

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 11-PM-19623-RAP (S192067)
)	
STEVEN HOWARD HERTZ,)	ORDER GRANTING MOTION TO
)	REVOKE PROBATION AND FOR
Member No. 153971,)	ORDER OF INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

Introduction¹

In this probation revocation proceeding, respondent Steven Howard Hertz 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.

The court finds, by a preponderance of the evidence, that respondent has violated his probation conditions and hereby grants the motion. Therefore, the court orders that respondent be involuntarily enrolled as an inactive member of the State Bar. The court also recommends, among other things, that respondent's probation be revoked, that the previously stayed, one-year suspension be lifted, and that he be actually suspended for one year and remain suspended until

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

he provides the Office of Probation with proof that he complied with his Fee Arbitration Condition, as set forth, *infra*.

Significant Procedural History

On December 22, 2011, the Office of Probation filed and properly served a motion to revoke probation on respondent. The motion was mailed to respondent's official membership records address. Respondent did not file a response within 20 days of the service of the motion.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on August 18, 1991, and has been a member of the State Bar of California at all times since that date.

Facts

On June 13, 2011, in Supreme Court case No. S192067, the California Supreme Court ordered, among other things, that:

1. 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, as recommended by the Hearing Department of the State Bar Court in its order approving stipulation filed on February 14, 2011 (State Bar Court case Nos. 09-O-11014 (09-O-15366); 10-O-00352 (10-O-06431) Cons.); and
2. Respondent comply, among other things, with the following probation conditions:
 - A. Within 30 days from the effective date of discipline (by August 12, 2011), he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the probation conditions; and
 - B. During the period of probation, he must submit 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 provisions of the State Bar Act and Rules of Professional Conduct during said period (quarterly report); and

- C. Within 30 days from the effective date of discipline (by August 12, 2011), he must provide the Office of Probation with sufficient proof that he has initiated and paid for binding fee arbitration with the Orange County Bar Association with respect to former client Louis DeWitt (De Witt) for the purpose of determining whether he owes DeWitt a refund of additional attorney fees regarding the fee dispute as reflected in State Bar Court case No. 09-O-15366. As to any award rendered by the arbitrator, DeWitt will not be obligated to pay respondent any additional fees. The purpose of the binding fee arbitration shall be to determine whether respondent owes DeWitt a refund of additional attorney fees.

The Supreme Court order became effective on July 13, 2011, 30 days after it was entered. (Cal. Rules of Court, rule 9.18(a).) It was properly served on respondent.²

On July 12 and August 22, 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 the probation imposed pursuant to the Supreme Court's order and enclosing,

² Although 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. 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 duty and transmitted a copy of the Supreme Court's order to respondent immediately after its filing.

among other things, copies of the Supreme Court's order, the probation conditions portion of the stipulation, and instruction sheets or forms to use in submitting quarterly reports.

Neither of the letters was returned as undeliverable.

Respondent did not contact the Office of Probation to schedule a meeting with his assigned probation deputy and no meeting has taken place—either in-person or by telephone. Respondent also failed to file his first quarterly report, which was due on October 10, 2011. Additionally, respondent did not provide any proof to the Office of Probation that he initiated and paid for binding fee arbitration with the Orange County Bar Association with respect to former client DeWitt.

Conclusions

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. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.)

Respondent did not comply with each of the conditions of probation as set forth above, as ordered by the Supreme Court in S192067: (1) Respondent has not contacted the Office of Probation to schedule a meeting with his assigned probation deputy and has neither participated in or conducted the meeting; (2) respondent has failed to file his first quarterly report due October 10, 2011; and (3) respondent has failed to comply with his Fee Arbitration Condition.

As a result, the revocation of respondent's probation in California Supreme Court order No. S192067 is warranted.

