

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 10-PM-04605-RAH
)	
DAVID BURKENROAD,)	
)	ORDER GRANTING MOTION
Member No. 110320,)	TO REVOKE PROBATION
)	
A Member of the State Bar.)	
_____)	

1. INTRODUCTION

In this probation revocation proceeding (Bus. & Prof. Code, § 6093; Rules Proc. of State Bar, rule 560 et seq.), the State Bar's Office of Probation charges respondent **DAVID BURKENROAD**¹ with seven violations of the conditions of probation that were imposed on him under the Supreme Court's September 16, 2008 order in *In re David Burkenroad on Discipline*, case number S165318 (State Bar Court case number 06-O-14001) (hereafter *Burkenroad II*). In that September 16, 2008 order, the Supreme Court placed respondent on one year's stayed suspension and two years' probation with conditions including a 30-day suspension.

¹ Respondent was admitted to the practice of law in this state on December 12, 1983, and has been a member of the State Bar of California since that time. He has two prior records of discipline.

As set forth below, the court finds that respondent is culpable of the seven charged probation violations and concludes that the appropriate level of discipline for those violations is revocation of respondent's probation in *Burkenroad II* and the imposition of a new one-year stayed suspension and a new two-year probation with conditions, including a one-year suspension that will continue until respondent files three past-due probation reports.

2. PERTINENT PROCEDURAL HISTORY

On May 7, 2010, the Probation Office filed the motion to revoke probation in this proceeding and, in accordance with Business and Professions Code section 6002.1, subdivision (c)² and Rules of Procedure of the State Bar, rule 563(a), properly served a copy of the motion on respondent by certified mail, return receipt requested, at his latest address shown on the official membership records of the State Bar. That service was deemed complete when mailed even if respondent never received it. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108; but see also *Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.)

Respondent never filed a response to the motion to revoke probation, and the time for respondent to do so under Rules of Procedure of the State Bar, rule 563(a) has long expired. On June 3, 2010, the court took the motion under submission for decision without a hearing.³

3. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Exhibits 1, 2, and 3 that are attached to the motion to revoke probation are received into evidence. (Rules Proc. of State Bar, rule 563(e).) Moreover, respondent's failure to file a response to the motion to revoke probation constitutes an admission of the *factual* allegations (not the legal conclusions or charges) contained in the motion and its supporting documents.

² Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

³ The Probation Office did not request a hearing. (Rules Proc. of State Bar, rule 563(a).)

(Rules Proc. of State Bar, rule 563(b)(3).) Accordingly, the court adopts those admitted factual allegations as its findings of fact, which are summarized below.

A. Probation-Deputy-Meeting Condition

Respondent's probation-deputy-meeting condition required respondent, no later than November 15, 2009, to contact the Probation Office *and* to schedule a meeting to discuss the terms and conditions of his probation with his assigned probation deputy. The record establishes, by a preponderance of the evidence (Rules Proc. of State Bar, rule 561), that respondent willfully violated his probation-deputy-meeting condition because he failed to contact the Probation Office and to schedule a meeting with his probation deputy no later than November 15, 2009. In fact, respondent did not even contact the Probation Office until November 19, 2009, which is when the Probation Office received a letter from respondent. Even if the Probation Office had received respondent's letter before respondent's November 15, 2009 deadline, respondent was required to do more than just send a letter. Respondent was to have scheduled a meeting with his assigned probation deputy. Eventually, the required meeting was held in early December 2009.

B. Quarterly-Probation-Reporting Condition

Respondent's quarterly-probation-reporting condition requires that, on every January 10, April 10, July 10, and October 10, respondent submit, to the Office of Probation, a written probation report stating, under penalty of perjury, whether he complied with the Rules of Professional Conduct of the State Bar and the State Bar Act (§ 6000, et seq.) during the preceding calendar quarter.

