

**PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION**

**Filed October 6, 2010**

**REVIEW DEPARTMENT OF THE STATE BAR COURT**

In the Matter of	)	No. <b>09-PM-13028</b>
	)	
<b>JAMES HARVEY TIPLER,</b>	)	<b>OPINION AND ORDER</b>
	)	
A Member of the State Bar.	)	
_____	)	

In this probation revocation case, the Office of Probation of the State Bar (Probation) seeks review of the hearing judge’s order recommending that respondent James Harvey Tipler’s probation be revoked and that he receive a 60-day actual suspension. Although Tipler filed his opposition to the motion to revoke probation and sought a hearing below, he failed to appear at the hearing or participate on review. Probation contends that the actual suspension should be increased to three years, arguing that: (1) Tipler’s declaration filed in the hearing department should not have been admitted or considered; (2) Tipler committed an additional probation violation; and (3) additional aggravation should be found.

Independently reviewing the record (Cal. Rules of Court, rule 9.12), we find: (1) Tipler’s declaration and attachments are inadmissible; (2) Tipler is culpable of an additional probation violation; and (3) more factors in aggravation than Tipler’s prior record exist. Based on relevant

case law and the standards,<sup>1</sup> we recommend that Tipler be suspended for two years and until he proves his rehabilitation, fitness to practice and learning and ability in the law.

## I. BACKGROUND AND PROCEDURAL ISSUES

Tipler was admitted to practice law in California in 1978. He is also admitted to practice in Alabama and Florida. As discussed below, he has been disciplined on six previous occasions in these jurisdictions.

On January 16, 2008, the California Supreme Court filed the discipline order that gives rise to this probation revocation proceeding. Effective February 15, 2008, the Supreme Court suspended Tipler for three years and until he established his rehabilitation, fitness to practice and learning and ability in the law, but stayed that suspension and placed Tipler on probation with conditions, including 15 months of actual suspension. Other conditions required Tipler to file quarterly reports with Probation, to contact Probation within 30 days of the effective date of probation and schedule an in-person or telephonic meeting with the probation office deputy assigned to his case, and to complete six hours of minimum continuing legal education (MCLE) courses in general legal ethics within one year.

This proceeding started on June 10, 2009, when Probation filed a motion to revoke Tipler's probation because he failed to comply with certain conditions. On July 20, 2009, Tipler filed his opposition to the motion and requested a hearing. He also filed a declaration under penalty of perjury, but the declaration was defective because it omitted an execution date. (See Code Civ. Proc., §2015.5; 4 Witkin, Cal. Procedure (5<sup>th</sup> ed. 2008) Pleading, § 462, pp. 592-593.) Tipler attached various documents to the declaration.

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<sup>1</sup> Unless otherwise noted, all references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

The hearing on the probation revocation motion was set for September 3, 2009. The day before the hearing, Tipler moved to continue, asserting that he did not have funds to travel to California. He failed to properly serve Probation with his motion to continue. Prior to the start of the September 3rd hearing, the judge denied the motion to continue.

At the September 3rd hearing, Probation objected to admission of Tipler's declaration and attachments to his opposition to the motion to revoke probation. The hearing judge correctly ruled that the opposition and accompanying declaration would not be admitted in evidence, but would be part of the record of State Bar proceedings. Despite this ruling, it is clear from the December 11, 2009 Amended Order Granting Motion to Revoke Probation, that the hearing judge considered Tipler's opposition and declaration. On review, Probation challenges the hearing judge's reliance on these documents.

Tipler was required to appear at the hearing in person or through counsel. (Rules Proc. of State Bar, rule 210.) Despite requesting a hearing, Tipler failed to appear or make himself available for cross-examination. As a result, his declaration and attachments are inadmissible. (Rules Proc. of State Bar, rule 563(d)(3).) Accordingly, we decline to consider any of Tipler's factual assertions in his opposition, declaration or attachments. To the extent that the hearing judge considered any of Tipler's statements in these documents, she erred in doing so. (See *In re Ford* (1988) 44 Cal.3d 810, 818. [letters consisting of hearsay properly excluded].)

## **II. PROBATION VIOLATIONS**

Pursuant to rule 561 of the Rules of Procedure of the State Bar, we find a preponderance of evidence that Tipler willfully violated the following conditions of probation:

### **A. Tipler Failed to Comply with Quarterly Reporting Requirement**

Tipler was ordered to comply with the State Bar Act and the Rules of Professional Conduct and to report such compliance under penalty of perjury for each quarter of his probation

period on January 10, April 10, July 10, and October 10. We find that Tipler failed to comply with this requirement on two occasions: (1) he was late in filing his required quarterly probation report due April 10, 2009, by filing it on April 15, 2009; and (2) he failed to file a report for October 10, 2008.

