

FILED NOVEMBER 5, 2014

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No.: 14-PM-04837-DFM
)	
TIMOTHY DAVID MYERS,)	ORDER GRANTING MOTION TO REVOKE
Member No. 199356,)	PROBATION AND ORDER OF
)	INVOLUNTARY INACTIVE ENROLLMENT
<u>A Member of the State Bar.</u>)	(Bus. & Prof. Code, § 6007, subd. (d)(1))

Introduction¹

The Office of Probation of the State Bar of California (Probation Office), represented by Supervising Attorney Terrie Goldade, filed a motion seeking to revoke the two-year disciplinary probation that the Supreme Court imposed on Respondent **TIMOTHY DAVID MYERS**² (Respondent) in its December 11, 2013, order in *In re Timothy David Myers on Discipline*, case No. S213798 (State Bar Court case No. 12-O-17220) (*Myers I*). (§ 6093, subds. (b); Rules Proc. of State Bar, rule 5.310 et seq.)

As set forth below, the court finds, by a preponderance of the evidence (§ 6093, subd. (c); Rules Proc. of State Bar, rule 5.311), that Respondent willfully failed to comply with three of the conditions of his probation. Accordingly, the court grants the motion to revoke probation and recommends, inter alia, that Respondent be actually suspended from the practice of law for six

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

² Respondent was admitted to the practice of law in California on December 7, 1998, and has been a member of the State Bar of California since that time. As discussed below, Respondent has one prior record of discipline.

months and until he pays restitution a former client and provides proof thereof and that Respondent be placed on a new two-year period of probation with conditions of probation comparable to those imposed on him under the Supreme Court's December 11, 2013, order.

Even though the court recommends a six-month actual suspension and even though Respondent has only one prior record of discipline involving a single client matter and is participating in this proceeding, the court orders Respondent's involuntary inactive enrollment under section 6007, subdivision (d) because of the serious nature of Respondent's prior misconduct in *Myers I.*³ (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 531-532 [State Bar Court must consider Supreme Court's inherent and plenary jurisdiction over attorney discipline before ordering inactive enrollment].)

Procedural History

On September 10, 2014, the Probation Office filed and properly served its motion to revoke probation on Respondent. Thereafter, Respondent filed his response to the motion on October 7, 2014.

The Probation Office did not request a hearing on its motion to revoke probation, and Respondent requested that the court resolve the proceeding on the pleadings without a hearing. Accordingly, on October 8, 2014, the court took the motion to revoke probation under submission for decision without a hearing.

Findings of Fact and Conclusions of Law

The court admits exhibits 1, 2, and 3 to the motion to revoke probation into evidence. (Rules Proc. of State Bar, rule 5.314(H).)

³ Respondent's prior misconduct included failing to refund \$3,510 in advanced fees that Respondent collected from his client under circumstances akin to obtaining money by false pretense (*Hulland v. State Bar* (1972) 8 Cal.3d 440, 449) and deliberately lying to a State Bar complaint analyst who was investigating Respondent's prior misconduct.

In its December 11, 2013, order in *Myers I*, the Supreme Court placed Respondent on two years' stayed suspension and two years' probation with conditions including a 90-day actual suspension. The Supreme Court imposed that discipline, including each of the probation conditions, on Respondent in accordance with a stipulation regarding facts, conclusions of law, and disposition that Respondent entered into with the Office of the Chief Trial Counsel of the State Bar of California (OCTC) and which the State Bar Court approved in an order filed on August 20, 2013, in *Myers I*. Thus, Respondent's misconduct here results from his failure to comply with his own agreement.

The Supreme Court's December 11, 2013, order in *Myers I* became effective on January 10, 2014, and has continuously been in effect since that time. At all times material to the motion to revoke probation, Respondent had actual knowledge of that order.

Probation Violations

Probation-Deputy-Meeting Condition

Respondent was required, within 30 days from the effective date of discipline, to contact the Probation Office and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of his probation and to thereafter meet with the probation deputy as directed by the Probation Office. The record establishes that Respondent willfully violated this probation-deputy-meeting condition by failing to contact the Probation Office to schedule a meeting with his probation deputy within 30 days from the effective date of discipline (i.e., by February 9, 2014). Respondent did not contact the Probation Office to set up a meeting with his probation deputy until February 12, 2014, close to but three days after the mandated deadline.

Probation-Reporting Condition

Respondent's probation-reporting condition requires, inter alia, that Respondent submit written-quarterly-probation reports to the Probation Office on every January 10, April 10,

July 10, and October 10 during the period of Respondent's probation. The record establishes, as charged, that Respondent failed to comply with this probation-reporting condition by submitting his first probation report on April 16, 2014, six days after it was due on April 10, 2014,.

