

PUBLIC MATTER

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STATE BAR COURT OF CALIFORNIA HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of)	Case No.: 15-O-10254-PEM
)	
GERALD WILLIAM FILICE,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 99657,)	ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

Introduction¹

In this contested disciplinary proceeding, respondent Gerald William Filice is charged with violating conditions attached to his disciplinary probation imposed by order of the California Supreme Court. This court finds by clear and convincing evidence that respondent is culpable of the charged misconduct. In view of respondent's misconduct, the lack of any mitigation, and two prior records of discipline, the court recommends that respondent be disbarred from the practice of law.

Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a notice of disciplinary charges (NDC) on February 18, 2015. On March 16, 2015, respondent filed a response to the NDC.

On February 20, 2015, a Notice of Assignment and Notice of Initial Status Conference was served on respondent by regular first class mail at his membership records address, requiring

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.



him and the State Bar (through its counsel) to appear at an in-person initial status conference on March 23, 2015 at 9:30 a.m. Respondent, however, did not appear at the status conference. At that March 23, 2015 status conference, the court ordered, among other things, that an in-person pretrial conference would be held on June 8, 2015. The court also ordered that the deadline by which the parties must serve and file their pretrial statements and any exhibits was June 3, 2015. On March 24, 2015, the court filed and served a Status Conference Order, setting forth in writing its orders issued at the March 23, 2015 status conference. The written order was served on respondent by first class mail at his membership records address.

Respondent disregarded this court's March 24, 2015 written order by failing to file and serve a pretrial statement and provide any exhibits by the June 3rd deadline. Subsequently, respondent also failed to appear at the June 8th pretrial conference. Respondent did not file a pretrial statement at any time. Due to respondent's failure to provide any exhibits by the June 3rd deadline, his nonappearance at the pretrial conference, and his failure to file a pretrial statement, the court granted the State Bar's motion to preclude respondent's presentation of witnesses (other than himself) and documentary evidence at trial.

At the June 8, 2015 pretrial conference, the court also granted the State Bar's motion to amend the NDC to include the charge that respondent failed to submit to the Office of Probation the quarterly report and Client Funds Certificate, both of which were due on April 10, 2015, as a condition of his probation.

The trial in this matter was held on June 30, 2015; and, on that same date, the court took this matter under submission. The State Bar was represented by Deputy Trial Counsel Heather E. Abelson. Respondent represented himself.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 1, 1981, and has been a member of the State Bar of California at all times since that date.

Case No. 15-O-10254

Facts

On October 29, 2013, the California Supreme Court filed an order in case No. S212773, suspending respondent from the practice of law for two years, execution of suspension stayed, and placing him on probation for two years, as recommended by the Hearing Department of the State Bar Court in its Order Approving Stipulation, filed June 20, 2013 (State Bar Court Nos. 12-H-18229; 12-O-17874 (Cons.)), subject to conditions of probation, including a condition that respondent be actually suspended from the practice of law for the first 60 days of probation.

The Supreme Court order required that respondent comply, among other things, with the following conditions of probation:

1. Respondent must 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. Under penalty of perjury, respondent must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next quarter date, and cover the extended period;

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of probation and no later than the last day of probation;

2. Within one (1) year of the effective date of Supreme Court order S212773, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session;

3. If respondent possesses client funds at any time during the period covered by a required quarterly report, respondent must file with each required report a certificate from respondent and/or a certified public accountant or other financial professional approved by the Office of Probation, certifying that respondent has met certain specified requirements; and

4. Within one (1) year of the effective date of Supreme Court order S212773, respondent must provide the Office of Probation satisfactory proof of attendance at a session of the Ethics School Client Trust Accounting School, and passage of the test given at the end of that session.

Supreme Court Order No. S212773, filed on October 29, 2013, became effective on November 28, 2013.

