

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

In the Matter of ) Case No.: **08-O-12311-RAP**  
)  
**EARL WAYNE HUSTED, III,** ) **DECISION**  
)  
**Member No. 99019** )  
)  
A Member of the State Bar. )

**I. INTRODUCTION**

In this contested matter, respondent **EARL WAYNE HUSTED, III**, is charged with two counts of misconduct, involving non-compliance with the terms of his probation, as ordered on August 26, 2004, by the California Supreme Court in Supreme Court Case No. S125496.

The court finds, by clear and convincing evidence, that respondent is culpable of the charged misconduct, as noted *post*. In view of respondent’s misconduct in this proceeding, and after considering the aggravating and mitigating circumstances, the court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of said suspension be stayed, and that he be placed on probation for two years with conditions, including a 60-day actual suspension.

**II. PROCEDURAL HISTORY**

The Office of Chief Trial Counsel of the State Bar of California (“State Bar”) initiated this proceeding by filing a Notice of Disciplinary Charges (“NDC”) on July 16, 2008.

Respondent filed his response to the NDC on September 15, 2008.

Trial was held on January 5, 2009. The State Bar was represented by Deputy Trial

Counsel Ashod Moordadian. Respondent represented himself at trial. Respondent, Office of Probation Supervising Attorney Terrie Goldade, former Probation Deputy Cheryl Chisholm, and Russell Riley testified at trial.

Following receipt of closing briefs, the court took this matter under submission on January 26, 2009.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The following findings of fact are based on the evidence and testimony introduced at this proceeding.

#### **A. Jurisdiction**

Respondent was admitted to the practice of law in California on December 1, 1981, and has been a member of the State Bar of California since that time.

#### **B. Credibility Determinations**

With respect to the credibility of the witnesses, the court carefully weighed and considered their demeanor while testifying; the manner in which they testified; their personal interest or lack thereof in the outcome of this proceeding; and their capacity to accurately perceive, recollect, and communicate the matters on which they testified. (See, e.g. Evid. Code section 780 [lists of factors to consider in determining credibility].) Except as otherwise noted, the court finds the testimony of the witnesses to be credible.

#### **C. Probation Conditions in Supreme Court Case No. S125496**

On March 16, 2004, respondent signed a stipulation as to facts and disposition in State Bar Court Case Nos. 02-O-10856, 02-O-13482, 02-O-13657, 02-O-14292, 02-O-14542, 03-O-05216, and 04-O-10344. The deputy trial counsel representing the State Bar signed the stipulation on March 16, 2004. On March 24, 2004, the Hearing Department of the State Bar Court filed an order approving the stipulation and recommending that the California Supreme

Court impose upon respondent stayed suspension along with conditions of probation as set forth in the order approving stipulation. On March 24, 2004, the order approving the stipulation was properly served on respondent. Respondent received this order.

On April 27, 2004, the Hearing Department of the State Bar Court filed a modification order to its March 24, 2004 order approving the stipulation. The modification order was served on respondent on April 27, 2004. Respondent received this order.

On August 26, 2004, in Supreme Court Case No. S125496, the California Supreme Court ordered that respondent be suspended from the practice of law for 16 months, that execution of that suspension be stayed, and that he be placed on probation for two years subject to certain conditions, as recommended by the Hearing Department of the State Bar Court in its March 24, 2004 order approving stipulation, as modified by its order filed April 27, 2004. The Supreme Court Order (“SCO”) became effective on September 25, 2004.

Among other probation conditions, respondent was required to:

1. Submit to the Office of Probation written quarterly reports each January 10, April 10, July 10, and October 10 of the probation period (“quarterly reports”);
2. Submit a final report, containing the same information reflected in the quarterly reports, no earlier than 20 days before the last day of the period of probation and no later than the last day of probation (September 25, 2006); and
3. Successfully complete six hours of participatory continuing legal education (“MCLE”) courses in attorney/client relations above those required for his license and provide proof of completion to the State Bar’s Office of Probation within one year of the effective date of the Supreme Court order imposing discipline in this matter.

