

Filed November 6, 2014

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

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| In the Matter of |) | Case No. 12-O-16888 |
| |) | |
| JOHN WILLIAM ELKINS, |) | OPINION |
| |) | |
| A Member of the State Bar, No. 91374. |) | |
| _____ |) | |

In this original proceeding, a hearing judge found John William Elkins culpable of one count of failing to comply with probation conditions imposed in his prior discipline case.¹ The judge recommended a six-month actual suspension.

Elkins seeks review. He raises procedural challenges, denies culpability, and requests a dismissal. If we find culpability, he urges a shorter actual suspension. The Office of the Chief Trial Counsel of the State Bar (OCTC) supports the decision below.

After independently reviewing the record under rule 9.12 of the California Rules of Court, we adopt the hearing judge’s culpability finding. Given the aggravating circumstances and the fact that Elkins served a 90-day suspension in his prior case, we adopt the recommended discipline as appropriately progressive.

I. PROCEDURAL BACKGROUND

Elkins was admitted to practice law in California in 1980. The present probation violations originate from his 2010 discipline. In that case, Elkins was removed as the co-executor of his father’s estate. Thereafter, in 2004 and 2005, he left a total of 53 threatening and

¹ A probation violation may be prosecuted by a motion to revoke probation or an original disciplinary proceeding. (Rules Proc. of State Bar, rule 5.310.)

abusive voicemail messages for the successor administrator, the attorney for the administrator, and the ex officio judge of a North Carolina court. A hearing judge found him culpable of violating rule 5-100(A) of the Rules of Professional Conduct (threatening to report individuals to state and federal agencies to gain advantage in a civil dispute) and Business and Professions Code sections 6106 (moral turpitude for making threats) and 6068, subdivisions (b) (showing disrespect to ex officio judge) and (j) (failing to update his membership address with the State Bar).² In mitigation, Elkins had practiced law for 24 years without discipline. In aggravation, he committed multiple acts of misconduct, harmed the administration of justice, and lacked insight. The hearing judge recommended a 90-day actual suspension subject to a two-year stayed suspension and two years' probation with conditions. Elkins sought review, and we affirmed. On June 9, 2010, the Supreme Court ordered the recommended discipline, effective July 9, 2010.

II. FACTS AND CULPABILITY

Count One of the Notice of Disciplinary Charges (NDC) alleged that Elkins violated section 6068, subdivision (k), which requires an attorney to comply with the conditions of disciplinary probation. According to the NDC, Elkins (1) submitted late quarterly reports and (2) failed to timely attend and provide proof that he completed the State Bar's one-day Ethics School. As detailed below, the hearing judge correctly found him culpable as charged.³

A. Quarterly Reports

Elkins was required to submit quarterly reports to the Office of Probation (Probation) on the 10th day of January, April, July, and October of each year of probation, stating under penalty of perjury whether he had complied with the State Bar Act, the Rules of Professional Conduct,

² Further references to sections are to the Business and Professions Code.

³ The hearing judge dismissed Count Two with prejudice (failure to obey court order in violation of § 6103) as duplicative of Count One. Neither party contests the dismissal, and we adopt it as supported by the record. (See *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [little purpose served by duplicate misconduct charges].)

and all conditions of probation during the preceding calendar quarter. His final report was due no earlier than 20 days before his probation ended and no later than the last day of probation, which was July 9, 2012.

On June 23, 2010, a few weeks before the discipline order took effect, Probation Officer Michael Kanterakis wrote to Elkins reminding him of the probation conditions. Kanterakis enclosed copies of the Supreme Court order, the probation conditions, forms to use in submitting quarterly reports, and an instruction sheet that stated: “Your original signed and dated report must be physically **received in the Office of Probation** by the tenth day of January, April, July, and October — even if the tenth falls on a weekend or holiday. For all conditions being **even one day late** means that you are **not** in compliance.” (Bold and underline in original.) The instruction sheet also stated: “If you have any questions regarding this information, please contact Michael Angelo Kanterakis in the Office of Probation” at his office number, which was provided. Elkins received the correspondence.

