

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 08-PM-12588-RAP
)	
PAUL F. FEGEN)	ORDER GRANTING MOTION TO
)	REVOKE PROBATION AND FOR
Member No. 31680)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. Introduction

In this probation revocation proceeding, respondent **Paul F. Fegen** (respondent) 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.

Respondent opposes the motion, stating that his noncompliance with certain probation conditions resulted from his being confused about the terms of his probation. Respondent also urges that he did not intentionally or willfully ignore the Court's order, and, thus, should be subject to a minimal period of actual suspension.

At the hearing in this matter, respondent was represented by Edward O. Lear, Esq. The Office of Probation was represented by Supervising Attorney Terrie Goldade.

The court finds, by preponderance of the evidence, that respondent has violated his probationary conditions and hereby grants, in part, the motion to revoke his probation. The court recommends, among other things, that respondent's probation in Supreme Court matter S144330 (State Bar Court Case Nos. 05-O-01082; 05-O-05319 (Cons.)) be revoked; that the previously ordered stay of execution of suspension be lifted, that respondent be suspended from the practice of law for two years; that execution of the suspension be stayed, and that he be placed on probation for two years subject to the condition that he be actually suspended for six months and until respondent makes full restitution.

II. Pertinent Procedural History

On July 2, 2008, the Office of Probation filed and properly served a motion to revoke respondent's probation, under rules 60 and 563(a) of the Rules of Procedure of the State Bar of California (Rules of Procedure). On August 4, 2008, respondent filed his response, and requested a hearing.

The hearing in this matter was held on September 15, 2008. At the hearing, the Office of Probation entered into evidence the declaration of Cheryl Chisholm (Chisholm), and called Chisholm to testify in rebuttal to respondent's declaration. Respondent testified and entered his own declaration into evidence. At the close of the hearing the court made a tentative finding of culpability and took the matter under submission.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on declarations, testimony, and documentary evidence submitted at the hearing.

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 6, 1961, and has since been a member of the State Bar of California.

B. Probation Conditions of Supreme Court Case No. S144330

On August 22, 2006, in Supreme Court Case No. S144330, the California Supreme Court ordered that:

1. Respondent be suspended from the practice of law for two years, that execution of the suspension be stayed, and that he be placed on probation for three years subject to the condition that he be actually suspended for thirty days; and

2. Respondent comply with other conditions of probation, as recommended by the Hearing Department of the State Bar Court in its order approving stipulation filed May 10, 2006 (State Bar Court Case Nos. 05-O-01082; 05-O-05319 (Cons.)), including, but not limited to:

a. Submitting to the Office of Probation on every January 10, April 10, July 10, and October 10, a written probation report stating, under penalty of perjury, whether he complied with the Rules of Professional Conduct of the State Bar of California, the State Bar Act, and all the conditions of probation during the preceding calendar quarter (quarterly probation reports);

b. Submitting to the Office of Probation, within eleven months from the effective date of his discipline (by August 21, 2007), satisfactory evidence of completion of no less than six hours of Minimum Continuing Education approved courses in law office management, attorney client relations and/or general ethics; and,

c. Making restitution, within eleven months from the effective date of the Supreme Court Order (by August 21, 2007), to Judy Wohl in the principal amount of \$4,500 plus interest of 10% per annum from January 27, 1997, or to the Client Security Fund if it had reimbursed Wohl for all or any portion of the principal amount.

Notice of the July 13, 2006 Supreme Court Order was properly served on respondent in the manner prescribed by California Rules of Court, rule 8.532(a), at respondent's official address in accordance with Business and Professions Code section 6002.1.¹

C. Findings of Fact

1. Quarterly Probation Reports

Respondent was required under his probation to submit quarterly reports to the Office of Probation in a timely manner. However, he did not do so.

The evidence introduced by the State Bar demonstrates that three of respondent's quarterly reports were filed late, as follows:

<u>Due Date</u>	<u>Date Filed</u>
October 10, 2006	October 11, 2006
January 10, 2007	January 11, 2007
October 10, 2007	October 11, 2007

Respondent testified that he took seriously his obligations under the terms of his probation and would prepare and fax his quarterly report to the Office of Probation on the due date, the 10th of each quarter. However, in three instances, he admits he filed the quarterly reports late. Respondent chose to wait until the last day to fax his quarterly report to the Office of Probation, even though the instructions the Office of Probation sent to him regarding how to prepare and file his quarterly reports clearly indicate that the closing date for each report is the last day of the month before the quarterly due date of the 10th. Thus respondent put himself in jeopardy of filing his report late each quarter by waiting to the last day to fax his report to the Office of Probation. Although respondent may believe he undertook his probation obligations in

¹ References to section(s) are to the Business and Professions Code.

a serious manner, the evidence shows otherwise. The timely filing of quarterly reports with the Office of Probation is an important indicator of a respondent's commitment to rehabilitation.

