

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

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| In the Matter of |) | Case No.: 13-PM-14581-RAH |
| |) | |
| MANSFIELD COLLINS, |) | ORDER GRANTING MOTION |
| |) | TO REVOKE PROBATION |
| Member No. 104049, |) | |
| |) | |
| <u>A Member of the State Bar.</u> |) | |

Introduction

In this probation revocation proceeding, the State Bar's Office of Probation (OP) charges respondent **MANSFIELD COLLINS**¹ with violating two of the conditions of the disciplinary probation that the Supreme Court imposed on him in its January 11, 2011, order in *In re Mansfield Collins on Discipline*, case number S187650 (State Bar Court case number 03-O-02352.) (*Collins I*). OP is represented by Supervising Attorney Terrie Goldade. Respondent is representing himself.

As discussed *post*, the court finds, by a preponderance of the evidence (Bus. & Prof. Code, § 6093, subd. (c);² Rules Proc. of State Bar, rule 5.311), that respondent is culpable of the charged probation violations. Accordingly, the court will grant the motion to revoke probation

¹ Respondent was admitted to the practice of law in California on September 27, 1982, and has been a member of the State Bar of California since that time. He has one prior record of discipline.

² Unless otherwise noted, all further statutory references are to the Business and Professions Code.

and, for the reasons set forth below, will recommend that respondent's probation be revoked and that he be actually suspended from the practice of law for six months and until he makes complete restitution with interest to Flavio Reynaldo Tenorio, Aurelio Tenorio, Francisco Tenorio, and Filiberto Tenorio (the Tenorio brothers) for the \$258,000 in unconscionable fees that respondent charged and collected from them. In addition, the court will also recommend that, if respondent remains actually suspended for two years or more as a result of his failure to make restitution with interest to the Tenorio brothers, respondent remain suspended until he establishes his rehabilitation, fitness to practice, and learning in the law in accordance with Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).³ The court denies OP's request that respondent be involuntarily enrolled as an inactive member of the State Bar of California under section 6007, subdivision (d)(1). (See *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 531-532.)

Pertinent Procedural History

OP filed the motion to revoke probation in this proceeding on August 15, 2013. Respondent filed his response to the motion to revoke probation on September 9, 2013. On September 20, 2013, the court filed an order approving the parties' requests to withdraw their respective requests for a hearing on the motion to revoke and taking the motion to revoke under submission for decision without a hearing on that same date.

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³ All further references to standards (or stds.) are to this source.

Findings of Fact and Conclusions of Law

Probation Violations

In the Supreme Court's April 13, 2011, order in *Collins I*, the Supreme Court placed respondent on one year's stayed suspension and three years' probation on conditions, including a ninety-day actual suspension.

Quarterly-Probation-Reporting Condition

OP charges that respondent willfully violated the probation condition requiring that respondent submit written quarterly-probation reports to OP every January 10, April 10, July 10, and October 10. In each of those reports, respondent must state, under the penalty of perjury under the laws of the State of California, whether he complied with the State Bar Rules of Professional Conduct, the State Bar Act (§ 6000, et seq.), and all the conditions of his disciplinary probation during the preceding calendar quarter. The record clearly establishes that respondent willfully violated his quarterly-reporting condition as charged when he submitted his third quarterly report to OP one day late on October 11, 2011.

Restitution Condition

OP also charges that respondent willfully violated the probation condition requiring that respondent make restitution with interest to the Tenorio brothers for the \$258,000 in unconscionable fees that respondent charged and collected from them. On February 1, 2012; February 21, 2012; March 2, 2012; December 20, 2012; March 28, 2013; and May 24, 2013; the State Bar Court filed orders modifying respondent's restitution condition on the motions of the parties filed in *Collins I*. (Cal. Rules of Court, rule 9.10(c)(2).) Under respondent's modified restitution condition, respondent was required to, among other things, pay the Tenorio brothers at least \$100,000 no later than February 10, 2013. Respondent, however, did not do so. As of February 10, 2013, respondent had only made three payments totaling \$2,500 to the Tenorio

brothers. Thereafter, on April 12, 2013, respondent made an additional payment of \$20,000, bringing the total of respondent's payments to the Tenorio brothers to only \$22,500. Respondent has not made any payments to the Tenorio brothers since April 12, 2013.

