

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No. 08-PM-11072-DFM
)	
LEWIS R. WIENER,)	
)	ORDER GRANTING MOTION TO
Member No. 41186,)	REVOKE PROBATION AND FOR
)	INVOLUNTARY INACTIVE
<u>A Member of the State Bar.</u>)	ENROLLMENT

I. Introduction

In this probation revocation proceeding, respondent **Lewis R. Wiener** is charged with violating his probation conditions imposed by the California Supreme Court. The Office of Probation of the State Bar of California (Office of Probation) seeks to revoke his probation, to impose upon respondent the entire period of suspension previously stayed, and to involuntarily enroll respondent as an inactive member of the State Bar.

The court finds, by preponderance of the evidence, that respondent has violated his probation conditions and hereby grants the motion. The court recommends, among other things, that respondent’s probation be revoked; that the previously stayed two years suspension be lifted; that respondent be actually suspended from the practice of law for two years and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the law, pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct; and that he be placed on probation for three years with conditions.

II. Pertinent Procedural History

On March 13, 2008, the Office of Probation filed and properly served a motion to revoke probation on respondent, under rules 60 and 563(a) of the Rules of Procedure of the State Bar of California.¹ The motion was mailed to respondent's official membership records address. Respondent did not file a response within 20 days of the service of the motion, as required by rule 563(b)(1).

The court took this matter under submission on April 9, 2008.

III. Findings of Fact and Conclusions of Law

All factual allegations contained in the motion to revoke probation and supporting documents are deemed admitted upon respondent's failure to file a response. (Rules Proc. of State Bar, rule 563(b)(3).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 21, 1967, and has since been a member of the State Bar of California.

B. Probation Conditions in Supreme Court Case No. S131704

On May 19, 2005, in Supreme Court case No. S131704, the California Supreme Court ordered that respondent be suspended from the practice of law for two years and until he shows 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) of the Standards for Attorney Sanctions for Professional Misconduct, that execution of the suspension be stayed, and that he be placed on probation for three years, including 90 days actual suspension, as recommended by the Hearing Department of the State Bar Court in its order approving stipulation filed January 4, 2005 (State Bar Court case No. 03-O-02167). In addition, the Supreme Court ordered that respondent comply with the probation conditions previously recommended by the State Bar Court Hearing Department, including, but not limited to:

¹References to rules are to the Rules of Procedures of the State Bar, unless stated otherwise. In addition, the State Bar requested that judicial notice be taken of the packets of records generated by respondent's prior disciplines. That motion is granted.

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; and

2. Within 12 months of the effective date of his discipline, by June 18, 2006, submit satisfactory evidence of completion of no less than nine hours of MCLE approved courses in law office management, attorney client relations and/or general legal ethics.

Notice of this order was properly served upon respondent in the manner prescribed by rule 8.532(a) of the California Rules of Court at respondent's official address in accordance with Business and Professions Code section 6002.1.²

C. Probation Violations

Section 6093, subdivision (b), provides that violation of a probation condition constitutes cause for revocation of any probation then pending and may constitute cause for discipline. Section 6093, subdivision (c), provides that the standard of proof is the preponderance of the evidence. Bad faith is not a requirement for a finding of culpability in a probation violation matter. Instead, "a 'general purpose or willingness' to commit an act or permit an omission is sufficient." (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.)

Based on the evidence submitted by the Office of Probation, respondent failed to do the following:

1. Submit the quarterly report due July 10, 2007, and timely submit nine other quarterly reports, as follows:

<i>Due</i>	<i>Filed</i>
October 10, 2005	December 23, 2005
January 10, 2006	January 12, 2006
April 10, 2006	April 13, 2006
July 10, 2006	July 14, 2006
October 10, 2006	October 13, 2006
January 10, 2007	July 10, 2007
April 10, 2007	April 13, 2007

²References to sections are to the Business and Professions Code.

October 10, 2007

October 12, 2007

January 10, 2008

January 14, 2008

2. Submit by June 18, 2006, satisfactory evidence of completion of at least nine hours of MCLE approved courses in law office management, attorney client relations and/or general legal ethics. To date, respondent has submitted proof of completion of only four hours of MCLE courses.

