

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 09-PM-17062-LMA
)	
DAVID G. FOX)	ORDER GRANTING MOTION TO
)	REVOKE PROBATION AND ORDER OF
Member No. 61158)	INACTIVE ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this probation revocation proceeding, respondent **David G. Fox** 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, among other things, 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 a preponderance of the evidence, that respondent has violated his probation conditions and hereby grants the Office of Probation’s motion to revoke. The court recommends, among other things, that respondent’s probation be revoked, that the previously stayed suspension be lifted, and that respondent be actually suspended from the practice of law for one year.

II. Pertinent Procedural History

On October 26, 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. Respondent did not file a response, as required by rule 563(b) of the Rules of Procedure. The court ultimately took this matter under submission on November 20, 2009.

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 16, 1974, and has since been a member of the State Bar of California.

B. Probation Conditions in Supreme Court Case No. S161079

On April 22, 2008, in Supreme Court Case No. S161079 (Supreme Court order), the California Supreme Court ordered that respondent be suspended from the practice of law for one year, that execution of the suspension be stayed, and that he be placed on probation for two years subject to the conditions of probation recommended by the Hearing Department of the State Bar Court in its Decision filed on December 12, 2007, including, but not limited to:

a. Complying with the State Bar Act and Rules of Professional Conduct and reporting such compliance—under penalty of perjury—by submitting quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation; and

b. Providing to the Office of Probation, within one year from the effective date of discipline, satisfactory proof of attendance at a session of the Ethics School and passage of the test given at the end of that session.

Notice of the Supreme Court order was served upon respondent in the manner prescribed by rule 8.264 of the California Rules of Court at respondent's official address in accordance with Business and Professions Code section 6002.1.¹ The Supreme Court order became effective on May 22, 2008.

C. Probation Violations

On or about May 7, 2008, the Office of Probation sent a letter to respondent at his official address, outlining the terms and conditions of his probation. This letter was not returned to the State Bar as undeliverable, or for any other reason.

On August 17, 2009, the Office of Probation called respondent's membership records telephone number and left a message informing respondent, among other things, that the Office of Probation was seeking proof that he had submitted his quarterly reports.²

On August 18, 2009, the Office of Probation sent a letter to respondent, at his official address, advising that the Office of Probation had not received proof of respondent's attendance at Ethics School or any of his quarterly reports. This letter was not returned to the State Bar as undeliverable, or for any other reason.

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

1. Submit with the Office of Probation his first six quarterly reports, due between July 10, 2008 and October 10, 2009; and
2. Provide the Office of Probation with satisfactory proof of attendance at a session of Ethics School and passage of the test given at the end of that session.

To establish culpability for a probation violation charged in a probation revocation proceeding, the State Bar must prove, by a preponderance of the evidence, the text of the

¹ All references to section(s) are to the Business and Professions Code, unless otherwise stated.

² It is unclear from the record whether respondent returned the Office of Probation's telephone call.

probation condition that the attorney is charged with violating and that the attorney willfully failed to comply with it. Willfulness in this context does not require a bad purpose or evil intent. Instead, it requires only a general purpose or willingness to commit an act or permit an omission. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.)

The court finds that respondent violated the conditions of his probation and that those violations were willful. Respondent's willful probation violations warrant the revocation of his probation. (Section 6093, subd. (b).)

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).)³

B. Aggravation

In aggravation, respondent has a prior record of discipline. (Std. 1.2(b)(i).)

On April 22, 2008, the California Supreme Court, in the underlying matter, issued an order (S161079) suspending respondent from the practice of law for one year, staying execution of the suspension, and placing him on probation for two years. In this default matter, respondent was found culpable of failing to update his membership records address and failing to cooperate in a State Bar investigation. In aggravation, respondent committed multiple acts of misconduct and failed to consistently participate in the disciplinary proceedings prior to the entry of his default. In mitigation, respondent had no prior record of discipline.

³ All further references to standard(s) are to this source.

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 indication that he intends to comply with any of the conditions of his previously imposed probation. In doing so, respondent has failed to undertake any of the rehabilitative steps that were deliberately crafted to insure public protection.

In consideration 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 efforts to secure it, the court does not believe it worthwhile 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 as follows:

1. That the probation of respondent **David G. Fox** previously ordered in Supreme Court case No. S161079 (SBC Case No. 06-O-12853) be revoked;
2. That the previous stay of execution of the suspension be lifted; and
3. That respondent be actually suspended from the practice of law for one year.

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 suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.⁴

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination as he was previously ordered to do so in Supreme Court matter S161079.

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.

⁴Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

VIII. Order of Involuntary Inactive Enrollment

Respondent is ordered to be involuntarily enrolled inactive under Business and Professions Code section 6007, subdivision (d)(1).⁵ This inactive enrollment order will be effective three calendar days after the date upon which this order is served.

Dated: January ____, 2009

LUCY M. ARMENDARIZ
Judge of the State Bar Court

⁵Any period of involuntary inactive enrollment will be credited against the period of actual suspension ordered. (Bus. & Prof. Code, § 6007, subd. (d)(3).)