

Filed July 10, 2003

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of) No. 01-PM-04164
)
ROBERT AARON GORMAN,) OPINION ON REVIEW
)
A Member of the State Bar.)
_____)

In this case, there is no dispute that respondent Robert Aaron Gorman wilfully failed to comply timely with two conditions of his disciplinary probation: making restitution and enrollment in the State Bar’s Ethics School. The sole issue in this review, brought by the State Bar’s Office of Chief Trial Counsel, is whether the hearing judge erred when she recommended only stayed suspension for respondent’s violations of probation. The State Bar seeks at least a 90-day actual suspension from practice as appropriate discipline, and respondent urges that we adopt the hearing judge’s recommendation.

Independently reviewing the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we

conclude that, in view of respondent's undeniably wilful violations of probation, particularly of the duty to timely make complete restitution, a 30-day actual suspension recommendation is now warranted as a part of extended probation.

I. Facts and findings below.

A. Introduction and prior stayed suspension.

Respondent was admitted to practice law in California in 1995. The facts of his prior discipline rested on a stipulated disposition. Moreover, the key facts surrounding this probation revocation proceeding rested either on stipulated facts or were not disputed.

Effective January 2001 respondent was placed by the Supreme Court on stayed suspension for one year and probation for two years. This discipline was based on respondent's failure during 1996 to maintain trust funds in his trust account. As a result, a trust account check respondent issued for \$620 to a medical provider of his client was dishonored. In 1997 and during part of 1998, respondent also failed to keep a current office address on the State Bar's official records as required by the Business and Professions Code.

In aggravation, the hearing judge considered that trust funds were involved in respondent's 1996 violation. In mitigation, respondent offered to show that he

had opened the trust account at issue to protect his client from a previous problematic trust account and that he had instructed his office staff to deposit adequate funds in the account. At about the time of his misconduct, respondent closed his practice and moved his practice records to his garage. A suspicious fire broke out in his garage and these events added to respondent's inattention to his trust account recordkeeping and State Bar obligations.

The stayed suspension required that respondent make restitution to the provider or his client of \$620, plus 10 percent interest from June 26, 1996, and furnish satisfactory evidence of this payment to the State Bar's Probation Unit. The deadline for these restitution duties was April 7, 2001, ninety days from the effective date of the Supreme Court's order.

During respondent's probation, he was required to file quarterly reports of his probation compliance and identify restitution payments. By January 7, 2002, respondent was required to complete the State Bar's Ethics School and by the same date, he had to pass the professional responsibility examination.

B. Respondent's compliance and probation violations.

There is no dispute that respondent timely passed the professional responsibility examination and made timely quarterly probation reports. However, it is also undisputed that respondent did not complete the State Bar's Ethics

School until February 21, 2002, about six weeks late. Also, respondent did not complete restitution payments until January 7, 2002, nine months late.

The record shows that respondent paid the principal sum of restitution, \$620, sometime in June 2001. He reported incorrectly on July 6, 2001, that he had satisfied his restitution duties. However, the State Bar had learned from respondent's former client that she had not received the interest due on the principal amount. Thereafter, the State Bar tried repeatedly to have respondent complete his restitution or provide proof of having done so. A State Bar Probation Unit deputy, Lydia Dineros, left phone messages twice in June 2001 with respondent to obtain information about his making of restitution. She also reminded him in an August 2001 letter of his restitution requirement. She did speak to respondent in December when he called her to report passage of the professional responsibility examination. In that call, she reminded respondent to register for the January 17, 2002, ethics school class. The record further shows that in November 2001, a State Bar attorney wrote to respondent reminding him that he had failed to make \$330 of required restitution; and, that unless he confirmed payment by December 5, 2001, the State Bar attorney would move to revoke his probation. In a declaration Respondent filed in March 2002 opposing the State Bar's motion to revoke probation, he stated that he understood that if the

State Bar received his payment by January 8, 2002, it would not seek probation revocation. In his testimony, he stated that he had informed the State Bar attorney that he could not make the payment until he received his salary in January. Even assuming arguendo that a State Bar attorney could grant respondent an extension of time to comply with a Supreme Court disciplinary order, the record shows no written grant by the State Bar attorney to respondent of an extension to January to complete restitution. As noted, not until January 7, 2002, did respondent complete restitution.

