

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

In the Matter of ) Case No.: 12-O-17244-DFM  
)  
BRIAN D. McMAHON, )  
) DECISION  
)  
Member No. 147662, )  
)  
A Member of the State Bar. )

INTRODUCTION

Respondent **Brian D. McMahon** (Respondent) is charged here with violating Business and Professions Code section 6068, subdivision (k),<sup>1</sup> by failing to comply with many of the conditions of his probation, including an obligation to make monthly restitution payments to two former clients, as he was ordered to do by the California Supreme Court in February 2011. The court finds culpability and recommends discipline, as set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on April 19, 2013. Respondent, represented by counsel, filed a Response to the NDC on June 17, 2013, and an Amended Response on July 1, 2013. In his responses, he admitted many of the factual allegations of the NDC, but denied culpability.

An initial status conference was held on May 28, 2013, at which time the case was scheduled to commence trial on July 26, 2013, with a two-day trial estimate. Trial was

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<sup>1</sup> Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

commenced and completed as scheduled. The State Bar was represented at trial by Deputy Trial Counsel Kelsey J. Blevings. Respondent was represented by Samuel C. Bellicini of Fishkin & Slatter, LLP.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The following findings of fact are based on the responses to the NDC, the stipulation of undisputed facts filed by the parties, and on the documentary and testimonial evidence admitted at trial.

#### **Jurisdiction**

Respondent was admitted to the practice of law in the State of California on July 24, 1990, and since that time has been a member of the State Bar of California.

#### **Case No. 12-O-17244**

On October 6, 2010, Respondent and the Office of the Chief Trial Counsel of the State Bar (the State Bar) entered into a Stipulation Re Facts, Conclusions of Law, and Disposition in case Nos. 06-O-14264, 06-O-15418, and 07-O-13030. Respondent's misconduct in those matters included issuing NSF checks [section 6106]; commingling funds in a client trust account [Rules of Professional Conduct, rule 4-100(A)<sup>2</sup>]; failing to provide an appropriate accounting of client funds to the client [4-100(B)(3)]; misappropriation of client funds in two matters [section 6106/rule 4-100(A)]; failing to act with competence [rule 3-110(A)]; improper termination of employment [rule 3-700(A)(2)]; and violation of a court order [section 6103].

On October 19, 2010, the State Bar Court issued an order approving, as modified, the stipulated facts and disposition and recommending the discipline set forth in the Stipulation to the California Supreme Court.

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<sup>2</sup> Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

On February 18, 2011, the California Supreme Court issued Order No. S188826 (the Disciplinary Order), ordering, inter alia, that Respondent be suspended from the practice of law for three years, that execution of the suspension be stayed, and that Respondent be placed on probation for three years subject to certain conditions, including that he be actually suspended for the first two years of probation and until he complies with Standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. Respondent was properly served with the Disciplinary Order and received it. On March 20, 2011, the Disciplinary Order became effective.

On March 23, 2011, Respondent and a probation deputy for the Office of Probation of the State Bar of California spoke by telephone regarding the conditions of his probation.

On April 21, 2011, the probation deputy mailed a letter to Respondent, including additional information regarding his conditions of probation.<sup>3</sup> The letter included a list of deadlines for various conditions of probation, including the deadlines of March 20, 2012, for Respondent's obligations (discussed below) with regard to taking and passing the State Bar's Ethics and Client Trust Accounting Schools. Respondent received the letter.

On May 3, 2011, the probation deputy spoke by telephone with Respondent and again discussed his probation conditions.

The State Bar contends that the following conditions of probation were violated.

#### **Medical Evaluation**

As a condition of probation, within 30 days of the effective date of the Disciplinary Order, Respondent was required to submit to a medical examination by a doctor mutually agreed

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<sup>3</sup> This letter also addressed Respondent's obligation to comply with rule 9.20 of the California Rules of Court. However, by the time the letter was sent, the time to comply with subdivision (a) of the rule had already passed.

upon by Respondent and the State Bar or as ordered by the State Bar Court. The deadline for compliance was April 19, 2011.

It is stipulated that Respondent did not submit to a medical examination by a doctor mutually agreed upon by Respondent and the State Bar or as ordered by the State Bar Court on or before April 19, 2011. However, the evidence at trial was uncontradicted that this delay in the scheduling of the required examination resulted from the failure of the State Bar to agree to any of the several doctors proposed by Respondent. Eventually, Respondent's medical evaluation by a doctor agreed upon by the State Bar took place on June 2, 2011.

