

PUBLIC MATTER

FILED
SEP 22 2015 P.B.
STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No.: 15-PM-13489-WKM
)	
STEVEN MICHAEL McCARTHY,)	
)	ORDER GRANTING MOTION TO REVOKE
Member No. 85433,)	PROBATION
)	
<u>A Member of the State Bar.</u>)	

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 **STEVEN MICHAEL McCARTHY**² in its December 9, 2014, order in *In re Steven Michael McCarthy on Discipline*, case number S222035 (State Bar Court case number 14-J-02524) (*McCarthy* I). (§ 6093, subs. (b); Rules Proc. of Cal. State Bar, rule 5.310 et seq.)

As set forth *post*, the court finds, by a preponderance of the evidence (§ 6093, subd. (c); Rules Proc. of Cal. State Bar, rule 5.311), that respondent willfully failed to comply with two of

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

² Respondent was admitted to the practice of law in California on May 31, 1979, and has been a member of the State Bar of California since that time. In addition, respondent was admitted to the practice of law in Oregon on May 1, 2008.

the conditions of his probation as charged in the motion to revoke and will, therefore, grant the motion to revoke probation and recommend that the California Supreme Court revoke respondent's probation.

The Probation Office requests a recommendation from this court that the California Supreme Court revoke respondent's probation and impose, on respondent, the entire one-year suspension that it imposed and then stayed in its December 9, 2014, order in *McCarthy I*. The Probation Office also requests an order involuntarily enrolling respondent as an inactive member of the State Bar of California under section 6007, subdivision (d).

The Probation Office's requests for a recommendation that the California Supreme Court impose, on respondent, the one year suspension that it imposed and stayed in *McCarthy I* is not supported by any citation to or analysis of the California Standards for Attorney Sanctions for Professional Misconduct. Nor is the request supported by any citation to or analysis of relevant case law. Moreover, the Probation Office's request that respondent be enrolled inactive under section 6007, subdivision (d) does not include an analysis showing that such an order would not inappropriately infringe on the California Supreme Court's inherent and plenary jurisdiction over attorney discipline. (See, e.g., *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 531-532.) Accordingly, the Probation Office's requests for a recommendation that respondent be suspended for one year and order of inactive enrollment under section 6007, subdivision (d) are denied.

The court independently concludes that the appropriate level of discipline for the found probation violations is one year's stayed suspension and two years' probation on conditions that are substantially identical to those previously imposed on respondent under the California Supreme Court's December 9, 2014, order with the addition of a condition that respondent be

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suspended from the practice of law in California for the first ninety days of his new two-year probation.

Procedural History

On July 22, 2015, the Probation Office filed and properly served its motion to revoke probation on respondent by certified mail, return receipt requested at his membership-records address. The service of the motion on respondent was deemed complete when mailed. (Cf. § 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108.) Thereafter, Respondent failed to file a response to the motion to revoke, and the time in which respondent had to file a response has expired.

The Probation Office did not request a hearing on the motion. Accordingly, the court took the motion under submission for decision without a hearing on August 24, 2015.

Findings of Fact and Conclusions of Law

Because respondent failed to file a response to the motion to revoke probation, the factual allegations contained in the motion to revoke and its supporting documents are treated as admissions. (Rules Proc. of Cal. State Bar, rule 5.314(C).)

The court admits the declaration of respondent's assigned probation deputy that is set forth on pages 7 through 10 of the Probation Office's memorandum of points and authorities in support of the motion to revoke and exhibits 1, 2, and 3 to the Probation Office's memorandum of points and authorities into evidence. (Rules Proc. of State Bar, rule 5.314(H).)

In its December 9, 2014, order in *McCarthy I*, the California Supreme Court placed respondent on one year's stayed suspension and two years' probation with conditions, but no 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 California State Bar Court approved in an order filed on August 15, 2014, in State Bar Court case number 14-J-02524. Thus, respondent's misconduct here results from his failure to comply with his own agreement.

The California Supreme Court's December 9, 2014, order in *McCarthy I* became effective on January 8, 2015, and has continuously been in effect since that time. January 8, 2015, was also the "date of discipline" in *McCarthy I*. At all times material to the motion to revoke probation, respondent had actual knowledge of the Supreme Court's December 9, 2014, order.³ (Cal. Rules of Court, rule 8.532(a); Evid. Code, § 664; *In re Linda D.* (1970) 3 Cal.App.3d 567, 571.)

