

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 09-PM-10731-RAP
)	
ERIC W. SCHOLZ)	ORDER GRANTING MOTION TO
)	REVOKE PROBATION AND FOR
Member No. 142357)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. Introduction

In this probation revocation proceeding, respondent **Eric W. Scholz** (“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 did not request a hearing on this matter and admits to the Office of Probation’s allegations. Respondent states that his failure to comply with the terms of his probation was due to his inability to maintain sobriety through the duration of his probation.

The court finds, by a preponderance of the evidence, that respondent has violated his probationary conditions and hereby grants the motion to revoke his probation. The court recommends, among other things, that respondent’s probation in Supreme Court matter S138288 (State Bar Court Case No. 03-O-01638) be revoked, and that respondent be actually suspended

for three 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 general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.¹

II. Pertinent Procedural History

On February 20, 2009, the Office of Probation filed and properly served a motion to revoke probation on respondent, pursuant to Rules of Procedure of the State Bar of California (“Rules of Procedure”), rules 560, et seq. On March 16, 2009, respondent filed a brief response admitting to the allegations of the Office of Probation and requesting that this proceeding be resolved on the pleadings without a hearing.

On March 18, 2009, the Office of Probation filed a motion requesting that the court take judicial notice of certified copies of two of respondent’s prior disciplines. Respondent did not file a response to this motion. The court hereby grants the Office of Probation’s request for judicial notice.

The court took this matter under submission on April 16, 2009.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the declarations and exhibits submitted in support of and in opposition to the motion to revoke probation. (Rules Proc. of State Bar, rule 563(e).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 11, 1989, and has since been a member of the State Bar of California.

¹ All further references to standard(s) are to this source.

B. Probation Conditions of Supreme Court Case No. S138288

On December 28, 2005, in Supreme Court Case No. S138288, the California Supreme Court ordered that:

1. Respondent be suspended from the practice of law for three years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), that execution of the suspension be stayed, and that he be placed on probation for five years on condition that he be actually suspended for two years and until he complies with standard 1.4(c)(ii); 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 August 11, 2005 (State Bar Court Case No. 03-O-01638), 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 reports”);

b. Submitting to the Office of Probation, within one year from the effective date of his discipline (by January 27, 2007), satisfactory proof of his attendance at a session of the State Bar’s Ethics School (“Ethics School”) and passage of the test given at the end of that session;

c. Obtaining psychiatric or psychological treatment from a duly licensed psychiatrist, psychologist or clinical social worker, at respondent’s own expense, a minimum of twice per month and furnishing evidence of his compliance to the Office of Probation with each quarterly report; and,

d. Selecting a licensed medical laboratory approved by the Office of Probation and causing the laboratory to provide the Office of Probation, at respondent's expense, a screening report on or before the 10th day of each month of the period of probation, containing an analysis of respondent's blood and/or urine obtained not more than 10 days previously.²

Notice of the December 28, 2005 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 6002.1.³

On January 31, 2006, the Office of Probation mailed an additional copy of the December 28, 2005 Supreme Court order to respondent at his official membership records address. Included in this mailing was, among other things, a letter confirming the terms and conditions of respondent's probation.

C. Findings of Fact

1. Quarterly Probation Reports

Respondent was required under the terms of his probation to submit quarterly reports to the Office of Probation in a timely manner. In each quarterly report, respondent was required to state, under the 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.

The evidence introduced by the State Bar demonstrates that respondent's April 10, 2006 quarterly report was filed late on May 11, 2006. In addition, his January, April, July, and October 2007 and April and October 2008 quarterly reports were not accepted by the Office of

² Respondent was further ordered to abstain from the use of any alcoholic beverages, and not use or possess any narcotics, controlled substances, marijuana, or associated paraphernalia, except with a valid prescription.

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

Probation because in these reports respondent failed to state whether he had complied with the State Bar Act and the Rules of Professional Conduct.

2. Ethics School

The evidence shows that respondent was required to provide satisfactory proof of his attendance at a session of Ethics School and of passage of the test given at the end of that session by April 30, 2007.⁴ Respondent, however, did not attend Ethics School until August 2, 2007, and did not provide the Office of Probation with proof of attendance and passage of the test given at the end of the session until September 4, 2007.

3. Psychiatric or Psychological Reporting

Respondent was required to obtain psychiatric or psychological treatment from a duly licensed psychiatrist, psychologist or clinical social worker (at respondent's own expense) a minimum of twice per month and furnish evidence of his compliance to the Office of Probation with each quarterly report. Respondent, however, failed to submit proof of any psychiatric or psychological treatment in February, March, April, August, September, October, and November 2006; and March and September 2008. In addition, respondent provided proof of only one treatment session for the months of December 2006; April, August, September, and December 2007; and July and August 2008.

4. Laboratory Testing

Respondent was required to provide, from a licensed medical laboratory, a screening report on or before the 10th day of each month of the period of probation, containing an analysis of respondent's blood and/or urine. The evidence presented by the Office of Probation demonstrates that respondent failed to file proof of any lab test reports for February, March, and December 2006; February, March, April, May, June, August, September, October, and

⁴ The original deadline of January 27, 2007, was extended by order of the State Bar Court.