The State Bar offered no explanation or evidence to explain or justify its failure to approve a proposed medical examiner prior to the deadline for the examination to go forward. Nevertheless, respondent had the ability to come into court to seek relief. He failed to do that. Therefore, the court finds Respondent's failure to meet the medical examination deadline represented a willful violation by him of section 6068, subdivision (k).

### **Quarterly Reports**

As another condition of probation, Respondent was required to submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 during the probation period, stating under penalty of perjury his compliance with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. As further conditions of probation, Respondent was required to submit with each quarterly report (1) either a Client Funds Certificate or a No Client Funds Statement; and (2) a statement under penalty of perjury, affirming that he had abstained from the use of any alcoholic beverages, narcotics, dangerous or restricted drugs, controlled substances, marijuana, or associated paraphernalia, except with a valid prescription (abstinence statement).

Respondent did not timely submit to the Office of Probation the written quarterly reports (including the required statement regarding client funds and the abstinence statement) due on July 10, 2011 and July 10, 2012.<sup>4</sup> Respondent did not submit those quarterly reports, client funds statements and abstinence statements until July 30, 2011 (20 days late) and September 6, 2012 (nearly two months late).

Respondent's failures to provide timely quarterly reports due on July 10, 2011 and July 10, 2012, constitute violations of the conditions of his probation and willful violations by him of section 6068, subdivision (k).

### **Monthly Drug Testing**

As another condition of probation, Respondent was required "to cause" to be submitted to the Office of Probation, on the tenth day of each month of the probation period, a screening report containing an analysis of Respondent's blood or urine. The State Bar alleges that Respondent violated section 6068, subdivision (k) because it received the following reports after the tenth day of the month:

<u>Deadline</u>	<u>Received</u>
June 10, 2011	June 15, 2011
July 10, 2011	July 13, 2011
August 10, 2011	August 11, 2011
September 10, 2011	September 15, 2011
October 10, 2011	October 12, 2011
March 10, 2012	March 12, 2012
April 10, 2012	April 16, 2012
June 10, 2012	June 11, 2012

A review of the above reports, however, reveals that Respondent actually appeared at the approved laboratory and provided the required specimen on or before the 10<sup>th</sup> day of each of the above months except September 2011. It was only because of the delay of the laboratory in preparing and/or forwarding the reports that the balance of the reports listed above were not

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<sup>4</sup> In his September 2012 Quarterly Report, Respondent stated under penalty of perjury that he "simply forgot" to file the July 2012 quarterly report and "has no other explanation."

received by the Office of Probation prior to the 11<sup>th</sup> day. For example, in June 2012, Respondent provided the required sample on June 6, 2012. The report was apparently not prepared until five days later, on June 11, 2012, and was then faxed to the Office of Probation on that same day. On another occasion, in April 2012, the report was prepared before the 10<sup>th</sup> day but was received late because it was not timely faxed by the lab to the Office of Probation. In that month, Respondent provided the required sample on April 4, 2012. The report was dated April 5, 2012, but it was not faxed by the laboratory to the Office of Probation until April 16, 2012.<sup>5</sup> All of this information was contained in the State Bar's file when it elected to treat the laboratory's tardiness as a probation violation by Respondent.

The language of this probation condition should not be applied to discipline a probationer for failing to control what is not within the probationer's ability to control. While the member is clearly accountable for providing the required blood and/or urine sample to a laboratory approved by the State Bar before the monthly deadline expires, after the probationer has done so, he or she has no further power to control when the sample will actually be tested, when the report of the test results will be prepared, or when that report will be sent to the State Bar. In situations where a laboratory, previously approved by the State Bar, proves to be performing in a deficient manner, the most appropriate response by the State Bar and/or the Office of Probation is to demand that corrective measures be taken by the laboratory, not to initiate a disciplinary proceeding against the probationer.

With the exception of the month of September 2011,<sup>6</sup> this court declines to find that the evidence shows a willful violation by Respondent with regard to this probation condition. While

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<sup>5</sup> The State Bar requires, for obvious reasons, that the test results be sent directly by the laboratory to the State Bar, rather than go through the respondent.