Notice of the SCO was properly served upon respondent. Respondent received the SCO.

#### **D. State Bar Records Regarding Respondent's Lack of Compliance**

On September 23, 2004, the Office of Probation sent a letter to respondent reminding him of the terms and conditions of his probation (“the September 23, 2004 letter”). The September 23, 2004 letter, which respondent received, listed, among other things, the compliance due-dates for filing the quarterly reports and completing six hours of MCLE courses in attorney/client relations. The letter also 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 or the Office of Probation. Among the documents enclosed with the September 23, 2004 letter were copies of the portion of the Order Approving Stipulation that set forth the conditions of respondent's probation, a quarterly report instruction sheet, and a quarterly report form.

Nevertheless, State Bar records show that respondent did not timely submit his quarterly reports, as follows: the January 10, 2005 report was filed on February 24, 2005; the April 10, 2005 report was filed on May 6, 2005; the July 10, 2005 report was filed on July 27, 2005; the October 10, 2005 report was filed on October 31, 2005; the January 10, 2006 report was filed on January 17, 2006; the April 10, 2006 report was filed on April 12, 2006; and the July 10, 2006 report was filed on August 22, 2006.

In addition, State Bar records show that respondent failed to file a final report and failed to provide proof of completion of six hours of participatory continuing legal education courses in attorney/client relations.

#### **E. Respondent's Efforts to Comply with Probation Conditions**

Respondent concedes that he was less than timely on all too many occasions in filing his quarterly reports. Respondent, in part, blames his failure to fully comply with the conditions of his probation on his child's health problems and the effect they had on his family. While the court agrees that this constitutes a factor in mitigation, it does not excuse respondent's

misconduct.

Respondent provided evidence establishing that he submitted a final report to the Office of Probation on October 2, 2006.<sup>1</sup> The State Bar does not have record of receiving respondent's October 2, 2006 letter and final report. The court finds that respondent is a credible witness and that he submitted his final report to the Office of Probation on October 2, 2006. However, since this report was actually due on September 25, 2006, it was untimely.

Respondent also experienced difficulty finding MCLE courses in attorney/client relations. However, instead of filing a motion with the court to extend the time period for completion of his MCLE requirements or for a modification of his probationary terms, respondent employed "self-help" and resolved to take more MCLE courses than required, but not in the area of attorney/client relations. Since respondent relied on his self-help solution, it is impossible for the court to find that he made a good faith effort to comply with this requirement. Although it has been shown that respondent completed more than six hours of MCLE credits, he failed to provide proof to the Office of Probation that he completed six hours of MCLE in attorney/client relations.

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

Business and Professions Code section 6068,<sup>2</sup> subdivision (k), provides that it is the duty of an attorney to comply with all conditions attached to a disciplinary probation.

The State Bar has shown by clear and convincing evidence that respondent willfully violated section 6068, subdivision (k), by failing to:

1. Timely submit seven quarterly reports (i.e., the January 10, April 10, July 10, and October 10, 2005; and January 10, April 10, and July 10, 2006 reports) as well as

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<sup>1</sup> Respondent signed this final report on September 25, 2006.

<sup>2</sup> All further references to section(s) are to the Business and Professions Code, unless otherwise indicated.

his final report;<sup>3</sup> and

2. Submit proof of completion of six hours of participatory MCLE courses in attorney/client relations.

### ***Count Two - Section 6103***

Section 6103 provides that it is a violation to willfully disobey or violate an order of the court requiring him to do or forbear an act connected with or in the course of an attorney's profession which he ought in good faith to do or forbear.

The State Bar has shown by clear and convincing evidence that respondent willfully violated section 6103 by failing to timely submit quarterly reports, failing to timely submit a final report, and failing to provide proof of completion of six hours of participatory MCLE in attorney/client relations to the Office of Probation. However, because the court relied upon this same misconduct to establish Count One, the court assigns no additional weight to Count Two in determining the appropriate discipline. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 149.)