In short, the record clearly establishes that respondent willfully violated his modified restitution condition when he failed to pay the Tenorio brothers at least \$100,000 no later than February 10, 2013.

Bad faith is not a requirement for finding a probation violation; "instead, a 'general purpose or willingness' to commit an act or permit an omission is sufficient. [Citations.]" (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.) Restitution effectively serves the state's significant interest in rehabilitating errant attorneys and protecting the public by forcing errant attorneys to confront the consequences of their misconduct in a concrete way. (*Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1009, quoting *Kelly v. Robinson* (1986) 479 U.S. 36, 49, fn. 10.) In fact, our Supreme Court has held that restitution is "a necessary condition of probation designed to effectuate [attorney] rehabilitation and to protect the public from similar future misconduct." (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044.) These tenets make "distinctions between 'substantial' and 'insubstantial' or 'technical' violations of probation restitution requirements inappropriate." (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 537.)

Moreover, contrary to respondent's contentions, OP is not required to prove that respondent had the financial ability to make the full first \$100,000 minimum restitution payment to the attorney for the Tenorio brothers. In the context of criminal law, a California court is precluded from revoking a defendant's supervision (i.e., probation) for failing to comply with the defendant's restitution condition unless the defendant "willfully failed to pay and has the ability to pay." (Pen. Code, § 1203.2, subd. (a); *In the Matter of Potack, supra*, 1 Cal. State Bar Ct.

Rptr. at p. 537.) Of course, that statutory restriction does not apply in State Bar Court disciplinary proceedings, “which have long been defined by our Supreme Court as unique, and not as criminal proceedings. [Citations.]” (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868, fn. 4 & 868.) In *Respondent Y*, the attorney argued that, before he could be disciplined for failing to pay \$1,000 in court ordered sanctions, the State Bar had the burden prove that he had the financial ability to pay. There the review department rejected the attorney’s argument, in part, because the attorney failed to cite any persuasive authority to support such a proof requirement and because the review department was unaware of any supporting authority. (*Id.* at p. 868.)

Furthermore, implicit in an attorney disciplinary probation condition requiring restitution is the duty to make sufficient bona fide efforts to legally acquire the resources to pay the restitution as ordered. In other words, an attorney has a clear duty to undertake sufficient good faith efforts to comply with disciplinary probation condition requiring restitution. (Cf. *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 311; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 148, fn. 8; see also *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81, 86.) At a minimum, if an attorney cannot fully comply with a restitution probation condition, the attorney must make restitution to the best of his or her financial ability, which includes making all reasonable sacrifices in his or her standard of living to maximize the amount of restitution paid. (Cf. *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297, 307.) An attorney is “expected to exercise his [or her] very best efforts in making restitution and to immediately embark upon a decisive course of action designed to timely do so.” (*In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 464, fn. 4.) What is more, when an attorney has wrongfully retained an fee without having earned any measurable portion of it, the attorney has the “burden to prove

factors justifying any recommendation other than one requiring restitution prior to being relieved of the actual suspension.” (*Id.* at p. 466.) If the attorney fails to meet this burden, the attorney must make restitution forthwith and before being relieved of any actual suspension imposed. (*Ibid.*)

The evidence that respondent presents in defense of the present motion to revoke his probation is substantially identical to the evidence that respondent presented on a number of motions that he filed in *Collins I* over the last 22 months in which respondent sought to relief from the probation conditions based on changed circumstances (i.e., respondent’s prostrate cancer, the substantial damage to respondent’s home [and home office] caused by a broken water pipe, financial hardship; and alleged lack of ability to pay). On respondent’s motions or the motion of OP, this court has made minor modifications to respondent’s restitution probation condition. (Cal. Rules of Court, rule 9.10(c)(2).) For the most part, however, this court has repeatedly denied many, if not most, of respondent motions seeking to relief from the probation conditions imposed on him under the Supreme Court's January 11, 2011, order in *Collins I*. This court denied those motions because respondent failed to establish that the requested relief was consistent with protecting the public, respondent’s successful rehabilitation, and maintaining the integrity of the legal profession (Rules Proc. of State Bar, rule 5.300(B)) and because respondent failed to establish that he lacks the financial ability to make restitution to the Tenorio brothers.

