

PUBLIC MATER

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 11-PM-19361-RAH
)	
COLIN C. SWAINSTON)	ORDER GRANTING MOTION TO
)	REVOKE PROBATION AND ORDER
Member No. 150761)	REGARDING INACTIVE ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

INTRODUCTION

The Office of Probation, represented by Terrie Goldade, filed a motion pursuant to Business and Professions Code sections 6093, subdivision (b) and 6093, subdivision (c)¹ and rules 5.310 et seq. of the Rules Proc. of State Bar² to revoke the probation of respondent Colin C. Swainston. Respondent did not participate in this proceeding although he was properly served with the motion by certified mail, return receipt requested, and by regular mail at his State Bar membership records address.³

¹Future references to section are to this source.

²Future references to rule are to this source.

³The court finds an error in the service of the motion as the suite numbers in respondent’s address were transposed. The correspondence sent by the State Bar Court was all correctly addressed and were not returned as undeliverable. Accordingly, the court finds that respondent had adequate notice of the proceedings and that the error was de minimis.

For the reasons stated below, the court finds by a preponderance of the evidence that respondent wilfully failed to comply with the terms of his probation. (Section 6093, subd. (c).) As a result, the court grants the Office of Probation's motion to revoke his probation and the request to involuntarily enroll him as an inactive member of the State Bar pursuant to section 6007, subdivision (d). The court recommends that respondent's probation be revoked, that the previously-ordered stay be lifted and that he be actually suspended from the practice of law for one year, stayed, and two years' probation on conditions, including actual suspension for one year, as more fully set forth below.

FINDINGS OF FACT

Jurisdiction

Respondent was admitted to the practice of law in California on December 4, 1990, and has been a member of the State Bar at all times since.

Probation Violations

On September 9, 2010, the State Bar Court filed an order approving the stipulation of the parties in State Bar Court case no. 08-O-12620 recommending discipline consisting of one years' stayed suspension and two years' probation, among other things. A copy of the stipulation and the State Bar Court's order approving same were properly served upon respondent's counsel on that same date.

On January 11, 2011, the California Supreme Court filed an order, S187671, accepting the State Bar Court's discipline recommendation and ordering respondent to comply with the conditions of probation recommended, including the following, with which respondent did not comply:

(a) Within 30 days of the effective date of discipline, contacting the Office of Probation to schedule a meeting to discuss the terms and conditions of probation. Respondent did not do so; and

(b) During the period of probation, submitting a written report to the Office of Probation on January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect stating under penalty of perjury that he has complied with all provisions of

the State Bar Act and Rules of Professional Conduct during said period (quarterly report). Respondent has not submitted the quarterly reports due on the 10th of April, July and October 2011.

The Supreme Court order became effective on February 10, 2011, thirty days after it was entered. (Rule 9.18(a), California Rules of Court.) It was properly served on respondent.⁴

On February 14, 2011, the Office of Probation wrote a letter to respondent, properly sent to him at his official address, reminding him of certain terms and conditions of his suspension and probation imposed pursuant to the Supreme Court's order and enclosing, among other things, copies of the Supreme Court's order, the probation conditions portion of the stipulation, instruction sheets or forms to use in submitting quarterly reports and proof of restitution, as well as scheduling and enrollment information for Ethics School.

On July 1, 2011, the Office of Probation properly sent respondent a letter to his official address indicating that it had not received his first quarterly report and that he had not scheduled the meeting with the probation deputy. Neither letter was returned as undeliverable or for any other reason.

Respondent did not comply with the conditions of probation as set forth above.

CONCLUSIONS OF LAW

Pursuant to section 6093, subdivisions (b) and (c) and rule 5.311, the court concludes that Office of Probation has demonstrated by a preponderance of the evidence that respondent wilfully violated the conditions of probation regarding contact with the Office of Probation and quarterly reports as ordered by the Supreme Court in S187671, as more fully set forth above.

⁴Although no proof was offered that the Clerk of the Supreme Court served the Supreme Court's order upon respondent, rule 8.532(a) of the California Rules of Court requires clerks of reviewing courts to immediately transmit a copy of all decisions of those courts to the parties upon filing. Moreover, it is presumed pursuant to Evidence Code section 664 that official duties have been regularly performed. (*In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Therefore, in the absence of evidence to the contrary, this court finds that the Clerk of the Supreme Court performed his or her duty and transmitted a copy of the Supreme Court's order to respondent immediately after its filing.

