

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 10-PM-03859-PEM
)	
GREGORY JOHN TOKARCZYK)	ORDER GRANTING MOTION TO
)	REVOKE PROBATIONS AND ORDER
Member No. 150924)	OF INACTIVE ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this probation revocation proceeding, respondent **Gregory John Tokarczyk** 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 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 S175509 (State Bar Court Case Nos. 06-O-15057 (07-O-10970; 07-O-11260; 07-O-12270; 07-O-12482)) be revoked; that the previous stayed suspension be lifted, and that respondent be actually suspended from the practice of law for one year and that he remain suspended until he makes specified restitution.

II. Pertinent Procedural History

The Office of Probation served a motion to revoke probation on respondent and filed the motion to revoke probation, on April 13, 2010 and April 14, 2010, respectively, 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 address² by certified mail, return receipt requested. Respondent did not file a response, as required by rule 563(b) of the Rules of Procedure.

The court took this matter under submission on May 11, 2010.

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 4, 1990, and has since been a member of the State Bar of California.

B. Probation Conditions in Supreme Court Case No. S175509

On October 6, 2009, in Supreme Court Case No. S175509 (State Bar Court Case Nos. 06-O-15057 (07-O-10970; 07-O-11260; 07-O-12270; 07-O-12482)), the California Supreme Court ordered that:

1. Respondent be suspended from the practice of law for two years, that execution of that period of suspension be stayed, and that he be placed on probation for two years subject to the condition that he be suspended for a minimum of the first six months of probation and that he remain suspended until the following requirements are satisfied:

- a. He makes restitution to Bhupinder Kaur Gill (formerly Nijjar) in the amount of 10,000 plus 10 percent interest per year from December 28,

¹ References to rule(s) are to the Rules of Procedure of the State Bar, unless stated otherwise.

² Pursuant to Evidence Code section 452, subdivision (h), the takes judicial notice of respondent's official membership records address history.

2006 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Bhupinder Kaur Gill, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof to the State Bar's Office of Probation in Los Angeles;

- b. He makes restitution to Robert Skiba in the amount of \$300 plus 10 percent interest per year from September 25, 2006 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Robert Skiba, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof to the State Bar's Office of Probation in Los Angeles; and
- c. If he remains suspended for two years or more as a result of not satisfying the preceding conditions, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).); and

2. Respondent must also comply with the other conditions of probation recommended by the Hearing Department of the State Bar Court in its Order Approving Stipulation filed on February 24, 2009, including, but not limited to the following conditions:

- a. Respondent must contact the Office of Probation within 30 days from the effective date of discipline and schedule a meeting with respondent's assigned probation deputy to discuss the terms and conditions of probation; and upon direction of the Office of Probation, respondent must meet with the probation deputy either in-person or by telephone;
- b. Respondent must submit written quarterly reports to the Office of Probation no later than 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 the conditions of probation during the preceding calendar quarter (quarterly probation reports);
- c. Respondent must make restitution to Bhupinder Kaur Gill (formerly Nijjar) within one year of the effective date of discipline in this matter in the amount of \$10,000 plus 10 percent interest per year from December 28, 2006, in monthly installments in the minimum amount of \$500 each month until paid in full and provide satisfactory evidence of such restitution to the Office of Probation. Respondent must make the payments on the first day of each month (or reimburse the Client Security Fund, to the extent of any payment to Gill). Respondent must also include, in each required quarterly report, satisfactory evidence of the restitution payments made by him during that reporting period.

- d. Respondent must make restitution to Robert Skiba within one year of the effective date of discipline in this matter in the amount of \$300 plus 10 percent interest per year from September 25, 2006, in monthly installments until paid in full and furnish satisfactory evidence of such restitution to the Office of Probation. Respondent must also include, in each required quarterly report, satisfactory evidence of the restitution payments made by him during that reporting period.
- e. Respondent must attend 12 meetings per month at an abstinence based self-help group. At least four abstinence based self-help group meetings per month will be of respondent's own choosing. Respondent must, however, contact the Office of Probation and obtain approval of the program that he has selected, prior to attending the first self-help group meeting.³ Respondent must submit to the Office of Probation, with each quarterly report and with his final written reports documentary proof of attendance at the meetings of the approved program in a form acceptable to the Office of Probation.

As a separate reporting requirement, respondent must provide the Office of Probation satisfactory proof of attendance for the meetings attended during each month, on or before the 10th day of the following month, during the probation period.