2. Minimum Continuing Legal Education Courses

The evidence shows that respondent was required to complete six hours of Minimum Continuing Legal Education ("MCLE") by August 21, 2007. On March 28, 2008, Probation Deputy Cheryl Chisholm telephoned respondent and reminded him that he needed to complete his required MCLE and scheduled a meeting with respondent to take place on April 2, 2008. Chisholm instructed respondent to bring certificates of completion of MCLE courses to the meeting. Chisholm reminded respondent that he could file a motion for an extension of time for both his MCLE and restitution requirements.

Respondent met with Chisholm on April 2nd, but failed to bring any MCLE certificates to the meeting, claiming that he was not aware he needed to bring the certificates. Respondent met with Chisholm again on April 10, 2008, regarding his non-compliance with the terms of his probation. Respondent produced MCLE certificates he had earned in relation to his regular bar license requirements. Chisholm told respondent that under the terms of his probation, he would not earn credit for these MCLE certificates. Eventually, with some certificates being produced on the day of this hearing, respondent has shown compliance with the MCLE requirements of his probation. Respondent claims that he was confused by the terms of his probation in this matter and the terms of his probation in another matter, Supreme Court case number S135914, filed on October 13, 2005. Chisholm also testified to respondent's state of confusion regarding the terms of respondent's probation. Respondent is now in compliance with the terms of probation concerning MCLE requirements, but his compliance is late and occurred only with the constant reminders from the Office of Probation.

3. Restitution to Judy Wohl

As a condition of probation, respondent was ordered to provide to the Office of Probation, within eleven months of the effective date of his discipline, i.e., by August 21, 2007, satisfactory proof that he had paid restitution to Judy Wohl in the amount of \$4,500 plus interest of 10% per annum from January 27, 1997, or to the Client Security Fund if it had reimbursed her for all or any portion of the principal amount. Respondent had not paid any amount of restitution to Judy Wohl by August 21, 2007.

During respondent's April 10, 2008, meeting with Chisholm, respondent was encouraged to start making payments to Wohl as required by the terms of his probation. Respondent started making \$750 payments to Wohl and as of the date of this hearing has paid Wohl \$4,500. Respondent has not paid any interest owed as part the terms of his probation. Respondent claims that he presently is unable to pay the interest amount due to financial difficulties. Respondent did not produce any evidence to support his contention of inability to pay. Once again, respondent violated the terms of his probation by not timely making restitution to Wohl and is now only partially in compliance with his obligation to pay restitution.

D. Conclusions of Law

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. [Citations.]" (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.)

Respondent violated his probation conditions by failing to do the following:

1. Timely submit three quarterly reports (October 10, 2006, January 10, 2007, and October 10, 2007);
2. Provide satisfactory proof to the Office of Probation that by August 21, 2007, he completed no less than six hours of approved MCLE courses in law office management, attorney client relations and/or general legal ethics; and,
3. Provide satisfactory proof to the Office of Probation that by August 21, 2007, he had paid restitution to Judy Wohl in the principal amount of \$4,500 plus 10% interest per annum from January 27, 1997.

Therefore, the Office of Probation has demonstrated by a preponderance of the evidence that respondent willfully violated the probation conditions ordered by the Supreme Court in its August 22, 2006 order. As a result, the revocation of respondent's probation in California Supreme Court Case No. S144330 is warranted.

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.)²

A. Mitigation

Respondent displayed candor and cooperation to the State Bar during this proceeding. (Std.1.2(e)(v).)

Respondent claimed that he was suffering from financial difficulties. Respondent's claim of financial difficulties was not supported by the evidence and is therefore not considered as a factor in mitigation.

² All further references to standard(s) are to this source.

B. Aggravation

Respondent's prior record of discipline is an aggravating factor. (Std. 1.2(b)(i).)