AGGRAVATING CIRCUMSTANCES

In aggravation, respondent has one prior record of discipline. (Std. 1.2(b)(i).) In S187671, respondent and the State Bar stipulated to culpability in one client matter of violations of rule 3-110(A) of the Rules of Professional Conduct and section 6106. Aggravating factors included multiple acts of misconduct and client harm. In mitigating factors, respondent had a blemish-free discipline record in 19 years of practice.

Respondent engaged in multiple acts of misconduct. (Std. 1.2(b)(ii).)

Respondent significantly harmed the administration of justice as his failure to comply with the conditions of his probation made it more much difficult for the State Bar to appropriately monitor him in seeking to insure the protection of the public and the courts. (Std. 1.2(b)(iv).)

Further, respondent's failure to comply with the probation conditions after being reminded by the Office of Probation demonstrates indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).)

MITIGATING CIRCUMSTANCES

It is respondent's burden to establish mitigating factors, but he did not participate in this proceeding. Accordingly, no mitigating factors are found.

DISCUSSION

Section 6093 authorizes the revocation of probation for a violation of a probation condition, and standard 1.7 requires that the court recommend a greater discipline in this matter than that imposed in the underlying disciplinary proceeding, but any actual suspension cannot exceed the period of stayed suspension imposed in the underlying proceeding. (Rule 5.312.) The extent of the discipline to recommend is dependent, in part, on the seriousness of the probation violation and respondent's recognition of his misconduct and his efforts to comply

with the conditions. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.)

The court agrees with the Office of Probation's request that respondent be actually suspended for the full amount of stayed suspension. Respondent was aware of the terms and conditions of his disciplinary probation, yet failed to comply with them despite reminders from Office of Probation.

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.) Accordingly, after considering the misconduct and the aggravating and mitigating circumstances, the court recommends, among other things, one year's actual suspension and additional probation, during which time he will have the opportunity of demonstrating that he is desirous and able to meet these important ethical obligations in the timely and serious fashion expected of California attorneys. The court expects no less from respondent.

DISCIPLINE RECOMMENDATION

The court recommends that the probation of respondent Colin C. Swainston, previously ordered in Supreme Court case matter S187671 (State Bar Court case no. 08-O-12620), be revoked; that the previous stay of execution of the suspension be lifted, and that respondent be suspended from the practice of law in California for one year, that execution of that period of suspension be stayed and that respondent be placed on probation⁵ for a period of two years subject to the following conditions:

1. Respondent is suspended from the practice of law for the first one year of probation.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct and all of the conditions of respondent's probation.

⁵ The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.
4. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10 and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

It is also recommended that the Supreme Court order respondent to comply with rule 9.20(a) of the California Rules of Court within 30 calendar days after the effective date of the Supreme Court order in the present proceeding and to file the affidavit provided for in rule 9.20(c) within 40 calendar days after the effective date of the order showing respondent's compliance with said order.⁶

It is not recommended that respondent be ordered to successfully complete State Bar Ethics School or to take and pass the Multistate Professional Responsibility Examination as he was ordered to do so in Supreme Court matter S187671 (State Bar Court case no. 08-O-12620).

COSTS

⁶Respondent is required to file a rule 9.20(c) affidavit even if he has no clients. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 130.)

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.

ORDER REGARDING INACTIVE ENROLLMENT

Respondent is involuntarily enrolled inactive pursuant to Business and Professions Code section 6007, subdivision (d). The requirements of section 6007, subdivision (d)(1) have been met: Respondent was subject to a stayed suspension, was found to have violated probation conditions, and it has been recommended that respondent be actually suspended due to said violations.

IT IS THEREFORE ORDERED that respondent Colin C. Swainston be involuntarily enrolled as an inactive member of the State Bar of California pursuant to Business and Professions Code section 6007, subdivision (d). This enrollment shall be effective three days following service of this order.

IT IS ALSO ORDERED that his inactive enrollment be terminated as provided by Business and Professions Code section 6007, subdivision (d)(2).

IT IS RECOMMENDED that respondent's actual suspension in this matter commence as of the date of his inactive enrollment pursuant to this order. (Business and Professions Code section 6007, subdivision (d)(3).)

Dated: March _____, 2012

RICHARD A. HONN
Judge of the State Bar Court