

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD N. POTACK

A Member of the State Bar

[No. 89-P-11031]

Filed May 31, 1991

SUMMARY

In a probation revocation proceeding, respondent was found to have failed to timely file an amended probation report as requested by the State Bar probation department, and to have failed to complete restitution in a timely manner. (Hon. Ellen R. Peck, Hearing Judge.)

By the date of the hearing in the probation revocation matter, respondent had belatedly filed the amended report and completed restitution. The late probation report charge had already been adjudicated in a prior probation revocation matter then pending before the Supreme Court, and the review department therefore declined to impose culpability for that misconduct in this proceeding. The notice to show cause did not charge respondent with failing to meet his duty to respond to all inquiries from the State Bar, an independent duty from his obligation to file quarterly reports, and therefore respondent could not be found culpable of misconduct on that basis. As a result, the only charge properly before the review department was the restitution allegation.

The review department concluded that in order to impose discipline for a probation violation, it must be shown that the violation was wilful. After considering respondent's ability to make restitution and the sufficiency and good faith of his efforts to pay, the review department concluded that there was a wilful failure to pay restitution in a timely manner in this case.

The former review department, in a prior probation revocation case against respondent that was still pending before the Supreme Court, had recommended revocation of probation and lifting of the stay of the two years of actual suspension originally imposed on respondent. The record did not make clear whether, in making this recommendation, the former review department had relied on respondent's failure to make timely restitution, which had been considered as an aggravating factor in the prior matter, and which was the basis for culpability in the instant proceeding. For this reason, alternative discipline was recommended. If the Supreme Court were to act on both probation violation cases together and take the belated restitution into account in the first matter, the review department recommended that if the discipline in the earlier matter involved two years or more of actual suspension, no additional suspension should be imposed in the present matter. If the Supreme Court were to impose less than the recommended two-year actual suspension in the first matter, the review department recommended that additional discipline of up to one year of actual suspension be imposed in this matter, such that the aggregate actual suspension in both matters would not exceed two years. (Pearlman, P.J., filed a concurring opinion.)

COUNSEL FOR PARTIES

For Office of Trials: Russell G. Weiner

For Respondent: No appearance

HEADNOTES

- [1] **1714 Probation Cases—Degree of Discipline**
Actual suspension imposed as sanction for violation of probation may include entire period of previously stayed suspension, or may give credit for actual suspension already served as condition of probation.
- [2] **106.20 Procedure—Pleadings—Notice of Charges**
106.30 Procedure—Pleadings—Duplicative Charges
179 Discipline Conditions—Miscellaneous
1711 Probation Cases—Special Procedural Issues
Attorney could not be found culpable of violating probation by failing to respond to an inquiry from the State Bar Court, as required by conditions of his probation, where the notice to show cause in the probation revocation proceeding referred only to the requirement to file quarterly reports, an independent probation condition, and such charge would be factually duplicative of previously-adjudicated charge of failing to file quarterly report.
- [3 a, b] **130 Procedure—Procedure on Review**
166 Independent Review of Record
The review department may appropriately exercise its independent review authority to reach an issue which is otherwise moot as a result of the hearing judge's disposition of the matter below, where the issue comes before the State Bar Court on a regular basis or is an issue of public importance likely to recur.
- [4] **135 Procedure—Rules of Procedure**
162.90 Quantum of Proof—Miscellaneous
192 Due Process/Procedural Rights
1711 Probation Cases—Special Procedural Issues
Probation revocation proceedings are disciplinary proceedings, and no additional discipline can be imposed for a breach of probation absent proof of such violation in conformity with fundamental due process (notice and an opportunity to be heard), as set forth in rules 612-613, Trans. Rules Proc. of State Bar.
- [5] **802.21 Standards—Definitions—Prior Record**
1719 Probation Cases—Miscellaneous
A past revocation of probation is viewed as a prior disciplinary proceeding.
- [6 a, b] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
1712 Probation Cases—Wilfulness
Notwithstanding omission of term "wilful" from statute and rule governing imposition of discipline for probation violations, wilfulness is a necessary element to establish culpability in a probation revocation case alleging failure to pay restitution.

- [7] **163 Proof of Wilfulness**
 191 Effect/Relationship of Other Proceedings
 194 Statutes Outside State Bar Act
 1712 Probation Cases—Wilfulness

Although attorney disciplinary proceedings are sui generis and not criminal in nature, rules of criminal law may provide guidance in appropriate circumstances; case law and statutes in criminal law indicate that lack of wilfulness constitutes a reason not to revoke probation.

- [8] **163 Proof of Wilfulness**
 204.10 Culpability—Wilfulness Requirement
 1712 Probation Cases—Wilfulness

In disciplinary cases arising from violations of rule 955, Cal. Rules of Court, a showing of wilfulness requires only a “general purpose or willingness” to commit the act or suffer the omission, and need not involve bad faith. The same definition of wilfulness applies to the mental state required to justify discipline for violations of probation conditions.

- [9 a-c] **162.90 Quantum of Proof—Miscellaneous**
 171 Discipline—Restitution
 175 Discipline—Rule 955
 1713 Probation Cases—Standard of Proof

For the purpose of determining culpability for violation of restitution requirement imposed as condition of disciplinary probation, it is inappropriate to distinguish between “substantial” and “insubstantial” or “technical” violations. Restitution conditions are as significant as the notification requirements in rule 955, Cal. Rules of Court, as to which the Supreme Court has declined to draw such a distinction. The importance of the goals of restitution makes distinctions between “substantial” and “insubstantial” or “technical” failures to make restitution inappropriate.

- [10] **171 Discipline—Restitution**

Requiring restitution forces errant attorneys to confront the consequences of their misconduct in a concrete way and thereby serves the state’s interest in rehabilitating such attorneys and protecting the public.

- [11 a, b] **171 Discipline—Restitution**
 192 Due Process/Procedural Rights
 194 Statutes Outside State Bar Act
 1712 Probation Cases—Wilfulness
 2590 Reinstatement—Miscellaneous

As with the treatment of failure to pay restitution in reinstatement and criminal probation cases, in a disciplinary proceeding for failure to make timely restitution as a condition of attorney disciplinary probation, due process requires an examination of the probationer’s ability to make restitution and the sufficiency and good faith of the probationer’s efforts to acquire the resources to pay.

- [12 a, b] **163 Proof of Wilfulness**
 171 Discipline—Restitution
 1712 Probation Cases—Wilfulness
 1751 Probation Cases—Probation Revoked

A wilful breach of respondent’s restitution duty was established where respondent: (1) had the financial ability to make some restitution payments during the period when he had not done so; (2)

repeatedly chose to pursue professional goals which foreseeably rendered him financially unable to make timely restitution; (3) failed to protect his funds from attachment by creditors; and (4) failed to seek an extension of time to make his restitution payments. His conduct showed a conscious disregard of his restitution obligations and a failure to make sufficient good faith efforts to acquire the resources to pay.