The record establishes that respondent willfully violated his probation-reporting condition because, at least as of May 7, 2010 when the Probation Office filed the present motion, respondent had not submitted his third, fifth, and sixth probation reports, which were due July

10, 2009; January 10, 2010; and April 10, 2010, respectively. The record further establishes that respondent willfully violated his probation-reporting condition because he submitted (1) his first probation report, which was due January 10, 2009, almost eight months late on September 9, 2009; (2) submitted his second report, which was due April 10, 2009, almost two months late on June 3, 2009; and (3) submitted his fourth report, which was due October 10, 2009, about 50 days late on November 30, 2009.

4. AGGRAVATION AND MITIGATION

A. Aggravation

1. Prior Records of Discipline

Respondent has two prior records of discipline, which are aggravating circumstances. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i).)⁴

Respondent's first prior record of discipline is a private reproof that was imposed on him effective February 16, 2005, in State Bar Court case number 04-O-14954 for willfully failing to perform legal services competently and for failing to promptly refund an unearned fee after his employment terminated in a matter.

Respondent's second prior record of discipline is the Supreme Court's September 16, 2008 order in *Burkenroad II*. As noted above, in that order, the Supreme Court placed respondent on one year's stayed suspension and two years' probation on conditions, including a 30-day suspension. In *Burkenroad II*, respondent stipulated that, in mid-2006, when he failed to appear at two superior court hearings in a juvenile case in which he represented the minor/juvenile, he effectively withdrew from employment without the superior court's permission and without taking reasonable steps to avoid the reasonably foreseeable prejudice to

⁴ All further references to standards are to this source.

his minor client in willful violation of rule 3-700(A). He also stipulated that he willfully violated section 6103 when he failed to appear at the two superior court hearings as ordered by the superior court.

In *Burkenroad II*, the parties stipulated that respondent's misconduct was aggravated by respondent's prior private reproof (std. 1.2(b)(i)); harm (std. 1.2(b)(iv)); and indifference (std. 1.2(b)(v)). Finally, the parties stipulated that there was no mitigating circumstance surrounding respondent's misconduct in *Burkenroad II*.

2. Multiple Acts

Respondent's present misconduct involves seven probation violations. (Std. 1.2(b)(ii).)

3. Indifference

Respondent's failure to rectify his misconduct by filing his third, fifth, and sixth quarterly probation reports once he learned that the present probation revocation proceeding had been filed against him clearly establishes respondent's indifference toward rectification, which is an aggravating circumstance. (Std. 1.2(b)(v); *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 702; see also *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530.)

B. Mitigation

Because respondent did not appear in this probation revocation proceeding he did not establish any mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) Nor is any mitigating circumstance otherwise apparent from the record.

5. DISCUSSION

The Probation Office seeks the revocation of respondent's probation and the imposition of the entire one-year stayed suspension that was imposed on him in *Burkenroad II*. In addition,

the Probation Office seeks an order involuntarily enrolling respondent as an inactive member of the State Bar under section 6007, subdivision (d)(1).

The purposes of disciplinary proceedings are to protect the public, the courts, and the legal profession; to maintain high professional standards by attorneys; and to preserve public confidence in the profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline for respondent's seven probation violations, the court first considers standard 1.7(a), which provides that, when an attorney has a prior record of discipline, "the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust."⁵ Of course, standard 1.7(a) is not to be applied in a talismanic fashion when, as here, there is no common thread or course of conduct running through the past and present misconduct. (*In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527, 534.)

In determining the appropriate level of discipline, the court also considers, among other things, the seriousness of respondent's seven probation violations; respondent's efforts, if any, to comply with the probation conditions; respondent's recognition or lack of recognition of wrongdoing; and the total length of stayed suspension that may be imposed as an actual suspension under Rules of Procedure of the State Bar, rule 562. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540; see also Rules Proc. of State Bar, rule

⁵ Even though standard 1.7(b) provides for disbarment when an attorney has two or more prior records of discipline, like respondent does, standard 1.7(b) is not applicable in probation revocation proceedings under section 6093. (*In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244, 257, fn. 13.)