<sup>6</sup> In his September 2011 quarterly report, Respondent reported that he had gone to the laboratory on September 10, 2011, but it was closed. He then went to the laboratory on the following morning, September 11, 2011, and provided the required specimen at 9:03 a.m.

Respondent failed, by a matter of a few hours, to provide the required sample on the one occasion in September 2011, that failure, while a technical violation, is not so significant as to warrant discipline, were it standing alone.

**State Bar Ethics School/Client Trust Accounting School**

As a further condition of probation, Respondent was required to submit to the Office of Probation, within one year of the effective date of the Disciplinary Order, proof of attendance at a session of both the State Bar Ethics School and the State Bar Client Trust Accounting School. The deadline for compliance was March 20, 2012. That deadline was included in the letter sent by the Office of Probation to Respondent in April 2011.

Respondent did not attend a session of the State Bar Ethics School until October 25, 2012; he did not attend a session of State Bar Client Trust Accounting School until October 26, 2012; and he did not submit to the Office of Probation proof of his attendance at the schools until more than two months later, on January 9, 2013 (more than 9 months late).

Respondent seeks to explain, but not justify, his conduct by stating that he mistakenly believed that the deadline was March 20, 2013. At another time, he stated under penalty of perjury that he “was unaware of the requirement that [he was] supposed to attend the State Bar Ethics School and Client Trust Accounting School before March 30, 2012, despite the fact that it is clearly stated in my probation paperwork.” (Ex. 30, p. 5.) This statement was signed by Respondent on September 5, 2012. Given that Respondent then knew that he was already late in complying with this condition of probation, his subsequent delay for more than two months in reporting his attendance at the schools is inexplicable and a source of considerable concern to this court.

Respondent's failure to timely attend State Bar Ethics School and Client Trust Accounting School and provide proof of attendance to the Office of Probation constitutes a willful violation of section 6068, subdivision (k).

### **Restitution Payments**

As a condition of probation, Respondent was originally required to make minimum restitution payments to Susantina Hariputra and Marsha Ross on the first day of each month, beginning the month following the effective date of the Disciplinary Order, and then submit with each quarterly report proof of the required monthly restitution payments. These monthly restitution payments were originally required to be a minimum of \$500 per month.

On October 27, 2011, Respondent sought to have his restitution obligation reduced, but failed to file the required financial statement with that request. As a result, the request was denied by this court on October 28, 2011. Thereafter, Respondent filed a second motion to modify his restitution obligation. The Office of Probation filed an opposition to the request. In it, that office indicated that Respondent had paid all of the \$6,500 owed to Hariputra, but still owed her accrued interest of \$2,671. Hence, Respondent's financial obligation to Hariputra had been capped at that number, since Respondent was under no obligation to pay interest to Hariputra on the accrued, but unpaid interest. With regard to the Ross obligation, it was reported to this court that the Client Security Fund was then expected to make a payment of the \$6,300 principal to Ross.

On December 22, 2011, this court issued the following order, modifying and reducing Respondent's monthly restitution obligation:

Respondent is ordered to make monthly payments to Ross in the amount of \$500 each month until (1) the total amount of the \$6,300 principal amount has been paid by Respondent and/or CSF to Ross; and (2) Respondent has paid for all interest accruing on the \$6,300 principal amount up to the time of the complete payment by either CSF or him of that principal amount to Ross. In the event there is any portion of the

\$6,300 principal amount that has not been paid by Respondent and/or CSF at the time of any such monthly payment, such monthly payment shall first be credited toward Respondent's obligation to pay such principal amount. In the event any such payment of principal is subsequently duplicated by a payment (without reduction) by CSF, Respondent will be given credit for the amount of any such overpayment by CSF toward the principal with a credit toward Respondent's overall obligation to pay accrued interest to Ross. After Respondent has paid the above obligation to Ross in full, his obligation to make monthly payments will continue, as set forth below.

With regard to Respondent's obligation to make monthly payments to Hariputra, such obligation is reduced from \$500 to \$250. Such payments to Hariputra will continue until all accrued interest on the \$6,500 principal amount has been paid in full.

Once all monies and accrued interest owed by Respondent to either Ross or Hariputra have been paid by Respondent, Respondent's obligation to pay a total of \$750 each month toward restitution shall not be reduced, but rather all portions of the \$750 monthly obligation shall now be paid to the remaining unpaid former client, until such time as all principal (not previously paid by CSF) and accrued interest has been paid by Respondent to both former clients. At that time, Respondent's obligation to make \$750 monthly restitution payments shall be directed at his obligation to reimburse CSF for any payments, and accrued interest, it has made to Ross. In sum, Respondent will continue to make monthly restitution payments in the total sum of \$750, as set forth above, until all principal amounts, and accrued interest, owed to Ross, Hariputra, and CSF have been paid in full.

