

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of) Case No.: **12-O-10804-RAH**
)
WENDY ALICIA HARTE,) **DECISION**
)
Member No. 243230,)
)
A Member of the State Bar.)

Introduction¹

In this uncontested, disciplinary proceeding, respondent Wendy Alicia Harte violated her probation conditions imposed by the California Supreme Court.

Because respondent did not contest culpability, the only issue reserved for the court is the question of disposition. In view of respondent's misconduct in this proceeding and after considering the aggravating circumstances that have been established by clear and convincing evidence, this court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of that period of suspension be stayed, and that she be placed on probation for two years subject to certain conditions, including a 90-day period of actual suspension.

Significant Procedural History

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.

The State Bar of California, Office of the Chief Trial Counsel (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on February 24, 2012. On April 2, 2012, respondent filed her response to the NDC, stating that she did not deny the charge as set forth in Count One of the NDC.

On April 18, 2012, the court filed its Orders Regarding Briefing in Lieu of Trial, wherein it noted that as respondent acknowledged that she did not deny the charge contained in the NDC, it was making a tentative finding of culpability as to Count One. The court further noted that all that was left remaining for the purpose of determining the appropriate discipline in this proceeding was the establishment, by clear and convincing evidence, of aggravating and mitigating circumstances. The court ordered that unless either of the parties objected in writing on or before May 4, 2012, the issues of mitigation and aggravation were to be determined by declarations to be filed by each of the parties. The court's order was properly served on respondent by certified mail with return receipt requested and on the State Bar by regular first class mail. Neither of the parties filed an objection to the court's order.

The State Bar filed its Brief and Declaration as to Aggravation and Mitigation on May 18, 2012. Respondent did not file a declaration as to mitigation and/or aggravation.

On May 21, 2012, the court took the matter under submission for decision.

The State Bar was represented in this proceeding by Deputy Trial Counsel William Todd. Respondent represented herself in this matter.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 6, 2006, and has been a member of the State Bar of California at all times since that date.

Case No. 12-O-10804 – The Probation Matter

Facts

Respondent signed a stipulation on August 27, 2010, admitting professional misconduct and agreeing to receive a one-year stayed suspension and to comply with the conditions attached to that suspension.

On December 30, 2010, the California Supreme Court filed an order (the Supreme Court Order) in case No. S187480 (State Bar Court case No. 07-O-10306), suspending respondent from the practice of law for one year, execution of suspension stayed, and placing respondent on probation for one year subject to conditions of probation.

On December 30, 2010, the Clerk of the Supreme Court of the State of California properly served a copy of the Supreme Court Order by mail on respondent. Respondent received the Supreme Court Order.

Thirty days after it had been filed, i.e., on January 29, 2011, the Supreme Court Order became effective.

On or about March 1, 2011, a deputy in the Office of Probation mailed a letter to respondent at her member records address reminding her of her probation conditions. Respondent received the letter.

As set forth in the February 24, 2012 NDC, one of the conditions of the suspension required respondent to submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation, stating under penalty of perjury her compliance with the State Bar Act, the Rules of Professional Conduct, and all

conditions of probation during the preceding calendar quarter.² Respondent failed to timely file the reports due by April 10, July 10 and October 10, 2011.

By failing to timely file the reports due by April 10, July 10 and October 10, 2011, respondent violated the condition requiring her to submit quarterly reports. She also violated her reporting condition by failing to submit to the Office of Probation the quarterly report that was due by January 10, 2012, as well as the final report that was due by January 29, 2012.

As a condition of probation, respondent also was required to provide to the Office of Probation satisfactory proof of her attendance at a session of Ethics School within one year of the effective date of the Supreme Court Order, which as set forth, *ante*, was January 29, 2011.

Respondent violated the probation requirement requiring her to attend Ethics School and provide proof of such attendance to the Office of Probation by January 29, 2011. As of February 23, 2012 (the day before the filing and serving of the NDC in this matter), respondent had not provided the Office of Probation with proof of Ethics School attendance.³

Conclusions

Count One - (§ 6068, subd. (k) [Failure to Comply with Probation Conditions])

² Although the NDC specified that respondent was required to submit written quarterly reports to the Office of Probation on each January 10, April 10, and October 10 of the period of probation, it did not specify that she was also required to submit a final probation report by January 29, 2012. The NDC, however, did state and notify respondent that she had “failed to submit the quarterly report . . . due by January 29, 2012, establishing her compliance with other probation terms.” The court, therefore, finds that the NDC provided sufficient notice to respondent of the fact that she was being charged with failing to file her final report, which was due by January 29, 2011.