- [13] **725.59 Mitigation—Disability/Illness—Declined to Find**
795 Mitigation—Other—Declined to Find
Evidence concerning respondent's education, experience and drug use which occurred well prior to his probation violations was not causally related to the misconduct, nor did it demonstrate why a lesser disciplinary sanction would adequately protect the public, the courts and the legal profession. Therefore, it did not constitute mitigating evidence.
- [14] **745.31 Mitigation—Remorse/Restitution—Found but Discounted**
Restitution payments made under the direct pressure of probation revocation proceedings were entitled to little weight in mitigation.
- [15] **765.39 Mitigation—Pro Bono Work—Found but Discounted**
Respondent's public service work and representation of juveniles under court appointment deserved credit and recognition, but did not relieve respondent of his restitution obligations; it was incumbent on respondent to manage his limited finances to meet those obligations.
- [16] **740.32 Mitigation—Good Character—Found but Discounted**
The mitigating value of character testimony is undermined when the witness is unaware of the full extent of a respondent's misconduct.
- [17] **740.31 Mitigation—Good Character—Found but Discounted**
The requirement that mitigating character testimony come from a wide range of references exhibiting a familiarity with the details of respondent's misconduct was not met by testimony by respondent himself and a letter from one character witness reflecting no knowledge of respondent's misconduct.
- [18] **720.50 Mitigation—Lack of Harm—Declined to Find**
Finding of lack of harm to clients as mitigating factor was unsupported in the record where respondent failed to submit any evidence at the hearing of lack of harm resulting from his misconduct, and where respondent's clients (and the Client Security Fund, which had reimbursed them) had to wait years for restitution.
- [19] **511 Aggravation—Prior Record—Found**
802.21 Standards—Definitions—Prior Record
1714 Probation Cases—Degree of Discipline
In determining appropriate discipline for probation violations, respondent's original disciplinary matter, in which probation conditions were imposed, constituted a prior disciplinary record and was required to be treated as an aggravating circumstance.
- [20] **802.69 Standards—Appropriate Sanction—Generally**
806.59 Standards—Disbarment After Two Priors
The number or fact of prior disciplinary proceedings cannot, without more analysis, foretell result of subsequent discipline proceeding.

- [21] **805.10 Standards—Effect of Prior Discipline**
 1714 Probation Cases—Degree of Discipline
Where respondent's prior discipline arose from serious misconduct, and his subsequent breach of probation conditions arose after that prior discipline, it was appropriate to impose more actual suspension in probation revocation matter than in earlier disciplinary proceeding.
- [22] **135 Procedure—Rules of Procedure**
 511 Aggravation—Prior Record—Found
 801.41 Standards—Deviation From—Justified
 802.21 Standards—Definitions—Prior Record
 806.59 Standards—Disbarment After Two Priors
Although non-final prior discipline recommendation for probation violation, still pending before Supreme Court, is record of prior discipline under rule 571, Trans. Rules Proc. of State Bar, review department does not apply rigidly, or without regard to facts of prior matters, disciplinary standard indicating disbarment as appropriate sanction for third disciplinary proceeding.
- [23] **513.90 Aggravation—Prior Record—Found but Discounted**
 806.59 Standards—Disbarment After Two Priors
 1714 Probation Cases—Degree of Discipline
Where it was unclear whether or not the former review department had considered respondent's delayed restitution in its assessment of the appropriate discipline in a prior probation revocation matter still pending before the Supreme Court, no significant aggravating weight was accorded that prior probation matter as prior discipline.
- [24] **802.30 Standards—Purposes of Sanctions**
 1714 Probation Cases—Degree of Discipline
The factors to be considered in weighing the recommended discipline in probation revocation matters should include the aims of attorney discipline: protection of the public and rehabilitation of the attorney. The greatest discipline should be imposed where there is a breach of a condition significantly related to the underlying misconduct, particularly when the circumstances raise concerns about the need for public protection or the attorney's failure to undertake rehabilitation. Less discipline is required where a less significant probation condition is at issue under circumstances which do not call into question public protection or the attorney's rehabilitation. The length of stayed suspension which could be imposed as a sanction, and the length of the actual suspension earlier imposed, should also be considered.

ADDITIONAL ANALYSIS

Aggravation

Found

- 563.10 Uncharged Violations
- 582.10 Harm to Client

Mitigation

Found

- 735.10 Candor—Bar

Discipline

- 1815.06 Actual Suspension—1 Year
- 1815.08 Actual Suspension—2 Years

Other

- 107 Procedure—Default/Relief from Default

OPINION

STOVITZ, J.:

In this proceeding to revoke the disciplinary probation of an attorney, the State Bar examiner has requested that we review a decision of a hearing judge of the State Bar Court. The judge was faced with very difficult procedural issues and proposed several alternative recommendations, depending on the action taken on a separate probation revocation proceeding ("*Potack II*") now pending before the Supreme Court.*

As we shall detail, our independent review of the record and persuasive authorities have led us to conclude, in general accord with the hearing judge, that the scope of the proceeding before us should be limited to respondent's undisputed failure to make restitution timely as required by an earlier order of the Supreme Court and that respondent wilfully failed to make the required restitution when due. For the reasons which follow, we shall modify the judge's findings regarding aggravating and mitigating circumstances, and shall recommend that if the Supreme Court imposes the recommended two-year actual suspension in *Potack II*, we recommend that no additional discipline be imposed in this proceeding ("*Potack III*"). If the Supreme Court imposes less than two years actual suspension in *Potack II* and leaves the discipline for belated restitution to be addressed in *Potack III*, we recommend up to an additional year of actual suspension for *Potack III* and an aggregate discipline for both *Potack II* and *Potack III* no greater than two years actual suspension.

I. PROCEDURAL BACKGROUND

Respondent was admitted to practice in California in December 1975.

For ease of understanding, we set forth the different proceedings which bear on this review.

A. "Potack I" (Exh. 15 (Bar Misc. No. 5066)); Respondent's Prior Discipline Which Placed Him on Disciplinary Probation.

Effective June 6, 1986, the Supreme Court suspended respondent for three years, stayed execution of that suspension, and placed him on probation for that period on certain conditions, including actual suspension for the first year of probation and until he made restitution of \$945 to two clients. He was also ordered to make restitution of \$8,293 to other clients within 30 months and file reports quarterly with the State Bar Court regarding his compliance with the terms and conditions of his probation. This discipline rested on respondent's written stipulation as to facts and discipline. In that stipulation, he admitted misconduct in seven matters, which involved eight clients (Anita Barr, Donald and Marilyn Zawacki, Gene Giacomelli, Yves Emond, Claire Hanchett, Joe Hargrove, and Katherine Guthrie) and resulted from failure to perform legal services and to return unearned fees. (Hearing Judge's decision ("decision") p. 8; exh. 15.) By the terms of the Supreme Court's order, respondent's actual suspension ran from June 6, 1986, to June 6, 1987, and until he made \$945 of restitution. Because respondent paid the \$945 on April 30, 1987, his actual suspension ended in June of 1987.¹ His probation extended until June 6, 1989, but he had to complete restitution of the \$8,293 to all clients by December 6, 1988.