- f. Respondent must select a licensed medical laboratory approved by the Office of Probation and furnish to the laboratory such blood and/or urine samples as may be required to show that he has abstained from alcohol and/or drugs. Respondent must cause the laboratory to provide to the Office of Probation, at respondent's own expense, a screening report on or before the 10th day of each month of the probation period, containing an analysis of respondent's blood and/or urine obtained not more than 10 days earlier; and
- g. At his own expense, respondent must obtain psychiatric or psychological treatment from a duly licensed psychiatrist, psychologist or clinical social worker, at a minimum of twice per month and furnish evidence of his compliance to the Office of Probation with each quarterly report.

Notice of the October 6, 2009 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

³ Twelve-step groups such as Alcoholics Anonymous and Narcotics Anonymous, among others, were deemed acceptable by the Office of Probation.

address in accordance with Business and Professions Code section 6002.1.⁴ The Supreme Court order became effective on November 5, 2009.

C. Probation Violations

On or about November 17, 2009, 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 Office of Probation as undeliverable, or for any other reason.

On or about December 16, 2009, the Office of Probation sent another letter to respondent at his official address, advising respondent that he was not in compliance with his probation because he had not made his initial contact with the Office of Probation by December 5, 2009, to discuss the terms and conditions of his probation, had not selected a self-help group to attend, had not selected an approved medical lab for drug/alcohol testing, and had not provided proof of the December restitution payment to Bhupinder Kaur Gill, which proof was due on December 10, 2009. It was further requested in the letter that respondent immediately contact the Office of Probation. The December 16, 2009 letter was not returned to the Office of Probation as undeliverable, or for any other reason.

Respondent did not contact the Office of Probation until December 22, 2009, when he left a voice mail message for the probation deputy. Respondent also left voice mail messages for the probation deputy on December 23 and 28, 2009. On December 29, 2009, the probation deputy telephoned respondent and a meeting was conducted, during which all of respondent's conditions and deadlines were reviewed.

1. Initial Contact with the Office of Probation

⁴ All references to section(s) are to the Business and Professions Code, unless otherwise stated.

As a condition of probation respondent was required to contact the Office of Probation within 30 days from the effective date of discipline, i.e., by December 5, 2009, and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation.

Respondent did not timely contact the Office of Probation. Respondent did not contact the Office of Probation until December 22, 2009 to schedule a meeting (the meeting took place on December 29, 2009.)

2. Quarterly Reports

As a condition of probation, respondent was required to submit quarterly reports to the Office of Probation no later than each January 10, April 10, July 10, and October 10 of the period of probation. The evidence introduced by the Office of Probation demonstrates that respondent did not file his quarterly report due on April 10, 2010.

3. Restitution to Bhupinder Kaur Gill and to Robert Skiba

As a condition of probation, respondent was ordered to make restitution to Bhupinder Kaur Gill within one year of the effective date of his discipline, in the amount of \$10,000 plus 10 percent interest per year from December 28, 2006, to be paid in monthly installments in the minimum amount of \$500 each month until paid in full and provide satisfactory evidence of such restitution to the Office of Probation. Respondent was required to make the payments on the first day of each month (or reimburse the Client Security Fund to the extent of any payment to Gill).

Respondent was also ordered to make restitution to Robert Skiba within one year of the effective date of his discipline, in the amount of \$300 plus 10 percent interest per year from September 25, 2006, to be paid in monthly installments until paid in full and provide satisfactory evidence of such restitution to the Office of Probation.

Respondent was further ordered to include in each quarterly probation report, satisfactory evidence of the required restitution payments made by him during the reporting period.

On January 8, 2010, respondent sent a fax to the Office of Probation. Attached to the fax was his quarterly report, which was due by January 10, 2010. Respondent wrote notes on the quarterly report stating, among other things, that he did not have the financial resources to pay restitution.

Respondent violated the terms of his probation by failing to file proof of restitution payments to Gill and to Skiba, as required. The proof was due on January 10, 2010 and April 10, 2010.

4. Abstinance Based Support Meetings

Respondent was required to provide the Office of Probation with satisfactory proof of his attendance at a minimum of four acceptable support-group meetings per month. The Office of Probation informed respondent that he must provide original signatures, not faxed signatures as proof of his attendance at the support meetings for November and December 2009. Respondent, however, failed to provide proof in the form required by the Office of Probation for the November and December 2009 meetings that he attended. Additionally, respondent failed to submit any proof of attendance at meetings for January, February, or March 2010.

