

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No. 08-O-14139-PEM
)	
Gregory Allen Brubaker,)	
)	Decision
Member No. 163916,)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this default disciplinary matter, respondent **Gregory Allen Brubaker** is found culpable, by clear and convincing evidence, of violating his probation conditions as ordered by the California Supreme Court and of committing acts of dishonesty.

In view of respondent's misconduct and the evidence in aggravation, the court recommends, among other things, that respondent be suspended from the practice of law for three years, that execution of suspension be stayed, and that he 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 and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (Rules Proc. of State Bar, rule 205.)

II. Pertinent Procedural History

On November 19, 2008, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) properly served on respondent a two-count Notice of Disciplinary Charges (NDC) at his official membership records address. The NDC was returned as undeliverable.

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 April 2, 2009, and respondent was enrolled as an inactive member on April 5, 2009, under Business and Professions Code section 6007, subdivision (e).¹ An order of entry of default was sent to respondent's official address by certified mail.

Respondent did not participate in the disciplinary proceedings. This matter was submitted for decision on April 27, 2009, 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).)

Respondent was admitted to the practice of law in California on March 29, 1993, and has been a member of the State Bar of California at all times since that date.

A. Supreme Court Case No. S138437

On January 4, 2006, the California Supreme Court ordered respondent suspended from the practice of law for 18 months, that execution of the suspension be stayed, and that he be placed on probation for three years subject to the conditions of probation, including an actual

¹All references to section (§) are to the provisions of the Business and Professions Code, unless otherwise indicated.

suspension of 18 months and until he makes certain restitution, as recommended by the Hearing Department of the State Bar Court in its order approving stipulation (Supreme Court case No. S138437; State Bar Court case Nos. 04-O-10121 and 04-O-14891). The order became effective February 3, 2006, and was duly served on respondent.

Among other probation conditions, respondent was required to:

1. 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 and the Rules of Professional Conduct;
2. Attend and pass the State Bar Ethics School within one year of the effective date of the Supreme Court order; and
3. Report to the Membership Records office and the Office of Probation of any address or telephone number changes within 10 days of the change.

Respondent did not file the quarterly reports due January 10, April 10, July 10, and October 10, 2008.² And, his April 10, 2007 quarterly report was defective for lack of an

² The NDC alleged that respondent's quarterly reports due October 10, 2006, January 10, 2007, and October 10, 2007, were defective because they were signed "too early" by one to three days. Technically and ideally, respondent should have signed them after the last day of the quarter. In other words, he should have signed the January 10, 2007 quarterly report after December 31, 2006, and not on December 30, 2006. But such hyper-technical allegation of violation loses sight of the fundamental purpose for the operation of quarterly-reporting.

Probation is applied primarily as an additional measure to protect the public, courts and the legal profession. The quarterly probation reporting requirement not only allows the State Bar to monitor respondent's compliance with professional standards, but also permits respondent to review and reflect upon his professional conduct, which is an important step towards his rehabilitation. (See *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 298-299; *In the Matter of Wiener* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759.)

Accordingly, respondent's "early" signing of the quarterly reports by a day or two does not render the probation quarterly reports defective – respondent had complied satisfactorily with those three orders under the circumstances.

original signature.

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. Thus, respondent did not attend the State Bar Ethics School by February 2008 or at any time since.

At all times mentioned, respondent maintained the following address with the State Bar Membership Records Office: 523 Green Street, San Francisco, CA 94133. Prior to June 1, 2008, respondent abandoned this address and ceased to receive any mail there. To date, respondent has failed to provide an updated mailing address either to the Office of Probation or to the State Bar Membership Records Office.

Moreover, respondent maintained the following telephone number with the State Bar Membership Records Office: 415/845-7109. Prior to June 1, 2008, this telephone number was disconnected and service has never been restored. To date, respondent failed to provide an updated telephone number either to the Office of Probation or to the State Bar Membership Records Office.

All of respondent's quarterly reports were signed under penalty of perjury.

In the submitted quarterly reports, respondent used a form prepared by the Office of Probation, which contained a check box for respondent to indicate whether he had registered for Ethics School and a blank space for respondent to indicate the date for which he was registered to take the class. The blank form was in the following format:

“_____I have registered for the State Bar Ethics School course given on _____. ”

In the quarterly reports set forth below, respondent checked off the box signifying that he had registered for Ethics School. In all but one of these instances, respondent also filled in

the date for which he claimed to have registered for Ethics School. In one case, respondent left the date box blank.

Date of Signature	Statement on Quarterly Reports Re Ethics School
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6/30/2006	Claimed to have registered for the course to be given on "Nov. 1, 2006"
9/27/2006	Claimed to have registered for the course to be given on "Nov. 1-2, 2006"
12/30/2006	Claimed to have registered for the course to be given "3/07"
4/3/2007	Claimed to have registered for the course to be given "June 2007"
7/5/2007	Claimed to have registered for the course to be given "11/2/07"
9/29/2007	Claimed to have registered for the course, but did not indicate the date of the course for which he had registered.

Respondent's claims that he had registered for Ethics School were all false. In truth, respondent had never registered for any Ethics School session.

