

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of) Case No.: **08-O-11094-PEM**
)
JOHN W. EVANS,) **DECISION**
)
)
Member No. 92161,)
)
)
A Member of the State Bar.)

I. Introduction

In this default proceeding, respondent **John W. Evans** is found culpable, by clear and convincing evidence, of failing to comply with conditions of his probation. The court recommends, among other things, that respondent be suspended from the practice of law for three years, that execution of the suspension be stayed, and that respondent be actually suspended from the practice of law for two years and until the State Bar Court grants a motion to terminate respondent’s actual suspension. (Rules Proc. of State Bar, rule 205.)

II. Pertinent Procedural History

On May 15, 2008, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) properly served a Notice of Disciplinary Charges (NDC) on respondent by certified mail, return receipt requested, at his official membership records address (official address) under

Business and Professions Code section 6002.1, subdivision (a).¹ The correspondence was returned bearing the postal stamp, “Unclaimed.”

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

On the State Bar’s motion, respondent’s default was entered on August 8, 2008. Respondent was enrolled as an inactive member under section 6007, subdivision (e) on August 11, 2008. An order of entry of default was sent to respondent’s official address by certified mail. On September 25, 2008, the mailing was returned to the State Bar Court bearing the label “UNABLE TO FORWARD.”

Respondent did not participate in the disciplinary proceedings. This matter was submitted for decision on September 5, 2008, following the filing of the State Bar’s brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

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

A. Jurisdiction

Respondent was admitted to the practice of law in California on May 30, 1980, and has been a member of the State Bar of California at all times since that date.

B. Failure to Comply with Probation Conditions

On December 16, 2005, the California Supreme Court ordered respondent suspended from the practice of law for one year, that execution of the suspension be stayed, and that he be placed on probation for two years subject to the conditions of probation, including an actual

¹ References to section (§) are to the California Business and Professions Code, unless otherwise noted.

suspension of 30 days, as recommended by the Hearing Department of the State Bar Court in its order approving stipulation, filed July 22, 2005, as modified by its order filed August 18, 2005 (Supreme Court case No. S137836, State Bar Court case No. 03-H-04534; 03-O-05101 (Cons.)). The order became effective January 15, 2006, and was properly served on respondent in the manner prescribed by California Rule of Court 8.532(a), at respondent's official address in accordance with section 6002.1.²

Among other probation conditions, respondent was required to:

1. Contact the Office of Probation within 30 days from the effective date of discipline and schedule a meeting with respondent's assigned probation deputy, and upon direction of the Office of Probation meet with the probation deputy either in-person or by telephone;
2. Submit quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation, stating under penalty of perjury whether he had complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter; and
3. Provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar Ethics School and passage of the test given at the end of the session within one year of the effective date of discipline.

Respondent did not comply with the condition requiring him to contact the Office of Probation within 30 days of the effective date of his discipline and schedule a meeting with his assigned probation deputy. Respondent participated in a July 20, 2007 meeting that was not

² Additionally, on January 4 and May 23, 2006, the Office of Probation mailed letters to respondent, reminding him of the terms and conditions of his probation and providing information as to how respondent could comply with those conditions.

arranged based on a contact made by respondent, but that was initiated by the Office of Probation.

Respondent did not timely file the quarterly reports that were due no later than April 10, July 10, October 10, 2006, and January 10, April 10, and July 10, 2007. Respondent did not provide the afore-listed quarterly reports to the Office of Probation until July 25, 2007. The reports submitted on July 25, 2007, were not in compliance with the terms of probation conditions in that they did not state whether respondent had complied with the State Bar Act and the Rules of Professional Conduct during the calendar quarters to which the reports pertained. As of the date of the filing of the NDC, respondent had failed to file corrected April 10, July 10, October 10, 2006, and January 10, April 10, and July 10, 2007 quarterly reports. As of the date of the filing of the NDC, respondent had not filed the reports that were due no later than October 10, 2007 and January 10 and January 15, 2008.

As alleged in the NDC, respondent “failed timely to attend Ethics School, failed timely to pass the test given at the end of an Ethics School session, and failed timely to provide proof of attendance to the Office of Probation. [As of the date of the filing of the NDC], respondent [had] failed to do any of these things.”

Count 1: Failure to Comply With Probation Conditions (Bus. & Prof. Code, § 6068, Subd. (k))

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

By failing to contact the Office of Probation within 30 days from the effective date of discipline to schedule a meeting with his assigned probation deputy, by failing to timely file the quarterly reports that were due no later than April 10, July 10, October 10, 2006, and January 10, April 10 and July 10, 2007, by failing to state in the reports, which he belatedly filed on July 25,

2007, whether he had complied with the State Bar Act and the Rules of Professional Conduct during the calendar quarters to which the reports pertained, by failing to file the quarterly reports that were due no later than October 10, 2007, January 10, 2008, and January 15, 2008, and by failing to timely attend Ethics School, timely pass the test given at the end of an Ethics School session, and timely provide proof of attendance to the Office of Probation, respondent failed to comply with conditions attached to his probation under S137836, in willful violation of section 6068, subdivision (k).

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating evidence was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)³

B. Aggravation

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

Respondent has two prior records of discipline. (Std. 1.2(b)(i).) In his first prior record, filed on August 21, 2002, respondent was privately reprovved with public disclosure for trust account violations (State Bar Court case No. 00-O-13342).