The NDC, as filed on February 18, 2014, and thereafter, amended by order of this court at the pretrial conference in the instant matter, alleges that respondent violated the terms of his probation, as recommended by the State Bar Court in State Bar Court on June 20, 2013, in case Nos. 12-H-18229; 12-O-17874 (Cons),² by: (1) failing to submit the quarterly reports that were due no later than January 10 and April 10, 2015; (2) failing to submit the Client Funds Certificates by their due dates of January 10 and April 10, 2015; (3) failing to provide to the Office of Probation no later than November 28, 2014, satisfactory proof of attendance at a session of Ethics School and passage of the test given at the end of that session; and (4) failing to provide to the Office of Probation no later than November 28, 2014, satisfactory proof of attendance at a session of Client Trust Accounting School and passage of the test given at the end of that session.

Respondent acknowledges that he failed to submit the quarterly reports that were due no later than January 10 and April 10, 2015. He testified that he thought that the duration of his probation was only one year. This court finds respondent's testimony credible and has no reason to doubt that respondent held an honest belief that his probation was only for one year – especially, in light of the fact that he had submitted his quarterly reports during 2014.

Nonetheless, it is clear that by February 18, 2015, the date of the filing of the NDC in this

² The California Supreme Court in its order No. S212773 issued on October 29, 2013, required, among other things, that respondent comply with the conditions of probation recommended by the Hearing Department of the State Bar Court in its Order Approving Stipulation, filed on June 20, 2013.

proceeding, respondent was aware or should have been aware that his was a two-year probation. Yet, to date, respondent has not filed his January 10, 2015 and April 10, 2015 quarterly reports, in an effort to come into compliance, albeit belatedly, with that condition of his probation. Thus, the January 10 and April 10, 2015 probation reports are still outstanding. And, respondent still is not in compliance with his probation conditions.

Respondent also acknowledges that he failed to submit the Client Funds Certificate by the due dates of January 10, 2015 and April 10, 2015. Again, respondent relies on his belief that his probation was only for a one-year as an explanation for his failure to comply with the Client Funds Certificate condition. And, again it is clear that by February 18, 2015, the date of the filing of the NDC, respondent was aware or should have been aware that his was a two-year probation and that, therefore, it was incumbent upon him to come into compliance with his probation requirements.

Respondent further admits that three and one half years after he was ordered to attend Ethics School and Client Trust Accounting School, he has not attended either. His reason for not attending Ethics School and Client Trust Accounting School is that he did not have the financial resources to cover the expenses of the fees and transportation. He maintains that he had no idea that he could have filed a motion with this court requesting a fee waiver so that he could comply with his Ethics School and Client Trust Accounting School requirements. Respondent also states that although he informed the probation officer, who was assigned to this matter, of his financial condition, that probation officer did not indicate that that respondent could request a fee waiver. The court again finds respondent's testimony credible and believes he did not know he could request a fee waiver.

But, even if respondent did not have knowledge as to what remedies, if any, existed to address the fact that he did not have the financial resources to pay the costs and fees for traveling

to and taking the Ethics School class and the Client Trust Accounting class, respondent should have researched what, if any, remedies were available to him. Respondent was acting as his own lawyer and as such he should have made an effort to familiarize himself with the Rules of Procedure of the State Bar. Respondent could have searched on the State Bar's website or looked in the index of the Rules of Procedure of the State Bar under "probation" to ascertain the remedies available to him. If he had looked, respondent would have found that he could have filed a motion to modify his probation conditions by seeking an extension of time in which to comply with those probation conditions or that he could have filed a motion for relief based on financial hardship. However, respondent did not testify that he took any steps to seek out a means that would enable him to comply with his Ethics School and Client Trust Accounting School probation requirements. Respondent's failure to comply with his probation requirements, which had been imposed by the Supreme Court of California, demonstrates an indifference toward rectification for the consequences of his misconduct.

Conclusions

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

Section 6068, subdivision (k), provides that an attorney has a duty to comply with all conditions attached to any disciplinary probation. By failing to submit the quarterly reports that were due on January 10, 2015 and April 10, 2015, respectively; by failing to submit the Client Funds Certificates that were due on January 10, 2015 and April 10, 2015, respectively; by failing to provide the Office of Probation satisfactory proof of attendance at a session of Client Trust Accounting School and passage of the test given at the end of that session by the due date of November 28, 2014; and by failing to provide the Office of Probation satisfactory proof of attendance at a session of Ethics School and passage of the test given at the end of that session

by the due date of November 28, 2014, respondent willfully failed to comply with the Supreme Court's order in case No. S212773 and conditions attached to his disciplinary probation.