**This modification of Respondent's restitution obligation is made prospectively and does not modify his obligation to pay all of the principal amounts, and accrued interest, owed to Ross, Hariputra, and CSF prior to the termination of his probation.** In the event that the installment payment schedule, set forth above, does not produce that effect, Respondent will need either to plan to make a balloon payment to extinguish his restitution obligation during the term of his probation or file a motion with this court to extend his probation and his schedule of installment payments.

On January 6, 2012, the Client Security Funds paid Marsha Ross the full principal amount of \$6,300. According to a June 26, 2012 phone message received by the Office of Probation from a CSF representative, Ross did not cash the check issued in January 2012 by CSF until June 20, 2012.

The State Bar alleges in the NDC that Respondent failed to make any monthly payments to Ross between April 1, 2011 and October 1, 2012. The evidence shows, however, that Respondent had sent some restitution checks to Ross at times during that period, but that Ross was refusing to sign them. Ross represented to the Office of Probation in July 2012, that she had not cashed the checks because she had been told by a representative of the Office of Probation to “not sign the checks she receives.” (Ex. 1002.) Ross did not appear as a witness at trial.

The stipulated history of restitution payments to Marsha Ross is as follows:

<u>Deadline</u>	<u>Completed</u>
April 1, 2011	Incomplete
May 1, 2011	Incomplete
June 1, 2011	Incomplete
July 1, 2011	Incomplete
August 1, 2011	Incomplete
September 1, 2011	Incomplete
October 1, 2011	Incomplete
November 1, 2011	Incomplete
December 1, 2011	Incomplete
January 1, 2012	Incomplete
February 1, 2012	Incomplete
March 1, 2012	Incomplete
April 1, 2012	Incomplete
May 1, 2012	Incomplete
June 1, 2012	Incomplete
July 1, 2012	Incomplete
August 1, 2012	Incomplete
September 1, 2012	Incomplete
October 1, 2012	Incomplete
November 1, 2012	November 15, 2012 (late)
January 1, 2013	January 10, 2013 (late)
February 1, 2013	February 14, 2013 (late)
March 1, 2013	Incomplete <sup>7</sup>
April 1, 2013	April 3, 2012 (late)

While the evidence is not sufficient for this court to determine whether Respondent failed to make a timely payment in each of the months alleged, Respondent has stipulated that at least

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<sup>7</sup> The check given to Ross by Respondent for the March 1, 2013 monthly payment was returned by Respondent’s bank for not having sufficient funds in the account to negotiate.

four of the payments in 2013 were late. In addition, in his past quarterly reports, he acknowledged not making all of the required payments to Ross in the first three quarters of 2012. This failure by Respondent to make the required restitution payments constitutes a violation of section 6068, subdivision (k).

In addition, as a condition of probation, Respondent was required to submit with each quarterly report proof of monthly restitution payments to Ross and Hariputra. It is alleged in the NDC, stipulated by the parties, and the finding of this court that Respondent failed to submit to the Office of Probation proof of the monthly restitution payments to Ross due on July 10, 2011, October 10, 2011, January 10, 2012, April 10, 2012, July 10, 2012, and October 10, 2012. With respect to Hariputra, it is alleged in the NDC, admitted in Respondent's responses to the NDC, stipulated by the parties, and the finding of this court that Respondent failed to submit to the Office of Probation proof of the monthly restitution payments to Hariputra due on July 10, 2011, October 10, 2011, April 10, 2012, July 10, 2012, and October 10, 2012. This conduct constitutes additional violations of Respondent's probation and his obligations under section 6068, subdivision (k).

The State Bar also alleges in the NDC that Respondent failed to make the restitution payments to Hariputra due on April 1, 2011, and on the first day of all of the months from November 1, 2011 through April 1, 2013.

Respondent, in a quarterly report, acknowledged that he did not make the March 2012 payment (Ex. 26, p. 7), and the evidence is clear that the April 1, 2011 payment was not made until April 4, 2011, four days late. Once again, this conduct constitutes additional violations of Respondent's probation and his obligations under section 6068, subdivision (k).

