

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of) Case No.: 15-PM-11434-LMA (S213799)
)
THOMAS MELVIN SWIHART,) ORDER GRANTING MOTION TO
) REVOKE PROBATION AND FOR
) INVOLUNTARY INACTIVE
) ENROLLMENT
)
A Member of the State Bar.)

Introduction¹

In this probation revocation proceeding, respondent Thomas Melvin Swihart is charged with violating his probation conditions imposed by the California Supreme Court. The Office of Probation of the State Bar of California (Office of Probation) seeks to revoke his probation, to impose upon respondent the entire period of suspension previously stayed, and to involuntarily enroll respondent as an inactive member of the State Bar.

The court finds, by preponderance of the evidence, that respondent has violated his probation conditions and hereby grants the motion. Therefore, the court orders that respondent be involuntarily enrolled as an inactive member of the State Bar. The court also recommends, among other things, that respondent's probation be revoked, that the previously stayed, two-year suspension be lifted, and that he be actually suspended for two years and until he pays sanctions

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.

and provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

Significant Procedural History

On March 27, 2015, the Office of Probation properly filed and served a motion to revoke probation² on respondent. The motion was mailed to respondent's official membership records address. Respondent did not file a response within 20 days of the service of the motion.

The court took this matter under submission on April 21, 2015.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 12, 1981, and has been a member of the State Bar of California at all times since that date.

Facts

On December 11, 2013, in Supreme Court case No. S213799, the California Supreme Court ordered, among other things, 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 six months and until he pays sanctions ordered by the United States Treasury in the amount of \$5,200, as recommended by the Hearing Department of the State Bar Court in its order approving stipulation filed August 13, 2013 (State Bar Court case Nos. 12-O-11143 et al.); and
2. Respondent comply, among other things, with the following probation conditions:

² The court takes judicial notice of the certified copy of respondent's prior record of discipline attached to the motion (case Nos. 12-O-11143 et al.).

- A. During the period of probation, Respondent was required to submit a written report to the Office of Probation on January 10, April 10, July 10 and October 10 of each year, or part thereof, during which the probation is in effect, stating under penalty of perjury that he has complied with provisions of the State Bar Act and Rules of Professional Conduct during said period (quarterly report); and
- B. Within one year of the effective date of the discipline (by January 10, 2015), respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar Ethics School, and passage of the test given at the end of the session.

The Supreme Court order became effective on January 10, 2014, 30 days after it was entered. (Cal. Rules of Court, rule 9.18(a).) It was properly served on respondent.³

On January 28, 2014, the Office of Probation sent a letter to respondent at his official membership address, reminding him of the terms and conditions of the suspension and probation imposed by the Supreme Court's order and enclosing, among other things, copies of the Supreme Court's order, the probation conditions portion of the stipulation, and instruction sheets and forms to use in submitting quarterly reports. On February 7, 2014, respondent confirmed his receipt of the letter with the Office of Probation.

Respondent has not filed any of the quarterly reports that were due April 10, July 10, and October 10, 2014, and January 10, 2015.

³Although 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.

Also, respondent was ordered to attend the State Bar Ethics School and provide proof of attendance by January 10, 2015. He has not complied in that he has not attended a session of Ethics School.

In addition, respondent was ordered to pay the \$5,200 court sanctions to the U.S. Treasury and provide proof to the Office of Probation. He has not provided any proof of such payment.

Conclusions

Section 6093, subdivision (b), provides that violation of a probation condition constitutes cause for revocation of any probation then pending and may constitute cause for discipline. Section 6093, subdivision (c), provides that the standard of proof is the preponderance of the evidence. Bad faith is not a requirement for a finding of culpability in a probation violation matter. Instead, a general purpose or willingness to commit an act or permit an omission is sufficient. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.)

Respondent did not comply with the conditions of probation, as ordered by the Supreme Court in S213799: (1) Respondent failed to attend the Ethics School and provide proof to Office of Probation by January 10, 2015; and (2) Respondent has failed to file the quarterly reports that were due April 10, July 10, and October 10, 2014, and January 10, 2015.

Furthermore, he has failed to provide the Office of Probation with any proof of sanctions payment to the U.S. Treasury.

As a result, the revocation of respondent's probation in California Supreme Court order No. S213799 is warranted.

Aggravation⁴

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

Respondent has one prior record of discipline.

In the underlying matter, respondent stipulated to culpability involving two client matters. His multiple acts of misconduct included failing to obey court order, failing to report court sanctions, and committing acts of moral turpitude. He was ordered suspended for two years, stayed, placed on probation for two years, and actually suspended for six months and until he pays court sanctions. (Supreme Court case No. S213799, effective January 10, 2014; State Bar Court case Nos. 12-O-11143 et al.)

Multiple Acts (Std. 1.5(b).)

Respondent committed multiple acts of wrongdoing, including failing to file four quarterly reports and failing to attend the State Bar's Ethics School.

Mitigation

No evidence in mitigation was presented and none is apparent from the record. (Std. 1.6.)

Discussion

Section 6093 authorizes the revocation of probation for a violation of a probation condition, and standard 1.8 requires that the court recommend a greater discipline in this matter than that imposed in the underlying disciplinary proceeding, but any actual suspension cannot exceed the period of stayed suspension imposed in the underlying proceeding. (Rules Proc. of State Bar, rule 5.312.) 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

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

efforts to comply with the conditions. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.)

The Office of Probation requested that respondent be actually suspended for the full amount of stayed suspension and that he should remain suspended: (1) until he pays sanctions in the amount of \$5,200, and furnish satisfactory evidence of payment to the Office of Probation; and (2) until he complies with standard 1.2(c)(1). The court agrees.

Recommendations

The court recommends that the probation of respondent Thomas Melvin Swihart, member No. 98564, imposed in Supreme Court case No. S213799 (State Bar Court case Nos. 12-O-11143 et al.) be revoked; that the previous stay of execution of the suspension be lifted; and that respondent be actually suspended from the practice of law for a minimum of two years and he will remain suspended until the following requirements are satisfied:

1. Respondent pays sanctions ordered by the United States Treasury in the amount of \$5,200, and furnishes satisfactory proof to the State Bar's Office of Probation in Los Angeles; and
2. Respondent must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

Multistate Professional Responsibility Examination

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) because he was previously ordered to do so in S213799.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a)

and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.⁵

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

Section 6007, subdivision (d)(1), provides for an attorney's involuntary inactive enrollment for violating probation if: (A) the attorney is under a suspension order any portion of which has been stayed during a period of probation, (B) the court finds that probation has been violated, and (C) the court recommends that the attorney receive an actual suspension due to the probation violation or other disciplinary matter. The requirements of section 6007, subdivision (d)(1) have been met.

Respondent is ordered to be involuntarily enrolled inactive under section 6007, subdivision (d)(1).⁶ This inactive enrollment order will be effective three calendar days after the date upon which this order is served.

Dated: May _____, 2015

LUCY ARMENDARIZ
Judge of the State Bar Court

⁵ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

⁶The court recommends that any period of involuntary inactive enrollment be credited against the period of actual suspension ordered. (Bus. & Prof. Code, § 6007, subd. (d)(3).)