Probation Violations

Probation-Deputy-Meeting Condition

Under respondent's 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, as charged, that respondent willfully violated his probation-deputy-meeting condition by failing to contact the Probation Office to schedule a meeting with his probation deputy no later than February 7, 2015 (i.e., 30 days after the January 8, 2015, effective date of discipline in *McCarthy I*). As of July 22, 2015, the date on which the Probation

³ In June 2015, respondent and his assigned probation deputy exchanged multiple emails. In one of the emails that respondent sent to his probation deputy, respondent claimed, inter alia, that he has not had any appreciable income since 2013; that he, therefore, "cannot pay any of this"; and that he is "not able to comply with the terms of [his] 'probation.'" In that same email, respondent asked his probation deputy: "if I can just quit the California bar." The court notes that the costs associated with complying with the two probation conditions that respondent is charged with violating in the motion to revoke are extremely low (one telephone call to the Probation Office in Los Angeles and two first class mail postage stamps to mail two probation reports to the Probation Office).

Office filed the its motion to revoke probation, respondent had not contacted the Probation Office to set up a meeting with his probation deputy and no such meeting had been held.

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. The record establishes, as charged, that respondent willfully violated his probation-reporting condition by failing to submit his first two probation reports, which were due on April 10, 2015, and July 10, 2015, respectively, to the Probation Office.

Aggravation

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

Respondent has one prior record of discipline: *McCarthy I*. In *McCarthy I*, respondent stipulated that the Oregon Supreme Court's January 16, 2014, order in case number S060882 suspending respondent from the practice of law in Oregon for 90 days for violating Oregon Rules of Professional Conduct, rules 1.1, 1.4(a), and 1.4(b) in a single client matter established his culpability for professional misconduct in California. (§ 6049.1, subd. (a).) In addition, respondent stipulated that the foregoing Oregon Rules of Professional Conduct were substantially identical to California rule 3-110(A) (failing to perform legal services competently) and section 6068, subdivision (m) (respond to client status inquires and keep client informed of significant developments).

Respondent repeatedly and recklessly failed to perform legal services competently in a case in which he represented an Oregon homeowner in a lawsuit against the homeowner's mortgage lender. In addition, respondent failed to adequately communicate with the client. He repeatedly ignored her status inquiries, and failed to adequately apprise her of the consequences of significant development he undertook in representing her. For example, respondent failed to

apprise his client that filing a lawsuit against her mortgage lender would expose her to a deficiency judgment in excess of \$500,000 because respondent had no experience in or understanding of the applicable laws. In aggravation, respondent stipulated to committing multiple acts of misconduct and initially lacking insight into his misconduct. In mitigation, respondent had 29 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.

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

Respondent's failure to rectify the present misconduct by belatedly contacting the Probation Office and scheduling a meeting with his probation deputy and by belatedly filing his first two probation reports once he was aware of this proceeding not only demonstrates, but also establishes his indifference towards rectification. That indifference is an aggravating circumstance.

Mitigation

Because respondent did not file a response to the motion to revoke probation, there is no evidence of any mitigating circumstances. Nor is the court otherwise aware of mitigating circumstances.

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

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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.)

Even though the probation conditions that respondent violated were not directly related to his prior misconduct, his probation-reporting condition is fundamental to his rehabilitation. As the Supreme Court instructed in *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605, a probation “reporting requirement permits the State Bar to monitor [an attorney’s] compliance with professional standards.” Thus, respondent’s probation-reporting condition, which requires that respondent self-report his compliance with the State Bar Act, the State Bar of California Rules of Professional Conduct, and all the conditions of his probation to the Probation Office under penalty of perjury is a very important part of respondent’s rehabilitation. (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 152.)

Moreover, the record reflects that respondent has failed to undertake any meaningful effort whatsoever to comply with his probation conditions. As noted *ante* in footnote number 3, in an email respondent sent to his probation deputy, respondent asserted a meritless claim that he lacked the financial ability to comply with his probation conditions.

Attorneys have an unqualified professional duty to comply with the conditions of any disciplinary probation imposed on him. Therefore, even if respondent did or does in fact lack the financial ability to comply with his probation conditions, respondent was and is required to expend substantial efforts in an attempt to obtain the financial resources needed to comply.