562.) “When an attorney commits multiple violations of the same probation condition, the gravity of each successive violation increases.” (*In the Matter of Tiernan, supra*, 3 Cal. State Bar Ct. Rptr. at p. 531.) Thus, respondent's sixth successive failures to comply with his quarterly-probation-reporting condition unquestionably warrant the greatest level of discipline under rule 562, which in this case is one year's suspension. (*Ibid.*)

The court's conclusion that respondent should be suspended for one year is supported by the fact that, on April 22, 2010, the review department filed an order suspending respondent from the practice of law effective May 17, 2010, because respondent failed to take and pass the Multistate Professional Responsibility Examination (hereafter MPRE) within the time period set forth in the Supreme Court's September 16, 2008 order in *Burkenroad II*.⁶ (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; Cal. Rules of Court, rule 9.10(b).)

Of course, respondent's suspension for not passing the MPRE is not a prior record of discipline under standard 1.2(b)(i). (*In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, 331; *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 531-532.) Nonetheless, respondent's MPRE suspension is yet another indication that he is either unwilling or unable to comply with Supreme Court disciplinary orders. Therefore, respondent's MPRE suspension is relevant to this court's determination of the appropriate level of discipline to recommend to the Supreme Court in this proceeding. (*Ibid.*; cf. std. 1.2(b)(iii).)

What is more, the court independently concludes that respondent should also be required to demonstrate that he is now willing and capable of fully complying with Supreme Court orders and of engaging in the rehabilitative process by *strictly* complying with the probation conditions that were imposed on him and to which he stipulated in *Burkenroad II* by imposing substantially

⁶ This court takes judicial notice, sua sponte, of the review department's April 22, 2010 order and of the fact that, as of the date the present order is filed, respondent remains suspended under the review department's order for not passing the MPRE.

similar conditions on him for two years prospectively. (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 705.) Accordingly, the court will recommend that respondent be placed on one year's stayed suspension and two years' probation on conditions including a minimum suspension of one year and until respondent files his third, fifth, and sixth probation reports, which are all past due.⁷

Finally, the court is unaware of any public-protection concern to support the Probation Office's request for an order of inactive enrollment under section 6007, subdivision (d). When an attorney is enrolled inactive under section 6007, subdivision (d), the attorney must be given credit for the period of his or her inactive enrollment against any period of suspension that the Supreme Court ultimately imposes on the attorney. (§ 6007, subd. (d)(3).) Thus, when the State Bar Court enrolls an attorney inactive under section 6007, subdivision (d), the State Bar Court effectively imposes, at least temporarily, its recommended period of suspension on the attorney before the its discipline recommendation is transmitted to the Supreme Court. In other words, when the State Bar Court orders an attorney's inactive enrollment under section 6007, subdivision (d), it sends the Supreme Court a discipline recommendation that is, at least, partially unreviewable. (*In the Matter of Tiernan, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 531-532.) In short, the court declines to order respondent's involuntary inactive enrollment because it is unaware of any public-protection concern to justify sending the Supreme Court a discipline recommendation that is effectively unreviewable in part.

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⁷ Because respondent will still remain suspended from the practice of law under the review department's April 22, 2010 order until he takes and passes the MPRE (*Segretti v. State Bar, supra*, 15 Cal.3d at p. 891, fn. 8), this court does not recommend that respondent be ordered to take and pass the MPRE again in this proceeding.