1. Effective November 12, 2005, respondent, in Supreme Court matter S135914, was ordered suspended for two years, stayed, placed on probation for three years on condition that he be actually suspended for sixty days. In this prior disciplinary matter, respondent stipulated to failing to perform legal services with competence in willful violation of rule 3-110(A) of the California Rules of Professional Conduct;³ failing to keep a client informed of significant developments in willful violation of section 6068, subdivision (m); committing acts of moral turpitude, dishonesty or corruption in willful violation of section 6106; and failing, upon termination of employment, to take reasonable steps to avoid foreseeable prejudice to his client in violation of rule 3-700(A)(2). In aggravation, respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct, and his misconduct significantly harmed his client; was surrounded by bad faith, dishonesty, or concealment; and evidenced multiple acts of wrongdoing. In mitigation, respondent had no prior record of discipline.

2. Effective September 21, 2006, respondent, in the underlying matter - Supreme Court Case No. S144330, was ordered suspended for two years, stayed, placed on probation for three years on condition that he be actually suspended for thirty days. In this prior disciplinary matter, respondent stipulated to failing to perform legal services with competence in willful violation of rule 3-110(A); failing, upon termination of employment, to take reasonable steps to avoid foreseeable prejudice to his client in violation of rule 3-700(A)(2); failing to keep a client informed of significant developments in willful violation of section 6068, subdivision (m); and holding himself out as practicing or entitled to practice law when he was not an active

³ All future references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

member of the State Bar in willful violation of sections 6125, 6126, and 6068, subdivision (a). In aggravation, respondent had a prior record of discipline and his misconduct significantly harmed his client. In mitigation, respondent fully cooperated with the State Bar during the disciplinary investigation and proceeding.

Respondent's misconduct in the current proceeding also involves multiple acts of wrongdoing, including failing to: (1) timely submit quarterly probation reports; (2) provide satisfactory proof to the Office of Probation that he timely completed six hours of MCLE courses; and (3) timely provide satisfactory proof to the Office of Probation of paying restitution to Judy Wohl. (Std. 1.2(b)(ii).)

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. at p. 540.) The extent of the discipline to be recommended is dependent, in part, on the nature of the probation violation and its relationship to respondent's prior misconduct. (*Ibid.*)

Here, respondent's probationary violations primarily involved his failure to comply with his reporting requirements. “[A] probation ‘reporting requirement permits the State Bar to

monitor [an attorney probationer's] compliance with professional standards.’’ (*In the Matter of Weiner* (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.) Thus, respondent’s repeated failures to timely comply with his various reporting conditions warrants discipline.

The State Bar contends that respondent’s probation should be revoked because his probation violations demonstrate a lack of concern about professional responsibilities and that the full amount of stayed suspension of two years should be imposed for respondent’s rehabilitation.

Respondent, on the other hand, argues that he has been “confused” with the probationary terms of his two prior discipline matters and is financially unable to meet his restitution requirement. He (erroneously) believes he “is less than someone intentionally or willfully ignoring the Court’s order...” and thus should be subject to a short period of suspension.

Respondent’s prior misconduct and his present probation violations involve inattention to his professional duties and a continued unwillingness or inability to conform to the standards required of attorneys licensed in this state. While he may be facing financial challenges, his earning ability was not the cause of his tardiness to file the quarterly reports or provide proof to the Office of Probation that he had complied with probation conditions. Absent compelling mitigating circumstances, an attorney who willfully violates a significant condition of probation can anticipate actual suspension as the expected result. (*In the Matter of Gorman, supra*, 4 Cal. State Bar Ct. Rptr. at p. 574.)

The court finds guidance in *In the Matter of Gorman*, *supra*, 4 Cal. State Bar Ct. Rptr. 567; *In the Matter of Laden* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 678; and *In the Matter of Howard*, *supra*, 2 Cal. State Bar Ct. Rptr. 445.

In *Gorman*, the attorney was actually suspended for 30 days with a two-year probation and a one-year stayed suspension after he violated two probation conditions to timely complete restitution and ethics school. His cooperation, good faith efforts to pay restitution, and emotional difficulties were considered in mitigation. But these factors did not outweigh the aggravating circumstances that included the attorney's one prior record of discipline, the fact that the State Bar had to repeatedly remind the attorney to comply with probation, and the fact that the attorney misrepresented the official participation of a third party in the proceedings.

In *Laden*, the attorney was actually suspended for 90 days and until he made restitution for his numerous untimely restitution payments and several delinquent quarterly probation reports. The attorney had four prior records of discipline, but this was the third matter involving his failure to make timely restitution to the same client. But for his strong mitigating evidence, including financial hardship, good faith efforts, cooperation with the client, recognition of the seriousness of his wrongdoing, and community service, the Review Department would have recommended more than a 90-day actual suspension.