B. "Potack II" (Exh. 16 (State Bar Court No. 89-P-14598)); Respondent's Probation Revocation Proceeding Pending Before the Supreme Court.

Proceeding No. 89-P-14598 is a probation revocation matter now pending in the Supreme Court for review. In that matter, the referee found that respondent wilfully failed to file his October 10, 1988, probation report. As an aggravating circumstance, the referee found that respondent had failed to make restitution by the December 6, 1988, deadline. The referee recommended that respondent be suspended for two years. On October 5, 1989, by a vote of nine

* [Editor's note: See *Potack v. State Bar* (1991) 54 Cal.3d 132.]

1. After paying required State Bar membership fees, respondent returned to good standing on July 16, 1987.

to five, the former review department adopted the referee's decision in *Potack II*, except that it deleted his conclusion regarding respondent's failure to make restitution. The former review department did not explain why it adopted the recommended discipline even though it deleted the sole aggravating factor. Four of the five dissenting members of the review department would have recommended three months actual suspension and one year's probation; the fifth dissenting member would have recommended only three months suspension. On March 28, 1990, *Potack II* was submitted to the California Supreme Court, which granted review at respondent's request, but is awaiting a recommendation from the State Bar Court in *Potack III* before acting on *Potack II*.

C. "Potack III" (State Bar Court No. 89-P-11031); Respondent's Probation Revocation Proceeding Before Us for Review.

We shall refer to the proceeding we now review as "*Potack III*." It was initiated by a notice to show cause ("notice") on March 27, 1989, more than a month before the State Bar Court hearing in *Potack II*. As pertinent, the notice charged that respondent failed, as requested by the probation department on November 23, 1988, to file an amended report for October 10, 1988, and failed to make restitution ordered by the Supreme Court to five named clients by the deadline for that restitution.² Respondent was ordered to show cause why it should not be recommended to the Supreme Court that the stay of the order for his suspension be set aside and recommended discipline imposed.

II. FACTS

Just prior to the State Bar Court hearing in *Potack III*, the parties filed a written stipulation to the basic facts placed in issue by the notice in that matter. (Exh. 15.) Respondent agreed that he failed to file a probation report as required on or before October 10, 1988; that on October 22, 1988, the probation department of the State Bar Court asked him to file his report; that he filed a report on November 22, 1988;

and that the next day, the probation department returned his report as not complying with the terms of his probation. On November 23, 1988, the probation department requested that respondent submit an amended report within 10 days; but he did not file it until July 1989 (over seven months after the notice was filed in *Potack III*). (*Id.* at ¶¶ 5-9.)

In their pre-hearing stipulation, the parties also agreed that prior to the end of the 30-month period for the making of restitution ordered by the Supreme Court, respondent failed to make restitution to three clients or to the State Bar Client Security Fund on account of restitution it made to three other clients. Respondent did not file a written motion or petition with either the State Bar Court or the Supreme Court to request an extension of the time within which to make restitution. (See, e.g., *In the Matter of Galardi*, L.A. No. 32184 [minute orders extending time for making of restitution based on attorney's showing].) Finally, the parties stipulated that respondent completed the prescribed restitution on May 30, 1989, almost six months after the deadline of December 6, 1988. (Exh. 15 at ¶¶ 10-12.)

The following additional facts were established at the hearing; and we adopt them as our findings of fact, in addition to the foregoing stipulated facts.

From late 1986 until August 1987, respondent earned \$10 per hour as a law clerk. His net monthly income (\$1,100) equalled his monthly expenses. (Decision at p. 9.)

After repaying \$945 to Joe Hargrove and Katherine Guthrie in 1987, respondent resumed the practice of law as allowed by the Supreme Court order. As an attorney for Community Defenders, Inc., from August 1987 until July 1988, he earned an annual salary of approximately \$27,000. His net monthly income (\$1,650) slightly exceeded his monthly expenses (\$1,500). (*Id.* at pp. 9-10.)

In August 1988, respondent opened a private law practice based exclusively on appointments

2. Respondent had also failed to make timely restitution to a sixth client. The notice stated that respondent owed restitution

to the sixth client, but did not charge respondent with failure to make timely restitution to that client.

through the San Diego Superior Court's Juvenile Department. From August through December 1988, he billed approximately \$3,500 per month and had expenses of approximately \$2,600 per month. Because payments for his services to the juvenile court arrived more slowly than he anticipated, he was unable to make restitution in 1988. (*Id.* at p. 10.)

After paying the \$945 necessary to end his actual suspension, respondent made no further restitution until 1989. He claimed that he "diligently sought employment, and worked, and did not waste money, and tried to put money aside in order to make . . . restitution payments." (I Reporter's Transcript ["R.T."] 40.) Yet from August 1987 (when he resumed the practice of law) through December 1988, he did not make even a small restitution payment; nor did he consider switching jobs or taking an extra job to increase his income, so that he could make timely restitution. (I R.T. 102.)

Respondent testified repeatedly that he was not able to pay restitution by the time it was due. (I R.T. 91, 93, 95.) He stated that nothing required him to work as a law clerk for \$10 per hour, but that he happily chose to take the job. Although Community Defenders, Inc., paid him only \$27,000 per year, he stated that he chose the position because of his passion to do criminal law and public interest law. (I R.T. 99-100.) Despite his inability to pay restitution, he was able in April 1988 to buy a 1987 Ford Taurus requiring monthly payments of \$339. (I R.T. 104-105.)

At the hearing in *Potack III*, respondent presented no financial statements, copies of tax returns, or other documents to support his claims about his financial situation during the 30 months he had to make full restitution. The examiner, however, did not present evidence to rebut his testimony, which the hearing judge accepted.

In October 1988, respondent traveled to Pennsylvania to deal with serious problems arising from his mother's mental illness and hospitalization. (Decision at p. 10.) He failed to file the quarterly report due by October 10, 1988. On October 20, 1988, the probation department sent respondent a letter stating that unless he filed the overdue report with an expla-

nation within 10 days, it would issue a notice to show cause. (Stipulation in *Potack III* at pp. 4-5.)

On November 22, 1988, the State Bar Court received a report from respondent. This report stated that he had not filed a report by October 10, 1988, because his probation was "scheduled to terminate" in December 1988. The report also stated that he had visited his family in Pennsylvania for three weeks in October 1988, had not received the probation department's letter concerning the overdue report until the end of October, had encountered problems fighting the flu and catching up with his case load, planned to make payments in December 1988 and every month thereafter until he completed his restitution, and requested an extension of his probation until June 1989. Absent from the report was the required assertion about compliance with all provisions of the State Bar Act and Rules of Professional Conduct for the quarterly period ending with October 1988.