Finally, the record shows that when this probation revocation proceeding arose, respondent repeatedly used the pleading caption of his public office of employment, the Yolo County District Attorney's Office, when appearing, although that office had no role in his probation compliance.¹

At the formal hearing, respondent openly and repeatedly admitted his probation violations. When he entered into the 2000 stipulation for his prior discipline, he was aware of the conditions he had to meet and their deadlines. He testified as to the pressures of the death of his father in October 2000 after nearly 12 months of attempts to get proper diagnosis and treatment for his father's brain

¹During the proceedings below, the State Bar moved to clarify the record by striking references to the Yolo County District Attorney's Office as the appearing attorney in the case. The hearing judge granted the motion.

tumor; and the birth of his first child also in October 2000. He also had to pay about \$4,000 in the costs of disciplinary proceedings which was a sum far in excess of what he thought he would have to pay. His testimony suggested that he did not have immediate funds to pay the interest portion of the restitution when it was due. His primary resource at the time was his modest salary as a deputy district attorney. He asserted that he could continue his employment provided he would not receive any actual suspension.

C. The hearing judge's findings and conclusions.

The hearing judge found that the State Bar proved by a preponderance of the evidence² that respondent wilfully violated the restitution and Ethics School completion conditions of his probation. The hearing judge found respondent's prior stayed suspension as the sole factor in aggravation. She found many factors in mitigation: his participation in the previous disciplinary and present revocation proceedings; his remorse and display of candor and cooperation at trial; the absence of any bad faith, coupled with his belief that he was making good faith efforts to make restitution; and the effect of the illness and subsequent death of respondent's father, yielding mental and emotional exhaustion. After reviewing

²We view the hearing judge's reference to the preponderance standard as not an assessment of the relative strength of the evidence adduced but rather as a reference to the lower proof standard required for probation revocation. (See Bus. & Prof. Code, § 6093, subd. (c); Rules Proc. of State Bar, rule 561.) Indeed, the hearing judge recited that the respondent admitted his violations.

several probation revocation decisions in past cases, the hearing judge deemed the 90-day actual suspension recommended by the State Bar to be unduly harsh, considering the confluence of mitigating factors found and that respondent would lose his employment if actually suspended. Concluding that the State Bar had not adequately shown a need for actual suspension and that the public would be protected by extending respondent's probation with only stayed suspension, the hearing judge recommended only stayed suspension. The State Bar then requested review.

II. Discussion.

A. Culpability.

We uphold the hearing judge's decision finding that respondent wilfully breached probation terms. As the judge stated correctly, the law does not require bad purpose or intentional evil to support a wilful violation of probation conditions. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.) Here, respondent openly admitted his failures to complete restitution timely and attend the State Bar's Ethics School by the due date. Not until January 2002, did he provide proof that he paid the interest due his client.

B. Degree of discipline.

The State Bar urges that we increase the discipline for respondent's violations, pointing to alleged error by the hearing judge in weighing mitigation excessively and in devaluing aggravation inappropriately. As the State Bar contends, respondent did not display mitigating candor and cooperation, he did not show good faith, did not demonstrate extreme emotional problems caused by the death of his father, did not prove that his feared loss of his job would be a mitigating circumstance and demonstrated more aggravation than found by the hearing judge. According to the State Bar, comparable probation cases warrant at least a 90-day actual suspension. Respondent argues that the hearing judge's discipline recommendation is correct because he did show his candor and cooperation, he proved emotional difficulties linked to his father's death, and he acted in good faith because he was unable to pay restitution timely.

We agree with some of the mitigating factors found below, but we nevertheless conclude that the hearing judge weighed them somewhat heavier than is appropriate on this record in view of aggravating factors.

Although we agree that respondent's cooperation in stipulating to facts in this matter warrants some mitigative consideration, we do not extend that treatment to his participation in the past case (see *In the Matter of Stewart*

(Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52, 61), or even in this case. It was respondent's statutory duty to participate in these proceedings (Bus. & Prof. Code, § 6068, subd. (i))³, just as it was his duty to comply with the conditions of his probation (§ 6068, subd. (k)).