Aggravation³

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

Respondent's has two prior records of discipline. The two prior records of discipline serve as evidence in aggravation in the current matter. There is also a third disciplinary action, which as discussed below, is not considered as part of respondent's prior record of discipline.

First Disciplinary Action

On October 19, 2011, the State Bar Court Hearing Department issued an order of public reproof with one year of conditions against respondent. The State Bar Court's order became effective on November 9, 2011. Respondent stipulated to a violation of rule 4-100(A) for commingling his personal funds in his client trust account between August 2010 and May 2011. One of the conditions required respondent to supply to the Office of Probation satisfactory proof of attendance at a session of the Ethics School Client Trust Accounting School and passage of the test given at the end of the session within one year of the effective date of the State Bar Court's reproof order imposing discipline. (State Bar Court case Nos. 10-O-10073 et al.)

Second Disciplinary Action

Effective November 28, 2013, under Supreme Court Order No. S212773, respondent was suspended from the practice of law for two years, stayed, and placed on probation for two years, and actually suspended for 60 days. Respondent stipulated to misconduct in one client matter and violations of conditions attached to the reproof, which occurred in 2011 and 2012.

³ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. The standards have been amended, effective July 1, 2015. As this case was submitted before the effective date, the court applies the standards that were effective January 1, 2014, and not the newly revised version.

Respondent's misconduct violated rules 3-410 and 1-110 and section 6068, subdivision (i). Respondent failed to inform his client that he did not have professional liability insurance, failed to cooperate in the State Bar investigation, and failed to comply with six of the conditions attached to the previous reproof. Among other things, he was again ordered to attend Ethics School Client Trust Accounting School, a condition with which he had failed to comply in the first disciplinary order. (State Bar Court case Nos. 12-O-17874 and 12-H-18229.)

Third Disciplinary Action

Respondent's third disciplinary matter alleges a trust account violation and failure to cooperate with the State Bar investigation. It is similar to that of his previous misconduct. As such, respondent should have had a heightened awareness of his need for strict compliance with his trust accounting and duty to respond to State Bar's inquiries, as well as with his need to strictly comply with any outstanding probation conditions. A trial was held in the State Bar Court and respondent's third disciplinary matter is now pending in the Review Department of the State Bar Court (Review Department). The decision of the Hearing Department relating to that third disciplinary action does not constitute a prior record of discipline or serve as evidence in aggravation in the instant matter.

Multiple Acts (Std. 1.5(b).)

Respondent's misconduct demonstrates multiple acts of misconduct involving his inattention to the disciplinary order. Respondent's multiple acts of wrongdoing, including failing to file two quarterly reports, failing to file two Client Fund Certificates, failing to provide the Office of Probation with satisfactory proof of attendance at a session of the Client Trust Accounting School and passage of the test given at the end of that session, and failing to provide the Office of Probation with satisfactory proof of attendance at a session of the Ethics School and passage of the test given at the end of that session.

Indifference Toward Rectification/Atonement (Std. 1.5(g).)

Respondent has demonstrated lack of insight into his wrongdoing and indifference towards rectification of his misconduct. In this court's September 2014 decision (State Bar Court case No. 13-O-13520), the court was quite clear in warning respondent that he needed to comply with the conditions of his probation ("... [R]espondent's attendance and completion of the State Bar's Ethics School and Client Trust Accounting School is essential in light of his trust account violations in both of his first prior record of discipline and current misconduct.") Yet, despite the court's unequivocal warning to respondent regarding completing Ethics School and the Client Trust Accounting School, respondent has yet to come into compliance with those conditions and several other terms of his probation.

Mitigation

A member must establish mitigating circumstances by clear and convincing evidence. In the instant matter, no mitigating factor was submitted into evidence.⁴ (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.6.)

