



### **Pertinent Procedural History**

The Office of Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a notice of disciplinary charges (NDC) on October 28, 2014. Respondent filed his response to the NDC on November 19, 2014.

On March 25, 2015, the court entered respondent's default for failure to appear at trial and granted attorney Edward O. Lear's request to withdraw as respondent's counsel. On June 8, 2015, respondent's default was set aside.

A trial was held on July 14, 2015. On the same day, the parties submitted a stipulation as to facts and admission of documents. The State Bar was represented by Deputy Trial Counsel R. Kevin Bucher. Respondent represented himself. The court took this matter under submission at the end of trial.

### **Findings of Fact and Conclusions of Law**

Respondent was admitted to the practice of law in California on December 13, 1993, and has been a member of the State Bar of California at all times since that date.

#### **Facts**

The following findings of fact are based on the evidence and testimony admitted at trial and the stipulation as to facts filed July 14, 2015.

In November of 2008, at the early evaluation conference in State Bar Court case Nos. 08-J-10456 and 09-O-11418 (the underlying matter), respondent advised the State Bar Court of his intent to file bankruptcy.<sup>2</sup>

On April 4, 2010, in the underlying matter, respondent entered into a stipulation of facts and conclusions of law for purposes of being accepted into the Alternative Discipline Program

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<sup>2</sup> The parties stipulated to this fact.

(ADP). His misconduct included an earlier discipline in Minnesota and a disciplinary matter in California.

In a decision filed October 12, 2011, in the underlying matter, the State Bar Court found that respondent's severe emotional, financial, and family difficulties had led to his earlier misconduct in Minnesota, for which he was admitted to ADP, and that he had successfully completed ADP.

On May 16, 2012, the California Supreme Court ordered, among other things, in Supreme Court case No. S198346, that:

1. Respondent be suspended from the practice of law for two years, that execution of the suspension be stayed, that he be placed on probation for two years, and that he be actually suspended for nine months, as recommended by the Hearing Department of the State Bar Court in its decision filed October 12, 2011 (State Bar Court case Nos. 08-J-10456 and 09-O-11418); and
2. Respondent comply, among other things, with the following probation conditions:  
During the period of probation, respondent must provide to the Office of Probation satisfactory proof of payment of the attorney fees assessed against respondent by the Federal District Court in *Willhite v. Collins*, case No. 04-CV-4380 (D. Minn. 2005) or proof that respondent has entered into and is in compliance with a payment plan for payment of such attorney fees as ordered by the Minnesota Supreme Court in case No. A07-2418, filed January 18, 2008.

Any restitution owed to the Client Security Fund (CSF) is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

To the extent that respondent has paid any restitution prior to the effective date of the Supreme Court's final discipline order in this proceeding, respondent will be given

credit for such payments provided satisfactory proof of such is or has been shown to the Office of Probation.

With each written quarterly report required herein, respondent must provide to the Office of Probation satisfactory proof of all restitution payments made by him during that quarter or applicable reporting period.

The Supreme Court order became effective on June 15, 2012, 30 days after it was entered. (Cal. Rules of Court, rule 9.18(a).) It was properly served on respondent.<sup>3</sup>

Respondent was to provide proof of payment by the end of his probation period, June 15, 2014, or in the alternative, to enter into a payment plan.

Respondent was aware of the disciplinary order and the probation conditions. He complied with all conditions except the condition that he pay attorney fees relating back to the Minnesota litigation and provide proof of payment by the end of his probation period, June 15, 2014, or in the alternative, to enter into a payment plan.

Respondent presented bankruptcy documents showing that he had the attorney fees discharged in bankruptcy on or about December 16, 2010. The discharge injunction was issued after he entered into the April 4, 2010 stipulation but before the October 12, 2011 State Bar Court decision. Respondent never petitioned the court to modify the order regarding his probation conditions.

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<sup>3</sup>Although no proof was offered that the Clerk of the Supreme Court served the Supreme Court's order upon Respondent, California Rules of Court, rule 8.532(a) 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.

On February 4, 2015, the bankruptcy court found that respondent's obligation to pay the attorney fees as a condition of his right to practice law under 11 U.S.C. section 524(a) was not discharged.<sup>4</sup>

Respondent has never provided any proof of payment of the attorney fees.