Restitution Condition

Respondent's restitution condition required, inter alia: (1) that Respondent pay Matthew Kahnamelli restitution in the amount of \$3,510 plus 10 percent interest a year from March 17, 2011, within 30 days after the effective date of the Supreme Court's December 11, 2013, disciplinary order (i.e., by February 9, 2014); and (2) that Respondent provide proof of that payment to the Probation Office within that same 30-day time period. Respondent did not comply with the requirement that he pay restitution by the February 9, 2014 deadline.

In his response to the motion to revoke probation, Respondent contends that he lacked the ability to timely pay restitution in accordance with the stipulation he signed and resulting Supreme Court order. According to Respondent, he lacked the ability to pay restitution timely because he incurred "financial difficulties" and "a medical issue requiring surgery that depleted what little fund [sic] I had available to me." That assertion by Respondent is unsupported by any corroborating medical or financial evidence proffered by Respondent in this proceeding. Respondent's failure to attach adequate corroborating documentary evidence to his declaration alone is grounds for rejecting his declaration testimony. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 122; *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 498, fn. 7; see also *Breland v. Traylor Engineering & Manufacturing Co.* (1942) 52 Cal.App.2d 415, 426.) This is particular true in the present case because, in an order filed July 14, 2014, State Bar Court Judge Richard Platel denied Respondent's motion for an extension of time to pay restitution because Respondent failed to provide any proof of his alleged financial hardship.

In addition, Respondent asserts that he has now paid the restitution in full, offering a copy of an uncashed cashier's check dated October 7, 2014, and a certificate that purports to show that Respondent mailed the check to Kahnamelli. That evidence is insufficient for this court to conclude that Respondent has, in fact, paid the restitution amount and accrued interest owed to his former client. Nor does it, even if true, avoid the conclusion that Respondent had failed to comply with the conditions of his probation.

In short, the record establishes, as charged, that Respondent willfully violated his restitution condition by failing to provide the Probation Office with proof that he timely paid restitution to Kahnamelli.⁴

Aggravation

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

Respondent has one prior record of discipline: *Myers I*. In *Myers I*, Respondent stipulated to committing the following three ethical violations in a single client matter: (1) failing to perform legal services competently [rule 3-110(A)]; (2) failing to refund unearned fees [rule 3-700(D)(2)]; and (3) committing an act involving dishonesty by deliberately lying to a State Bar complaint analyst who was investigating Respondent's misconduct in the Kahnamelli client matter [§ 6106]. In aggravation, Respondent stipulated to multiple acts of misconduct and significant client harm. In mitigation, Respondent had 15 years of misconduct free practice and entered into a stipulation of facts, culpability, and discipline before trial.

Multiple Acts of Misconduct (Std. 1.5(b).)

Respondent's present misconduct involves three violations of his disciplinary probation.

⁴ The motion to revoke probation charges Respondent only with failing to provide proof of his restitution payment. The motion does not charge Respondent with failing to pay restitution.

Mitigation

In his written response to the motion to revoke probation, Respondent apologized for his delinquent conduct. Respondent is entitled to some minimal mitigation for his remorse and recognition of wrongdoing.

Discussion

Public protection and attorney rehabilitation are the primary goals of attorney disciplinary probation. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452.)

“[T]here has been a wide range of discipline imposed for probation violations from merely extending probation . . . to a revocation of the full amount of the stayed suspension and imposition of the amount as an actual suspension.” (*In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 573.)

In determining the appropriate level of discipline in a probation revocation proceeding, the court is to consider the “total length of stayed suspension which could be imposed as an actual suspension and the total amount of actual suspension earlier imposed as a condition of the discipline at the time probation was granted.” (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.) The court is to also consider the seriousness of the probation violations, the Respondent’s recognition of his or her misconduct, and the Respondent’s efforts to comply with the conditions of probation. (*Ibid.*)

Furthermore, “[t]he violation of a probation condition significantly related to the attorney’s prior misconduct merits the greatest discipline, especially if the violation raises a serious concern about the need to protect the public or shows the attorney’s failure to undertake steps toward rehabilitation.” (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 151.) “The degree of discipline ultimately imposed must, of necessity, correspond

to some reasonable degree with the gravity of the misconduct at issue.” (*In re Nevill* (1985) 39 Cal.3d 729, 735.)

In addition, the court considers standard 1.8(a), which provides:

If a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust.