We acknowledge that respondent's testimony of his steps to make restitution and comply with probation appears sincere. That warrants some, but not extensive mitigation since the record shows considerable effort and even pressure on the part of the State Bar to effect respondent's completion of restitution. Respondent was never confused as to his probationary duties nor the deadlines for compliance; and he discharged several of his other duties timely, including paying a significant assessment of costs, in order to continue to keep his license in good standing. However, if he did not complete restitution earlier because of lack of funds, he never explained that to the probation unit nor did he seek an extension of time based on that reason. In our view, this history undercuts notably, respondent's claim of credit for good faith action.

We are sympathetic with respondent's claim that he will be able to continue in employment if he is not suspended actually from practice. However, we note that respondent gave no details supporting this claim. Even if he had done so, that

³Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

would not excuse a degree of discipline that is otherwise warranted. If avoidance of actual suspension were a prerequisite for respondent's continued employment, it would have been appropriate for respondent to have resolved his restitution obligation when the State Bar gave him ample opportunity to do so to avoid this very proceeding.

Although we do not minimize the trauma associated with the death of respondent's father after a period of illness, that event appeared separated by a significant time from the deadlines of respondent's restitution and his ethics school compliance. Absent either expert evidence or more detailed evidence from respondent, as to specifically how his father's death affected his lack of compliance, we cannot consider it weighty in mitigation. We note that during this same time, respondent timely provided quarterly reports and passed the professional responsibility examination – accomplishments which collectively require a certain concentration, focus and organization.

We find two aggravating factors of note, in addition to the one of respondent's prior record found by the hearing judge. We consider the repeated reminders and pressure needed by the State Bar for respondent to complete restitution to be aggravating. These were not one or two routine reminders, but continued past his deadline for restitution, and even these were not enough to

secure respondent's completion of restitution by the deadline set forth. Indeed, even his payment of the principal amount of restitution was late. In short, the repeated need of the State Bar to intervene actively to seek respondent's compliance with duties he voluntarily undertook was inconsistent with the self-governing nature of probation as a rehabilitative part of the attorney disciplinary system.

Finally, we are concerned by respondent's injection of his public employer, the Yolo County District Attorney's Office, into the defense of this matter in which it had no role. Respondent's use of his agency name in pleadings in this court when probation revocation proceedings commenced, defies understanding. We have no proof and make no finding that this was respondent's inappropriate attempt to influence the State Bar Probation Unit or this court⁴. Whatever its reason, at the very least, it was a misrepresentation by respondent of official participation in these proceedings and we hold it to be an aggravating circumstance.

As the decision in *In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. 525, 540 teaches, there has been a wide range of discipline imposed for probation

⁴However, in view of the mutual duties of cooperation found in statute in certain matters between the State Bar and criminal prosecution agencies (see §§ 6044.5, 6054), this potential concern is not solely academic.

violations from merely extending probation, as the hearing judge here recommended, to a revocation of the full amount of the stayed suspension and imposition of that amount as an actual suspension. Further, as we discussed in *Potack*, more serious sanctions should be assigned to those probation violations closely related to the reasons for imposing the previous discipline or closely related to rehabilitation. (*Ibid.*) Also to be weighed, per *Potack*, is the total length of stayed suspension which could be imposed as an actual suspension and the total length of actual suspension imposed earlier as a condition of probation. (*Ibid.*) *Potack* preceded the Supreme Court's opinion in *Potack v. State Bar* (1991) 54 Cal.3d 132 in which the Court imposed a two-year actual suspension, based on Potack's failure to timely file probation reports and that one was incomplete when filed. In aggravation, the Court found that Potack had failed to make restitution timely as ordered by his probation. (*Id.* at pp. 138-139.)

Although the hearing judge distinguished cases cited by the State Bar, as calling for excessive discipline here, other than *In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. 525, she did not discuss cases in which the primary probation violation found was, as here, the failure to make timely restitution.

We have reviewed all of our reported decisions since 1989 in which probation revocation for failure to make restitution was the sole or significant

factor in the case and find that although they resulted in actual suspension of six months or longer, they are also more serious than the present case.