Beyond that, the evidence is not sufficiently clear and convincing that Respondent was not making the required monthly payments to Hariputra throughout 2012 and until his restitution

obligation was satisfied. To the contrary, there is ample evidence that payments were routinely being made. Indeed, on October 2, 2012, Hariputra provided to the Office of Probation a declaration under penalty of perjury that she had then received \$10,171 from Respondent and that “Mr. McMahon doesn’t owe me any more money.” (Ex. 1004.) Hariputra was not called as a witness at trial to dispute the statements in that declaration.

At trial, the State Bar argued that, at the time that Respondent had repaid all of the principal owed to Hariputra, he owed her **\$3,925** in accrued interest. It is the apparent position of the State Bar that, because the total of the principal (\$6,500) and accrued interest (\$3,925) would total \$10,425, Respondent was still obligated to be making \$250 monthly payments to Hariputra after October 2012, notwithstanding her belief that she had been paid in full.

The State Bar’s allegation, that restitution payments were still owed by Respondent to Hariputra after October 2012, is based on calculations made by various representatives of the Office of Probation at various times. Those calculations, however, are sufficiently conflicting that they fail to provide clear and convincing evidence of the correctness of any of them.

For example, the Office of Probation, in a sworn statement to this court by one of its representatives on December 11, 2011, represented to this court and Respondent, nearly ten months prior to the above October 2012 declaration, that Respondent had already paid all of the \$6,500 principal owed to Hariputra and that the remaining accrued interest then owed to her was **\$2,671.03:**

According to the evidence received by the Office of Probation, Respondent has paid Hariputra **\$7,500**, which covers the \$6,500 in principal owed to her. Respondent only owes Hariputra interest.”

(Ex. 1001, p. 2.)

Because Respondent is not obligated to pay interest on the accrued but unpaid interest, once he had paid the principal (\$6,500) owed to Hariputra, the dollar amount of his obligation to

pay to her interest on the unpaid principal, accruing before the final principal payment, would not go up and instead would be reduced by every subsequent payment.

It is clear that the Office of Probation was aware that Respondent was continuing to make payments to Hariputra after the above declaration. For example, on December 27, 2011, Hariputra called the Office of Probation and informed it that she had received \$500 from Respondent. In response, the Office of Probation called Hariputra on January 5, 2012, to inform her “that after deducting Dec payment, [Respondent] will owe her **\$2,171.03**.” (Ex. 37, pp. 9-11.)

However, on receiving the declaration from Hariputra in October 2012, stating under penalty of perjury that all principal and interest had then been paid in full, the Office of Probation, rather than treating the declaration as proof that Respondent had completed his restitution obligation owed to Hariputra, wrote to Hariputra to challenge her statements about the total amount of money (\$10,171) that she had received (“As of today, the Office of Probation has received sufficient proof of payment that Mr. McMahon has paid you **\$7,400**.”)<sup>8</sup> and to state that Respondent “still owes you **\$3,025.82** in interest.” (Ex. 32, p. 1.)

At about that same time, a representative of the Office of Probation, in opposing an effort by Respondent to have his monthly restitution obligation reduced, had represented to this court, under penalty of perjury, that Respondent owed **\$3,025.82** in accrued interest to Hariputra. (Ex. 1003, ¶ 10 of Declaration.)

Given the many discrepancies by the Office of Probation in its calculations and representations regarding the money that had been paid by Respondent and the interest owed by him, this court declines to find that his failure to make timely restitution payments extends above

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<sup>8</sup> Note that the Office of Probation had represented to this court in December 2011 that it had evidence that **\$7,500** had then already been paid. Further, as noted above, that office was subsequently informed by Hariputra of her receipt in December 2011 of an additional \$500.

those stated above. Nonetheless, his conduct has fallen below that required by the Supreme Court's order and this court.

**Count 1 – Failure to Comply with Conditions of Probation [Bus. & Prof. Code, § 6068, subd. (k)]**

Business and Professions Code section 6068, subsection (k), provides that it is the duty of every member to “comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.” Respondent’s conduct in failing to comply with the conditions of probation, as described in detail above, constituted willful violations by him of that duty.

**Aggravating Circumstances**

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)<sup>9</sup> The court makes the following findings with regard to possible aggravating factors.