An attorney’s failure to strictly comply with the conditions of his or her disciplinary probation “ ‘demonstrates a lapse of character and a disrespect for the legal system that directly relate to [the attorney’s] fitness to practice law and serve as an officer of the court. [Citation.]’ [Citation.]” (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530.)

The court concludes that Respondent’s violation of his restitution probation condition was significantly related to his prior misconduct and warrants actual suspension standing alone. (*In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 574 [“[A]n attorney who wilfully violates a significant condition of probation, such as restitution, can anticipate actual suspension as the expected result, absent compelling mitigating circumstances.”].)

All of the reported probation revocation proceedings in which failure to make restitution was the sole or significant probation violation in the case have resulted in actual suspension of 30 days or more. *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302 is one such case that the court finds instructive on the appropriate level of discipline in the present proceeding. The attorney in *Taggart*, who had two prior records of discipline for serious misconduct, was found culpable of violating his disciplinary probation by failing to pay restitution in the amount of \$1,528 plus interest. The discipline imposed for the single probation violation in *Taggart* was two years’ stayed suspension and two years’ probation with conditions, including a six-month actual suspension.

Moreover, the court independently concludes that public protection requires that Respondent demonstrate that he is now willing and capable of fully engaging in the rehabilitative process and strictly complying with Supreme Court disciplinary orders. Accordingly, the court will also recommend that Respondent be placed on a new two-year period of probation on conditions that are substantially identical to those imposed on him under the Supreme Court's December 11, 2013, order in *Myers I.* (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 705.)

The court does not recommend that Respondent be again ordered to take and pass a professional responsibility examination because he was ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) in the Supreme Court's December 11, 2013, order in *Myers I.* That portion of the Supreme Court's December 11, 2013, order will remain in effect even after Respondent's probation is revoked in this proceeding. Accordingly, if Respondent fails to take and pass the MPRE within the time prescribed in the Supreme Court's December 11, 2013, order (or as it may be modified by the State Bar Court), Respondent will be suspended from the practice of law until he provides proof that he has passed the examination. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

Discipline Recommendation

Actual Suspension

The court recommends that the probation imposed on respondent **Timothy David Myers**, Member No. 199356, in the Supreme Court's December 11, 2013, order in case number S213798 (State Bar Court case number 12-O-17220), be revoked; that the stay of execution of the two-year suspension be lifted; and that **Timothy David Myers** again be suspended from the practice of law in the State of California for two years, that execution of that suspension be stayed, and that he be placed on a new two-year period of probation on the following conditions:

1. Respondent is suspended from the practice of law for a minimum of the first six months of his probation with credit given for the period of involuntary inactive enrollment (Bus. & Prof. Code, § 6007, subd. (d)(3)), and he will remain suspended until the following conditions are satisfied:
 - a. He makes restitution to Matthew Kahnamelli in the amount of \$3,510 plus 10 percent interest per year from March 17, 2011 (or reimburses the Client Security Fund, to the extent of any payment from the Fund to Matthew Kahnamelli, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof to the State Bar's Office of Probation in Los Angeles;⁵ and
 - b. If Respondent remains suspended for two years or more as a result of not satisfying the preceding restitution condition, 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 the suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)
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 30 days after the effective date of the Supreme Court order in this matter, 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. Respondent must promptly meet with the probation deputy as directed and upon request.
4. 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, Respondent's address to be used for State Bar purposes, Respondent must report such change in writing to the State Bar's Membership Records Office and Office of Probation.
5. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10. Under penalty of perjury, Respondent must state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of Respondent's probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 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

⁵ If Respondent has, in fact, already paid full restitution to Kahnamelli, Respondent may satisfy this restitution condition merely by providing the Office of Probation with satisfactory proof of his prior payment.

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.)
8. Respondent's new two-year probation will commence on the effective date of the Supreme Court order in this probation revocation proceeding.
9. At the expiration of the period of probation, if Respondent has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

California Rules of Court, Rule 9.20

The court further recommends that Respondent be ordered to comply with California Rules of Court, rule 9.20 and to 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 probation revocation proceeding.

Costs

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that the costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order of Involuntary Inactive Enrollment

The requirements set forth in Business and Professions Code section 6007, subdivision (d)(1) having been met, the court orders that **Timothy David Myers**, Member No. 199356 be involuntarily enrolled as an inactive member of the State Bar of California under Business and Professions Code section 6007, subdivision (d)(1) effective three calendar days after service of

this order by mail. (See also Bus. & Prof. Code, § 6007, subd. (d)(2); Rules Proc. of State Bar, rule 5.315.)

Dated: November 5, 2014.

DONALD F. MILES
Judge of the State Bar Court