Two months later, in August 2010, Kanterakis held an initial meeting with Elkins by telephone. He discussed the probation conditions, and instructed Elkins that “due” meant “received by” when submitting quarterly reports. Kanterakis asked Elkins if he had any questions. Elkins had none. Despite these directives and explanations, Elkins submitted the following quarterly reports late:

| Date Report Due | Date Filed | |
|-----------------------------|-------------------|-----------------|
| October 10, 2010 | October 12, 2010 | (2 days late) |
| January 10, 2011 | January 24, 2011 | (14 days late) |
| April 10, 2011 | April 11, 2011 | (1 day late) |
| July 10, 2011 | July 12, 2011 | (2 days late) |
| October 10, 2011 | November 4, 2011 | (24 days late) |
| July 9, 2012 (final report) | December 7, 2012 | (5 months late) |

After Kanterakis received the first late report in October 2010, he called Elkins and left a voicemail message at his membership records telephone number and his cell phone number. Elkins did not return the calls. When the January 2011 report came due, Elkins submitted only the first of two pages. In response, Kanterakis again called him and left voicemail messages. After the two spoke by telephone, Elkins sent in the report 14 days late. The next two reports (April and July 2011) were also late by one and two days, respectively. When Elkins failed to file his fifth report by the October 10, 2011 due date, Kanterakis sent him a courtesy letter on October 26th, informing him the report was due “immediately,” and that no further reminder letters would be sent. In response, Elkins filed the report 24 days late on November 4, 2011. As for the final report, Elkins filed it on December 7, 2012 — five months past the July 9, 2012 due date. This evidence establishes Elkins is culpable of repeatedly filing late quarterly reports.

Elkins presents several arguments in his defense.

First, he asserts he substantially complied with his quarterly reporting requirements by placing most reports in the mail by the due dates. He claims Kanterakis led him to believe that the requirement to submit reports on the 10th of the month was “an advisory statement, as long as it reached Probation in a reasonable time after mailing by the 10th,” and “could be interpreted as meaning the date of mailing.” His argument is not persuasive. Probation’s written directions stated in bold print that the reports must be *received* in the Office of Probation to be timely, and Kanterakis emphasized that due date meant the “received by” date. Strict compliance with probation conditions is required, and substantial compliance is not a defense to culpability. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536-537.)

Next, Elkins argues that his final report was late because he could not file it until he received the results of his Multistate Professional Responsibility Examination (MPRE). He is incorrect. The Supreme Court’s order that Elkins pass the MPRE is separate and distinct from its

order that he comply with probation conditions. The order to complete the MPRE imposed a specific deadline, and advised that automatic suspension might result from non-compliance.⁴ Further, the quarterly reporting form provided several options for Elkins to inform Probation about the status of his MPRE compliance, including whether he had: (1) registered for the exam; (2) taken the exam; (3) passed the exam; or (4) failed the exam.⁵ Nothing in the Supreme Court order or the probation forms suggested that Elkins should delay filing his final report until he passed the MPRE.

Finally, Elkins contends that the quarterly report due dates were not firm deadlines because Kanterakis told him “if the reports were received a few days late because of delays in mailing, that normally was not a problem.” The record does not support his argument. Kanterakis testified he did not recall making this statement to Elkins, although he confirmed telling other respondents: “A late report, in and of itself, isn’t detrimental to you. However, if your case is ever referred for the possible imposition of further discipline, the tardiness of any received report will definitely be highlighted in such referral.” While such a statement is inconsistent with the requirements of strict compliance with probation terms, no credible evidence established that Kanterakis actually made the comment to Elkins. And even if he had, Elkins submitted three quarterly reports that were significantly later than “a few days” (14 days, 24 days, and five months).

⁴ The order states: “John William Elkins must also take and pass the Multistate Professional Responsibility Examination within one year after the effective date of this order and provide satisfactory proof of such passage to the State Bar’s Office of Probation in Los Angeles. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)”

⁵ The Quarterly Report Form provides:

Multi-State Professional Responsibility Examination

- ___ I have registered for the MPRE given on _____.
- ___ I have taken the MPRE given on _____ and am awaiting the results.
- ___ I passed the MPRE given on _____. A copy of my results is attached.
- ___ I did not pass the MPRE given on _____ and have re-scheduled to take the examination given on _____.

B. Ethics School

Elkins also was obligated to complete Ethics School and submit proof to Probation that he passed the test given at the end of the course within one year. In 2010, Kanterakis gave Elkins a schedule of Ethics School classes, an information sheet disclosing the \$150 cost, and the application procedures. Even so, Elkins did not attend by the July 9, 2011 due date. Instead, two days later, he filed a motion claiming financial problems and asked to take the November 1, 2011 class. The hearing judge granted his request, but Elkins still did not attend the November class.