December 2007; March, September, and November 2008; and January 2009. In addition, respondent went for his lab test late in April, May, July, August, September, October, and November 2006; July 2007; and January and October 2008. Further, respondent filed his lab test results late in April, May, June, July, August, September, October, and November 2006; January, July, and November 2007; and January, April, May, June, July, August, October, and December 2008.

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:

1. Properly and adequately submit six quarterly reports (January, April, July, and October 2007; and April and October 2008) and timely submit a seventh (April 10, 2006);
2. Provide proof of his attendance at a session of Ethics School and passage of the test given at the end of that session to the Office of Probation by April 30, 2007;
3. Provide satisfactory proof to the Office of Probation, with each quarterly report, that he had obtained psychiatric or psychological treatment from a duly licensed psychiatrist, psychologist or clinical social worker a minimum of twice per month throughout the period of probation; and

4. Provide, or cause to be provided, drug and alcohol screening reports to the Office of Probation on or before the 10th day of the month of each month of the period of probation.

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 December 28, 2005 order. As a result, the revocation of respondent's probation in California Supreme Court Case No. S138288 is warranted.

IV. Mitigating and Aggravating Circumstances

The parties bear the burden of proving mitigating and aggravating circumstances by clear and convincing evidence. (Std. 1.2.)

A. Mitigation

Respondent failed to demonstrate, by clear and convincing evidence, the existence of any mitigating circumstances. (Std. 1.2(e).) Although he provided the court with a cursory explanation regarding his inability to maintain his sobriety through the duration of his probation, respondent did not provide the court with sufficient details or evidence to warrant a finding in mitigation. (See std. 1.2(e)(iv).)

B. Aggravation

A member's prior record of discipline is an aggravating factor. (Std. 1.2(b)(i).) Here, respondent has been previously disciplined on three separate occasions.

Effective November 21, 1996, respondent, in Supreme Court Case No. S055491, was ordered suspended for three years, stayed, with four years' probation on condition that he be actually suspended for two years and until he pays restitution and proves his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii). In this matter, respondent stipulated to numerous acts of misconduct in five client matters and one

criminal conviction referral. His misconduct included failing to perform legal services with competence, improperly withdrawing from representation, collecting an illegal fee, failing to account, failing to communicate, and committing an act of moral turpitude in regard to his criminal conviction for receiving stolen property. In aggravation, respondent evidenced multiple acts of wrongdoing. In mitigation, respondent was suffering from extreme emotional difficulties relating to his depression and alcoholism. He also demonstrated spontaneous candor and cooperation, and had no prior record of discipline.

Effective August 1, 2002, respondent, in Supreme Court Case No. S106209, was ordered suspended for three years, stayed, with four years' probation on condition that he be actually suspended for two years and until he pays restitution and proves his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii). In this matter, respondent stipulated to failing to comply with the terms of probation ordered in Supreme Court Case No. S055491. In aggravation, respondent committed multiple acts of misconduct, caused significant harm to his client, and had a prior record of discipline. In mitigation, respondent demonstrated candor and cooperation, and was suffering from alcohol abuse at the time of the misconduct.

Effective January 27, 2006, respondent, in Supreme Court Case No. S138288 (the underlying matter), was ordered suspended for three years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), stayed, with five years' probation on condition that he be actually suspended for two years and until he proves his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii). In this matter, respondent stipulated to failing to comply with the terms of probation ordered in Supreme Court Case No. S106209. In aggravation, respondent had two prior disciplines and

committed multiple acts of misconduct. In mitigation, respondent was candid and cooperative with the State Bar.

As an additional point in aggravation, respondent's misconduct in the current proceeding involves multiple acts of wrongdoing. (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 is dependent, in part, on the nature of the probation violation and its relationship to respondent's prior misconduct. (*Ibid.*)

Here, respondent has given the court no reason to believe that he will comply with the conditions of his previously imposed probation. This is the third time respondent has been disciplined for failing to undertake rehabilitative steps that were deliberately crafted to insure public protection.

In consideration of respondent's present violation of probation conditions and his history of failing to comply with previous probationary conditions, the court finds no compelling reason to recommend again placing him on probation subject to conditions.

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.) Hence, the court finds good cause to grant the motion to revoke respondent’s probation and recommends, among other things, that the entire period of his stayed suspension be imposed.

VI. Recommended Discipline

Accordingly, the court recommends that the probation of respondent **Eric W. Scholz** previously ordered in Supreme Court case No. S138288 (SBC Case No. 03-O-01638) be revoked; and that:

1. He be suspended from the practice of law for a minimum of three years and remain suspended until the following requirement is satisfied:
 - i. He must provide proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

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.⁵

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners and provide proof of passage to the Office of Probation during the period of his actual suspension. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

⁵ 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.)

It is not recommended that respondent attend Ethics School, as respondent attended and completed that course within the last two years.

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).⁶ This inactive enrollment order will be effective three calendar days after the date upon which this order is served.

Dated: April 17, 2009.

RICHARD A. PLATEL
Judge of the State Bar Court

⁶Any period of involuntary inactive enrollment will be credited against the period of actual suspension ordered. (Bus. & Prof. Code, § 6007, subd. (d)(3).)