On November 23, 1988, the probation department returned the report of November 22, 1988, to respondent because it failed to contain the required assertion. The probation department's letter of November 23 asked respondent to submit an amended report within 10 days. It also informed him that his probation was not scheduled to end until June 1989, that full restitution was due in December 1988, and that he could petition the Supreme Court for an extension of time to pay the restitution.

In a probation report filed on January 13, 1989, respondent asserted his compliance with the State Bar Act and Rules of Professional Conduct during his probation period. This report did not state that it purported to respond to the probation department's request of November 23, 1989, and to cover the period prior to October 10, 1988. Because he believed that the report filed on January 13, 1989, complied with the probation department's request of November 23, 1988, he did not file a proper amended report for October 10, 1988, until July 21, 1989. (Decision at pp. 7, 13.)

On November 22, 1988, the probation department filed a notice to show cause in *Potack II*. Based on probation condition three of the *Potack I* stipula-

tion, which required respondent to file quarterly reports, the notice charged him with failure to file the report due on October 10, 1988. Respondent defaulted in *Potack II* because he mistakenly believed that *Potack III*, for which the notice was filed on March 27, 1989, superseded *Potack II*. (II R.T. 201, 276.)

On May 3, 1989, a hearing referee held the hearing in *Potack II*, at which the same examiner appeared as in *Potack III*. The referee's decision was filed on May 15, 1989. Determining that respondent had wilfully failed to file the report required by October 10, 1988, and concluding, as an aggravating fact, that respondent had not made the restitution required by December 6, 1988, the referee recommended that respondent's probation be revoked and that respondent "commence the remaining period of his suspension." Amending his decision on June 9, 1989, the referee stated that he intended the remaining period of respondent's suspension to be two years.³ [1 - see fn. 3]

In early January 1989, within a few days of respondent's receiving the first big check for his services to the San Diego Juvenile Court, a creditor

attached his bank account. As a result of the attachment, he lost over \$7,000. (Answer to Interrogatories at p. 3.) Despite this setback, respondent made full restitution within six months of the date when it was due. His payments to the Client Security Fund included \$1,000 on January 6, 1989; \$1,000 on January 20, 1989; \$2,000 on April 9, 1989; \$1,000 on May 14, 1989; and \$348 on May 25, 1989. On May 30, 1989, he completed the restitution by paying \$1,000 to Anita Barr, \$500 to Marilyn Zawacki, and \$500 to Donald Zawacki.⁴ (Decision at pp. 7-8.)

The hearing in *Potack III* was on November 14 to 15, 1989, more than a month after the former review department's decision in *Potack II*. The examiner argued that respondent's conduct had been wilful and that respondent had not substantially complied with the terms of his probation. Representing himself, respondent disputed both claims.

During the degree of discipline phase of the hearing in *Potack III*, the examiner and respondent informed the hearing judge of *Potack II*, of which the judge was previously unaware. The essential part of the record in *Potack II* was admitted in evidence. (Exh. 4.)⁵

3. [1] Even though respondent served one year of actual suspension as a condition of probation, the hearing referee could have recommended up to three years actual suspension, as indicated by the notice in *Potack II*. The Supreme Court's own minute orders in past revocation of probation cases sometimes give credit for actual suspension imposed as a condition of the earlier probation and sometimes do not, usually based on the State Bar Court's recommendation.

4. The timing of respondent's final restitution payments may explain why the hearing referee concluded, as an aggravating fact in *Potack II*, that respondent had failed to make restitution and why the former review department deleted this conclusion from its decision in *Potack II*. The hearing in *Potack II* was on May 3, 1989; respondent's five last restitution payments occurred from May 14, 1989 to May 30, 1989; and the former review department reached its decision on October 5, 1989. Because respondent made his final payments during the period after the evidentiary hearing in *Potack II* and before the former review department's decision, it was factually understandable for the hearing referee in *Potack II* to conclude that respondent had failed to make restitution and for the former review department to delete this conclusion. Nevertheless, we are unable to ascertain whether the former review department

in *Potack II* has already taken into consideration respondent's delay in making restitution in recommending his two-year suspension.

Because *Potack II* is not before us and we have decided its weight is not significant as an aggravating circumstance, we need not reach the question of the propriety of the referee in *Potack II* receiving evidence in a default proceeding as to a significant matter not charged in the notice to show cause: failure to timely make restitution. (Contrast *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36 [in a contested matter, evidence of uncharged misconduct may be relevant to establish an aggravating circumstance]; see *In The Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 217, [defaulting attorney has no reasonable opportunity to defend against matters not raised in original notice to show cause].)

5. The State Bar Court's case information record of this matter, *Potack III*, appears to erroneously show that exhibit 16 was not admitted into evidence. However, the judge's and parties' treatment of exhibit 16 shows that it was so admitted. (Decision at p. 2; II R.T. p. 211.) We therefore treat exhibit 16 as part of the record in *Potack III*.

III. FINDINGS AND CONCLUSIONS BELOW

In *Potack III*, the judge made findings consistent with the stipulated facts and evidence, finding, *inter alia*, that respondent neither timely filed an amended report when requested to do so on November 23, 1988, nor made restitution in a timely manner. (Decision at pp. 6-8.)

The judge concluded that while wilfulness is not required for culpability of a probation violation, the evidence showed that respondent's violation of his probation conditions was wilful. (*Id.* at pp. 14-15.) Although respondent's violation of his probation duty to make timely restitution was clearly established, as was his failure to amend his quarterly report as requested in November of 1988, the judge concluded that the latter violation was adjudicated by *Potack II* and that it would be inherently unfair to respondent and wasteful of judicial resources to base culpability on it in *Potack III*. (*Id.* at pp. 16-26.)

With regard to respondent's obligation to make restitution, the hearing judge noted that respondent undertook that obligation by personal agreement (stipulated disposition) approved by the Supreme Court. Although he suffered some financial setbacks, he "failed to assume responsibility to structure" his commitments to make amends for his past misconduct to those he harmed or to the State Bar Client Security Fund.

After considering mitigating circumstances, including a number arising before the start of his probationary period, and after declining to consider as aggravating respondent's prior record of discipline (which record the judge stated exists in every probation revocation matter), the judge recommended several disciplinary alternatives, depending on whether and what action is taken in *Potack II*. None of her alternatives recommended additional actual suspension. In the event that the Supreme Court has revoked probation in *Potack II* and set aside some or all of the suspension earlier stayed, the judge recommended that this matter (*Potack III*) be dismissed. If the Supreme Court has imposed less than a two-year actual suspension in *Potack II* and "believes that it is not a denial of due process to hold that respondent's violation of probation" in *Potack II* may be cause for

discipline in *Potack III*, the judge recommended that respondent be suspended for one year, stayed, on conditions including no actual suspension, to run concurrent to discipline in *Potack II*. Finally, if the Supreme Court has not acted on *Potack II*, the judge recommended that the Supreme Court revoke probation and impose a two-year period of suspension stayed on conditions, including no actual suspension.