Moreover, respondent sought review of this court’s March 23, 2013, and May 24, 2013, orders denying two of respondent’s multiple motions to modify his probation. The review department summarily denied respondent’s petitions to review the March 23, 2013, and May 24, 2013, orders because respondent failed to show either an abuse of discretion or error of law. (Rules Proc. of State Bar, rule 5.150(I).)

Respondent fails to explain how the same evidence that this court and the review department found insufficient to support the probation modifications that respondent's sought in *Collins I* over the last 22 months is now somehow sufficient to defend against the charged probation violations or to establish mitigation with respect the violations. Instead, respondent merely suggests that this court erred in denying his numerous motion to modify his restitution probation condition and that the review department erred in not granting respondent's petitions for review of this court's March 23, 2013, and May 24, 2013, orders denying two of respondent motions to modify. This court, of course, rejects respondent's suggestions that this court and the review department erred.

The evidence now before the court fails to establish that respondent has made sufficient bona fide efforts to legally acquire the resources necessary to pay restitution to the Tenorio brothers in accordance with either the original restitution condition or the modified restitution condition; that respondent has undertaken sufficient good faith efforts to comply with either the original or modified restitution conditions; or that respondent has made restitution to the Tenorio brothers in accordance with his ability to pay. In short, the record establishes the charged probation violations, and respondent has failed to establish any mitigating circumstance by clear and convincing evidence.

Aggravating & Mitigating Circumstances

As noted *ante*, respondent has one prior record of discipline—*Collins I*—which is an aggravating circumstance under standard 1.2(b)(i). The Supreme Court imposed the discipline on respondent in *Collins I* in accordance with a stipulation as to facts, conclusions of law, and disposition that respondent and the State Bar entered into and which the State Bar Court approved in an order filed on September 20, 2010. In the *Collins I*, respondent and the State Bar stipulated that respondent charged and collected \$258,000 in attorney's fees from the Tenorio

brothers in a criminal case when respondent had not properly documented or contracted for the fees and that respondent thereafter charged the Tenorio brothers an additional \$226,213.77 in that by charging and collecting the \$258,000 and that by charging the \$226,213.77 respondent charged or collected an unconscionable fee in willful violation of the State Bar Rules of Professional Conduct, rule 4-200(A). The parties stipulation is consistent with the February 24, 2005, final judgment that the United States Bankruptcy Court for the District of Arizona entered against respondent and others in a case that the Tenorio brothers filed alleging, among other things, legal malpractice and attorney breach of fiduciary duty. In that case, respondent brought a counterclaim against the Tenorio brothers seeking to recover the \$226,213.77 in attorney's fees they refused to pay.

In that final judgment, which was affirmed on appeal, the bankruptcy court awarded the Tenorio brothers judgment against respondent in the amount of \$258,400.34 plus statutory interest at the California judgment rate from February 24, 2005, until paid. The bankruptcy court also entered judgment against respondent on his counterclaim for \$226,213.77 in additional legal fees finding the \$226,213.77 was "unreasonable, excessive, not properly itemized, and not with the contract of the parties." Notably, the first time respondent made a payment on the \$258,400.34 judgment was on early 2012 when respondent made the three payments totaling \$2,500, which are noted above.

In *Collins I*, there was no aggravating circumstances. In mitigation, respondent had 27 years of discipline-free practice (std. 1.2(e)(i)) and respondent displayed candor and cooperation with the State Bar (std. 1.2(e)(v)).

Discussion

Public protection and attorney rehabilitation are the primary goals of 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, the court is to consider, *inter alia*, the seriousness of the violations, respondent’s efforts to comply with his probation conditions, respondent’s recognition of his misconduct, and the total length of stayed suspension which can be imposed as actual suspension. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.) The court must also consider standard 1.7(a), which provides that, when an attorney has a prior record of discipline, “the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.”