Attorneys also have a unqualified duty to cooperate and participate in disciplinary proceedings. Accordingly, respondent’s failure to file a response to the motion to revoke probation is further evidence that respondent fails to appreciate the duties of an attorney.

In sum, the court concludes that respondent’s probation violations warrant a significant period of actual suspension. In that regard, the court finds the case of *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 to be instructive. In *Meyer*, the attorney was placed on two years’ stayed suspension and three years’ probation on conditions, including a 90-

day period of actual suspension because he violated two of the conditions attached to a private reproof imposed on him by the State Bar Court. Specifically, the attorney violated his quarterly-reporting condition by failing to submit his fifth and sixth reports, and he violated his education condition by failing to provide proof that he had completed six hours of continuing legal education (CLE) courses.

In *Meyer*, the attorney's default was entered when he failed to appear at trial. In aggravation, the attorney had two prior records of discipline (one of which was also involved the attorney's failure to comply with the conditions attached to a reproof); committed multiple (i.e., three) acts of misconduct; displayed indifference by not belatedly submitting proof that he completed six CLE hours and by not belatedly filing his fifth and sixth reports; and failed to cooperate by failing to file a pretrial statement and by failing to appear at four pre-trial hearings in his disciplinary case.

On balance, the court concludes that the appropriate level of discipline for the three probation violations found in the present case includes a 90-day period of 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 one-year stayed suspension and a new two-year period of probation on conditions that are substantially identical to those imposed on him under the Supreme Court's December 9, 2014, order in *McCarthy I* with an added condition suspending respondent from the practice of law for 90 days. (*In the Matter of Meyer, supra*, 3 Cal. State Bar Ct. Rptr. at p. 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 9, 2014, order in *McCarthy I*. That portion of the Supreme Court's December 9, 2014, order will remain in effect even after respondent's probation is revoked in this proceeding. And, if respondent fails to take and pass the MPRE within the time prescribed in the Supreme Court's December 9, 2014, order (or as it may be modified by the State Bar Court), respondent will be suspended from the practice of law until he does. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

Discipline Recommendation

The court orders that the Office of Probation's July 14, 2014, motion to revoke probation is GRANTED. Accordingly, the court recommends that the probation imposed on respondent **STEVEN MICHAEL McCARTHY** in the Supreme Court's December 9, 2014, order in case number S222035 (State Bar Court case number 12-O-17220), be revoked; that the stay of execution of the one-year suspension imposed in that case be lifted; and that **STEVEN MICHAEL McCARTHY** again be suspended from the practice of law in the State of California for one year, that execution of that one-year suspension be stayed, and that he be placed on a new two-year period of probation on the following conditions:

1. Respondent Steven Michael McCarthy is suspended from the practice of law for the first 90 days of probation.
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, the address to be used for State Bar

purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's 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 of the period of probation. 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 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. In lieu of attending the State Bar's Ethics School, which would require respondent to return to California, respondent must complete 15 hours of continuing legal education in legal ethics within one year of the effective date of the Supreme Court order in this proceeding and provide written proof of his completion of the 15 hours within the same time period. This requirement is separate from respondent's California Minimum Continuing Legal Education (MCLE) requirement. Respondent is ordered *not* to claim any MCLE credit for completing these 15 hours. (Accord, Rules Proc. of Cal. 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 one-year stayed suspension will be satisfied and that suspension will be terminated.

Rule 9.20

The court further recommends that **STEVEN MICHAEL MCCARTHY** 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.⁴

⁴ Respondent must file a rule 9.20(c) compliance affidavit/declaration even if he does not have any clients on the date the Supreme Court orders him to comply with rule 9.20. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) Furthermore, an attorney's failure to fully and timely comply with rule 920 is extremely serious misconduct for which disbarment is ordinarily the

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.

Dated: September 22, 2015.



W. KEARSE MCGILL
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 Los Angeles, on September 22, 2015, I deposited a true copy of the following document(s):

ORDER GRANTING MOTION TO REVOKE PROBATION

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 Los Angeles, California, addressed as follows:

**STEVEN MICHAEL MCCARTHY
POB 3524
DELAND, FL 32721**

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

Terrie Goldade, Probation, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on September 22, 2015.



Paul Barona
Case Administrator
State Bar Court