IV. ISSUES ON REVIEW

Seeking review, the State Bar examiner urged several arguments: the hearing judge's allegedly inadequate recommendation of discipline, inadequate weighing of aggravating circumstances, improper consideration of certain factors as mitigating, incorrect conclusion that matters in this case were decided in *Potack II*, inappropriate comment on a disciplinary matter not pending in the present case, and improper proposal of alternative recommendations. Although granted an opportunity to file his reply brief, respondent has not done so and did not appear at oral argument.

V. DISCUSSION

A. Proper Scope of This Proceeding.

We first deem it appropriate to identify the probation violations which are properly the scope of this proceeding. While the record in *Potack II* is pending before the Supreme Court it is part of the record we now review. We are therefore able, as was the hearing judge below, to consider the basis of that proceeding in relation to the charges in *Potack III*. In *Potack II*, the State Bar Court hearing referee determined that respondent failed to timely file the probation report due by October 10, 1988, for the preceding quarter. The referee considered fully the circumstances surrounding respondent's probation reporting failure, including his failure to avail himself of an opportunity to correct the defective report he filed in a belated attempt to satisfy the October 10, 1988, reporting requirement. (Exh. 16, referee's decision, finding 4, p. 2.) In the circumstances of this matter, we hold that the referee's decision in *Potack II* resolved completely all duties respondent had with respect to the October 10, 1988, report.

[2] Respondent did have a duty under paragraph six of the conditions of his probation to answer fully and promptly, except as privileged, any inquiries as to whether he was complying with his probation. That duty was *independent* of the duty placed on respondent by paragraph three of those conditions to file quarterly reports with the State Bar Court as to his compliance with the rules and laws governing attorney conduct. Yet on the record before us, the only purpose which could have been served by the request made to respondent by the State Bar Court clerk's office on November 23, 1988, was to seek respondent's filing of a complete quarterly probation report due October 10, 1988. Since the very basis of the charges and recommendation in *Potack II* was respondent's failure to file an acceptable report for the quarter in question, we agree with the hearing judge that no culpability in *Potack III* should be based on respondent's failure to respond to the November 23, 1988, inquiry. Our conclusion is supported further by review of the charges in *Potack III*. The portion of the notice to show cause which started this proceeding referring to respondent's failure to respond to the November 23, 1988, inquiry cited only paragraph three of the conditions of probation, *not* paragraph six.

Accordingly, we deem the only aspect of respondent's probation compliance properly at issue in this proceeding to be respondent's duty set forth in paragraph seven of the conditions of his probation to make restitution by December 6, 1989, to the named individuals (or the client security fund) in the specific amounts.

B. Wilfulness as an Element of Culpability of a Probation Violation.

The hearing judge stated that a showing of "wilfulness" was unnecessary before concluding that a member of the State Bar could be culpable of violating a condition of disciplinary probation. Yet

the judge made the issue moot by concluding that in this case, respondent's failure to make restitution as required was wilful. (Decision at pp. 14-15, 27-29.)

[3a] As we stated earlier, our scope of review of this proceeding is independent. As the judge implicitly recognized, no statute or rule has specifically defined whether or not wilfulness is a requirement for finding a respondent subject to revocation of probation for violation of a probation condition. Considering that probation revocation matters come before the State Bar Court on a regular basis, we deem it an appropriate exercise of our independent review power to reach that issue.⁶ [3b - see fn. 6]

[4] As a preface to our analysis of the wilfulness issue, we must make clear that this probation revocation proceeding is a disciplinary proceeding. The examiner takes the view that this proceeding is not truly a disciplinary proceeding, but merely an inquiry to determine whether discipline already decided upon when probation was earlier imposed and suspension was stayed should now be put into effect. This view of the matter before us fails to take into account the fact that no added discipline may be imposed on an attorney-probationer for breach of probation absent requisite proof of such breach following fundamental due process steps (i.e., notice and a fair opportunity to be heard). (Trans. Rules Proc. of State Bar, rules 612-613.) [5] Moreover, our Supreme Court has considered an attorney's past revocation of probation to be a prior *disciplinary* proceeding. (E.g., *Barnum v. State Bar* (1990) 52 Cal.3d 104, 113; *Slaten v. State Bar* (1988) 46 Cal.3d 48, 62-63.)

[6a] The hearing judge's conclusion that a showing of wilfulness was unnecessary in a probation revocation proceeding was based on a review of Business and Professions Code sections 6077, 6103, and 6093 (b) and standard 1.2(f).⁷ Section 6077 permits discipline only for a "wilful" breach of the

6. [3b] Even if we were bound by the constraints of a civil appeal, which we are not (see *Bernstein v. State Bar* (1972) 6 Cal.3d 909, 916), we would be able to resolve the issue of wilfulness notwithstanding its possible mootness in this proceeding based on our determination that it is an issue of public importance likely to recur. (See, e.g., *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 167, fn. 2; *Zeilenga v. Nelson*

(1971) 4 Cal.3d 716, 719-720; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 526, pp. 511-513.)

7. Unless noted otherwise, references to "sections" are to the Business and Professions Code and references to "standards" are to the Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V.)

rules of professional conduct, and section 6103 permits discipline only for “wilful” disobedience or violation of a court order. By contrast, section 6093 (b) provides: “Violation of a condition of probation constitutes cause for revocation of any probation then pending, and may constitute cause for discipline.” It does not state whether violation of a probation condition must be wilful in order to provide a cause for probation revocation or discipline. Also, standard 1.2(f) defines the term “prior record of discipline” as including “a member’s violation of probation or wilful violation of an order” to comply with rule 955. Observing that section 6093 (b) and standard 1.2 (f) do not include the word “wilful,” the hearing judge concluded that a probation revocation proceeding did not require the wilful violation of a probation condition.

The United States Supreme Court has indicated that as a matter of fundamental due process, revocation of criminal probation for violation of a probation condition is not appropriate if “substantial reasons . . . justified or mitigated the violation . . .” (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790.) [7] Although disciplinary proceedings are sui generis and are not criminal in nature, rules of criminal law may provide guidance in appropriate circumstances. (*Emslie v. State Bar* (1974) 11 Cal.3d 210, 226.) Lack of wilfulness appears to constitute a substantial reason for not revoking probation in a disciplinary proceeding where, for example, a probationer has failed to file a required report or make restitution as ordered.

Pursuant to Penal Code section 1203.2, subdivision (a), a court may revoke and terminate probation in a criminal matter for various reasons, including the violation of any conditions of probation. However, that statute prohibits the revocation of probation for failure to pay any restitution required as a condition of probation unless the court determines that the probationer “has willfully failed to pay and has the ability to pay.” [6b] In a disciplinary proceeding, therefore, wilfulness would seem necessary before any revocation of probation for failure to pay restitution.