In the Matter of Taggart (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302 was clearly a more serious case than this one. Taggart had two previous suspensions, and he had failed to make any of the restitution of \$1,528 plus interest due three years earlier. We held that Taggart had wilfully breached his restitution duty and found insufficient evidence of mitigating circumstances. We noted that the record lacked evidence that Taggart had failed to comply with any other conditions of his probation. On our recommendation, the Supreme Court suspended Taggart for six months actual and until he completed restitution, as part of a longer stayed suspension.

In the Matter of Broderick (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138 is also more serious than the present one. Broderick had failed to make any of the required restitution of \$4,666 plus interest, had filed no quarterly reports and failed to obtain required psychological counseling. We also found Broderick culpable of misconduct in an original disciplinary proceeding as well. We gave several mitigating circumstances considerable weight but also considered two aggravating ones. For the probation violations, the Supreme Court imposed a one-year actual suspension.

We also deem more serious than the present matter, the case of *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81. Hunter was found to have violated one of the quarterly-reporting conditions of his probation as well as to have failed to make about \$1,166.50 of required restitution in the total amount of \$1,766.50. Further defects in his probation reports were considered aggravating as was his uncooperative conduct in the hearing below. We considered the aggravating circumstances to outweigh the few mitigating ones, which consisted of emotional difficulties experienced by Hunter and favorable character evidence. We recommended, and the Supreme Court imposed, actual suspension of one year and until Hunter provided proof of restitution.

In this case, respondent's primary probation violation of failure to make restitution timely to his client, was centrally related to the trust account violation underlying respondent's prior discipline. As we have observed, the Supreme Court and our court have underscored the important functions of restitution in attorney discipline: "Requiring restitution serves the rehabilitative and public protection goals of disciplinary probation by forcing attorneys to confront in concrete terms the consequences of the attorney's misconduct." (*In the Matter of Taggart, supra*, 4 Cal. State Bar Ct. Rptr. at p. 312, citing *Brookman v. State Bar*

(1988) 46 Cal.3d 1004, 1009 and *In the Matter of Potack*, supra, 1 Cal. State Bar Ct. Rptr. at p. 537.)

We also consider that discipline imposed for the wilful violation of probation often calls for actual suspension as a reflection of the seriousness with which compliance with probationary duties is held. Just as a wilful violation of an attorney's duties under California Rules of Court, rule 955 usually results in disbarment (e.g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131, and cases there cited), an attorney who wilfully violates a significant condition of probation, such as restitution, can anticipate actual suspension as the expected result, absent compelling mitigating circumstances.

Balancing all relevant facts and circumstances to reach the appropriate recommendation of degree of discipline (e.g., *Gary v. State Bar* (1988) 44 Cal.3d 820, 828), we conclude that aggravating circumstances weigh more than the hearing judge assessed and mitigating ones weigh less. Even considering fully the mitigating circumstances in this proceeding, we determine that a 30-day actual suspension is called for as a condition of a stayed suspension and the extension of probation recommended by the hearing judge.⁵

⁵The hearing judge had recommended that respondent be suspended for two years, with execution stayed. In view of the limits of suspension contained in rule 562, Rules of Procedure of the State Bar, we shall reduce the stayed suspension in this case to one year.

III. Recommendation.

For the reasons set forth, we recommend that the stay of suspension previously ordered in Supreme Court case number S091756 (State Bar Court case numbers 96-O-06517; 96-O-08074; 97-O-11026 (consolidated)) be revoked and set aside, that the respondent, Robert A. Gorman, be suspended for one year, that execution of such suspension be stayed and that respondent be placed on probation for two years on the conditions recommended by the hearing judge in her order granting motion to revoke probation filed June 17, 2002, with the added condition that respondent be actually suspended from the practice of law in California for the first thirty (30) days of the period of probation.

In view of respondent's passage of the professional responsibility examination and his ultimate completion of the State Bar's Ethics School, we do not recommend that he be required to recomplete those requirements.

We do recommend that the State Bar be awarded costs in accordance with the provisions of section 6086.10 and that such costs be payable in accordance with section 6140.7.

STOVITZ, P. J.

We concur:

WATAI, J.
EPSTEIN, J.

Case No. 01-PM-04164

In the Matter of Robert Aaron Gorman

Hearing Judge

Patrice E. McElroy

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