

PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed October 6, 2010

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)	No. 08-O-13238
)	
DONALD MARTIN WANLAND, JR.,)	OPINION ON REVIEW
)	
A Member of the State Bar.)	
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I. STATEMENT OF THE CASE

Donald Martin Wanland, Jr. and the State Bar’s Office of Probation (Probation) failed to perform their respective professional duties. Wanland stipulated to disciplinary probation terms in 2002, but failed to timely comply with them. Probation did not properly monitor Wanland’s compliance and ignored his late filings. As a result, the Office of the Chief Trial Counsel (State Bar) did not file disciplinary charges until 18 months after Wanland had completed his five-year probation period.

The hearing judge concluded that Wanland violated his probation terms and recommended a 45-day actual suspension subject to two years’ probation. In choosing an actual suspension, the hearing judge found aggravation in Wanland’s prior discipline record, multiple acts of wrongdoing and uncharged misconduct. The hearing judge also assigned mitigation credit because Wanland completed each probation requirement, albeit late, and the State Bar caused prejudice to Wanland by not promptly filing the case. Wanland seeks review.

II. ISSUES

Wanland contends that he is not culpable of violating his probation, and any actual suspension is too harsh. The State Bar did not seek review but requests that we find additional culpability and aggravation, and recommends at least a 90-day actual suspension. The issue before us is: Does the State Bar's delay in filing its Notice of Disciplinary Charges (NDC) sufficiently mitigate this case to justify a stayed suspension for Wanland's violations of his 2002 probation?

III. SUMMARY OF THE CASE

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we conclude that the State Bar's delayed filing justifies a stayed suspension. Wanland did not timely comply with his probation terms, but the delayed filing of the disciplinary proceeding significantly mitigates this case. Imposing an actual suspension three years after Wanland satisfied all of his probation conditions would be punitive and would not serve to protect the public or the legal profession. We recommend a 90-day stayed suspension.

IV. FINDINGS OF FACT

The following facts have been established by clear and convincing evidence.¹ On March 6, 2002, the Supreme Court ordered that Wanland serve a 30-day stayed suspension and a five-year probation for violating a bankruptcy court order to return a former client's file. The bankruptcy court ordered Wanland to pay attorneys' fees and a fine for each day that he failed to produce the file, resulting in a total of \$12,603 (the coercive sanction). Later, the court fined him \$13,699.12 for contempt (the contempt sanction) when he failed to pay the initial fine.

In these proceedings, Wanland stipulated to probation conditions that included filing quarterly reports, successfully completing Ethics School by a specific date and paying restitution.

¹ Evidence by a clear and convincing standard requires that the proof be " 'so clear as to leave no substantial doubt' [and must be] 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " (*Sheehan v. Sullivan* (1899) 126 Cal. 189, 193.)

He agreed to the five-year probation so he could make restitution payments of \$500 per month each to the Internal Revenue Service (IRS) for the coercive sanction and to Wells Fargo Bank for the contempt sanction.

Lydia Dineros, Wanland’s probation deputy, regularly communicated with him during the probationary period. She sent Wanland an initial letter explaining the probation requirements and warning that if he failed to timely comply, she would notify the State Bar. Consequently, Wanland sent Dineros at least 50 written communications, including probation reports and copies of money orders as proof that he paid the IRS and Wells Fargo Bank. He completed the restitution requirement in August 2004, having made 45 payments totaling \$26,302.12 over two and a half years.

But Wanland did not always timely perform his probation obligations. He made several late restitution payments. He filed his Ethics School certification two months late, mistakenly believing that he was not required to attend the course. He submitted late quarterly reports, and usually only after Dineros called to remind him. The late quarterly report filings are detailed below:

Date Due	Date Filed
Oct. 10, 2002	Oct. 15, 2002 (5 days late)
Jul. 10, 2003	Jul. 14, 2003 (4 days late)
Jan. 10, 2004	Jan. 14, 2004 (4 days late)
Apr. 10, 2004	Apr. 21, 2004 (11 days late)
Jul 10, 2004	Aug. 5, 2004 (26 days late)
Oct. 10, 2004	Feb. 16, 2005 (129 days late)
Jan. 10, 2005	Feb. 16, 2005 (37 days late)
Apr. 10, 2005	Apr. 29, 2005 (19 days late)
Jul. 10, 2005	Oct. 3, 2005 (85 days late)
Jan. 10, 2006	Feb. 14, 2006 (35 days late)
Apr. 10, 2006	Aug. 14, 2006 (126 days late)
Jul. 10, 2006	Aug. 14, 2006 (35 days late)

Despite Wanland's tardiness, Dineros filed his late reports for over four years without any repercussions. Consequently, Wanland developed a belief that he and Dineros shared joint responsibility for his compliance with probation terms.

