

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 09-O-13927
)	
MICHAEL FRANCIS GALLIGAN)	DECISION
)	
Member No. 53572)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this contested hearing respondent Michael Francis Galligan is charged with violating the conditions of probation imposed by the California Supreme Court in its September 26, 2006 order in Supreme Court Case No. S145364 (State Bar Case No. 04-N-11360). For the reasons stated below, the court finds by clear and convincing evidence that respondent failed to fully comply with the terms of his disciplinary probation in the above-referenced case. Accordingly, the court recommends, among other things, that he be actually suspended for six months.

II. Pertinent Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (“State Bar”) initiated this proceeding by filing a Notice of Disciplinary Charges (“NDC”) on August 17, 2009.

On September 18, 2009, respondent filed a demurrer to the disciplinary charges. The court treated respondent's demurrer as a motion to dismiss.

On October 6, 2009, respondent's motion to dismiss was granted, in part, and denied, in part. The charges in paragraph 11 of the NDC, which dealt with respondent's medical probation conditions, were dismissed pursuant to rule 262(c)(1) of the Rules of Procedure of the State Bar of California ("Rules of Procedure"). The balance of respondent's motion to dismiss was denied.

On October 16, 2009, respondent filed a response to the NDC.

A two-day trial commenced on January 27, 2010. The State Bar was represented by Deputy Trial Counsel Wonder J. Liang. Respondent represented himself. On January 28, 2010, following closing argument, the court took this matter under submission.

III. Findings of Fact and Conclusions of Law

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

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 13, 1972, and has been a member of the State Bar of California since that time.

B. Findings of Fact

On September 26, 2006, the California Supreme Court filed an order in Case No. S145364 ("Supreme Court order") suspending respondent from the practice of law for one year, staying imposition of suspension, placing him on probation for a period of three years on conditions including 120 days of actual suspension, and requiring respondent to comply with other specified conditions of probation. The specified conditions of probation were contained in a stipulation filed in State Bar Case No. 04-N-11360. Respondent signed this stipulation and agreed to its terms and conditions.

By letter dated October 5, 2006, the Office of Probation of the State Bar of California (“Office of Probation”) advised respondent of the conditions of his probation and provided him with a copy of the Supreme Court order. In this letter, the Office of Probation reminded respondent that he was required to contact probation officer Lydia Dineros (“Dineros”) within 30 days from the effective date of discipline to schedule a meeting to discuss the terms and conditions of probation. Respondent received this letter and its enclosures shortly thereafter.

The Supreme Court order became effective October 26, 2006, and remained in full force and effect at all times thereafter. Respondent had notice of and was aware of the Supreme Court order. Respondent remained on probation at all times from October 26, 2006 to October 26, 2009; and the conditions of probation imposed by the Supreme Court order were never modified.

As noted above, one of the conditions of probation required respondent to contact the Office of Probation within 30 days from the effective date of discipline — by November 27, 2006 — and schedule a meeting with his assigned probation deputy. Respondent, however, did not contact the Office of Probation to schedule a meeting with his assigned probation deputy until January 2, 2007.¹

Respondent was also required, by the terms of probation, to submit quarterly reports throughout the probationary period. Specifically, respondent was required to “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” and state, under penalty of perjury, “whether [he] has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter.”

¹ Respondent had been in contact with Dineros on another case and therefore believed that he did not have to contact her again to schedule a meeting in the present matter. Respondent’s prior contacts with Dineros, however, did not involve a discussion of the terms and conditions of the present matter.

Respondent faxed his April 10, 2007, July 10, 2007, and October 10, 2007 quarterly reports to the Office of Probation in a timely fashion. Respondent, however, did not promptly mail copies of these reports — containing original signatures — to the Office of Probation.² After this issue was brought to respondent's attention, he was unable to find the original copies of these reports because, at that time, he was homeless and his belongings were in different locations. Consequently, respondent recreated these reports and submitted them to the Office of Probation. These reports were received by the Office of Probation on January 14, 2008.

On February 13, 2008, the State Bar issued a Warning Letter to respondent regarding his alleged failure to comply with the terms of his disciplinary probation in Case No. S145364. In this letter, the State Bar referenced respondent's failure to timely contact the Office of Probation to schedule his initial meeting and his failure to submit original copies of quarterly reports. Noting respondent's "substantial compliance" with the terms of his probation and his assurances of strict compliance with future probationary conditions, the State Bar chose not to pursue disciplinary action at that time.