Respondent was not without prior warnings of the fact that he was not in compliance with his probation obligations. On June 27, 2006, after the time for compliance had expired, respondent filed a motion seeking an extension until December 31, 2006, of the time for him to complete Ethics School, the required nine hours of MCLE courses, and the Multistate Professional Responsibility Examination. By order filed on July 26, 2006, that motion was denied. Thereafter, he was notified in writing by the Office of Probation on August 10, 2006, that the Certificate of Completion of MCLE courses he faxed to that office on July 31, 2006, satisfied only four of the required nine hours of study and that he needed to complete and provide proof of completion of an additional five hours of MCLE courses to complete the required nine hours.

On July 21, 2007, nearly a year later, he was again notified in writing that he needed to complete the additional five hours of MCLE courses in the designated areas and that he was not entitled to credit toward that requirement for the time he spent in the mandated Ethics School. This letter also directed respondent to submit a properly completed report for the period ending July 10, 2007.

On February 5, 2008, Probation Deputy Cindy Jollotta of the Office of Probation telephoned respondent, again advising him that he was not in compliance with his MCLE and quarterly reporting conditions and that he needed to submit his July 10, 2007³ quarterly report and proof of five hours of MCLE courses in legal ethics, attorney client relations, or law office

³Respondent had mailed the July 10, 2007 report but because he did not check the box indicating compliance with State Bar Acts and Rules, the Office of Probation returned the defective report to him, advising him to resubmit it. He never did.

management. Respondent stated that he thought he had already sent in proof of his MCLE. Jollotta again told him that Ethics School did not count toward his MCLE condition and that previous letters and phone calls to him had explained this to him.⁴ Although respondent stated that he would submit both as soon as possible, he did not do so.

Therefore, the State Bar has demonstrated by a preponderance of the evidence that respondent willfully violated the probation conditions ordered by the Supreme Court in its May 19, 2005 order. Respondent failed to file the written quarterly report that was due July 10, 2007; failed to timely file the nine written quarterly reports that were due as indicated above; and failed to complete the required total of at least nine hours of MCLE approved courses in law office management, attorney client relations and/or general legal ethics.

As a result, the revocation of respondent's probation in California Supreme Court case No. S131704 is warranted.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

Since respondent did not file a response to the probation revocation motion, no evidence in mitigation was presented and none is apparent from the record. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁵

B. Aggravation

In aggravation, respondent has four prior records of discipline. (Std. 1.2(b)(i).)

1. Effective June 22, 1990, respondent was privately reprovved for failing to perform services competently, failing to communicate with client and violating his oath and duties as an attorney in one client matter. (State Bar Court case No. 88-O-15438.)

2. Effective May 14, 1998, respondent was ordered suspended for one year, stayed, and placed on probation for 18 months, and actually suspended for 30 days for failing to perform

⁴On December 6, 2005, August 10, 2006, and July 21, 2007, the Office of Probation sent letters to respondent reminding him that he was not in compliance with his probation conditions. The Office of Probation also telephoned respondent about the same on December 6, 2005, June 21, 2006, July 31, 2006, and June 30, 2007.

⁵All further references to standards are to this source.

services competently, failing to communicate with client and failing to cooperate in the State Bar investigation in one client matter. (Supreme Court case No. S067805; State Bar Court case No. 95-O-14361.)

3. Effective August 17, 2000, respondent was ordered suspended for two years, stayed, and placed on probation for two years, and actually suspended for 45 days for failing to file his quarterly reports, failing to stop practicing law during his suspension, and failing to complete the Ethics School. (Supreme Court case No. S088226; State Bar Court case No. 99-O-12270.)

4. Effective June 18, 2005, the underlying matter, respondent was ordered suspended for two years, stayed, and placed on probation for three years, and actually suspended for 90 days for failing to perform services competently, improperly withdrawing from employment, failing to communicate with client and failing to cooperate in the State Bar investigation in one client matter. (Supreme Court case No. S131704; State Bar Court case No. 03-O-02167.)

An attorney's continued failure to comply with his probation conditions after being notified of that noncompliance is properly considered a substantial aggravating circumstance. It demonstrates indifference toward rectification of or atonement for the consequences of one's misconduct. (Std. 1.2(b)(v); *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530.) Such conduct is particularly troubling where, as here, the attorney has been previously disciplined for failing to comply with the conditions of probation.