In March 2007, Wanland completed his probation. One year later, a new probation deputy, Cindy Jollotta, was assigned to his case. Dineros had retired from the State Bar in December 2006, and no one in Probation actively maintained Wanland's file for the 15-month period from Dineros' departure to Jollotta's assignment.

Jollotta noted several deficiencies when she reviewed Wanland's file. First, she could not locate the final three quarterly reports for October 2006, January 2007 and April 2007. Second, she found no response to Dineros' February 2005 letter requesting proof that the restitution victims actually received full payment. And finally, she discovered that Dineros had mistakenly filed at least five faxed reports instead of the required originals.

As a result of the file review, Jollotta called Wanland in May 2008, and requested the missing items. She claimed that he seemed annoyed and "hung up" on her. In June 2008, she sent Wanland a follow-up letter seeking the same information. He denied hanging up on Jollotta and receiving her letter. When Jollotta did not hear from Wanland, she referred his probation violations to the State Bar. In turn, the State Bar filed this case on November 18, 2008.

V. CULPABILITY FINDINGS

COUNT 1: BUSINESS AND PROFESSIONS CODE SECTION 6068 SUBDIVISION (K) – FAILURE TO COMPLY WITH PROBATION CONDITIONS

The State Bar has charged that Wanland violated Business and Professions Code section 6068, subdivision (k),² because he failed to timely comply with probation conditions in three

² Section 6068, subdivision (k), requires an attorney "[t]o comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney."

ways: (1) he failed to file quarterly reports on time; (2) he failed to satisfy the Ethics School requirement and timely file proof; and (3) he failed to file the last three quarterly reports.

At trial, Wanland stipulated to the first two allegations, and the hearing judge found him culpable. We agree. As to the third allegation, the hearing judge found that the State Bar failed to prove Wanland did not file his last three quarterly reports. Again, we agree. The State Bar relied exclusively on Jollotta's testimony that the reports were missing from the file to prove that Wanland did not submit them, even though she did not assume responsibility for the matter until 15 months after Dineros left. Wanland thought he had submitted the reports to Probation, but was not certain because so many years had passed. Probation did not actively monitor his case for 15 months after Dineros retired. The State Bar's evidence does not clearly and convincingly establish that Wanland failed to file the final three reports.

On review, Wanland presents two primary defenses to culpability for violating probation: He did not act willfully and he substantially complied with probation. We reject both for reasons outlined below.

Wanland first contends that he did not *willfully* violate probation since he never intended to act in "bad faith," citing Black's Law Dictionary's definition of "willful." He claims he merely acted negligently and filed tardy reports because of the "press of business," "illness" or "being out of town." Willful misconduct in attorney discipline matters does not require bad faith, but calls only for a general purpose or intent to commit an act or make an omission.³

All further references to "section(s)" are to the Business and Professions Code unless otherwise noted.

3 (See *Durbin v. State Bar* (1979) 23 Cal.3d 461, 467 [general intent for willful violations of Rule 955(c)]; *Zitny v. State Bar* (1966) 64 Cal.2d 787, 792 [general intent for willful violations of Rules of Professional Conduct]; *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309 [general intent for willful "probation revocation (and other disciplinary) proceedings".])

Wanland knew about each filing deadline, but ignored them until Dineros called to remind him. This repeated conduct demonstrates he acted with a general purpose or intent to file late reports.⁴

Wanland next contends that he substantially complied with the probation requirements and his late filings were merely technical violations. We cannot excuse even “insubstantial” or “technical” violations because probationers must fully comply with all aspects of probation conditions. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 537.) “[S]ubstantial compliance with a probation condition is not a defense to culpability. [Citation.]” (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 652.)

