the Probation deputy notified Thompson by mail that he had not timely complied with the reproval conditions. Again, the deputy mistakenly referenced the superseded ASSAM requirement in his letter. Thompson did not respond to the letters or comply with the conditions.

Ten months after the Reproval Order was issued, on June 3, 2008, the State Bar filed an NDC alleging that Thompson willfully failed to comply with the Reproval Order conditions in violation of rule 1-110. In the NDC, the State Bar also mistakenly referred to the ASSAM evaluation requirement. But the NDC's concluding paragraph alleged in general that Thompson failed "to comply with the terms and conditions of the Reproval Order."

The case proceeded to trial on November 18, 2008. During pretrial matters, Thompson repeatedly failed to file conference statements or appear at scheduled hearings due to his superior

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[3]Thompson contends that this provision is erroneous because a Supreme Court order is not required for a public reproval. He argues that this error made it "impossible" for him to comply with the conditions. We agree that a Supreme Court order is unnecessary to effectuate reprovals (Cal. Rules of Court, rule 9.19), but we reject Thompson's argument since he should have sought clarification from Probation if he genuinely believed this language prevented him from complying. In fact, the Probation deputy provided Thompson with a contact phone number if he had any questions about his reproval conditions.

court trial schedule. As a result, the hearing judge sanctioned Thompson under the Rules of Procedure of the State Bar of California, rule 211(f),[4] by prohibiting evidence on culpability issues at trial other than Thompson's own testimony.

On the day of trial, Thompson stipulated to culpability. In his written stipulation, he admitted that he failed to notify Probation about timely completing an ASSAM "or other comparable evaluation." In a further oral stipulation, he mentioned the new special conditions and admitted that he had failed to seek any substance abuse or mental health evaluation. He told the hearing judge: "I did not get an examination from any practitioner as is described in this paragraph [in the new special conditions] as I read it."[5] After the culpability stipulation was entered, the trial was continued for several months. But before the hearing concluded, the judge admonished Thompson to immediately begin complying with the conditions, warning him that further noncompliance could be considered an aggravating circumstance.[6] Thompson replied, "Yes sir."

Despite this warning, Thompson had still not complied with the reproval conditions when the trial resumed six months later on May 13, 2009. The hearing judge asked him why he had failed to comply and Thompson testified that it was a combination of three things. First, he admitted he had been inattentive to the conditions. Second, he described himself as having a "natural psyche to focus on [his] work and put personal life to the rear." And third, he explained that his law practice had recently involved very complicated civil cases that took his full time

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[4]This section provides that the hearing judge may order evidentiary exclusion sanctions for failure to file a pretrial statement.

[5]Thompson told the hearing judge that he attended a few meetings with the Lawyer Assistance Program but was not able to continue because the meeting locations and times conflicted with his trial schedule.

[6]The hearing judge warned Thompson: "Comply with probation starting now. You don't have a trial that – you have the trial behind you. Make sure you're in compliance with all of the terms of you – I would suggest you go back and look at it."

and attention. In the end, however, Thompson candidly admitted that the primary reason was "inattention."

III. CULPABILITY

Count 1 – Thompson Failed to Comply with Conditions of Reproval (Rule 1-110)

We adopt the hearing judge's finding that Thompson violated rule 1-110, which requires members of the State Bar to comply with conditions of a reproval. By his stipulation and testimony, Thompson admitted that he did not comply with the conditions, which became effective on August 2, 2007. When a reproval becomes final, the conditions attached to it are presumed valid. (*In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929, 933.)

We find that Thompson was aware of all the reproval conditions, including the new special conditions added by the hearing judge. Thompson received a copy from Probation and referenced them in his trial stipulations. His written stipulation states that he did not obtain an ASSAM or "other comparable examination," which logically refers to the new condition permitting him to seek a professional mental health assessment other than through ASSAM. And in his oral stipulation before the hearing judge, he cited the new conditions directly in admitting that he had never obtained *any* professional evaluation. This evidence clearly and convincingly establishes Thompson's culpability.