In the underlying matter, respondent stipulated to a one-year stayed suspension, two-year probation and 30-day actual suspension for his misconduct in a consolidated matter (Supreme Court case No. S137836, State Bar Court case No. 03-H-04534; 03-O-05101 (Cons.)). In case No. 03-H-04534 respondent failed to comply with the conditions of his private reprovval; in case No. 03-O-05101, involving one client matter, respondent failed to communicate, failed to

³ All further references to standards are to this source.

competently perform legal services, failed to return the client file to the client's new attorney, and failed to cooperate in a State Bar investigation.

Respondent's multiple acts of wrongdoing are an aggravating factor. (Std. 1.2(b)(ii).) He violated several probation conditions.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct by failing to comply with the probation conditions even after the NDC in the instant proceeding was filed. (Std. 1.2(b)(v).) He has yet to file the quarterly reports that were due no later than October 10, 2007 and January 10 and January 15, 2008.

Respondent's failure to participate in this disciplinary matter before the entry of his default is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Respondent is found culpable of violating his probation conditions. The standards provide a broad range of sanctions ranging from suspension to disbarment, depending upon the gravity of the offenses and the harm to the victim. (Stds. 1.6, 1.7, and 2.6.)

Standard 1.7(b) provides that if an attorney has a record of two prior impositions of discipline, the degree of discipline in the current proceeding must be disbarment unless the most compelling mitigating circumstances clearly predominate.

The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-

251.) “[E]ach case must be resolved on its own particular facts and not by application of rigid standards.” (*Id.* at p. 251.) The court will look to applicable case law for guidance. Nonetheless, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The extent of the discipline to recommend in this matter is dependent, in part, on the nature of the probation violation and its relationship to respondent’s prior misconduct. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.)

The State Bar urges disbarment, given standard 1.7(b), respondent’s two prior records of discipline and his inability to adhere to the terms of the probation imposed by the Supreme Court.

Although standard 1.7(b) proposes disbarment, there is no supporting case law to justify the recommended discipline under the particular facts in this proceeding. While respondent has demonstrated unwillingness or inability to comply with his professional obligations and duties, his failure to comply with the probation conditions in this instant matter does not warrant disbarment.

There is one comparable case, cited by the State Bar, in which the attorney was disbarred in an original disciplinary proceeding for his probation violations and other misconduct. But it is clearly distinguishable from the instant matter in that the attorney had three prior records of discipline and a history of serious professional misconduct. In *In the Matter of Rose* (Review Dept. 1997) 3 Cal.State Bar Ct. Rptr. 646, during 18 of his 26 years of practice, the attorney committed professional misconduct or was actually suspended as a result of that misconduct, including client abandonments, probation violations and failure to file timely the affidavit required by the Rules of Court, rule 955 (since renumbered as rule 9.20). As a result, the Review

Department found that the attorney had ample opportunity to conform his conduct to the ethical requirements of the profession, but repeatedly failed or refused to do so in his 26 years of practice and that, therefore, disbarment was appropriate.

The State Bar also cited *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal.State Bar Ct. Rptr. 480 in which the attorney, who had engaged in “very serious” misconduct, was disbarred. He willfully failed to comply with rule 955 of the California Rules of Court. In three matters the attorney misappropriated clients’ cost advances and was grossly negligent in supervising trust funds. In four matters he engaged in the unauthorized practice of law; in two matters he threatened criminal or administrative charges to gain a civil advantage; in one matter he misled a superior court judge; in another matter he failed to perform legal services competently; and in two matters he failed to participate in a State Bar investigation. Finally, in a probation revocation matter, the attorney violated his probation in two respects. The Review Department noted that the attorney’s willful violation of rule 955, standing alone, would have warranted disbarment.

The misconduct of the attorneys in both *Rose* and *Rodriguez* was far more extensive and serious than that of the respondent in the instant matter.

Other cases involved revocation of probation and therefore, the recommended actual suspension may not exceed the entire period of stayed suspension. (Rules Proc. of State Bar, rule 562.)

In *In the Matter of John Henry Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81, a probation revocation matter, an attorney violated his disciplinary probation by failing to pay restitution and by filing a tardy, incomplete quarterly probation report. He had a record of prior discipline. The attorney was actually suspended for one year and until he completes restitution.

In the Matter of Charles Clinton Hunter (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, three consolidated matters involving a probation revocation matter and two original disciplinary matters, an attorney was actually suspended for three years for violating his probation conditions, but disbarred for the two original disciplinary matters. He also had one prior record of discipline and defaulted in the consolidated matters.

Therefore, in view of the case law, the aggravating evidence, the absence of mitigating circumstances and the seriousness of respondent's probation violations, although disbarment is not warranted at this time, an actual suspension of two years would be adequate and appropriate to protect the public and to preserve public confidence in the profession.

VI. Recommended Discipline

Accordingly, the court hereby recommends that respondent **John W. Evans** be suspended from the practice of law for three years, that said suspension be stayed, and that respondent be actually suspended from the practice of law for two years and until he files and the State Bar Court grants a motion to terminate his actual suspension (Rules Proc. of State Bar, rule 205)

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

It is also recommended that respondent remain suspended until he has shown proof satisfactory to the State Bar Court of his rehabilitation fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii). (Rules Proc. of State Bar, rule 205.)

It is further recommended that respondent take and pass the Multistate Professional Responsibility Exam during the period of his actual suspension. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, 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. Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.⁴

VII. Costs

It is further 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: November _____, 2008

PAT E. McELROY
Judge of the State Bar Court

⁴ Respondent is required to file a rule 9.20(c) affidavit, even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)