Following the issuance of respondent's Warning Letter, the Office of Probation received his April 10, 2008, October 10, 2008, and April 10, 2009 quarterly reports on April 14, 2008, October 17, 2008, and April 13, 2009, respectively. Although these quarterly reports were actually received after their due dates, their postmarks reveal that they were mailed to the Office of Probation on or before to their respective due dates.

C. Conclusions of Law

Respondent is charged with violating Business and Professions Code section 6068, subdivision (k),³ which provides that it is the duty of a member of the State Bar to comply with

² The policy of the Office of Probation is that if a fax is sent and an identical original is followed up within two weeks the quarterly report will be considered as timely filed.

³ All further references to section(s) are to the Business and Professions Code.

all conditions attached to any disciplinary probation. It is alleged that respondent violated the terms of his disciplinary probation in Supreme Court Case No. S145364 by: (1) failing to promptly contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of his probation; and (2) failing to timely submit six quarterly reports.

The court finds that by failing to contact the Office of Probation to schedule a meeting with his assigned probation deputy to discuss the terms and conditions of his probation within 30 days from the effective date of discipline, respondent failed to comply with all conditions attached to a disciplinary probation, in willful violation of section 6068, subdivision (k).

The State Bar, however, did not prove, by clear and convincing evidence, that respondent's conduct also constituted a failure to submit written quarterly reports in a timely fashion. The court finds that respondent's faxing and mailing of his quarterly reports on or before their respective due dates was in compliance with the requirement that he "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."⁴

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.)⁵

⁴ The meaning of the word "submit" is fairly ambiguous. The underlying court order does not state that the quarterly reports must contain an original signature; nor does it state that the quarterly reports must be actually received by the Office of Probation on or before the due date. Accordingly, respondent shall be given the benefit of the doubt. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 438 [any reasonable doubts must be resolved in respondent's favor].)

⁵ All further references to standard(s) are to this source.

A. Mitigation

The court finds four factors in mitigation. (Std. 1.2(e).)

Objective Steps Demonstrating Remorse (Std. 1.2(e)(vii))

Respondent believed that he did not need to contact Dineros in the present matter because he was already in contact with her on a prior matter. Once respondent realized his mistake, he promptly scheduled a meeting and met with Dineros.⁶

Lack of Harm (Std. 1.2(e)(iii))

Respondent's failure to timely schedule his initial probation meeting did not result in any harm to the Office of Probation or the State Bar.

Substantial Compliance

Substantial compliance with a probation condition is a mitigating factor, but not a defense to culpability. (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 652.)

The circumstances involved in the present matter demonstrate substantial compliance on respondent's part. Although respondent was in communication with his probation deputy on another matter, he failed to promptly schedule a meeting with her to discuss the terms and conditions of his probation. In its warning letter sent February 13, 2008, the State Bar acknowledged that respondent had "substantially complied, albeit untimely," with the requirement that he contact the Office of Probation to schedule his initial meeting.

⁶ The court also considered whether to find in mitigation that respondent's actions were in good faith. To establish good faith as a mitigating circumstance, an attorney must prove that his beliefs were both honestly held and reasonable. (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653.) Here the court finds that respondent honestly believed that his prior communications with Dineros satisfied the requirements of his present probation; however, this belief was not reasonable because respondent's prior communications with Dineros did not involve the terms and conditions of the present probation.

Participation in the Lawyer Assistance Program

Respondent voluntarily enrolled in the State Bar's Lawyer Assistance Program ("LAP") in 2004. Respondent currently continues to be an active participant in LAP. Respondent's continued efforts to address his mental health issues warrant some consideration in mitigation.

B. Aggravation

The court finds one factor in aggravation. (Std. 1.2(b).)

Prior Record of Discipline (Std. 1.2(b)(i).)

Respondent's prior record of discipline is an aggravating circumstance. Respondent has been previously disciplined on three separate occasions.

Effective June 16, 2002, respondent was publicly reprovved with conditions in State Bar Court Case No. 00-O-13635 for failing to perform and failing to cooperate with a State Bar investigation. In mitigation, respondent had no prior record of discipline. In aggravation, respondent's misconduct caused his clients to retain new counsel at additional expense.

On January 12, 2004, the California Supreme Court issued an order (S120130), in a default proceeding, suspending respondent from the practice of law for two years, stayed, including a period of actual suspension of 90-days and until the court granted a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure. This discipline involved respondent's failure to comply with the conditions of his public reproof in State Bar Court Case No. 00-O-13635.⁷ In aggravation, respondent: (1) had a prior record of discipline; (2) failed to participate in the disciplinary matter; and (3) harmed the administration of justice. No mitigating factors were found.