³ In her April 2, 2012 response to the NDC, respondent asked the court for an extension of time so that she could belatedly satisfy her Ethics School requirement. She claimed that “due to circumstances beyond [her] control” attending Ethics School in a timely manner and paying for Ethics School placed her “in a situation of undue hardship.” Respondent, however, did not explain the “circumstances” or provide any facts or proof in support of her claim of “undue hardship.” She did not provide a declaration, a financial statement, or file a motion for an extension of time.

Section 6068, subdivision (k), provides that an attorney has a duty to comply with all conditions attached to any disciplinary probation.

Respondent failed to comply with her probation conditions as ordered by the Supreme Court in S187480, by clear and convincing evidence, in willful violation of section 6068, subdivision (k) by: (1) failing to timely file the quarterly reports due by April 10, July 10 and October 10, 2011 and failing to submit to the Office of Probation the reports that were due by January 10, 2012, and by January 29, 2012, respectively; and (2) failing to attend Ethics School and provide proof of such attendance within one year of the effective date of the Supreme Court Order, i.e., by January 29, 2011.

Aggravation⁴

Prior Record of Discipline (Std. 1.2(b)(i).)⁵

In the underlying matter, respondent stipulated to a one year stayed suspension and one year probation. Respondent was found culpable of engaging in the unauthorized practice of law and failing to support the laws of this state and failing to disclose a material fact in connection with an application for admission to the State Bar. (Supreme Court case No. S187480, filed December 30, 2010; State Bar Court case No. 07-O-10306.)

⁴ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

⁵ As referenced, *ante*, on May 18, 2012, the Office of the Chief Trial Counsel submitted “The State Bar’s Brief and Declaration as to Aggravation and Mitigation.” Included with that Brief is the “Declaration of William Todd.” Paragraph 4 of Deputy Trial Counsel (DTC) Todd’s Declaration states, “Attached as “Exhibit ‘1’ is a certified copy of respondent’s prior discipline in State Bar Court case 07-O-10306.” While the State Bar did attach a certified copy of respondent’s prior record of discipline as part of Exhibit 1, it also erroneously attached a certified copy of an NDC in case Nos. 08-O-10056 (09-O-12537), which has no connection or relation to respondent herein or the issues before the court in this proceeding.

Accordingly, the court **ORDERS** that the NDC in case Nos. 08-O-10056 (09-O-12537) be removed from the record in this matter. The court, therefore, directs the case administrator to remove the NDC in case Nos. 08-O-10056 (09-O-12537) and the proof of service relating to that NDC from Exhibit 1 of DTC Todd’s Declaration.

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

Respondent committed multiple acts of misconduct, including failing to timely submit three quarterly reports, failing to submit one quarterly report, failing to submit a final report, and failing to provide proof of having attended Ethics School.

Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) Respondent, however, did not submit a brief on the issue of mitigation and none can be discerned from the record.

As noted, *ante*, respondent intimated in her response to the NDC that financial difficulties prevented her from complying with her State Bar Ethics School probation requirement. However, as set forth in footnote 3 of this Decision, respondent has failed to provide any proof or evidence in support of her claim that financial difficulties prevented her from complying with her Ethics School requirement. Moreover, respondent's unsupported assertion that "attending in a timely manner and paying for Ethics School placed [her] in a situation of undue hardship," bears no logical relationship to her failure to timely file three quarterly reports or her failure to submit her January 10, 2012 quarterly report and her January 29, 2012 final report. Respondent has provided no reason for her failure to comply with her reporting requirements.

Absent compelling mitigating circumstances, an attorney who willfully violates a significant condition of probation can anticipate actual suspension as the expected result. (*In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 574.) Here, given respondent's failure to provide any support for her claim of undue hardship and to address the issue of why she did not comply with her reporting requirements, the court cannot accord any weight in mitigation based on her claim of undue/financial hardship. While the court sympathizes with respondent's predicament, it cannot excuse a degree of discipline, which

otherwise is warranted, in the absence of mitigating evidence or other evidence that supports her assertion that her failure to comply with the Ethics School requirement was caused by financial difficulties.