VI. AGGRAVATION AND MITIGATION

The offering party bears the burden of proof for aggravating and mitigating circumstances. Wanland must establish mitigation by clear and convincing evidence (std. 1.2(e)),⁵ while the State Bar has the same burden to prove aggravating circumstances. (Std. 1.2(b).)

A. THREE FACTORS IN AGGRAVATION

Like the hearing judge, we find three factors in aggravation. First, Wanland committed prior misconduct when he violated the bankruptcy court orders resulting in sanctions, prompting the underlying discipline order. (Std. 1.2(b)(i).) Second, he committed multiple acts of wrongdoing when he repeatedly filed late probation reports. (Std. 1.2(b)(ii).) In fact, Wanland needed continual reminders to file the reports, which is “inconsistent with the self-governing nature of probation as a rehabilitative part of the attorney disciplinary system.” (*In the Matter of*

⁴ We strike the Black’s Law Dictionary attachment to Wanland’s opening brief. Since this document was not admitted at trial, it violates rule 306(a) of the Rules of Procedure of the State Bar that permits us to consider only evidence in the Hearing Department record.

⁵ All further references to “standard(s)” are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct unless otherwise noted.

Gorman (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 573.) Third, Wanland committed uncharged misconduct by failing to provide Probation with proper proof of restitution.

(Std. 1.2(b)(iii).) Although he made all restitution payments, he did not furnish proof that the IRS and Wells Fargo Bank actually *received* payment, by either cancelled check (front and back) or payee declaration, as Probation had requested. We assign moderate weight to the totality of the aggravation evidence.

B. TWO FACTORS IN MITIGATION

We agree with the hearing judge that Wanland proved two factors in mitigation.

First, and most significantly, the State Bar delayed filing the NDC. (Std. 1.2(e)(ix); see *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431-432 [whether delay constitutes mitigating circumstance determined on case-by-case basis]; see also *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244, 257 [std. 1.2(e)(ix) particularly relevant in probation revocation proceedings that must be expedited].) Wanland urges that this delay entitles him to a dismissal because he could not remember important facts, including whether he submitted the final three quarterly reports. But he suffered no legally cognizable prejudice in this case because the State Bar did not successfully prove that he failed to file his final reports, and Wanland stipulated to the other late filings. Even so, it is unacceptable that the State Bar filed the NDC 18 months after Wanland's probation had expired and five years after he had paid restitution and completed Ethics School. (See *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 13 [delay may be considered in mitigation even though no prejudice].)⁶ The delay significantly mitigates this case.

⁶ We also reject Wanland's claim for dismissal under the affirmative defenses of laches, estoppel, ratification and waiver since he suffered no prejudice, as described above.

As a second mitigation factor, we assign some credit to Wanland for belatedly completing all of the terms of his probation. (*In the Matter of Gorman, supra*, 4 Cal. State Bar Ct. Rptr. at p. 572 [“some” mitigation for sincere “steps to make restitution and comply with probation”]; *In the Matter of Rose, supra*, 3 Cal. State Bar Ct. Rptr. at p. 652 [“belated compliance with a probation condition may be considered as a mitigating factor in determining discipline”].) Notably, Wanland paid full restitution as a condition of probation by making monthly payments for two and a half years. (See *In the Matter of Taggart, supra*, 4 Cal. State Bar Ct. Rptr. at pp. 310-311 [restitution is important indicator of attorney rehabilitation].)

Overall, the mitigation outweighs the aggravation.

VII. PRINCIPLES OF LAW AND ANALYSIS

A. STATUTE OF LIMITATIONS

Rule 51(a) of the Rules of Procedure of the State Bar governs the statute of limitations in attorney discipline matters and provides: “A disciplinary proceeding based solely on a complainant’s allegation of a violation of the State Bar Act or Rules of Professional Conduct shall be initiated within five years from the date of the alleged violation.”⁷ Wanland contends that his first two late quarterly reports in October 2002 and July 2003, and his Ethics School compliance on June 12, 2003, are time-barred under rule 51(a). We reject this contention since the State Bar initiated this case and rule 51(a) applies only to charges initiated by third-party complaints. (*In the Matter of Wolff, supra*, 5 Cal. State Bar Ct. Rptr. at p. 9.)

B. DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession, to maintain high standards for attorneys and to preserve

⁷ All further references to “rule(s)” are to the Rules of Professional Conduct of the State Bar unless otherwise noted.

public confidence in the profession. (Std. 1.3.) There is no fixed formula to determine the appropriate discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to impose discipline consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.)

Two standards guide our analysis. Standard 2.6(a) provides that an attorney who violates section 6068 should be suspended or disbarred, depending on the gravity of the offense and the harm to the victim. Standard 1.7(a) calls for progressive discipline where an attorney has previously been disciplined unless the prior was so remote in time or so minimal in severity that a greater discipline would be manifestly unjust. Wanland's earlier discipline was neither remote nor minimal and we therefore apply progressive discipline.

Case law further assists our analysis. Discipline for probation violations spans from imposing the entire stayed suspension to extending the probation period with no actual suspension. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.) Cases that recommend actual suspensions involve more serious probation violations than Wanland's late filings and therefore do not offer useful guidance. Those violations include failing to complete probation, making no restitution payments or significantly late payments, or having an extensive prior discipline record.⁸

⁸ (See, e.g., *In the Matter of Gorman, supra*, 4 Cal. State Bar Ct. Rptr. at pp. 572-575 [30-day actual suspension for paying restitution nine months late and failing to timely attend Ethics School]; *In the Matter of Taggart, supra*, 4 Cal. State Bar Ct. Rptr. at pp. 311-313 [six-month actual suspension for failing to pay any restitution over three years and attempt to discharge restitution obligation in bankruptcy]; *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 528 [one-year actual suspension for failing to timely submit five reports or to cooperate and four prior discipline records]; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138 [one-year actual suspension for failing to make any restitution payments or obtain counseling and filing no quarterly reports].)

If timely prosecuted, we might ordinarily recommend an actual suspension for Wanland's probation violations. But the State Bar's filing delay mitigates this matter and compels us to make an exception since Wanland has made substantial progress toward rehabilitation. In particular, he has completed probation, paid restitution, demonstrated remorse and expressed a sincere desire to abide by probation deadlines on his own initiative. (See *In re Chira* (1986) 42 Cal.3d 904, 909 [actual suspension ordinarily warranted but not imposed because it would be punitive under compelling circumstances of case].)

Mindful that the goals of probation are to protect the public and rehabilitate the attorney (*In the Matter of Potack, supra*, 1 Cal. State Bar. Ct. Rptr. at p. 540), we recommend a 90-day stayed suspension subject to a one-year probation. This discipline is progressive under standard 1.7(a) since Wanland received a 60-day stayed suspension in his prior disciplinary case. The new probation period will give him an opportunity to fully comply with all of Probation's directives. Wanland will face further progressive discipline or even disbarment if he violates probation or commits any future misconduct since it would be his third discipline. (Std. 1.7(b); *In the Matter of Rose, supra*, 3 Cal. State Bar Ct. Rptr. 646, 654-655 [disbarment recommended where attorney's third and fourth disciplines were for probation violations].)⁹

VIII. CONCLUSIONS OF LAW

The State Bar's excessive delay in filing the NDC sufficiently mitigates this case to justify recommending a stayed suspension for Wanland's violations of his 2002 probation.

IX. RECOMMENDATION

⁹The State Bar did not seek review but makes three requests: (1) increase the actual suspension; (2) find aggravation for lack of remorse; and (3) reverse the hearing judge's finding that the State Bar did not prove Wanland failed to submit his final three quarterly reports. The State Bar's requests are denied for lack of evidence or as meritless for reasons set forth in this opinion. Although we conduct *de novo* review of all issues, we discourage responding parties from requesting review of issues that the appellant did not raise. (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 977.)

We recommend that Donald Martin Wanland, Jr. be suspended from the practice of law in the State of California for 90 days, that execution of that suspension be stayed, and that he be placed on probation for one year on the following conditions:

1. Wanland must comply with the provisions of the State Bar Act and the Rules of Professional Conduct.
2. 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 his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office of the State Bar and the State Bar's Office of Probation.
3. He 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, he 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. 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.
4. Subject to asserting applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation which are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.
5. Within one year of the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)
6. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the 90-day period of stayed suspension will be satisfied and that suspension will be terminated.

X. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Wanland be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to

provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

XI. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

PURCELL, J.

We concur:

REMKE, P. J.

EPSTEIN, J.