On September 26, 2006, the California Supreme Court issued an order (S145364) in the underlying matter suspending respondent from the practice of law for one year, stayed, with a

⁷ More specifically, respondent failed to submit two required quarterly reports.

three-year probationary period, and an actual suspension of 120 days. This matter involved respondent's failure to timely comply with former rule 955 of the California Rules of Court as ordered by the Supreme Court in Case No. S120130. In aggravation, respondent had a prior record of discipline. In mitigation, respondent: (1) cooperated with the State Bar; (2) acted in good faith; (3) demonstrated remorse; (4) was suffering from severe financial stress; and (5) demonstrated significant improvement in his mental health condition.

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 a condition of his probation. 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. (Std. 1.6 and 2.6.)

Standard 2.6 relates to cases involving a violation of section 6068. It states that culpability of a member of a violation of section 6068 "shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3."

Due to respondent's prior record of discipline, the court also looks to standard 1.7(b) for guidance. Standard 1.7(b) provides that when an attorney has two prior records of discipline, "the degree of discipline imposed in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate."

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 that respondent be disbarred pursuant to standard 1.7(b). The Supreme Court and Review Department have not historically applied standard 1.7(b) in a rigid fashion. Instead, the courts have weighed the individual facts of each case, including whether or not the instant misconduct represents a repetition of offenses for which the attorney has previously been disciplined. (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 977.) When such repetition has been found, the courts have typically found disbarment to be the appropriate sanction. (See *Morgan v. State Bar* (1990) 51 Cal.3d 598, 607; *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841; *In the Matter of Thomson, supra*, 4 Cal. State Bar Ct. Rptr. at p. 977.)

Although respondent has twice been found culpable of failing to comply with disciplinary conditions, the court finds that the facts and circumstances surrounding the present matter are considerably different from respondent’s prior misconduct. Unlike in his prior two disciplines, respondent’s present violation was due to a mistaken understanding, rather than avoidance, disinterest, or willful disobedience. Moreover, respondent, in the present matter, demonstrated remorse and promptly took steps to help remedy the situation.

After considering these factors, along with the extensive mitigation and the modest nature of the present misconduct, the court finds that a recommendation of disbarment would be excessive.

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, 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 nineteen restitution payments⁸ and timely file seven quarterly reports.⁹ 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 restitution was paid in full.

The present case involves less misconduct and more mitigation than *Laden*. However, unlike *Laden*, where the attorney's most-recent prior discipline involved a stayed suspension, respondent's most recent prior discipline involved a 120-day actual suspension. Therefore, pursuant to standard 1.7(a), the present case warrants a period of actual suspension greater than 120 days.¹⁰

Therefore, after weighing the evidence, including the factors in aggravation and mitigation, and considering the standards and the case law, the court finds that the appropriate discipline should include, among other things, a six-month period of actual suspension.

⁸ Eleven of these untimely payments were considered in aggravation as uncharged misconduct.

⁹ Six of these untimely quarterly reports were considered in aggravation as uncharged misconduct.

¹⁰ Standard 1.7(a) states that a member's present discipline should be greater than his or her prior discipline unless the prior discipline was so remote in time and the offense was so minimal that imposing a greater discipline would be manifestly unjust. Here, respondent's prior discipline is not remote in time, and the court finds that his misconduct is not "minimal" considering that he has been disciplined for failing to comply with disciplinary conditions on two previous occasions.

VI. Recommended Discipline

Accordingly, it is recommended that respondent **Michael Francis Galligan**, State Bar Number 53572, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that he be placed on probation for a period of three years subject to the following conditions:

1. Respondent is suspended from the practice of law for the first six months of probation;
2. Respondent must also comply with the following additional conditions of probation:
 - i. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct of the State Bar of California;
 - ii. 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 he 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 thirty (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;

- iii. 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 him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein;
- iv. 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;
- v. Within thirty (30) days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with his

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; and

- vi. Within one year after the effective date of the discipline herein, respondent must 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.).
3. 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 also recommended that respondent take and pass the Multistate Professional Responsibility Examination ("MPRE") administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the Office of Probation, within one year after the effective date of the discipline herein. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage. (But see Cal. Rules of Court, rule 9.10(b), and Rules Proc. of State Bar, rule 321(a)(1) and (3).)

It is further recommended that respondent be ordered to comply with the 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.¹¹

VII. Costs

It is 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. Respondent must also reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds and such payment is enforceable as provided under Business and Professions Code section 6140.5.

Dated: April _____, 2010

PAT McELROY
Judge of the State Bar Court

¹¹ Respondent is required to file a rule 9.20 affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1998) 44 Cal.3d 337, 341.)