Aggravation³

The parties bear the burden of proving all aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Att. Sanctions for Prof. Misconduct, std. 1.2(e); *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 932-933; *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128,148.) Rule 5.106 of the Rules of Procedure provides, in pertinent part, that a prior record of discipline consists of an authenticated copy of all charges, stipulations, findings and decisions reflecting or recommending imposition of discipline. Rule 5.106 clearly anticipates that the State Bar and the Office of Probation will introduce certified copies of all charges, stipulations, findings and decisions reflecting or recommending imposition of discipline. Such practice makes the prior record of discipline a part of the official record of the State Bar Court proceeding and enhances the ability of the Supreme Court to conduct its independent, de novo review of the State Bar Court's decision or order recommending discipline and the record supporting that decision or order.

On January 13, 2012, the Office of Probation filed a Request for Judicial Notice asking that this court take judicial notice of respondent's prior record of discipline. Although the Office of Probation's request for judicial notice refers to the "[c]ertified prior discipline of respondent," including the stipulation, the Supreme Court order and other orders underlying case No. S094425 (State Bar Court case Nos. 96-O-06077 (97-O-18014); 97-O-11989 (99-O-11855) Cons.), it did not submit certified copies of documents reflecting respondent's prior record of discipline in case No. S094425. The Office of Probation submitted only a copy of a certified copy of the March 21, 2001 Supreme Court order No. S094425.

³ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Similarly, the Office of Probation failed to submit certified copies of documents reflecting respondent's prior record of discipline in case No. S192067 (State Bar Court case Nos. 09-O-11014 (09-O-15366); 10-O-00352 (10-O-06431) Cons.) The only documents submitted were a copy of a certified copy of Supreme Court order S192067, filed on June 13, 2011, and a copy of the Stipulation re Facts, Conclusions Of Law and Disposition and Order Approving, filed on February 14, 2011 regarding State Bar Court case Nos. 09-O-11014 (09-O-15366); 10-O-00352 (10-O-06431) Cons.

Thus, the Office of Probation has failed to submit copies of documents reflecting respondent's prior disciplinary record. Instead, it simply invited this court to take judicial notice of those records pursuant to Evidence Code section 452. The court has independently obtained copies of respondent's prior disciplinary record and will take judicial notice of the prior record and consider those records in its order in this proceeding. It should be noted that the court has had to caution and advise the Office of Probation in the past to provide a certified copy of all prior records of discipline before the case is submitted.⁴

Prior Record of Discipline (Std. 1.2(b)(i).)

Respondent has two prior records of discipline.

1. On March 21, 2001, the California Supreme Court issued an order, which, among other things, suspended respondent from the practice of law for one year, stayed the execution of that period of suspension, and placed him on probation for three years, subject to the conditions of probation, including restitution, as recommended by the Hearing Department of the State Bar Court in its Order Approving Stipulation, filed on November 20, 2000. Respondent's misconduct included failing to render an accounting,

⁴ The court hereby directs the Clerk to mark respondent's prior disciplinary record as a court exhibit in this proceeding and to include that exhibit as part of the record that is transmitted to the Supreme Court.

failing to competently perform legal services, and commingling funds in a client trust account and failing to maintain client funds in a client trust account. The aggravating circumstances included the involvement of trust funds or property and significant harm to clients. Mitigating circumstances included: (1) cooperation and candor to the victims of respondent's misconduct and to the State Bar during its investigation, and (2) emotional or physical difficulties suffered by respondent that were responsible for his misconduct, as well as difficulties in his family life. (Supreme Court case No. S094425; State Bar Court case Nos. 96-O-06077 (97-O-18014); 97-O-11989 (99-O-11855) Cons.)

2. In the underlying matter, effective June 13, 2011, respondent was ordered suspended for one year, stayed, and placed on probation for two years for failure to promptly pay funds as requested by a client, which funds the client was entitled to receive, and failing to provide appropriate accounts to a client. Aggravating circumstances included a prior record of discipline and multiple acts of misconduct. Mitigating circumstances included respondent's pro bono assistance to charitable organizations during the time period of his misconduct. (Supreme Court case No. S192067; (State Bar Court case Nos. 09-O-11014 (09-O-15366); 10-O-00352 (10-O-06431) Cons.)