Thompson argues that he was denied due process because the NDC erroneously charged him with some of the obsolete original conditions, specifically the ASSAM evaluation requirement. He contends that he cannot be found culpable of violating this condition since it was not part of the Reproval Order. We reject his argument as meritless. The NDC not only charged a violation of the ASSAM evaluation requirement but also generally alleged that Thompson failed "to comply with terms and conditions of the Reproval Order." We conclude

that Thompson was not denied due process since the NDC charged him with violating any and all of the Reproval Order's conditions.

IV. FACTORS IN AGGRAVATION AND MITIGATION

The offering party bears the burden of proof for aggravating and mitigating circumstances. Thompson must establish mitigation by clear and convincing evidence (Std. 1.2(e)), while the State Bar has the same burden to prove aggravating circumstances. (Std. 1.2(b).)

A. TWO FACTORS IN AGGRAVATION

The hearing judge found two factors in aggravation, and we agree. First, Thompson committed multiple acts of misconduct (std. 1.2(b)(ii)), as evidenced by his repeated failure to comply with the conditions of the Reproval Order, despite many opportunities and reminders to do so. And second, Thompson has one prior record of discipline (std. 1.2(b)(i)), which is the 2007 public reproval for his DUI conviction.

The State Bar requests that we find additional aggravating circumstances, including Thompson's failure to submit quarterly reports, his temporary non-compliance with criminal probation conditions, and his failure to participate in the current proceedings. The hearing judge did not find these additional factors in aggravation and we agree. The incidents and/or circumstances cited by the State Bar are either duplicative of the charged violation or were not proved by clear and convincing evidence.

B. TWO FACTORS IN MITIGATION

The hearing judge found two factors in mitigation – cooperation and good character. We agree.

Thompson is entitled to moderate weight in mitigation for his cooperation. (Std. 1.2 (e)(v).) He cooperated with the State Bar by entering into a stipulation of facts that proved the

single charged violation. (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521 [stipulation to facts and culpability is mitigating].) Although these facts may not have been difficult to prove, the stipulation greatly assisted the State Bar in establishing culpability. The hearing judge assigned only minimal mitigation to this factor because Thompson had failed to appear for certain hearings and, as a sanction, was limited to presenting his own testimony in the culpability phase of the trial. Regardless, Thompson's cooperation fully established culpability and we find that it warrants somewhat greater mitigation weight.

Second, Thompson presented un-rebutted evidence of good character through his extensive military service, which was very impressive. (Std. 1.2(e)(vi).) He served 22 years in the U.S. Army, holding various leadership positions. For four years in the early 1980s, he commanded between 166 and 250 troops that patrolled the Iron Curtain. He also volunteered for service in Desert Storm and went to Kuwait and Iraq as a Readiness Officer where he was in charge of more than 2,500 tanks. After he retired from the military, Thompson participated in the California National Guard, serving in his final post as commander of a National Guard school with over 1,000 students.

The hearing judge assessed mitigating credit, expressly noting that he was "impressed with his outstanding record of service to the country," even though it was presented exclusively through Thompson's own testimony. This evidence is significant and we consider it a mitigating factor demonstrating good character, despite a lack of other references from the community, as called for by standard 1.2(e)(vi). (See *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158, fn. 22 [respondent's testimony about community service may

be considered as "some" evidence in mitigation despite requirements of std. 1.2(e)(vi)].)[7] Overall, we conclude that the mitigation outweighs the aggravation.

V. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession, to preserve public confidence in the profession and to maintain high standards for attorneys. (Std. 1.3.) No fixed formula exists for determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

Our discipline analysis begins with the standards. While we recognize that they are not binding on us in every case, the Supreme Court has instructed us to follow them "whenever possible" (*In re Young, supra,* 49 Cal.3d at p. 267, fn. 11), and that they should be given great weight in order to promote " ' "the consistent and uniform application of disciplinary measures." ' [Citation.]" (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Standard 2.9 applies in this matter as it broadly calls for "suspension" for willful violations of rule 1-100, but it does not provide a timeframe for the length of any actual suspension. Therefore, we look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311).