## **IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES**

The parties bear the burden of proving mitigating and aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2.)<sup>4</sup>

### **A. Mitigation**

Extreme emotional difficulties or physical disabilities can constitute mitigating evidence. (Std. 1.2(e)(iv).) The evidence shows that during the period of his misconduct, respondent was suffering from extreme emotional difficulties relating to the birth of his daughter, who suffered

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<sup>3</sup> As noted *ante*, the State Bar did not establish, by clear and convincing evidence, that respondent failed to file a final report.

<sup>4</sup> All further references to standard(s) are to this source.

from a severe illness. While no expert testimony was introduced to establish a causal connection between respondent's emotional condition and his misconduct, as called for by standard 1.2(e)(iv), the standards are guidelines rather than inflexible mandates. Lay testimony regarding emotional problems or illness has often been considered as mitigation. (See *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, 340-341.) Accordingly, the court finds respondent's emotional condition associated with his daughter's illness to be a mitigating circumstance.

Respondent demonstrated candor and cooperation with the State Bar during these disciplinary proceedings. (Std. 1.2(e)(v).) His candor and cooperation undoubtedly shortened the trial time in this proceeding.

Respondent presented one character witness. Russell Riley ("Riley") testified to respondent's good character and honesty. Riley also testified to respondent's many good acts of community service and as a leader in the Boy Scouts of America. In order to establish good character, however, the standards call for testimony from a wide range of references from the legal and general community. (Std. 1.2(e)(vi).) The testimony of a single character witness is generally not sufficient to qualify as a mitigating circumstance. (See *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 88, and *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 960.) Therefore, the court assigns no weight in mitigation to respondent's character witness testimony.

Respondent argues that the unique nature of his practice is a mitigating factor. For the past ten years, he has worked out of his home in a relaxed practice with no due dates or court appearances. During this time, respondent acknowledges that he became "lazy in the practice of law." The court does not agree that the unique nature of respondent's practice is a mitigating factor. Respondent is responsible for adhering to his ethical responsibilities, regardless of the

status of his practice.

## **B. Aggravation**

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

### **1. Prior Record of Discipline**

Respondent has a prior instance of discipline. (Std. 1.2(b)(i).) In the underlying matter, as referenced *ante*, the State Bar Court ordered a 16-month suspension, stayed, with a two year period of probation. In this prior discipline, respondent stipulated to ten acts of misconduct in nine separate matters. Said misconduct included commingling personal funds in his client trust account (“CTA”), failing to communicate with clients, issuing an NSF check from his CTA, failing to perform legal services with competence, and failing to cooperate in multiple State Bar investigations.

### **2. Multiple Acts of Wrongdoing**

Respondent committed multiple acts of wrongdoing, including failing to timely submit quarterly reports; failing to timely submit a final report; and failing to provide proof of completion of six hours of participatory MCLE in attorney/client relations. (1.2(b)(ii).)

## **V. DISCUSSION**

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve 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.) Disciplinary probation serves the critical function of protecting the public and rehabilitating the attorney. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.)



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

Standard 1.7(a) provides, “[i]f a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one prior imposition of discipline as defined by standard 1.2(f), 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.”

Standard 2.6(a) provides for discipline ranging from suspension to disbarment for violations of section 6103 and subdivisions of section 6068, depending on the gravity of the offense or the harm to the victim.

The standards, however, are 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. [Citation.]” (*Id.* at p. 251.) While the standards are not binding, they are entitled to great weight. (*In re Silvertown* (2005) 36 Cal.4th 81, 92.)

The State Bar urges the court to impose an actual suspension of one year. Respondent, on the other hand, argues that he now realizes the importance of submitting his reports in a timely manner and his discipline should therefore not include any period of actual suspension.