The hearing judge found insufficient evidence to conclude that Tipler failed to timely file his October 2008 report, as charged. We disagree. Charges of failure to comply with probation terms in a probation revocation proceeding need be supported only by a preponderance of the evidence. (Rules Proc. of State Bar, rule 561; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 148.) Here, that standard was met.

The documentary evidence submitted at the hearing contains Probation's file copies of quarterly probation reports received from Tipler between April 2008 and April 2009. No October 2008 report was included. Also in evidence was a letter written to Tipler on May 12, 2009, by probation deputy Michael Kanterakis, confirming that Probation had never received Tipler's October 2008 report. Tipler's failure to file that report was also set forth in a declaration by Kanterakis, who maintained Tipler's probation file.

In her decision, the hearing judge referred to the reduced credibility she accorded Kanterakis's declaration. Ordinarily, we are reluctant to differ from the witness credibility assessment of the hearing judge. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 826; Rules Proc. of State Bar, rule 305(a).) However, no live testimony was received and we see no good cause to discredit Kanterakis's statements concerning the lack of receipt of Tipler's October 2008 quarterly probation report. Accordingly, we find Kanterakis's declaration to be credible and conclude that Tipler is culpable of this violation.

**B. Tipler Failed to Meet with his Probation Deputy**

Tipler was ordered to contact Probation within 30 days from the effective date of his discipline – by March 15, 2008 – and schedule a meeting with his assigned probation deputy and meet with the deputy, either in-person or by telephone, to discuss the terms and conditions of his probation. Tipler failed to comply. Although he left a voicemail message for a deputy on March 14, 2008, he did not call back to schedule a meeting and never participated in the required meeting.

**C. Tipler Failed to Timely Complete Required MCLE Courses**

Tipler was ordered to submit to Probation satisfactory evidence of completion of no less than six hours of MCLE-approved courses in general legal ethics within one year of the effective date of his discipline, i.e., by February 15, 2009. The hearing judge found that Tipler failed to timely comply and we agree.<sup>2</sup>

**III. AGGRAVATION AND MITIGATION**

We determine the appropriate discipline in light of all relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar, supra*, 44 Cal.3d at p. 828.) Probation must establish aggravation by clear and convincing evidence, while Tipler has the same burden of proof for mitigating circumstances. (Stds. 1.2(b) & 1.2(e).)

**A. Aggravation**

The hearing judge considered one factor in aggravation, Tipler’s prior record of discipline in California. (Std. 1.2(b)(i).) As additional factors in aggravation, we consider

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<sup>2</sup> The hearing judge found that Tipler completed the required courses by June 12, 2009. This finding appears to be based on Tipler’s inadmissible declaration and attachments and, therefore, we reject it. We note that even subsequent completion of the courses would not negate the finding that he violated this condition of his probation. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536-537 [substantial compliance with probation does not allow an attorney to escape culpability].)

Tipler's multiple acts of wrongdoing (std. 1.2(b)(ii)), and his failure to cooperate with Probation and to participate in these proceedings (std. 1.2(b)(vi)).

### **1. Tipler's Extensive Prior Discipline Record**

Tipler's prior record of discipline is a very serious factor in aggravation.

Although technically Tipler has been disciplined only once in California, that prior record reveals that Tipler has been disciplined *six times* by three different jurisdictions for unique causes and his offenses have become increasingly serious with the passage of time.

Tipler's first discipline was in December 1992, when he was publicly reprimanded and placed on probation by the Florida Bar for misconduct incident to an arrest for possession of cocaine. In November 1994, the Alabama Bar privately reprimanded Tipler for failure to communicate with a client. Then in November 2001, Tipler was publicly reprimanded with probation by the Florida Bar for violating ethics rules regarding attorney fees. These three prior records of discipline were considered in aggravation in Tipler's 2008 California discipline case.