5. Laboratory Testing

Respondent was required to select a medical laboratory to test his blood and/or urine samples to demonstrate that he abstained from alcohol and/or drugs. Respondent was further ordered to cause the laboratory to provide the Office of Probation with a screening report on or before the tenth day of each month of the probation period, containing an analysis of respondent's blood and/or urine obtained not more than 10 days earlier.

Respondent did not comply in that the Office of Probation did not receive a screening report containing an analysis of respondent's blood or urine on or before the tenth day of January, February, March, or April 2010, the first full four months of respondent's probation period.

6. 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 for December 2009, which was due with his quarterly report by January 10, 2010. Respondent also failed to submit proof of psychiatric or psychological treatment for January, February, and March 2010, which was due by April 10, 2010.

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.)

Based on the evidence submitted by the Office of Probation, respondent violated his probation conditions by failing to:

1. Timely contact the Office of Probation by December 5, 2009, to schedule a meeting to discuss the terms and conditions of his probation;

2. Submit to the Office of Probation his quarterly report that was due on April 10, 2010;
3. Provide the Office of Probation with proof of restitution payments to Bhupinder Kaur Gill and to Robert Skiba, which proof was due on January 10, 2010 and April 10, 2010;
4. Provide the Office of Probation with satisfactory proof of attendance at his abstinence based self-help group meetings for November and December 2009, and any proof of attendance at meetings for January, February, and March 2010;
5. Provide, or cause to be provided, drug and alcohol screening reports to the Office of Probation on or before the 10th day of January, February, March , and April 2010, the first full four months of respondent's probation period; and
6. Provide proof of any psychiatric or psychological treatment for December 2009, which was due with his quarterly report by January 10, 2010, and provide proof of psychiatric or psychological treatment for January, February, and March 2009, which was due by April 10, 2010.

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 October 6, 2009 order.

As a result, the revocation of respondent's probation in California Supreme Court case No. S175509 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(e).)⁵

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. (Std. 1.2(e).)

B. Aggravation

In aggravation, respondent has two prior records of discipline.⁶ (Std. 1.2(b)(i).)

1. On October 6, 2009, the California Supreme Court issued an order which, among other things, suspended respondent from the practice of law for two years, stayed the execution of that period of suspension, and placed respondent on probation for two years subject to the conditions that he be suspended for a minimum of the first six months of probation and that he remain suspended until he makes specified restitution.⁷ Respondent's misconduct included failing to competently

⁵ All further references to standards are to this source.

⁶ Given that the Office of Probation of the State Bar did not submit authenticated/certified copies of respondent's first and second record of discipline, the court will take judicial notice of those records pursuant to Evidence Code section 452. (In fact, the Office of Probation failed to submit any copy, authenticated or otherwise, of respondent's second record of discipline.) The court cautions and advises the Office of Probation, as it has had to do in the past, that it should provide a certified copy of all prior records of discipline before the case is submitted. (See, Rules Proc. of State Bar, rule 216.)

⁷ The Stipulation Re Facts, Conclusions of Law and Disposition and Order (February 24, 2009 Stipulation and Order) in State Bar Court case Nos. 06-O-15057 (07-O-10970; 07-O-11260; 07-O-12270; 07-O-12482) sets forth the facts and disposition, agreed to by the parties and approved by the State Bar Court. The disposition stipulated to by the parties, which the State Bar Court recommended to the Supreme Court, as set forth on page 4 in paragraph D of the Stipulation and Order under the sub-heading "Stayed Suspension," states that "[r]espondent must be suspended from the practice of law for **one year** [emphasis in original] . . .," which period of suspension is stayed. But, Supreme Court Order S175509 states that respondent is ordered

perform legal services (five client matters), failing to communicate (five client matters), failing to release client files (three client matters); failing to cooperate in State Bar investigations (five client matters); engaging in an act of moral turpitude; failing to return unearned fees (two client matters); failing to maintain a current address with the State Bar, failing to render accounts of client funds, and failing to obey a court order. (Supreme Court case No. S175509; State Bar Court Case Nos. 06-O-15057 (07-O-10970; 07-O-11260; 07-O-12270; 07-O-12482).)