**Prior Discipline**

As discussed above, Respondent was disciplined on February 19, 2011, effective March 20, 2011, in the Disciplinary Order. That prior record of discipline is an aggravating factor. (Std. 1.2(b)(i).)

**Multiple Acts of Misconduct**

Respondent has violated his probation in multiple ways and at numerous times. This is a significant aggravating factor. (Std. 1.2(b)(ii).)

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<sup>9</sup> All further references to standard(s) or std. are to this source.

### **Mitigating Circumstances**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The court makes the following findings with regard to possible mitigating factors.

#### **Cooperation**

Respondent entered into an extensive stipulation of facts and admitted at trial that he had violated the conditions of his probation. This is a mitigating factor. (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653.)

#### **Character Evidence**

Respondent presented good character evidence from 14 individuals representing a wide range of references, including numerous attorneys and a past president of the State Bar. Respondent is entitled to mitigation for this good character evidence. (Std. 1.2(e)(vi).)

#### **Community Service**

Respondent regularly performed services for others in conjunction with the Alcoholics Anonymous and Other Bar programs. This court accords some mitigation credit for those efforts. (*In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117, 126.)

### **DISCUSSION**

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The court then looks to the decisional

law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As the Review Department noted more than 21 years ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

The State Bar contends that Respondent's disbarment is called for by both the case law and the standards and that such is necessary to protect both the public and the profession. This court disagrees.

Standard 2.6 provides that violation of certain provisions of the Business and Professions Code, including section 6068, must result in disbarment or suspension, depending on the gravity of the offense or the harm to the victim, with due regard for the purposes of discipline.

Standard 1.7(a) provides: "If 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."

Respondent has been disciplined on only one prior occasion. Hence, disbarment is required by neither the standards nor the case law. More significantly, Respondent has

acknowledged that his early compliance with his probation was deficient and has demonstrated during the last year his commitment to adhering to the obligations created by the Disciplinary Order. Perhaps more significantly, this court is not unmindful that Respondent's prior disciplinary problems resulted from his alcoholism. Although the State Bar complains that the results of his monthly drug tests have been a few days late on a few occasions in the past, it does not gone unnoticed by the court that all of the tests have confirmed Respondent's continued commitment to sobriety. While the problems that Respondent has had in his probation clearly represent a set-back in his road to demonstrating his complete rehabilitation, they are not so significant as to cause this court to conclude that hope should be abandoned and Respondent be disbarred.

For all of the above reasons, this court concludes that the appropriate discipline is a lengthy period of stayed suspension and probation, and a minimum two-year period of suspension.

### **RECOMMENDED DISCIPLINE**

For all of the above reasons, it is recommended that **Brian D. McMahon**, Member No. 147662, be suspended from the practice of law for four years; that execution of that suspension be stayed; and that Respondent be placed on probation for four years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for a minimum of the first two years of probation and he will remain suspended until he provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Std. 1.4(c)(ii).)
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.

3. Respondent 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).) Respondent must also maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will not be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.
4. Within thirty (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 and 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. Respondent must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which Respondent is on probation (reporting dates).<sup>10</sup> However, if Respondent's probation begins less than 30 days before a reporting date, Respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, Respondent 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:

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<sup>10</sup> To comply with this requirement, the required report, duly completed, signed and dated, must be received by the Office of Probation on or before the reporting deadline.

(a) in the first report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, Respondent 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, Respondent must certify to the matters set forth in subparagraph (b) 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, Respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to Respondent, whether orally or in writing, relating to whether Respondent is complying or has complied with the conditions of this probation.
7. Within two years after the effective date of the Supreme Court order in this matter, Respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation. This condition of probation is separate and apart from Respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, rule 3201.)
8. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter.

9. At the termination of the probation period, if Respondent has complied with all of the terms of his probation, the four-year period of stayed suspension will be satisfied and the suspension will be terminated.

**MPRE**

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination during the period of his suspension and provide satisfactory proof of such passage to the State Bar’s Office of Probation in Los Angeles within the same period. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

**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 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.<sup>11</sup>

**Costs**

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment. It is also recommended that Respondent be ordered to reimburse the Client Security Fund to the extent that the misconduct in this matter

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<sup>11</sup> Respondent is required to file a rule 9.20(c) 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.)

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

Dated: November \_\_\_\_\_, 2013.

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**DONALD F. MILES**  
Judge of the State Bar Court