Three subsequent incidents in Alabama formed the basis of Tipler's one prior record of discipline in California under section 6049.1,<sup>3</sup> which provides an attorney may be disciplined for misconduct in another jurisdiction. In the first incident, Tipler was convicted in 2001 of a misdemeanor violation of the Alabama criminal statute proscribing interference with judicial proceedings. In a medical malpractice action, he created the impression that a videotape he offered in evidence was in its original, unedited condition when the tape had in fact been edited. He was fined \$1,000 and ordered to pay \$100 to the Alabama Victim's Compensation Fund. In

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<sup>3</sup> Unless otherwise noted, all references to "section(s)" are to the Business and Professions Code.

his California discipline case, Tipler stipulated that this conviction was a crime involving misconduct warranting discipline in violation of section 6102.<sup>4</sup>

In the second incident, in 2003, the Alabama Supreme Court suspended Tipler for 91 days for failing to follow the Alabama ethical rules concerning trust funds. He failed to maintain in a trust account nearly a half-million dollars in payments destined for another law firm pursuant to an agreement to divide legal fees. Instead, before the payments to the other law firm were made, Tipler transferred the funds to his law firm operating account and used them for personal purposes. In his California discipline case, Tipler stipulated that his misconduct in Alabama constituted a violation of rule 4-100(A) the Rules of Professional Conduct<sup>5</sup> (failure to deposit funds in a trust account).

In the third incident, in 2005, the Alabama Supreme Court suspended Tipler for 15 months for engaging in an inappropriate sexual relationship with a vulnerable client, an 18-year-old single mother he was defending on a criminal charge. He also pressured the client to solicit other women to be Tipler's sexual partners in return for a further reduction of the client's legal fees. In his California discipline case, Tipler stipulated that this misconduct in Alabama constituted a violation of rule 3-120(B)(1) (improper sexual relations with client). As noted previously, these last three matters from Alabama formed the basis of Tipler's one prior record of discipline in California, for which he received a three-year stayed suspension and was actually suspended for 15 months.

## **2. Tipler's Multiple Violations**

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<sup>4</sup>It is unclear whether Tipler was disciplined in Alabama following this conviction. However, because it was a criminal conviction, it was an appropriate basis for disciplinary proceedings in California whether or not the Alabama disciplinary authorities took any action against him. (Bus. & Prof. Code, §§ 6101-6102.)

<sup>5</sup> Unless otherwise noted, all further references to "rule(s)" are to this source.

Tipler's misconduct included multiple acts of wrongdoing. He failed to comply with the conditions that required contacting and meeting with his probation deputy, filing quarterly reports, and completing MCLE requirements.

### **3. Tipler Failed to Cooperate with Probation and Participate in These Proceedings**

We agree with Probation that Tipler failed to cooperate with the State Bar by violating the "self-governing nature of probation as a rehabilitative part" of attorney discipline. (*In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 573.) As a result of Tipler's noncompliance, Probation was required to repeatedly intervene. In addition to sending Tipler an initial letter reminding him of the terms and conditions of his probation, Probation made at least two telephone calls and sent another letter to advise him of the deficiencies in his probation compliance. His failure to appear at the hearing below is further evidence in aggravation of his failure to cooperate. (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 703.)

#### **B. Mitigation**

We agree with the hearing judge that Tipler presented no mitigating evidence.

### **IV. DEGREE OF DISCIPLINE**

Fundamentally, the purpose of discipline is not to punish the attorney, but to protect the public. (Std. 1.3.) In assessing the proper level of discipline, we consider the standards, prior decisional law, and the facts and circumstances unique to this case. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.)

While there is no standard that specifically addresses probation violations, rule 562 of the State Bar Rules of Procedure provides that any actual suspension recommended shall not exceed the entire period of the stayed suspension from the underlying discipline order. Moreover, standard 2.10 provides that for violations not otherwise specified, the misconduct shall result in

reproval or suspension according to the gravity of the offense or harm, if any, to the victim. However, in light of Tipler's prior record of discipline in California, we focus our attention on standard 1.7(a).

Standard 1.7(a) provides that if an attorney has one prior imposition 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." (Italics added; *In re Silvertown* (2005) 36 Cal. 4th 81, 90-91 [exception to standard 1.7(a) is in the conjunctive].) Tipler's earlier California discipline was neither remote nor minimal since it involved discipline for three separate acts of misconduct in Alabama from 2001 to 2005. Thus, the two-prong exception to standard 1.7(a)'s requirement of greater discipline for recidivist attorneys is not applicable in the present case and we find no other compelling justification to deviate from the standard.

Case law further assists our analysis. As we observed in *In the Matter of Gorman, supra*, 4 Cal. State Bar Ct. Rptr. at p. 573, the degree of discipline in probation revocation matters has varied widely from simply extending the probationary term, on the one hand, to imposing the full period of stayed suspension. Cases that recommend a short period of suspension involve less serious probation violations, significant mitigation, or not as serious a prior record as the current case.<sup>6</sup> These cases do not offer useful guidance under the facts unique to Tipler's case.