Although we have found no Supreme Court opinion directly on point, *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 suggests that a probation revocation proceeding may require a showing of wilfulness

equivalent to the wilfulness needed for discipline resulting from a violation of rule 955, California Rules of Court (hereinafter, “rule 955”). Phillips argued that a mental disorder prevented him from having the intent necessary for wilful violation of either the duties owed to his clients pursuant to the State Bar Act and Rules of Professional Conduct or the duties imposed by Supreme Court orders requiring him to comply with rule 955, pass the Professional Responsibility Examination, and cooperate with his probation monitor. Phillips stipulated, however, that he had wilfully violated duties imposed by the State Bar Act and Rules of Professional Conduct. Also, Phillips did not explain how he could have wilfully violated such duties, but have been incapable of wilfully violating probation conditions. Asserting that Phillips’s mental disorder did not render him incapable of wilful misconduct, the Supreme Court concluded that he had wilfully violated his probation conditions. (*Phillips v. State Bar, supra*, 49 Cal.3d at pp. 953-954.) At no point did the Supreme Court consider the possibility that a showing of wilfulness was unnecessary in dealing with violations of probation conditions.

[8] We find especially apt to probation violation proceedings the analysis which surrounds the wilfulness requirements of rule 955. Pursuant to rule 955(e), violations of rule 955 must be “wilful” to warrant discipline. Such wilfulness need not involve bad faith; instead, a “general purpose or willingness” to commit an act or permit an omission is sufficient. (*Durbin v. State Bar* (1979) 23 Cal.3d 461, 467; see also *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) Insofar as violations of rule 955 require such a mental state to justify discipline, violations of probation conditions should require the same mental state, and we so hold.

C. “Substantial Compliance” With Probation Conditions.

The examiner claimed below that respondent did not substantially comply with the terms of his probation, whereas respondent claimed that he did. Apparently underlying these claims was the assumption that substantial compliance with the probation terms would have allowed respondent to escape culpability. We reject this assumption.

[9a] For the purpose of determining culpability, it is misguided to distinguish between “substantial” and “insubstantial” or “technical” violations of the probation conditions involved in respondent’s case. The Supreme Court has refused to draw such a distinction in dealing with violations of rule 955 notification requirements because they serve the critical protective function of insuring that all concerned parties learn about an attorney’s discipline. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1096; *Lydon v. State Bar*, *supra*, 45 Cal.3d at p. 1187.)

[9b] Probation restitution requirements are as significant as discipline notification requirements. [10] By forcing culpable attorneys to confront the consequences of their misconduct in a concrete way, restitution serves the state’s interest in rehabilitating such attorneys and protecting the public. (*Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1009.) Recently, the Supreme Court described restitution as “a necessary condition of probation designed to effectuate . . . rehabilitation and to protect the public from similar future misconduct.” (*Sorenson v. State Bar* (1991) 52 Cal.3d 1036, 1044.) [9c] The importance of these goals makes distinctions between “substantial” and “insubstantial” or “technical” violations of probation restitution requirements inappropriate, particularly on this record.

D. Wilfulness of Respondent’s Failure to Comply With the Restitution Duties of His Probation.

No reported California disciplinary proceeding has addressed the issue of an attorney’s failure to pay restitution required as a condition of probation. [11a] In reinstatement proceedings, however, the Supreme Court has evaluated the efforts of attorneys to make restitution by examining both their financial ability and their attitude toward restitution. (See *In re Gaffney* (1946) 28 Cal.2d 761, 764-765; *In re Andreani* (1939) 14 Cal.2d 736, 750.)

[11b] In the context of criminal matters, the United States Supreme Court has suggested that a court should evaluate the reasons for a probationer’s failure to make restitution and that probation is revocable if “the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay.” (*Bearden v. Georgia*

(1983) 461 U.S. 660, 672-673.) As we observed earlier, pursuant to California Penal Code section 1203.2, subdivision (a), a criminal court must not revoke probation because of a failure to make restitution required as a condition of probation unless the court determines that the probationer “has willfully failed to pay and has the ability to pay.” In a disciplinary proceeding for failure to make timely restitution, due process requires that we examine whether the probationer was able to make restitution and whether the probationer made sufficient good faith efforts to acquire the resources to pay.

In *Potack I*, respondent stipulated to the discipline imposed, including probation condition 7, which required him to pay \$8,293 in restitution by December 6, 1988. (Stipulation in *Potack I* at p. 16.) In this proceeding, he also stipulated to the fact that as of December 6, 1988, he still owed \$7,348 in restitution. (Exh. 15, stipulation at pp. 4, 6.)

[12a] The hearing judge determined that respondent wilfully breached his duties although he was unable to make restitution. (Decision at p. 27.) Yet between August 1987 and July 1988, respondent’s salary from Community Defenders, Inc., exceeded his expenses by approximately \$150 per month. Also, he did not consider earning more money by taking an extra job; and from April 1988 onwards, he afforded monthly car payments of \$339. These facts show that despite his assertions to the contrary, respondent was able to make some restitution payments between August 1987 and December 6, 1988.

[12b] Even if respondent was unable to make restitution, we must examine the reasons for this inability to pay. As the hearing judge observed, respondent repeatedly chose to pursue professional goals which rendered him financially unable to make timely restitution. He chose to work as a law clerk for \$10 per hour. He chose to work for Community Defenders at an annual salary of \$27,000. He chose to begin a solo practice when start-up costs and delays in reimbursement were foreseeable. Although he knew that he would not make timely restitution and was advised by the probation department to seek an extension from the Supreme Court, he failed to do so. Although he knew that he had creditors who could levy against his checking accounts, he failed to

protect the funds with which he hoped to make restitution from attachment. (Decision at pp. 27-28.) Such conduct clearly shows respondent's conscious disregard of his obligations and failure to make sufficient good faith efforts to acquire the resources to pay. Thus, we agree with the judge's conclusion of respondent's wilful breach of his restitution duties.

E. Factors Bearing on the Appropriate Degree of Discipline.

The hearing judge found that respondent presented extensive mitigating evidence covering five broad areas: his education and experience prior to his suspension in 1986, his cocaine usage and recovery from 1981 to 1986, his full restitution in 1989, his extensive pro bono work throughout his legal career, and his character. (Decision at pp. 29-35.) Standard 1.2(e) defines the term "mitigating circumstance" as "an event or factor established clearly and convincingly by the member subject to a disciplinary proceeding as having caused or underlain the member's professional misconduct and which demonstrates that the public, courts and legal profession would be adequately protected by a more lenient degree of sanction than set forth" in the standards. Examples of mitigating circumstances include "good faith" on the part of the attorney, "lack of harm to the client or person who is the object" of the attorney's misconduct, "spontaneous candor and cooperation" during the disciplinary investigation and proceedings, "an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct," and "objective steps" which the attorney has promptly taken to atone for his misconduct and which demonstrate remorse or recognition of wrongdoing. (Standard 1.2(e)(ii), (iii), (v), (vi), (vii).)

