# PUBLIC MATTER



**STATE BAR COURT OF CALIFORNIA**

**HEARING DEPARTMENT - LOS ANGELES**

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| In the Matter of<br><br>JOHN FRANCIS SHELLABARGER,<br><br>A Member of the State Bar, No. 132805. | Case No. 17-O-01373-DFM<br><br>DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT |

## INTRODUCTION[1]

In this contested disciplinary proceeding, Respondent John Francis Shellabarger is charged with violating his probation conditions imposed by the California Supreme Court. This court finds, by clear and convincing evidence, that Respondent is culpable of the alleged misconduct. Based on the nature and extent of culpability, as well as the aggravating factors, this court recommends, among other things, that Respondent be disbarred from the practice of law.

## SIGNIFICANT 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 May 8, 2017. On June 5, 2017, Respondent filed a response to the NDC.

A trial was held on August 29, 2017. The State Bar was represented by Deputy Trial Counsel Patrice Vallier-Glass. Respondent represented himself.

[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.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

**Jurisdiction**

Respondent was admitted to the practice of law in California on December 11, 1987, and has been a member of the State Bar of California at all times since that date.

**Case No. 17-O-01373 (Probation Violations)**

On April 29, 2016, the California Supreme Court ordered, among other things, in Supreme Court case No. S231412 (State Bar Court case No. 14-H-04090 [the H case]), that 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 three years, and that he be actually suspended for 60 days. In addition, the court ordered that Respondent comply, among other things, with the following probation conditions:

A. Respondent was required, within 30 days from the effective date of discipline, to contact the Office of Probation and schedule a meeting with his assigned Probation Deputy to discuss the terms and conditions of his probation.

B. 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 was in effect, stating under penalty of perjury that he had complied with provisions of the State Bar Act and Rules of Professional Conduct during said period (quarterly report). In addition to all quarterly reports, a final report, containing the same information, was 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.

C. Respondent was required to comply with the recommendations set forth in the parties' sealed Second Stipulation as to Facts, including a statement of compliance with paragraph six of the stipulation.

The Supreme Court order resulted from a decision by this court, filed and served on Respondent and his attorney, Kevin Gerry, on October 13, 2015, in which all of the above conditions of probation were recommended. The Supreme Court's order became effective on May 29, 2016, 30 days after it was entered. (Cal. Rules of Court, rule 9.18(a).) It was properly served on Respondent's counsel of record, Kevin Gerry.

On June 10, 2016, shortly after the Supreme Court's order became effective, 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, providing a list of the deadlines for him to comply with the various conditions of probation ordered by the court, 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 the required quarterly reports. The letter was not returned as undeliverable.[2]

As noted above, Respondent was required to contact the Office of Probation to schedule a meeting to review the terms and conditions of his probation by June 28, 2016. He did not do so.

On September 28, 2016, the Office of Probation sent Respondent another reminder letter and a copy of its June 10, 2016 letter, with its list of deadlines and enclosures, including another copy of the Supreme Court's order, the probation conditions portion of the stipulation, and instruction sheets and forms to use in submitting the required quarterly reports.

Although Respondent acknowledges receiving the Office of Probation's letter of September 28, 2016, with its many enclosures, he elected not to comply with any of the

[2] Respondent's claim that he never saw the June 10, 2016 mailing is not credible.

probation conditions imposed upon him on his conclusion that the order was not binding on him because it was served on attorney Gerry, rather than directly on Respondent himself. As a result of this decision by Respondent, he never scheduled a meeting with the Office of Probation to discuss the conditions of probation; did not file the quarterly reports due on July 10, 2016, October 10, 2016, January 10, 2017, and April 10, 2017; and did not submit a statement of compliance pursuant to paragraph six of the sealed Second Stipulation as to Facts.

**Count 1 - (Bus. & Prof. Code, § 6068, subd. (k) [Failure to Comply with Probation Conditions])**

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.

As noted above, Respondent never scheduled a meeting with the Office of Probation to discuss the conditions of probation; did not file the quarterly reports due on July 10, 2016, October 10, 2016, January 10, 2017, and April 10, 2017; and did not submit a statement of compliance pursuant to paragraph six of the sealed Second Stipulation as to Facts. His failure to comply with the conditions continued to and through the time of the trial of this matter in August 2017.