Accordingly, the court, must recommend that respondent's discipline include a period of actual suspension.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025.) Disciplinary probation serves the critical function of protecting the public and rehabilitating the attorney. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.)

Respondent has been found culpable of violating her probation conditions. The standards, however, provide a broad range of sanctions ranging from suspension to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds. 1.6, 1.7(a), and 2.6.)

Standard 1.7(a) provides, “[i]f a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one prior imposition of discipline as defined by standard 1.2(f), 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.”

Standard 2.6(a) provides for discipline ranging from suspension to disbarment for violations of section 6068, depending on the gravity of the offense or the harm to the victim.

The standards, however, are guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) “[E]ach case must be resolved on its own particular facts and not by application of rigid standards. [Citation.]” (Id. at p. 251.) While the standards are not binding, they are entitled to great weight. (*In re Silvertown* (2005) 36 Cal.4th 81, 92.)

In addition to taking the standards into consideration in formulating its recommendation regarding the discipline to be imposed, the court turns to the applicable case law for guidance. The court finds *In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, and *In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, to be instructive.

In *Howard*, a probation revocation matter the respondent, therein, failed to submit quarterly probation reports and to timely deliver certain financial records of a former client to former client’s accountant. Howard also defaulted in the disciplinary proceeding. The Review Department of the State Bar Court (Review Department) found culpability based on Howard’s failure to deliver the client’s financial records and his failure to file two quarterly reports. The court concluded that a one-year actual suspension was appropriate and imposed a standard 1.4(c)(ii) requirement before his resumption of practice.

Howard, like the instant case, involves a failure to submit quarterly probation reports. However, unlike the instant case, *Howard* involves additional serious misconduct. Specifically, the court was concerned by the attorney’s lack of cooperation with the State Bar, as evidenced by his default and his failure to produce financial records, which prevented the accountant from assessing whether disciplinary restitution was appropriate. (*In the Matter of Howard, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 451-452.) Here, respondent did not default; she was candid in her acknowledgement of culpability, thereby obviating the need for a trial in this matter. Thus, the present matter warrants significantly lower discipline that that imposed in *Howard*.

In *Gorman*, the attorney initially received a one year stayed suspension with two years probation for failing to maintain trust funds in his CTA and failing to update his State Bar membership records address. He subsequently failed to timely complete the State Bar Ethics School and timely pay restitution, as required by the terms of his probation. In aggravation, the Review Department found that the attorney's use of the name of his employer, the Yolo County District Attorney's Office, in his pleadings constituted, at the very least, a misrepresentation of that office's official participation in the State Bar proceedings. Further, the repeated need of the State Bar to intervene and seek the attorney's compliance with his probationary conditions was also considered as a factor in aggravation. The respondent in *Gorman*, unlike respondent in the instant matter, presented strong mitigating evidence to the court, including cooperation with the State Bar, good faith efforts to pay restitution, and evidence of emotional difficulties. The Review Department ultimately recommended that the attorney be suspended for one year, stayed, with two years' probation and a 30-day actual suspension.

Gorman involves less egregious misconduct than the present case and strong mitigating evidence, which is not present in the instant matter. The attorney in *Gorman* violated only two conditions of probation and subsequently complied, albeit in untimely fashion, with both of those conditions. On the other hand, respondent, herein, filed three late quarterly reports, failed to provide one quarterly report, failed to provide her final report, and did not comply with the requirement that she attend Ethics School and provide proof of passage of the test given at the end of the session to Office of Probation. Moreover, when, as here, an "attorney commits multiple violations of the same probation condition, the gravity of each successive violation increases." (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 531.) Therefore, the present matter warrants a greater level of discipline than *Gorman*.

After considering the standards and relevant case law and balancing the lack of mitigating circumstances and the aggravating circumstances, the court concludes that an actual suspension of 90 days would be appropriate to protect the public and preserve public confidence in the profession.

Recommendations

It is recommended that respondent Wendy Alicia Harte, State Bar Number 243230, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that respondent be placed on probation⁶ for a period of two years subject to the following conditions:

1. Respondent Wendy Alicia Harte is suspended from the practice of law for the first 90 days 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.
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. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.
5. 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,

⁶ 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.)

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.

6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.
7. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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

Multistate Professional Responsibility Examination

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) because she was previously ordered to do so in Supreme Court case No. S187480.

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.

///

///

///

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.

Dated: August _____, 2012

RICHARD A. HONN
Judge of the State Bar Court