Ordinarily, attorney disciplinary probation is effective “only when the attorneys placed on probation are effectively monitored to ensure (1) that they do not again engage in misconduct and (2) that they are undertaking to conform their conduct to the ethical strictures of the profession. [Citations.]” (*In the Matter of Weiner* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763.) Consequently, an attorney’s filing of quarterly-probation reports is important in the attorney’s rehabilitation (*ibid*) and protecting the public (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 705). Nonetheless, the court finds that respondent’s submission of his third quarterly-probation report to OP one day late is a very minor probation violation that does not warrant discipline either independently or as makeweight.

On the other hand, respondent's violation of his restitution condition is a very serious probation violation particularly in light of the fact that the restitution is to refund \$258,000 in legal fees which respondent charged and collected from the Tenorio brothers, but that respondent did not properly document or contract for with the Tenorio brothers. "Restitution is fundamental to the goal of rehabilitation." (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1094.)

The Supreme Court's disciplinary order in *Collins I* provided respondent with an opportunity to reform his conduct to the ethical strictures of the profession. His culpability in the present proceeding " 'demonstrates a lapse of character and a disrespect for the legal system that directly relate to [his] 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.)

In short, the court concludes that respondent's violations of his restitution condition require the imposition of actual suspension. *In the Matter of Taggart, supra*, 4 Cal. State Bar Ct. Rptr. 302 is instructive on the issue of discipline here. In *Taggart*, the attorney was, among other things, placed on six months' actual suspension for violating his disciplinary probation. The attorney in *Taggart*, who had two prior records of discipline, failed to make any of the restitution of \$1,528 plus interest that was due three years earlier.

After carefully considering the seriousness of the found probation violations, respondent's efforts to comply with his probation conditions, respondent's recognition of his misconduct, the total length of stayed suspension that may be imposed as a suspension, respondent's prior record of discipline, the California standards and caselaw, the court concludes that the appropriate level of discipline for the found probation violations is six months' actual suspension continuing until respondent makes restitution to the Tenorio brothers in the amount of \$258,000 plus 10 percent interest per year from January 18, 2005, with credit given for the \$22,500 that respondent has already paid and that, if respondent's actual suspension continues

for two years or more as a result of not completing the restitution, respondent remain suspended until he establishes his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii).

Finally, the court does not recommend that respondent be required to take and pass the Multistate Professional Responsibility Examination (MPRE) because he was ordered to do so in *Collins I.* (Cf. Rules Proc. of State Bar, rule 5.135.) Respondent took and passed the March 2012 MPRE.

Order & Recommended Discipline

The court orders that the State Bar Office of Probation's August 15, 2013, motion to revoke probation is GRANTED. Accordingly, the court recommends that the probation imposed on respondent **MANSFIELD COLLINS** in the Supreme Court's April 13, 2011, order in case number S190158 (State Bar Court case number 05-O-02960, etc.) be revoked; that the stay of execution of the one-year suspension previously imposed in that order be lifted; and that **MANSFIELD COLLINS** be actually suspended from the practice of law in the State of California for six months and until he makes restitution to Flavio Reynaldo Tenorio, Aurelio Tenorio, Francisco Tenorio, and Filiberto Tenorio in the total amount of \$258,000 plus 10 percent interest per year from February 24, 2005, with credit given for the \$22,500 that **MANSFIELD COLLINS** has already paid them.⁴ The court further recommends that, if **MANSFIELD COLLINS** remains suspended for two years or more as a result of not making full restitution to the Tenorio brothers, **MANSFIELD COLLINS** be required to establish, in the State Bar Court, his rehabilitation, fitness to practice, and learning and ability in the general law before his actual suspension is terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

⁴ Respondent paid this \$22,500 to the Tenorio brothers as follows: \$1,000 on January 6, 2012; \$500 on January 12, 2012; \$1,000 on February 1, 2012; and \$20,000 on April 12, 2013.

VI. Rule 9.20 & Costs

The court further recommends that **MANSFIELD COLLINS** 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 matter.

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

Dated: October 18, 2013.

RICHARD A. HONN
Judge of the State Bar Court