[13] Evidence about respondent's education and experience before 1986 and evidence about his illegal drug usage and recovery by 1986 bore no causal relationship to his failure to file the amended report for October 10, 1988, or his failure to make full restitution by December 6, 1988. (Cf. *Hawes v. State Bar* (1990) 51 Cal.3d 587, 595.) Nor did such types of evidence demonstrate how a sanction less than the sanction set forth in the standards would adequately

protect the public, courts, and legal profession. Thus, pursuant to standard 1.2(e), they did not constitute mitigating evidence and we disregard those factors as mitigating.

Evidence about respondent's restitution payments from January 1989 through May 1989 showed that he ultimately took steps to atone for his misconduct, albeit belatedly. Pursuant to standard 1.2(e)(vii), the judge regarded such evidence as mitigating. (Decision at p. 36.) Yet all of the \$8,293 in payments which respondent made after his return to active status in 1987 were made when the charges in *Potack II* were pending against him, and most (\$6,293) were made when the charges in *Potack III* were pending against him. [14] Because respondent made such payments under direct pressure of the proceedings against him, they are entitled to little weight. (See *Howard v. State Bar* (1990) 51 Cal.3d 215, 222; *Hipolito v. State Bar* (1989) 48 Cal.3d 621, 628; *Rosenthal v. State Bar* (1987) 43 Cal.3d 658, 664.)

[15] Respondent's public service work as a Community Defenders attorney and his later work representing juveniles under court appointment deserves credit and recognition. Nevertheless, the valuable aims of these public service positions did not relieve respondent from his restitution requirements; and, given the more limited income his employment offered, it was incumbent on respondent to manage his finances better to accomplish his restitution duties.

[16] Respondent's character evidence consisted of testimony from Cruz Saavedra, a tax attorney who referred a juvenile case to respondent and who testified that respondent did a "good job" for a "very reasonable" fee. (I R.T. 58, 60; see decision at p. 34.) Saavedra, however, knew only that respondent had been "disbarred for one year" and that the State Bar was holding a disciplinary hearing involving respondent because he had failed "to pay some restitution." (I R.T. 60; see decision at pp. 34-35.) Pursuant to standard 1.2(e)(vi), Saavedra's lack of awareness about the full extent of respondent's misconduct undermined the value of his character testimony. [17] Because such evidence concerned respondent's character, standard 1.2(e)(vi) sets forth a guideline of an extraordinary demonstration of good character, as

attested to by a wide range of references who knew the full extent of respondent's misconduct in order to serve as a mitigating circumstance. Testimony by respondent himself and one letter from a person who expressed no knowledge about respondent's misconduct did not meet this requirement.⁸ The Supreme Court has indicated that significant mitigating testimony should show familiarity "with the details" of an attorney's misconduct.

[18] Asserting that respondent's delay in paying restitution caused no harm to his clients or the State Bar Client Security Fund, the judge concluded that such lack of harm deserved "some weight in mitigation" pursuant to standard 1.2(e)(iii). (Decision at p. 35.) Respondent, however, submitted no evidence concerning lack of harm. Without such evidence, the judge's conclusion appears unsupported by the record, particularly when the clients whom respondent harmed in *Potack I* (or the Client Security Fund which had earlier reimbursed those clients) had to wait years for restitution.

The record supports the judge's observation that respondent demonstrated "candor and cooperation" during the proceeding. Pursuant to standard 1.2(e)(v), the judge properly accorded mitigating weight to his candor and cooperation. (*Id.* at p. 35.)

[19] The judge rejected the examiner's claim that *Potack I* was an aggravating circumstance. "Because every existing probation proceeding arises necessarily from an underlying proceeding," the judge stated, "it seems unfair to automatically find that prior a circumstance in aggravation." (Decision at p. 37.) Standard 1.2(b)(i), however, provides that "a prior record of discipline" shall be an aggravating circumstance. Because *Potack I* resulted in discipline, standard 1.2(b)(i) required the hearing judge to consider it an aggravating circumstance. In *Conroy v. State Bar* (1990) 51 Cal.3d 799, 805, a case decided after the hearing judge filed her decision, the Supreme Court determined that standard 1.7(a) ap-

plied in a later original proceeding founded solely on the attorney's failure to pass a professional responsibility examination ordered when imposing discipline earlier. Also, in *Barnum v. State Bar*, *supra*, 52 Cal.3d at p. 113, another opinion filed after the hearing judge's decision, the Supreme Court considered an attorney who had previously been found culpable in a single original discipline matter (Bar Misc. 5779) to have three prior records of discipline: the probation order in 1988, a suspension order in 1989 for violating a requirement of the 1988 order, and a suspension order in 1990 for violating another requirement of that order. Thus, we consider *Potack I* an aggravating circumstance under standard 1.7(a). Next we consider its weight. [20] In *Arm v. State Bar* (1990) 50 Cal.3d 763, the Supreme Court made clear that the number or fact of prior disciplinary proceedings cannot, without more analysis, foretell the result. (*Id.* at pp. 778-780.) The discipline in *Potack I* became effective in 1986. [21] Because *Potack I* arose from serious misconduct in seven matters, and respondent's breach of probation arose after being disciplined, standard 1.7(a) indicates the need for more actual suspension in *Potack II* and *Potack III* than in *Potack I*.

While determining that additional discipline than imposed in *Potack I* is warranted, the specific recommendation to make is complicated somewhat by *Potack II*, which is now before the Supreme Court, and which we view as overlapping, if not co-extensive with the probation violations in this proceeding.

[22] We must also consider whether *Potack II* is prior discipline under standard 1.7(a) or 1.7(b). In defining prior discipline, standards 1.7(a) and (b) use the definition of standard 1.2(f); which, in turn, refers to rule 571 of the Transitional Rules of Procedure of the State Bar. Under rule 571, the recommendation in *Potack II* is prior discipline. Nevertheless, we are not required to apply standard 1.7(b) rigidly, without regard to the facts of the prior matters. (See

8. By contrast, in *Gadda v. State Bar* (1990) 50 Cal.3d 344, 356, the Supreme Court observed that an attorney's apparent zeal in undertaking pro bono work deserved mitigating weight where the attorney presented several letters and certificates

commending his volunteer efforts from the State Bar and the Bar Association of San Francisco and where a letter from a judge highly praised the attorney's continuous and unselfish efforts to defend the indigent.

Conroy v. State Bar (1991) 53 Cal.3d 495, 506-507.) [23] We do not deem it appropriate in the unique facts before us to give any significant weight to *Potack II* as prior discipline. This is so because we are unable to discern whether and to what extent the former review department, in reaching its two-year suspension recommendation in that matter has already considered the facts of what is now the central focus of *Potack III*: the timing of respondent's belated restitution to former clients. Clearly the former review department had facts before it bearing on this issue and its recommendation does not guide us as to whether any aspect of the delayed restitution accounted for the recommended two-year actual suspension.