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)

Respondent committed multiple acts of wrongdoing, including failing to contact the Office of Probation and schedule a meeting with his probation deputy, failing to file his first quarterly report, and failing to provide the Office of Probation with proof that he had initiated and paid for binding fee arbitration with the Orange County Bar Association with respect to his former client DeWitt.

Indifference Toward Rectification/Atonement (Std. 1.2(b)(v).)

An attorney's continued failure to comply with his probation conditions after being notified of that noncompliance is properly considered a substantial aggravating circumstance. It demonstrates indifference toward rectification of or atonement for the consequences of one's misconduct. (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530.) Although the motion to revoke his probation was filed in December 2011, which put respondent on notice that his probation status was in jeopardy, respondent still failed to contact the Office of Probation to schedule a meeting with his probation deputy, failed to file the October quarterly report, and failed to provide the Office of Probation with proof that he had initiated and paid for binding fee arbitration with the Orange County Bar Association with respect to his former client DeWitt.

Lack of Candor/Cooperation to Victims/State Bar (Std. 1.2(b)(vi).)

Respondent's failure to participate in this proceeding is also an aggravating factor.

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).)

Discussion

In determining the appropriate discipline to recommend in this matter, the court looks to the standards, statutory law and relevant decisional law. 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. (Rules Proc. of State Bar, 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 Office of Probation requested, among other things, that respondent be actually suspended for the full amount of stayed suspension and that he remain suspended until he has complied with his Fee Arbitration Condition and, if the time extends to two years or more, he must also comply with Standard 1.4(c)(ii), Attorney Standards for Attorney Sanctions for Professional Misconduct. (See *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81; *In the Matter of Luis* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 737.) The court agrees.

Recommendations

The court recommends that the probation of respondent **Steven Howard Hertz**, member No. 153971, imposed in Supreme Court case matter S192067 (State Bar Court case Nos. 09-O-11014 (09-O-15366); 10-O-00352 (10-O-06431) Cons.) be revoked; that the previous stay of execution of the suspension be lifted; and that respondent be actually suspended from the practice of law for a minimum of one year and will remain suspended until the following requirements are satisfied:

1. He provides the Office of Probation with proof that he has initiated and paid for binding fee arbitration, with the Orange County Bar Association with respect to former client Louis DeWitt (De Witt) for the purpose of determining whether he owes DeWitt a refund of additional attorney fees, regarding the fee dispute as reflected in State Bar Court case No. 09-O-15366. In any award rendered by the arbitrator, DeWitt will not be obligated to pay respondent any additional fees.

The purpose of the binding fee arbitration shall be to determine whether respondent owes DeWitt a refund of additional attorney's fees; and

2. If respondent remains suspended for two years or more as a result of not satisfying the preceding requirement(s), 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).)

Multistate Professional Responsibility Examination

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) because he was ordered to do so in Supreme Court case matter S192067.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.⁵

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.

Order of Involuntary Inactive Enrollment

Section 6007, subdivision (d)(1), provides for an attorney's involuntary inactive enrollment for violating probation if: (A) the attorney is under a suspension order any portion of which has been stayed during a period of probation, (B) the court finds that probation has been

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.)

violated, and (C) the court recommends that the attorney receive an actual suspension due to the probation violation or other disciplinary matter. The requirements of section 6007, subdivision (d)(1) have been met.

Respondent is ordered to be involuntarily enrolled inactive under section 6007, subdivision (d)(1). This inactive enrollment order will be effective three calendar days after the date upon which this order is served.⁶

Dated: February 16, 2012.

RICHARD A. PLATEL
Judge of the State Bar Court

⁶ The court recommends that any period of involuntary inactive enrollment be credited against the period of actual suspension ordered. (Bus. & Prof. Code, § 6007, subd. (d)(3).)