At all times mentioned, respondent knew that he had never registered for any session of Ethics School and he therefore knew that the statements claiming that he had registered for the course were false.

Beginning on or about May 16, 2008, the Office of Probation tried to contact respondent by telephone and letter to request his compliance with the conditions of probation. The letters were returned as undeliverable and respondent's telephone number was disconnected.

On or about August 13, 2008, the Office of Probation contacted respondent via an email address. On or about September 7, 2008, respondent emailed a response to the Office of Probation, promising that he would contact the Office of Probation by telephone on Monday, September 8. Respondent failed to do so, and has failed to communicate with the Office of Probation at any time thereafter.

Respondent received but ignored a further email communication sent by the Office of Probation on or about September 20, 2008, which again requested compliance with the conditions of probation.

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.

Respondent failed to comply with his probation conditions as ordered by the Supreme Court in S138437, in willful violation of section 6068, subdivision (k): (1) by failing to file the January 10, April 10, July 10, and October 10, 2008 quarterly reports; (2) by filing a defective April 10, 2007 report, which lacked his original signature; (3) by failing to attend the State Bar Ethics School; and (4) by failing to provide changes of address and telephone number to the State Bar.

Count 2: Dishonesty (Bus. & Prof. Code, § 6106)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

Respondent committed acts of dishonesty when he knowingly made the false statements under penalty of perjury that he had registered for Ethics School in his 2006 and 2007 quarterly reports, in willful violation of section 6106.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating evidence was offered or received. (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).)

³All further references to standards are to this source.

Respondent's prior record of discipline is an aggravating circumstance. (Std. 1.2(b)(i).) In the underlying matter, respondent stipulated to an 18-month stayed suspension, a three-year probation and an 18-month actual suspension and until he makes certain restitution. His misconduct involved two client matters, in which he failed to perform services with competence, failed to communicate, failed to refund unearned fees, misappropriated \$25,000, and failed to render an accounting.

Respondent's multiple acts of misconduct 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 attend Ethics School or file the 2008 quarterly reports. Although he promised to contact the Office of Probation in September 2008, he did not do so.

Respondent's failure to participate in this disciplinary matter prior to the entry of his default is 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's misconduct included repeated violations of 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.)

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. Nevertheless, 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, citing standard 1.7(a) in support of its recommendation, which provides: “If 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.”

The court also finds these cases to be instructive.

In *In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, the attorney was actually suspended for one year because he failed to submit two quarterly probation reports, to timely deliver financial records to a former client’s accountant, and defaulted in the disciplinary proceeding. The attorney’s lack of cooperation with the State Bar was a serious concern.

In *In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. 525, in consideration of two probation violation cases, the Review Department recommended an aggregate actual suspension in both matters not exceeding two years for the attorney's failure to timely file a probation report and to timely make restitution to six clients.

And, in *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, the attorney had four prior records of discipline and a history of serious professional misconduct during 18 of the 26 years of his practice, including client abandonments, probation violations and failure to file timely the affidavit required by the California Rules of Court, rule 955. As a result, the Review Department found that he had ample opportunity to conform his conduct to the ethical requirements of the profession, but had repeatedly failed or refused to do so in his 26 years of practice and that, therefore, disbarment was appropriate.

The court finds that the misconduct found in *Rose* is much more serious than that of respondent. Here, respondent had one prior record of discipline and had not violated California Rules of Court, rule 9.20 (formerly rule 955). Thus, disbarment would be unduly harsh for respondent's probation violations.

“[A] probation ‘reporting requirement permits the State Bar to monitor [an attorney probationer’s] compliance with professional standards.’” (*In the Matter of Wiener* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605.) In addition, “an attorney probationer’s filing of quarterly probation reports is an important step towards the attorney’s rehabilitation.” (*In the Matter of Wiener, supra*, 3 Cal. State Bar Ct. Rptr. at p. 763.) Thus, respondent’s failure to file quarterly reports warrants significant discipline.

In recommending discipline, the “paramount concern is protection of the public, the courts and the integrity of the legal profession.” (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.)

Failing to appear and participate in this hearing shows that respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) His failure to participate in this proceeding leaves the court without information about the underlying cause of respondent's misconduct or of any mitigating circumstances surrounding his misconduct.

Therefore, in view of respondent's misconduct, the case law and the aggravating evidence, placing respondent on an actual suspension for a minimum of two years would be appropriate to protect the public and to preserve public confidence in the profession.

VI. Recommendations

A. Discipline

Accordingly, the court hereby recommends that respondent **Gregory Allen Brubaker** be suspended from the practice of law in California for three years, that said suspension be stayed, and that respondent be actually suspended from the practice of law for a minimum of two years. He is to remain suspended until he files and the State Bar Court grants a motion to terminate his suspension. (Rules Proc. of State Bar, rule 205.)

It is further recommended that he remain actually 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).

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

B. Multistate Professional Responsibility Exam

It is also recommended that respondent take and pass the Multistate Professional Responsibility Examination during the period of his suspension and provide satisfactory proof of

such passage to the State Bar's Office of Probation in Los Angeles. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

C. California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20(a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline 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

D. 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: July _____, 2009

PAT McELROY
Judge of the State Bar Court

⁴Respondent 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.)