Respondent's failure to fully participate in this proceeding is an aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

Public protection and attorney rehabilitation are the primary goals of disciplinary probation. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452.)

"[T]here has been a wide range of discipline imposed for probation violations from merely extending probation ... to a revocation of the full amount of the stayed suspension and

imposition of that amount as an actual suspension.” (*In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 573.)

In determining the level of discipline to be imposed, the court must consider the “total length of stayed suspension which could be imposed as an actual suspension and the total amount of actual suspension earlier imposed as a condition of the discipline at the time probation was granted.” (*In the Matter of Potack, supra* 1 Cal. State Bar Ct. Rptr. 525, 540.) The extent of the discipline is dependent, in part, on the nature of the probation violation and its relationship to respondent’s prior misconduct. (*Ibid.*)

Here, respondent’s four prior records involved misconduct in three client matters and violation of his probation conditions in the fourth. In this fifth disciplinary matter, respondent again failed to comply with the court-ordered conditions of his probation. He failed to file one quarterly report, failed timely to file nine other quarterly reports, and failed to submit proof of completion of five hours of MCLE courses to comply with the required nine hours of MCLE courses. Although respondent was notified of these deficiencies months ago, and has provided assurances that compliance would be forthcoming, his conduct has been continued non-compliance.

“[A] probation ‘reporting requirement permits the State Bar to monitor [an attorney probationer’s] compliance with professional standards.’” (*In the Matter of Weiner*⁶ (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 Weiner, supra*, 3 Cal. State Bar Ct. Rptr. at p. 763.) These words in a published 1997 Review Department opinion have a double significance in this case. Not only do they set out the importance of a disciplined attorney’s compliance with conditions of probation, they were issued in the context of a prior disciplinary action against this very same respondent. (*In the Matter of Weiner, supra*, 3 Cal. State Bar Ct. Rptr. 759.) For the second time since that decision was handed down, this court is now required to discipline respondent for violating the conditions of a probation. It is a situation that is

⁶This was respondent’s second prior record of discipline.

inexcusable, and one which respondent must be made to understand must not be allowed to happen again.

The prior disciplinary order “provided [respondent] an opportunity to reform his conduct to the ethical strictures of the profession. His culpability in [the matter] presently under consideration sadly indicates either his unwillingness or inability to do so.” (*Arden v. State Bar* (1987) 43 Cal.3d 713, 728.) In view of respondent’s violation of probation conditions, his lack of participation in these proceedings, and his continuing noncompliance with probation conditions despite the Office of Probation’s repeated efforts to secure it, this Court finds good cause to GRANT the motion to revoke respondent’s probation and concludes that imposition of the entire period of his stayed suspension is reasonable, appropriate, and necessary. In addition, it is recommended that respondent again be placed on probation for a period of three years, on the terms and with the conditions set forth below.

VI. RECOMMENDATION

Accordingly, the court recommends as follows:

A. Disciplinary Recommendation

The court recommends that the probation of respondent **Lewis R. Wiener**, previously ordered in Supreme Court Case No. S131704 (State Bar Court Case No. 03-O-02167), be revoked; that the previous stay of execution of the suspension be lifted; that respondent be actually suspended from the practice of law for two years and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the law, pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct; and that he be placed on probation for three years on the following conditions:

1. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation;

2. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, 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).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change;
3. Respondent must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, respondent must 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:
 - (i) In the first report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and
 - (ii) In each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all

other conditions of probation during that period.

During the last 20 days of this probation, respondent must 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, respondent must certify to the matters set forth in subparagraph (ii) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California;

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation; and
6. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter.

B. California Rules of Court, Rule 9.20

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.⁷

⁷Respondent 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.)

C. Multistate Professional Responsibility Examination

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination during the period of his actual suspension.

D. Costs

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.

E. Order of Involuntary Inactive Enrollment

Respondent is ordered to be involuntarily enrolled inactive under Business and Professions Code section 6007, subdivision (d)(1).⁸ This inactive enrollment order will be effective three calendar days after the date upon which this order is served.

Dated: May 7, 2008

DONALD F. MILES
Judge of the State Bar Court

⁸The court recommends that any period of involuntary inactive enrollment be credited against the period of actual suspension ordered. (Bus. & Prof. Code, § 6007, subd. (d)(3).)