6. ORDER AND DISCIPLINE RECOMMENDATION

The court orders that the Probation Office's May 7, 2010 motion to revoke the probation of respondent **DAVID BURKENROAD** is GRANTED. Accordingly, the court recommends that the probation imposed on respondent **DAVID BURKENROAD** under the Supreme Court's September 16, 2008 order in *In re David Burkenroad on Discipline*, case number S165318 (State Bar Court case number 06-O-14001) be revoked; that the stay of execution of the one-year suspension in that proceeding be lifted; that Burkenroad again be suspended from the practice of law in the State of California for one year, that the execution of this new one-year suspension be stayed, and that Burkenroad again be placed on probation for two years on the following conditions:

1. Burkenroad is suspended from the practice of law for a minimum of the first year of his probation, and he will remain suspended until the following requirements are satisfied:
 - i. He files his third, fifth, and sixth probation reports, which were due July 10, 2009; January 10, 2010; and April 10, 2010, respectively.
 - ii. If he remains suspended for two years or more as a result of not satisfying the preceding condition, 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).)
2. Burkenroad must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the conditions of this probation.
3. Burkenroad must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Burkenroad must also maintain, with the State Bar's Office of Probation, his current home address and telephone number. (Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Burkenroad's home address and telephone number are *not* to be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Burkenroad must notify the Membership Records Office and the Office of Probation of any change in this information no later than 10 days after the change.

4. Within 30 days after the effective date of the Supreme Court order in this probation revocation proceeding, Burkenroad must contact the State Bar's Office of Probation and schedule an *in-person* meeting with his assigned probation deputy to discuss these terms and conditions of probation. The meeting is to be held in the State Bar's Los Angeles office. Burkenroad must then meet in person with the probation deputy at the scheduled time. Thereafter and throughout the period of probation, Burkenroad must promptly meet with the probation deputy either in person or over the telephone as directed and upon request.
5. Burkenroad must report, in writing, to the State Bar's Office of Probation on January 10, April 10, July 10, and October 10 of each year or part thereof in which Burkenroad is on probation (reporting dates). However, if Burkenroad's probation begins less than 30 days before a reporting date, Burkenroad may submit the first report no later than the second reporting date after the beginning of his probation. In each report, Burkenroad must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:
 - (i) In the first report, whether he has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all other conditions of this probation since the beginning of probation; and
 - (ii) In each subsequent report, whether he has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all other conditions of this probation during that period. During the last 20 days of his probation, Burkenroad must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, Burkenroad must certify to the matters set forth in this subparagraph (ii) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.
6. Subject to the proper or good faith assertion of any applicable privilege, Burkenroad must fully, promptly, and truthfully answer any inquiries of the California State Bar's Office of Probation that are directed to Burkenroad, whether orally or in writing, relating to whether he is complying or has complied with the conditions of his probation.
7. Within the first year of his probation, Burkenroad must attend and satisfactorily complete the State Bar's Ethics School and promptly provide satisfactory proof of his successful completion of that school to the State Bar's Office of Probation. The program is offered periodically at 180 Howard Street, San Francisco, California 94105-1639 and at 1149 South Hill Street, Los Angeles, California 90015-2299. Arrangements to attend the program must be made in advance by calling (213) 765-1287 and by paying the required fee. This condition of probation is separate and apart from Burkenroad's Minimum Continuing Legal Education requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this program. (Accord, Rules Proc. of State Bar, rule 3201.)

8. Burkenroad's new two-year probation, including Burkenroad's suspension during the first year of his probation, will begin on the effective date of the Supreme Court order in this probation revocation proceeding. At the expiration of the period of probation, if Burkenroad has complied with all the conditions of probation, the new one-year period of stayed suspension will be satisfied and that suspension will be terminated.

7. RULE 9.20 & COSTS

The court further recommends that David Burkenroad 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 probation revocation proceeding.⁸

Finally, the court recommends that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and that such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: June ___, 2010.

RICHARD A. HONN
Judge of the State Bar Court

⁸ Burkenroad is required to file a rule 9.20(c) compliance 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* (1988) 44 Cal.3d 337, 341.) At least in the absence of compelling mitigating circumstances, an attorney's failure to comply with rule 9.20 almost always results in disbarment. (E.g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 296.)