Considerable case precedent addresses *probation* violations but only limited case law relates to *reproval* violations. In recommending a six-month actual suspension, the hearing

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[7]We agree with the hearing judge that Thompson is also entitled to "some" mitigation credit for good character for handling a single pro bono case. (See *Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [community service is mitigating factor entitled to considerable weight].) However, he is not entitled to any mitigation credit for only briefly participating in the Lawyer Assistance Program.

judge did not rely on any reproval violation cases. Instead, he analogized Thompson's misconduct to a probation violation, but did not cite any case law for guidance. We find that cases specific to reproval violations are most applicable here. And in these cases, discipline ranges from a further reproval to 90 days' actual suspension, depending on mitigation, aggravation, and level of cooperation in the proceedings.[8] In fact, reproval cases have called for no more than 90 days' actual suspension even where mitigation was absent or nominal and where failure to cooperate resulted in a default.

We recommend that Thompson be actually suspended for 90 days. We acknowledge that the hearing judge recommended a six-month actual suspension because he felt that Thompson's failure to comply made him a poor risk for future probation. He was also concerned that the substance abuse treatment requirement was related to the underlying misconduct (DUI). Like the hearing judge, we do not condone Thompson's continual failure to comply with his reproval conditions because his trial schedule did not afford him the time to attend to them. Indeed, the requirements of State Bar discipline must be given priority over a busy law practice. But we consider it very significant that Thompson's DUI misconduct did not involve the practice of law or relate to any of his clients. And he was very candid with the court, accepted full responsibility for his failure to comply and has no disciplinary matters in 16 years of practice, except the underlying reproval for his DUI. Moreover, in the cases where no more than 90 days' actual

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[8](*Conroy v. State Bar* (1990) 51 Cal.3d 799 [60-day actual suspension in default proceeding for failing to pass MPRE with one factor in mitigation and three in aggravation including prior record of discipline, failure to participate and lack of remorse]; *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813 [further reproval for failing to pass MPRE with no mitigation and one aggravating factor of prior record of discipline] *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 [90-day actual suspension in default proceeding for failing to submit quarterly reports and to complete CLE hours with no mitigation and four aggravating factors including two prior discipline records, multiple acts of wrongdoing, indifference, and failure to cooperate].)

suspension was imposed, the attorneys presented little or no mitigation. In contrast, Thompson's impressive mitigation evidence outweighed the aggravation.

We intend our recommended discipline to provide an opportunity for Thompson to reflect on the seriousness of disciplinary conditions and to conform his conduct to proper ethical standards. He faces serious future consequences if he fails to fully and timely comply with any further disciplinary orders. Under our recommendation, Thompson would be subject to a Supreme Court order where a violation could result in progressive discipline (std. 1.7), and even disbarment (Cal. Rules of Court, rule 9.20(d)).

In the final analysis, we determine disciplinary sanctions after considering all factors in the case. (*Codiga v. State Bar* (1978) 20 Cal.3d 788, 796.) After evaluating those factors and the guiding case law, we recommend a 90-day actual suspension, a two-year stayed suspension and three years of probation in order to meet the goals of discipline without punishing the attorney.

VI. RECOMMENDATION

We recommend that Kris Patrick Thompson be suspended from the practice of law in the State of California for two years, that execution of the suspension be stayed, and that he be placed on probation for three years, on the following conditions:

1. He must be actually suspended from the practice of law for the first 90 days of the period of his probation.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office of the State Bar and the State Bar's Office of Probation.

4. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

6. Within 60 days of the effective date of the discipline herein, he must complete a substance abuse evaluation by a member of the American Society of Substance Abuse Medicine (ASSAM). If the ASSAM evaluation indicates a need for treatment, Thompson must comply with the terms of ASSAM's recommended treatment. His compliance will be determined by ASSAM standards. Thompson must inform the Office of Probation when he has completed the ASSAM evaluation and must provide to the Office of Probation a waiver that allows the Office of Probation to obtain a copy of the ASSAM evaluation and access to his treatment records, if any. Revocation of this waiver will be considered a violation of these probation conditions. Any medical records obtained by the Office of Probation are confidential and no information concerning them or their contents will be given to anyone except members of the Office of Probation, the Office of the Chief Trial Counsel and the State Bar Court who are directly involved with maintaining, enforcing or adjudicating matters relating to this condition.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

8. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Kris Patrick Thompson be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same

period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

RULE 9.20

We further recommend that Kris Patrick Thompson be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

PURCELL, J.

We concur:

REMKE, P. J.

EPSTEIN, J.