### **Conclusions of Law**

Business and Professions Code section 6068, subdivision (k), provides that an attorney has a duty to comply with all conditions attached to any disciplinary probation.

It is well settled that restitution intended to further California's interests in rehabilitation, punishment and deterrence of attorney misconduct is nondischargeable. (*Kelly v. Robinson* (1986) 479 U.S. 36.) The Supreme Court rejected the attorney's contention in *Brookman v. State Bar* (1988) 46 Cal.3d 1004 that federal bankruptcy law prohibited the order of restitution, holding that nothing in the bankruptcy act, or the cases interpreting it, prevented imposition of restitution as a condition of probation in an attorney disciplinary matter, even if the underlying subject of the restitution had previously been discharged in bankruptcy and thus could not be collected as a debt. Moreover, section 525(a) of the Bankruptcy Act did not preclude the restitution order. Hence the Supreme Court concluded that requiring restitution of \$48,900 as a condition of the attorney's probation and right to practice law was permissible under federal bankruptcy law and that such restitution as a condition of probation was appropriate for purposes of rehabilitation.

Similarly, respondent sought to justify his failure to make restitution by virtue of an intervening bankruptcy court discharge injunction. The bankruptcy court discharge injunction, however, did not terminate respondent's obligations created by the Supreme Court order. In fact,

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<sup>4</sup> State Bar exhibit 54, pages 14 through 41 are stricken from the record because they pertain to third parties and are irrelevant to this proceeding.

in its February 2015 ruling, the bankruptcy court confirmed that conclusion as well. This court finds respondent's arguments without merit.

Willfulness for purposes of disciplinary proceedings is simply a general purpose or willingness to commit an act or to make an omission; it does not require any intent to violate the laws or the probation condition and does not necessarily involve bad faith. (*Durbin v. State Bar* (1979) 23 Cal.3d 461, 467.) Respondent's failure or omission to pay the restitution is sufficient and thus, constitutes willfulness. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.)

In conclusion, there is clear and convincing evidence that respondent failed to comply with his probation condition, in willful violation of section 6068, subdivision (k), as ordered by the Supreme Court in S198346, by failing to pay the attorney fees as restitution assessed against respondent in *Willhite v. Collins*, case No. 04-CV-4380 (D. Minn. 2005), or provide proof that he entered into and was in compliance with a payment plan as ordered by the Minnesota Supreme Court in case No. A07-2418, filed January 18, 2008, by the end of his probation on June 15, 2014.

#### **Aggravation<sup>5</sup>**

##### **Prior Record of Discipline (Std. 1.5(a).)**

Respondent has a record of two prior disciplinary actions.

##### *First Prior Record of Discipline*

On January 24, 2007, the Supreme Court filed an order in case No. S147609 (State Bar Court case No. 99-O-12923), suspending respondent from the practice of law for one year, stayed, with a two-year period of probation, including a three-month actual suspension.

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<sup>5</sup> All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Respondent was found culpable of acquiring interest adverse to a client and collecting an illegal or unconscionable fee beginning in 1995.

*Second Prior Record of Discipline*

On May 16, 2012, the Supreme Court filed an order in case No. S198346, the underlying matter, suspending respondent from the practice of law in California for two years, stayed, with a two-year period of probation, including a nine-month actual suspension. Respondent was found culpable on multiple counts of misconduct, including failing to perform legal services with competence, failing to maintain client funds in trust, failing to promptly pay out client funds, commingling funds in trust, failing to maintain proper accounts, and committing acts of moral turpitude (issuing insufficiently funded checks and making misrepresentation to a judge). He was also culpable of failing to pay restitution and file quarterly reports, in violation of his disciplinary probation. In mitigation, respondent suffered from severe emotional, economic, and family hardship at the time of the misconduct; cooperated with the State Bar; demonstrated good character; provided volunteer and pro bono services; and successfully completed ADP, which qualified as clear and convincing evidence that respondent no longer suffered from the personal difficulties which led to the conduct. In aggravation, respondent had a prior record of discipline; his misconduct caused significant harm to his client and the administration of justice; and his misconduct evidenced multiple acts of wrongdoing.