Respondent argues that, because the order was sent to Kevin Gerry rather than directly to him, it had no effect. He also contends that attorney Gerry was not his attorney in the H case. These arguments are without merit.

Actual notice is not a necessary element of proper service in disciplinary proceedings, and service is deemed completed upon mailing. (*In the Matter of Carver* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 348, 357; *Middleton v. State Bar* (1990) 51 Cal.3d 548, 558-559 [under rules applicable to disciplinary proceedings, service is completed upon mailing; actual receipt not required to effect service].) Here, the Supreme Court properly sent the Supreme Court order to attorney Gerry, as Respondent's counsel in the H case.

Originally, Respondent represented himself in the H case. However, during the course of the trial of that matter in January 2015, this court became concerned about Respondent's mental competency. The court then appointed Kevin Gerry to serve as counsel for Respondent in a separate proceeding initiated by the court. Attorney Gerry's representation of Respondent thereafter expanded to include the H case. On February 10, 2015, acting as counsel for Respondent, attorney Gerry filed a motion to re-open the record in the H case, which had already gone to trial. On June 11, 2015, Gerry also filed a document on behalf of Respondent in the H case, providing proof that Respondent had complied with the State Bar Ethics School and Multistate Professional Responsibility Exam requirements imposed on him by this court in the earlier order of reproval. Then, on August 21, 2015, even after the court-initiated separate proceeding had been dismissed on August 6, 2015, Respondent and Gerry, as Respondent's counsel, executed and filed a "Second Stipulation as to Facts," in the H case, in which they agreed that the stipulation, including the attached medical record, would be filed under seal.

The fact that no written substitution of attorney was filed in the H case does not prevent Gerry from becoming Respondent's attorney. (See, e.g., *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 446 ["an attorney making a special appearance is representing the client's interests and has a professional attorney-client relationship with the client"].) "Nor does it make any difference that the associated attorney is being compensated by the [court] rather than the client, or is not being compensated monetarily at all. Just as a defense attorney selected and compensated by an insurer nevertheless represents an insured client and owes that client a duty of care [citation], the associated attorney represents the client and owes a duty of professional care to the client." (*Id.* at p. 447.)

As a result of Gerry's representation of Respondent in the H case at the time the matter was submitted to the Supreme Court, service was effective when the order was mailed to

attorney Gerry on April 29, 2016. In addition, based on attorney Gerry's office procedures, he then forwarded a copy of the order to Respondent by email within 24 hours of receiving the April 29, 2016 order. That would have been sometime in May 2016.

Further, Respondent admits that he had actual knowledge of the Supreme Court order when he received copies of it from the Office of Probation in September 2016 and from attorney Gerry sometime before Thanksgiving in 2016.[3] Despite Respondent's actual knowledge of the court's order, he elected not to comply with it.

In conclusion, there is clear and convincing evidence that Respondent was obligated to comply with the Supreme Court order filed in April 2016. Instead of doing so, he failed to comply with the terms of his probation, in willful violation of section 6068, subdivision (k), by (1) failing to meet with his assigned probation deputy; (2) failing to file four quarterly reports (July 10 and October 10, 2016; January 10 and April 10, 2017); and (3) failing to comply with the recommendations set forth in the parties' sealed Second Stipulation as to Facts, including a statement of compliance with paragraph six of the stipulation.

**Aggravation**[4]

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

Respondent has a record of two prior disciplinary actions.

*First Disciplinary Action*

On January 10, 2014, this court filed an order in State Bar Court case No. 12-O-17941, imposing a private reproval following Respondent's failure to comply with a court order imposing sanctions in willful violation of section 6103.

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[3] It should also be noted that this court's decision in the H case, setting forth all of the conditions of probation adopted by the Supreme Court, was sent to Respondent in October 2015, almost seven months before the Supreme Court order was filed.

[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.

*Second Disciplinary Action*

As previously discussed, on April 29, 2016, the Supreme Court filed an order in case No. S231412 (State Bar Court case No. 14-H-04090), suspending Respondent from the practice of law for two years, stayed, with a three-year period of probation, including a 60-day actual suspension. Respondent was found culpable of violating the probation conditions attached to his private reproval. In aggravation, Respondent had a prior record of discipline, was indifferent to the disciplinary process, and continued to deny any culpability for his non-compliance. In addition, his misconduct evidenced multiple acts of wrongdoing.