2. On February 12, 2010, the State Bar Court filed its Stipulation Regarding Facts, Conclusions Of Law And Disposition And Order Approving, which had been entered into by respondent and the Office of the Chief Trial Counsel of the State Bar of California. Respondent stipulated to improperly withdrawing from employment, failing to return unearned fees, and failing to communicate in one client matter and to failing to cooperate in a State Bar investigation. The disposition recommended to the Supreme Court in the February 12, 2010 Stipulation and Order includes, among other things, that respondent be suspended from the practice of law for one year, that execution of that period of suspension be stayed, and he be placed on probation for one year, subject to the conditions that he be suspended for a minimum of the first six months of suspension. (State Bar Court, case No. 08-O-13627.)⁸

suspended from the practice of law for **two years** and that execution of that period of suspension is stayed.

This court, therefore, will bring the discrepancy between the State Bar Court's February 24, 2009 Stipulation and Order and Supreme Court Order S175509 to the attention of the Supreme Court, so that it may correct what appears to be a clerical error in the Supreme Court order, if it deems appropriate.

⁸Whether the non-final prior discipline recommendation in State Bar Court case No. 08-O-13627 is adopted or is dismissed or modified, will not impact this court's discipline recommendation in the instant matter, i.e., case No. 10-PM-03859. Pursuant to rule 562 of the

Respondent committed multiple acts of wrongdoing, including failing to: (1) timely contact the Office of Probation to schedule a meeting to discuss the terms of his probation; (2) submit his April 2010 quarterly report; (3) provide the Office of Probation with proof of restitution payments; (4) provide the Office of Probation with proof of attendance at abstinence-based self-help group meetings; (5) provide, or cause to be provided, drug and alcohol screening reports to the Office of Probation; and (6) provide proof of any psychiatric or psychological treatment to the Office of Probation by April 10, 2010. (Std. 1.2(b)(ii).)

Respondent's failure to 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. at p. 540.) The extent

Rules of Procedure, any actual suspension recommended in a probation revocation proceeding must not exceed the entire period of stayed suspension. Because, as noted in footnote 7, *ante*, there appears to be a clerical error as to the period of stayed suspension in Supreme Court Order S175509, the period of actual suspension that this court will recommend in the instant matter will not exceed the period of stayed suspension agreed to by the parties and recommended in the February 24, 2009 Stipulation and Order.

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 two prior records involved misconduct in a total of six client matters. In this third disciplinary matter, respondent failed to comply with numerous court-ordered conditions of his probation. Respondent has given the court no indication that he intends to adequately comply with the conditions of his previously imposed probation. In doing so, respondent has failed to undertake the rehabilitative steps that were deliberately crafted to insure public protection.

In light of respondent's violation of probation conditions and his lack of participation in these proceedings, 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 respondent be suspended from the practice of law for one year. (See, footnotes 7 and 8, *ante.*)

VI. Recommendations

A. Discipline

It is recommended that:

1. The probation of respondent **Gregory John Tokarczyk** previously ordered in Supreme Court case No. S175509 (State Bar Court Case Nos. 06-O-15057 (07-O-10970; 07-O-11260; 07-O-12270; 07-O-12482)) be revoked;

2. The previous stay of execution of the suspension be lifted; and
3. Gregory John Tokarczyk be suspended from the practice of law for one year.

B. Restitution

It is not recommended that respondent be ordered to make restitution in the instant matter, since the Supreme Court ordered in the underlying matter (S175509) that respondent must remain suspended until he makes restitution to Bhupinder Kaur Gill and to Robert Skiba.

C. Multistate Professional Responsibility Exam

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 by the Supreme Court in S175509. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage.

D. 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.⁹

E. 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. It is also recommended that Gregory John Tokarczyk reimburse the Client Security Fund to the extent that the misconduct in

⁹ 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.)

this matter results in payment of funds and that such payment be enforceable as provided for under Business and Professions Code section 6140.5.

VII. Order of Involuntary Inactive Enrollment

Respondent is ordered to be involuntarily enrolled inactive under Business and Professions Code section 6007, subdivision (d)(1). This inactive enrollment order will be effective three calendar days after the date upon which this order is served.¹⁰

Dated: June _____, 2010

PAT McELROY
Judge of the State Bar Court

¹⁰ Any period of involuntary inactive enrollment will be credited against the period of actual suspension ordered. (Bus. & Prof. Code, § 6007, subd. (d)(3).)