Turning to the applicable case law for guidance, the court finds *In the Matter of Laden* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 678, and *In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, to be instructive.

In *Laden*, the attorney initially received a two year stayed suspension for failing to comply with the probationary conditions of an earlier discipline. The attorney subsequently failed to timely make 19 restitution payments<sup>5</sup> and timely file seven quarterly reports.<sup>6</sup> In aggravation, the attorney committed multiple acts of misconduct and had four prior disciplines. In mitigation, the attorney was suffering financial hardship at the time of the misconduct, he demonstrated a good faith effort to pay restitution, and he provided volunteer work for the community. Further, the Review Department found slight mitigation for the attorney's recognition of wrongdoing and cooperation. The Review Department recommended that he be suspended for 90 days and until full payment of restitution.

*Laden*, like the present case, involves multiple failures to timely comply with probationary conditions. However, unlike the present case, *Laden* involves considerably more aggravation including, most prominently, the attorney's record of four prior disciplines. The present matter therefore warrants a lower level of discipline than that found in *Laden*.

In *Gorman*, the attorney initially received a one year stayed suspension with two years probation for failing to maintain trust funds in his CTA and failing to update his State Bar membership records address. He subsequently failed to timely complete the State Bar Ethics School and timely pay restitution, as required by the terms of his probation. In aggravation, the Review Department found that the attorney's use of the name of his employer, the Yolo County District Attorney's Office, in his pleadings constituted, at the very least, a misrepresentation of that office's official participation in the State Bar proceedings. Further, the repeated need of the State Bar to intervene and seek the attorney's compliance with his probationary conditions was also considered as a factor in aggravation. In mitigation, the attorney cooperated with the State

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<sup>5</sup> Eleven of these untimely payments were considered in aggravation as uncharged misconduct.

<sup>6</sup> Six of these untimely quarterly reports were considered in aggravation as uncharged misconduct.

Bar by entering into a stipulation. The Review Department ultimately recommended that the attorney be suspended for one year, stayed, with two years' probation and a 30-day actual suspension.

*Gorman* involves less egregious misconduct than the present case. The attorney in *Gorman* violated only two conditions of probation and subsequently complied, albeit in an untimely fashion, with both of these conditions. Here, on the other hand, respondent filed eight late quarterly reports (including his final report) and failed to comply with the requirement that he provide the Office of Probation with proof of completion of six units of MCLE credit in the area of attorney/client relations. Therefore, the present matter warrants greater level of discipline than *Gorman*.

After considering the standards and relevant case law and balancing the mitigation and aggravation, the court concludes that an actual suspension of 60 days would be appropriate to protect the public and preserve public confidence in the profession.

## VI. RECOMMENDED DISCIPLINE

Accordingly, it is recommended that respondent **Earl Wayne Husted, III**, be suspended from the practice of law for two years, that execution of the suspension be stayed, and that respondent be placed on probation for two years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first 60 days of probation;
2. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct;
3. Respondent must submit written quarterly reports to the State Bar's Office of Probation ("Office of Probation") on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has

complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than (30) days, the report must be submitted on the next following quarter date; and cover the extended period.

In addition to all the quarterly reports, a final report, containing the same information is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probationary period;

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

5. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California 94105-1639, **and** to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;

6. Unless respondent previously completed the State Bar Ethics School within the prior two years, respondent must, within one year after the effective date of the discipline herein, provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015, and passage of the test given at the end of the session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education (“MCLE”) requirements, and respondent will

not receive MCLE credit for attending Ethics School (Rule 3201, Rules of Procedure of the State Bar.);

7. The period of probation must commence on the effective date of the order of the Supreme Court imposing discipline in this matter; and

8. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for two years will be satisfied and that suspension will be terminated.

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination since he was previously ordered to do so in Supreme Court Case No. S125496.

#### **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: April 14, 2009.

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RICHARD A. PLATEL  
Judge of the State Bar Court