Respondent's current misconduct is similar to the misconduct involved in his second prior disciplinary matter – failure to comply with probation conditions. Because of that prior discipline, he should have had a heightened awareness of his need for strict compliance with his probation conditions. Although he was disciplined in 2016 for violating these same conditions, he did not learn from that experience.

Moreover, Respondent's misconduct in this proceeding occurred during the probationary period of his second prior record of discipline. The force of the aggravating circumstance of his prior misconduct is magnified by the fact that Respondent committed the current misconduct while on probation in a prior disciplinary proceeding. (*In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430.)

**Multiple Acts (Std. 1.5(b).)**

Respondent committed multiple acts of wrongdoing, including failing to schedule a meeting with the Office of Probation, failing to file the quarterly reports, and failing to comply with the conditions under the Second Stipulation.

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

Respondent demonstrated indifference toward rectification of his wrongdoing. In his second disciplinary matter, the court significantly noted that Respondent's "repeated and ongoing failures to comply with his professional obligations raise considerable concern by this court regarding his ability to comply with his many professional obligations in the future." As of May 2016, Respondent had two prior records of discipline and, at that point, should be aware of his need for strict compliance with his reporting obligations. Not only did he fail to comply by the deadlines ordered by the Supreme Court (and listed in the letter from the Office of Probation), his failures to comply continued even after the instant disciplinary action was brought.

**Mitigation**

There are no mitigating factors shown by clear and convincing evidence. (Std. 1.6.)

## 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. The State Bar urges Respondent be disbarred for his complete failure to comply with the terms of the probation imposed in his prior H case, in light of his two prior records of discipline under standard 1.8(b).

Standard 2.14 states, "Actual suspension is the presumed sanction for failing to comply with a condition of discipline. The degree of sanction depends on the nature of the condition violated and the member's unwillingness or inability to comply with disciplinary orders." 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 shown no recognition of his misconduct or made any efforts to comply with his probation conditions. In his second disciplinary matter, the H case, he failed to comply with the conditions of his reproval order. And in this current proceeding, he maintains that he does not have to comply with the Supreme Court order. Even right up to the time of trial, he demonstrated complete indifference to his ethical obligation to comply with court orders. The evidence is undisputed that he has never complied with any of the probation conditions. He refuses to accept responsibility for his wrongdoing. Thus, Respondent's lack of insight raises concerns as to whether his misconduct may recur again and is particularly troubling to this court, as was previously remarked in the court's decision in the H case.

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 seven years. Respondent's two prior impositions of discipline have not operated to cause Respondent to conform his conduct to ethical norms. Probation and suspension have proven inadequate in the past to protect against future misconduct, and the record in the current proceeding provides no reasonable indication that discipline short of disbarment will ensure that future misconduct will not occur. (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646.) To the contrary, Respondent's lack of insight into his misconduct suggests that the misconduct will reoccur. (See *Blair v. State Bar* (1989) 49 Cal.3d 762, 781-782.)

In sum, it is clear that strong steps must be taken to prevent future professional misconduct on Respondent's part. Consequently, the court finds no reasonable cause to deviate from standard 1.8(b) and recommends that Respondent be disbarred for the "protection of the public, the profession, and the courts, maintenance of high professional standards, and preservation of public confidence in the legal profession." (*Rose v. State Bar* (1989) 49 Cal.3d 646, 666.)

## RECOMMENDATIONS

It is recommended that respondent John Francis Shellabarger, State Bar Number 132805, 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**

Respondent John Francis Shellabarger, State Bar Number 132805, 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: October 18, 2017

DONALD F. MILES
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 October 18, 2017, 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 Los Angeles, California, addressed as follows:

JOHN F. SHELLABARGER
LAW OFC JOHN SHELLABARGER
PO BOX 80628
GOLETA, CA 93118 - 0628

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

PATRICE N. VALLIER-GLASS, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on October 18, 2017.

Louisa Ayrapetyan
Case Administrator
State Bar Court