In *Howard*, 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.

Respondent's misconduct is less serious than that of *Howard* in that he has participated in these proceedings and did not completely abandon his probationary duties. Respondent filed his quarterly reports, albeit late. He also completed several of his probation conditions, including

his MPRE requirement (which was also late). Respondent also made significant belated payments toward his ordered restitution.

The severity of respondent's violations, however, is greater than that of *Gorman* and *Laden*. Respondent failed to do the following: (1) timely submit quarterly reports; (2) timely submit proof that he had completed his MCLE course requirements; and (3) provide timely proof to the Office of Probation that he had complied with his restitution requirement. In fact, respondent still is not in compliance with his restitution requirement.

Although significant discipline is warranted for respondent's probation violations, the court does not believe that imposing the entire period of stayed suspension is necessary to achieve the goals of attorney disciplinary probation. The Office of Probation's recommendation that respondent's probation be revoked and that he be actually be suspended for two years, the entire original period of stayed suspension, is excessive and not necessary to impress upon him the importance of strict compliance with probation conditions as an integral step toward rehabilitation.

The court finds good cause for granting the Office of Probation's motion to revoke respondent's probation. Balancing all relevant facts and circumstances to reach the appropriate recommendation of degree of discipline, the court finds that a six-month actual suspension and until respondent makes full restitution, among other requirements, is sufficient to achieve the goals of attorney disciplinary probation.

VI. Recommendation

Accordingly, the court recommends as follows:

A. Discipline

The court recommends that the probation of respondent **Paul F. Fegen**, previously ordered in Supreme Court Case No. S144330 (State Bar Case Nos. 05-O-01082; 05-O-05319

(Cons.)) be revoked; that the previous stay of execution of the two-year suspension be lifted; that respondent be suspended from the practice of law for two years and until: (1) he makes full restitution to Judy Wohl in the amount of \$4,500 plus 10% interest per annum from January 27, 1997⁴ (or to the Client Security Fund to the extent of any payment from the fund to Judy Wohl, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation;⁵ and (2) he provides proof to the satisfaction of the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii); that execution of such suspension be stayed; and that respondent be placed on probation for two years on the following conditions:

1. That respondent must be actually suspended from the practice of law during the first six months of the period of probation and until he makes full restitution to Judy Wohl in the amount of \$4,500 plus 10% interest per annum from January 27, 1997 (or to the Client Security Fund to the extent of any payment from the fund to Judy Wohl, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation;

2. During the probation period, respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California, and all the conditions of this probation;

3. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California (Office of Probation), all changes of information, including current office address and telephone

⁴ As noted *ante*, respondent has already paid \$4,500 toward this sum.

⁵ Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;

4. Within thirty (30) days from the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in-person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request;

5. Respondent 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, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all conditions of probation during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than thirty (30) days, that report must be submitted on the next quarter date, and cover the extended period.

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

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

7. Unless respondent previously completed the State Bar Ethics School and passage of the test given at the end of that session within two years prior to the effective date of the Supreme Court's final disciplinary order in this matter, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the 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 that session within one year of the effective date of discipline herein. (Rules Proc. of State Bar, rule 290.) 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) requirement, and respondent will not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201).

B. Conditional Rule 1.4(c)(ii)

It is further recommended that if respondent is actually suspended for two years or more, he must remain suspended until he provides proof to the satisfaction of the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii).

C. Multistate Professional Responsibility Examination

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 S135914 (State Bar Court Case No. 04-O-11253).

D. California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with rule 9.20 of the California Rules of Court and that he be ordered 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 imposing discipline in this matter. Willful failure to comply with the provisions of rule 9.20 of the California Rules of Court may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.⁶

VII. 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.

VIII. Order of Involuntary Inactive Enrollment

Respondent is ordered to be involuntarily enrolled inactive under Business and Professions Code section 6007, subdivision (d)(1).⁷ The inactive enrollment order will be effective three calendar days after the date upon which this order is served.

Dated: October 2, 2008

RICHARD A. PLATEL
Judge of the State Bar Court

⁶ 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.)

⁷ Any period of involuntary inactive enrollment will be credited against the period of actual suspension ordered. (Bus. & Prof. Code, § 6007, subd. (d)(3).)