Discussion

The purpose of 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; std. 1.3.)

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

⁴ As noted, *ante*, respondent's failure to comply with court orders requiring that he submit a pretrial statement and appear at the pretrial conference in this matter, as well as his failure to provide any exhibits to the State Bar, as he had been ordered to do, resulted in a court sanction prohibiting him from introducing any evidence or exhibits on his behalf at trial, other than his own testimony.

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.) As 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.

The State Bar urges that respondent be disbarred, in light of his prior record of discipline under standard 1.8(b).

As noted, *ante*, respondent claims that that he did not have the funds to attend the Ethics School and Client Trust Accounting School due to financial hardship. He maintains that he had no idea that he could have filed a motion with this court requesting a fee waiver, which might have enabled him to comply with his Ethics School and Client Trust Accounting School requirements. While the court sympathizes with respondent's predicament, absent any corroborating evidence, such as a financial statement based on financial hardship, his reference

to his financial situation does not satisfy the clear and convincing evidence burden necessary to demonstrate financial difficulty.

Respondent admits that he failed to submit the quarterly reports that were due no later than January 10 and April 10, 2015. He testified that he thought that the duration of his probation was only one year. As previously noted, this court finds respondent's testimony credible. Nonetheless, it is clear that by February 18, 2015, the date of the filing of the NDC in this proceeding, respondent was aware or should have been aware that his was a two-year probation. Yet, to date, respondent still has not filed his January 10, 2015 and April 10, 2015 quarterly reports, in an effort to come into compliance with the quarterly reporting condition of his probation.

Respondent's prior misconduct and his present probation violations reveal that he has been inattentive to his professional duties and demonstrate a continued unwillingness or inability by respondent to conform to the standards required of attorneys licensed in this state. Moreover, while respondent may be facing financial challenges, his earning ability has not been the cause of his repeated failures to file the outstanding required quarterly reports. There is no evidence that respondent has taken any steps to come into compliance with his quarterly reporting probation requirements. Respondent's prior misconduct and his current probation violations involve inattention to his professional duties and a continued unwillingness or inability to conform to the standards required of attorneys licensed in this state. (See discussion of Standard 1.8(b)(3), *ante*.)

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

evidenced in his prior disciplinary matters and in this current matter. There is no evidence that he has made any efforts to comply with his outstanding conditions.

In *Morgan v. State Bar* (1990) 51 Cal.3d 598, the Supreme Court held that disbarment was the appropriate level of discipline, noting that the attorney had been found culpable in four disciplinary proceedings, had been under suspension for an accumulated period of two years and on probation for an accumulated period of 11 years during his 31 years as an attorney, and holding that he did not demonstrate that compelling mitigating circumstances predominated in the case.

In the current matter, no compelling mitigating factors have been demonstrated. As discussed, the record shows that respondent has two prior records of discipline. He was actually suspended in his second prior disciplinary matter. (See, discussion of standard 1.8(b)(1), *ante*.) Additionally, his behavior demonstrates indifference to the disciplinary orders imposed against him; this is the second time that petitioner has been found culpable of violating his probation conditions.

This court, thus, concludes that it would undermine the integrity of the disciplinary system and damage public confidence in the legal profession if respondent were not disbarred for his willful violations of his probation conditions under standard 1.8(b) and case law. Accordingly, the court so recommends.

Recommendations

It is recommended that respondent **Gerald William Filice**, State Bar Number 99657, be disbarred from the practice of law in California and respondent's 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.

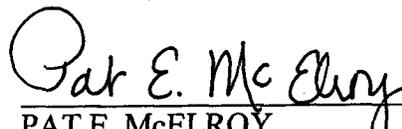
Costs

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

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: September 15, 2015


PAT E. McELROY
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 15, 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:

GERALD WILLIAM FILICE
2443 FAIR OAKS BLVD # 125
SACRAMENTO, CA 95825

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

Heather E. Abelson, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on September 15, 2015.


Laurretta Cramer
Case Administrator
State Bar Court