Elkins then filed a second motion seeking an additional one-month extension due to ongoing financial issues. The judge denied this request because Elkins: (1) failed to apply for a fee waiver; (2) misstated the enrollment fee as \$250 instead of \$150;⁶ and (3) did not file a proper financial declaration to support his claim. Elkins contends the hearing judge's denial is an abuse of discretion. Given the judge's detailed reasons for denying the motion, we find no abuse of discretion. (Cf. *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 [discretion abused if court exceeds bounds of reason].)⁷

III. NO MERIT TO PROCEDURAL CHALLENGES

Elkins asserts this case should be dismissed or certain factual allegations stricken because: (1) the principles of res judicata and collateral estoppel apply; and (2) OCTC delayed filing the NDC, which caused him prejudice. Both challenges lack merit.

⁶ Probation's information sheet, entitled "Ethics/Client Trust Accounting (CTA) School," set out separate costs for the classes: \$150 for Ethics and \$100 for CTA.

⁷ Elkins failed to seek timely interlocutory relief of this ruling. (Rules Proc. of State Bar, rule 5.150(A) [interlocutory review available for significant issues before proceedings in Hearing Department are complete].)

A. Res Judicata and Collateral Estoppel Do Not Apply

Elkins claims the charges and certain allegations are barred by the doctrines of collateral estoppel and res judicata.⁸ In particular, he argues that since the Review Department imposed a 15-month suspension for not timely passing the MPRE, he will receive a “double punishment” if he is suspended for violating his probation conditions.⁹ We do not agree.

No issues or actions have been re-litigated. The Supreme Court’s order that Elkins comply with probation terms is separate from its order that he provide proof he passed the MPRE within one year. The suspension imposed for his failure to timely pass the MPRE was administrative and automatic, and was unrelated to his probation failures. The present proceedings and recommended suspension are based solely on Elkins’s probation violations and *not* his failure to timely comply with the MPRE requirement.

B. OCTC Did Not Delay Filing the NDC

Elkins’s probation ended in July 2012 and OCTC filed the NDC on November 12, 2012. Elkins contends that OCTC should have filed the NDC a year earlier in November 2011, when Probation stated he had violated his probation in its response to his motions to extend time for Ethics School. He claims the delay prejudiced him because “[h]ad the conduct been timely alleged in 2011, when first known, any time imposed of actual suspension for that conduct would have been running concurrently with the time of suspension for the failure to take the MPRE timely.” Elkins is incorrect. First, he cites no authority for his claim that the suspensions would run concurrently. Moreover, OCTC filed the NDC four months after Elkins’s probation ended

⁸ Res judicata precludes relitigation of a final cause of action in a prior proceeding, while collateral estoppel precludes relitigation of issues that have already been decided against the party asserting it. (See *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828-829.)

⁹ *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8 (automatic suspension for non-compliance with MPRE).

and one month before he submitted proof he successfully completed Ethics School or filed his final quarterly report in December 2012. Under these circumstances, OCTC did not unreasonably delay the filing. (Cf. *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 157 [three and one-half years between client complaint and NDC filing amounts to delay that mitigates case].)¹⁰

IV. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct requires OCTC to establish aggravating circumstances by clear and convincing evidence.¹¹ Standard 1.6 requires Elkins to meet the same burden to prove mitigation. The hearing judge found three factors in aggravation (prior record of discipline, multiple acts, and significant harm) and one factor in mitigation (financial difficulties). We do not find significant harm in aggravation, but otherwise agree with the hearing judge.

A. Aggravation

Elkins's prior record of discipline is significant aggravation because it was recent and involved serious misconduct. (Std. 1.5(a).) Also, his multiple acts of misconduct aggravate this case. (Std. 1.5(b); see *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered aggravating as multiple acts].) However, Elkins's failure to comply with probation conditions did not cause significant harm to the administration of justice. Such non-compliance is not aggravating because "to a great extent, the harm was inherent in the probation violations and therefore is duplicative." (*In the Matter of Laden* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 678, 684; see *In the Matter of Jensen*

¹⁰ Having independently reviewed all arguments set forth by Elkins, those not specifically addressed have been considered and are rejected as having no merit.

¹¹ All further references to standards are to this authority. On January 1, 2014, the standards were revised and renumbered. Since this case was submitted for ruling in 2014, we apply the new standards.

(Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 283, 290 [no specific, cognizable harm to administration of justice for police, child services, and hotel staff efforts to investigate report of child left in hotel room].)

B. Mitigation

Elkins's financial problems affected his ability to timely attend Ethics School. (*In re Naney* (1990) 51 Cal.3d 186, 196-197 [financial difficulties may be considered in mitigation].) However, we assign only modest mitigating weight to these problems because they did not contribute to the other probation violations, i.e., late filing of quarterly reports.

Elkins requests mitigation credit for good faith because he mailed his quarterly reports on or before the due date. We reject his request. Since Elkins was clearly advised that his reports had to be actually *received* in the Probation office by the due date, he could not have reasonably believed that mailing them on that date or shortly before would ensure timely receipt. (Std. 1.6(b) [for mitigation, good faith belief must be honestly held and reasonable].)

V. LEVEL OF DISCIPLINE¹²

We begin our discipline analysis with the standards. (*In re Silvertan* (2005) 36 Cal.4th 81, 91.) Standard 2.10 provides that actual suspension is appropriate discipline for violations of probation, and the “degree of sanction depends on the nature of the condition violated and the member’s unwillingness or inability to comply with disciplinary orders.” Standard 1.8(a) directs that “the sanction must be greater than the previously imposed sanction” when the attorney has a prior record of discipline unless that prior discipline was remote in time or not serious. Both standards apply since Elkins repeatedly violated his probation and his 2011 prior discipline was recent and involved serious misconduct, including an act of moral turpitude.

¹² The purpose of attorney discipline is to: protect the public, the courts, and the legal profession; maintain high professional standards; and preserve public confidence in the legal profession. (Std. 1.1.)

Elkins has demonstrated that he fails to grasp the importance of strict compliance with probation conditions, despite reminders and warnings from Probation. Timely filing quarterly reports plays an important role in the rehabilitative process “because it requires the attorney, four times a year, to review and reflect upon his professional conduct . . . [and] to review his conduct to ensure that he complies with all of the conditions of his disciplinary probation.” (*In the Matter of Wiener* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763.) Of equal importance is Elkins’s failure to timely attend and report completion of Ethics School. This information assures the State Bar that the attorney has reviewed and considered anew his professional responsibilities. Elkins’s failures constitute willful, repeated, and serious probation violations. (See *Potack v. State Bar* (1991) 54 Cal.3d 132, 139 [failure to abide by terms and conditions of probation is serious violation]; *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530-531 [multiple violations of same probation condition warrant more severe discipline].) But perhaps most importantly, his disobedience of a Supreme Court order “demonstrates a lapse of character and a disrespect for the legal system that directly relate to an attorney’s fitness to practice law and serve as an officer of the court. [Citation.]” (*In re Kelley* (1990) 52 Cal.3d 487, 495.)

We conclude that the standards, case law, and weight of aggravating factors, when compared to Elkins’s minimal mitigation for financial difficulties, support a six-month suspension as the proper progressive discipline. (See *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302 [six-month suspension for failure to pay restitution as condition of probation]; *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81 [one-year suspension for failure to timely file first quarterly report and make restitution as conditions of probation].) We also recommend a period of probation with conditions to afford Elkins the opportunity to prove he will strictly follow them and that he is reformed from his

misconduct. (See *In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452 [a goal of disciplinary probation is to rehabilitate attorney].)¹³

VI. RECOMMENDATION

For the foregoing reasons, we recommend that John William Elkins be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for the first six months of his probation.
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.
3. 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 and the State Bar Office of Probation.
4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.
5. 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 of the 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.
6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.
7. It is not recommended that Elkins attend Ethics School, as he successfully completed the course in December 2012.

¹³ For reasons previously stated, we deny Elkins's request to credit the 15-month suspension he served for failing to timely pass the MPRE.

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 period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We do not recommend that Elkins be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners because he successfully passed it in December 2012.

VIII. CALIFORNIA RULES OF COURT, RULE 9.20

We do not recommend that Elkins be ordered to comply with the requirements of rule 9.20 of the California Rules of Court because he filed a declaration of compliance on August 18, 2010, and he has not been eligible to practice law since July 9, 2010 due to his MPRE non-compliance and failure to pay member dues.

IX. COSTS

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

PURCELL, P. J.

WE CONCUR:

EPSTEIN, J.

HONN, J.