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<sup>6</sup> See, e.g., *Conroy v. State Bar* (1990) 51 Cal.3d 799 (60-day actual suspension in default proceeding for failing to timely pass MPRE, with mitigation credit for taking exam at next available opportunity, and three factors in aggravation including prior private reproval, failure to participate and lack of remorse); *In the Matter of Laden* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 678 (actual suspension for 90 days and until restitution, key issue was restitution, attorney participated and offered mitigation).

As urged by Probation, we find guidance from *Potack v. State Bar* (1991) 54 Cal.3d 132. Potack received a two-year actual suspension based on his failure to correct a defective probation report he filed late, despite abundant opportunity to do so. Potack's default was entered by the hearing department and his subsequent motion to set it aside was denied. Potack had one prior discipline record that resulted in his one-year actual suspension and the underlying probation conditions. The Supreme Court rejected Potack's argument that the recommended two-year suspension was excessive, finding that although he attempted to "minimize his probation violation and subsequent misconduct with respect to the default proceedings, his failure to abide by the terms and conditions of his probation is a serious violation." (*Id.* at p. 139.) On balance, we find Tipler's lack of participation and his non-adherence to probation duties similar to Potack's.<sup>7</sup>

Ultimately, we consider all factors unique to each case to determine the appropriate discipline. (*Codiga v. State Bar* (1978) 20 Cal.3d 788, 796.) We find Tipler's probation violations to be more extensive than the hearing judge found, and have considered additional factors in aggravation. We also weigh heavily the nature and extent of Tipler's previous discipline record that shows increasingly serious misconduct over time. (See *In re Silvertan*, *supra*, 36 Cal.4th at pp. 90-91.) Tipler seems unwilling or unable to comply with his ethical responsibilities. 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

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<sup>7</sup> We have also considered *In the Matter of Luis* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 737 (three year actual suspension and until compliance with standard 1.4(c)(ii) for failing to file two quarterly reports and submit proof of completion of ethics school where Luis failed to participate and had one prior record of a two-year suspension); and *In the Matter of Broderick, supra*, 3 Cal. State Bar Ct. Rptr. 138 (one-year actual suspension for failing to make restitution payments and file quarterly reports, where aggravation included failure to obtain counseling, multiple acts and his prior record of a 45-day suspension, and significant mitigation included good faith attempts to make restitution, efforts to obtain therapy, and candor and cooperation).

that Tipler be suspended for two years and until he proves his rehabilitation, fitness to practice, and learning and ability in the law. This discipline recommendation is progressive under standard 1.7(a) since Tipler received a 15-month suspension in his prior disciplinary case.

## **V. FORMAL RECOMMENDATION**

We recommend that James Harvey Tipler's probation be revoked, and that he be suspended from the practice of law in the State of California 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 a minimum of the first two years of his probation and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law. (Std. 1.4(c)(ii).)
2. He must comply with the provisions of the State Bar Act and the Rules of Professional Conduct.
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 9002.1, 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.
4. 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.
5. 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.
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 two-year period of stayed suspension will be satisfied and that suspension will be terminated.

We do not recommend that Tipler be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners, or MCLE courses in general ethics, as he was required to comply with these conditions as part of his previous discipline order.

As Tipler has continuously been not entitled to practice law since February 2008, we do not again recommend his compliance with the provisions of rule 9.20 of the California Rules of Court.

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.

#### **VI. ORDER REGARDING INACTIVE ENROLLMENT**

The requirements of Business and Professions Code section 6007, subdivision (d)(1), have been met in that Tipler was subject to a stayed suspension, he has violated probation conditions, and it is recommended that he be actually suspended as a result of the violations.

We therefore order that James Harvey Tipler be involuntarily enrolled as an inactive member of the State Bar of California pursuant to Business and Professions Code section 6007, subdivision (d). This enrollment is effective 30 days following service of this order. Tipler's inactive enrollment will be terminated in the future in accordance with Business and Professions Code section 6007, subdivision (d)(2). Pursuant to subdivision (d)(3) of that same section, we also recommend that Tipler receive credit for the period of time he will be inactively enrolled pursuant to this order.

REMKE, P. J.

I concur:<sup>8</sup>

PURCELL, J.

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<sup>8</sup> Judge Epstein did not participate in this opinion.