There have been many revocations of attorney disciplinary probation over the years. The resultant discipline in those matters has ranged from actual suspension for the entire period of stayed suspension (see prior disciplinary cases discussed in *Barnum v. State Bar*, *supra*, 52 Cal.3d 104, 107 and *Slaten v. State Bar*, *supra*, 46 Cal.3d 48, 62) to some extension of the earlier-imposed probation with no actual suspension. (See, e.g., *In the Matter of Beauvais* (1990) Bar Misc. 5580 [minute order]; *In the Matter of Cooper* (1990) Bar Misc. 5708 [same].) Because all such past probation revocations have been by Supreme Court minute order, we have no explicit guidance by the high court as to the factors to be considered in weighing the discipline to recommend for violation of probation.

[24] We have earlier recognized the chief aims of attorney disciplinary probation to be protection of the public and rehabilitation of the attorney. (See *In The Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291.) If we measure an attorney's violations of probation against those aims, the greatest amount of discipline would be merited for violations which show a breach of a condition of probation significantly related to the misconduct for which probation was given. This would be especially significant in circumstances raising a serious concern about the need for public protection or showing the probationer's failure to undertake rehabilitative steps. Conversely, the least amount of discipline would appear appropriate for a violation of a less significant condition in circumstances which did not call into question either the need for public protec-

tion or the attorney's progress toward rehabilitation. Also to be considered are the total length of stayed suspension which could be imposed as an actual suspension and the total amount of actual suspension earlier imposed as a condition of the discipline at the time probation was granted.

The few examples of Supreme Court discussion we have found relative to an attorney's failure to comply with probation or probation-like duties appear consistent with our framework. In *Barnum v. State Bar*, *supra*, 52 Cal.3d 104, the Supreme Court noted that an attorney who had been previously disciplined by a one-year stayed suspension (no actual suspension) had that probation revoked and was actually suspended for a full year. The court described the attorney's breach of probation as failure to file "all but the first" of the required quarterly reports and noted that he defaulted to charges of probation violation, leading the hearing judge to characterize that attorney's probation breach as aggravated and as involving an "indifference towards rectification." (*Id.* at p. 107.)

In *Conroy v. State Bar*, *supra*, 51 Cal.3d 799, the attorney had been reprovved and had been ordered to pass a professional responsibility examination within one year. He passed the examination about three months late and provided no explanation for his untimely compliance, defaulting to the charges brought against him. Although the examination requirement was imposed under rule 956, California Rules of Court and not as a true probation condition, passage of the examination was required as part of the State Bar Court's earlier order of discipline. The Supreme Court imposed the discipline recommended by the State Bar Court of a one-year suspension stayed, on conditions including a sixty-day actual suspension. Deeming as extenuating the attorney's passage of the examination at the first opportunity possible after the deadline, the Court nonetheless imposed actual suspension for violation of the condition of his prior reprovval noting the aggravating circumstances of failure to participate in the later disciplinary proceedings and failing to show an understanding of the grave nature of the earlier misconduct.

Applying the foregoing analyses to *Potack III*, we must conclude that restitution was a preeminent probationary duty for this respondent. He was clearly

aware of his duty to fulfill that condition as he had stipulated to it as part of his earlier disciplinary proceedings. He was not required to complete the restitution at issue here until 30 months had passed. But having stipulated to complete it on schedule, he offered none of that restitution timely nor did he timely seek any extension based on any showing of good cause. But for his completion of all of the restitution within six months of when it was due, very severe discipline would be warranted. Respondent did participate in the trial proceedings in *Potack III* and testified openly as to his resources and actions. This is a favorable factor until it is noted that respondent did not participate in the review before us. Moreover, respondent's testimony below does show that his actions were virtually calculated to make it impossible to repay the funds to his victims by the time he had long earlier agreed to do so.

Recognizing that *Potack II* is before the Supreme Court with a recommendation of a two-year actual suspension ostensibly for respondent's failure to timely file his probation report but in circumstances in which the hearing panel expressly took into account his failure to make timely restitution and the review department may also have done so, we would recommend the following discipline in *Potack III* if the Supreme Court wishes to act on both matters in the aggregate: if the Supreme Court imposes a two-year or greater actual suspension in *Potack II*, taking into account the belated restitution as an aggravating factor, we recommend that no additional discipline be imposed in *Potack III*. If the Supreme Court imposes less than the recommended actual suspension in *Potack II* and leaves the discipline for belated restitution to be addressed in *Potack III*, we recommend that additional discipline be imposed in *Potack III*, up to one year actual suspension and that the aggregate discipline for both *Potack II* and *Potack III* not exceed two years actual suspension. We would recommend that respondent be ordered to comply with the provisions of rule 955, California Rules of Court, but that he not again be ordered to take and pass a professional responsibility examination.

Because of our desire to expedite the transmittal of this opinion and our recommendation and the record to the Supreme Court pursuant to its request, we direct that the clerk of our court effect such

transmittal within thirty (30) days of the service of our opinion, together with the State Bar Court certificate of costs and the Office of Trial Counsel certificate of costs, if received by such date.

We concur:

PEARLMAN, P.J.

NORIAN, J.

PEARLMAN, P.J., concurring:

I fully concur in the majority opinion but wish to address the unnecessary complexity of this proceeding. Under our current system, formal proceedings for violation of probation are initiated by the Probation Department of the State Bar Court. *Potack II* and *Potack III* thus were separately initiated for two apparent violations of probation by respondent. Thereafter, the Office of Trial Counsel had full control over the prosecution of the charges. The same examiner prosecuted both cases and introduced all of the probation violations as evidence in *Potack II* without seeking to consolidate the proceedings or amend *Potack II* and dismiss *Potack III* and without informing the Judge in *Potack III* of the existence of the other proceeding until the hearing in *Potack III* was almost concluded.

The sole, significant difference between *Potack II* and *Potack III* is that in *Potack III* the respondent answered and participated at the hearing, and the hearing judge made findings in mitigation based on evidence which was not part of the record in *Potack II*, in which respondent defaulted. The basic violations and evidence in aggravation are the same in both proceedings, i.e., no charged misconduct occurred in *Potack III* that was not already part of the record which is now before the Supreme Court in *Potack II*.

In light of the seriousness of the original misconduct, I view respondent's failure to adhere to the conditions of probation and on-again off-again participation in these State Bar proceedings to warrant imposition of substantial actual suspension in revocation of his probation. Nonetheless, the referee in *Potack II* recommended two years actual suspension based in part on the aggravating factor of respondent's

failure to make any restitution. Thereafter he completed restitution to all of his clients. The unexplained deletion of the lack of restitution as a factor in aggravation by the former review department leaves open the question of whether that was done to acknowledge belated restitution or to leave the issue for separate consideration in *Potack III* because of concerns regarding sufficiency of notice to a defaulting respondent. Whatever the reason for its deletion, it had no effect on the examiner's recommended discipline. The examiner, appearing before this review department in *Potack III*, sought two years actual suspension for all of the probation violations in *Potack II* and *Potack III* combined.

The alternative recommendations of this review department essentially recommend that the Supreme Court treat both cases as one consolidated case before the Supreme Court and impose discipline accordingly. Aside from the considerations of fairness to the respondent, this would have the salutary effect of encouraging the consolidation of similar matters into a single proceeding.