**Mitigation**

Respondent did not present any mitigation by clear and convincing evidence in this matter. But the court recognizes the prior mitigation that was given in prior disciplinary matters and gives credit here too, such as his emotional difficulties, cooperation with the State Bar, and community services. But the mitigation is not compelling.

### **Good Faith (Std. 1.6(b).)**

Respondent argued that he held the belief that his failure to pay restitution was justified because he thought the attorney fees were discharged. He made no attempt to inform himself of the effect of the bankruptcy discharge on his duty to comply with the Supreme Court's disciplinary order. (See *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302.) In order to establish good faith as a mitigating circumstance, an attorney must prove that his beliefs were both honestly held and objectively reasonable. To conclude otherwise would reward an attorney for his unreasonable beliefs and for his ignorance of his ethical responsibilities. (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966.)

Here, the Supreme Court and the State Bar Court clearly established that requiring restitution serves the rehabilitative and public protection goals of disciplinary probation by forcing attorneys to confront in concrete terms the consequences of the attorneys' misconduct. (*Brookman v. State Bar*, *supra*, 46 Cal.3d at p. 1009; *In the Matter of Taggart*, *supra*, 4 Cal. State Ct. Rptr. at p. 312.) Therefore, the requirement to pay restitution is irrelevant to whether the attorney fees were discharged. And, here, it is clear that the attorney fees were nondischargeable, as found by the bankruptcy court. Accordingly, respondent's good faith belief may be honestly held but was unreasonable and does not constitute as mitigation.

### **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. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review

Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.8(b) provides that, unless the most compelling mitigating circumstances clearly predominate or the prior misconduct occurred in the same time period as the current misconduct, if an attorney has two or more prior records of discipline, disbarment is appropriate if: (1) an actual suspension was ordered in one of the prior matters; (2) the prior and current matters together demonstrate a pattern of misconduct; or (3) the prior disciplinary matters coupled with the current record demonstrate the member’s unwillingness or inability to conform to ethical responsibilities.

Standard 2.10 provides that an actual suspension is appropriate for failing to comply with a condition of discipline. The degree of sanction depends on the nature of the condition violated and respondent's unwillingness or inability to comply with disciplinary orders.

Respondent argues that this matter should be either dismissed or given a two year's suspension with credit.

The State Bar urges respondent be disbarred, in light of his two prior records of discipline under standard 1.8(b). The court agrees.

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.) Here, respondent has repeatedly failed to comply with his probation conditions, as

evidenced in his second disciplinary matter and in this current proceeding. He failed to pay a restitution condition of probation in both matters.

Under standard 1.8(b), respondent was actually suspended for three months and nine months, respectively, in his prior disciplinary matters. His behavior demonstrates an indifference to the Supreme Court's disciplinary orders; this is the second time that petitioner has been found culpable of violating his probation conditions.

There are no compelling mitigating circumstances in this matter. Instead, there is a track record of repeated violations by respondent of his professional obligations for the past 20 years, to the detriment of the public. Respondent's two prior impositions of discipline have not operated to cause respondent to conform his conduct to ethical norms. In sum, it is clear that strong steps must be taken to protect the public from future professional misconduct on his part. For all of the above reasons, this court concludes that it is both appropriate and necessary to recommend that respondent be disbarred from the practice of law under standard 1.8(b).

#### **Recommendations**

It is recommended that respondent **David M. van Sickle**, State Bar Number 167401, be disbarred from the practice of law in California and his name be stricken from the roll of attorneys.

#### **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.

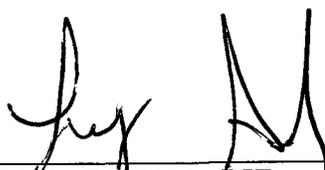
**Costs**

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**

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that David M. van Sickle, State Bar Number 167401, be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after the service of this decision and order. (Rules Proc. of State Bar, rule 5.111(D).)

Dated: September 8, 2015

  
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LUCY ARMENDARIZ  
Judge of the State Bar Court

## CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on September 8, 2015, I deposited a true copy of the following document(s):

### DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

DAVID M. VAN SICKLE  
DAVID VAN SICKLE, ATTORNEY  
PO BOX 71  
LA MIRADA, CA 90637

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

RONALD K. BUCHER, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on September 8, 2015.

  
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Mazie Yip  
Case Administrator  
State Bar Court