

**STATE BAR COURT  
REVIEW DEPARTMENT**

In the Matter of

**KENNETH LAWRENCE CARR**

A Member of the State Bar

No. 89-P-15235

Filed November 25, 1992

**SUMMARY**

Respondent had been placed on disciplinary probation under conditions requiring him to file quarterly reports and to report that he had abstained from intoxicants and non-prescribed drugs in any report required by the conditions of his probation. Respondent's first two quarterly reports did not contain an express statement that he had abstained from intoxicants and non-prescribed drugs. In the ensuing probation revocation proceeding, the hearing judge found that respondent had violated his probation, and recommended revoking probation and imposing respondent's previously stayed two-year suspension. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent requested review, contending that his probation reports satisfied his probation requirements, that he was not required to report his abstinence in his regular quarterly reports, and that the hearing judge committed prejudicial evidentiary errors requiring a new hearing. The review department rejected respondent's legal argument regarding the interpretation of his probation conditions, and found that all of the facts essential to support a conclusion that respondent violated his probation were established by evidence which respondent did not challenge. Although it modified the hearing judge's findings as to aggravation and mitigation, the review department adopted her recommendation as to discipline, with minor modifications.

**COUNSEL FOR PARTIES**

For Office of Trials: William F. Stralka

For Respondent: Kenneth L. Carr, in pro. per.

HEADNOTES

- [1 a, b]    135      **Procedure—Rules of Procedure**  
              159      **Evidence—Miscellaneous**  
              165      **Adequacy of Hearing Decision**  
              169      **Standard of Proof or Review—Miscellaneous**  
              204.90 **Culpability—General Substantive Issues**  
Review department did not need to reach respondent’s challenges to hearing judge’s evidentiary rulings in order to uphold hearing judge’s ultimate findings, where all essential elements of charged violation were established by evidence to which respondent did not object, and any evidentiary errors did not result in denial of a fair hearing. Where factual findings based on challenged evidence were not necessary to decision, remand for new hearing was not necessary even if evidentiary errors underlay some non-essential findings. (Rule 556, Trans. Rules Proc. of State Bar.)
- [2]            179      **Discipline Conditions—Miscellaneous**  
              1712     **Probation Cases—Wilfulness**  
              1713     **Probation Cases—Standard of Proof**  
Evidence needed to establish culpability of failure to comply with probation conditions regarding content of required quarterly reports was (1) text of probation conditions in question; (2) evidence that respondent had notice of such conditions; (3) text of quarterly reports at issue, and (4) evidence of wilful failure to comply with probation conditions, which was established by respondent’s testimony that statement at issue was not included in reports due to respondent’s interpretation of probation conditions.
- [3 a-c]      172.19 **Discipline—Probation—Other Issues**  
              1719     **Probation Cases—Miscellaneous**  
As a matter of law, probation condition requiring respondent to include statement regarding abstinence from alcohol and drugs in any report required under probation conditions required respondent to include such statement in all required reports, including quarterly reports. Statement in quarterly reports that respondent had complied with all “valid, legally reasonable and enforceable” probation conditions did not comply with such requirement, because it was not a clear and unequivocal statement of respondent’s compliance with the abstinence condition.
- [4]            169      **Standard of Proof or Review—Miscellaneous**  
              172.19 **Discipline—Probation—Other Issues**  
              1713     **Probation Cases—Standard of Proof**  
The question of how a court order should be interpreted is a question of law for the court, not a question of fact, and the parties’ subjective beliefs as to its meaning are not relevant to the court’s interpretation. Whether language of respondent’s probation reports complied with requirements of probation conditions was a legal issue, not a factual one. Moreover, probation order was a Supreme Court order, not a contract, and rules of contract interpretation did not apply.
- [5]            172.19 **Discipline—Probation—Other Issues**  
              199      **General Issues—Miscellaneous**  
              204.90 **Culpability—General Substantive Issues**  
              1518     **Conviction Matters—Nature of Conviction—Justice Offenses**  
              1719     **Probation Cases—Miscellaneous**  
Where probation conditions required that respondent abstain from intoxicants and non-prescribed drugs, and respondent stated under penalty of perjury that respondent had complied with all “valid,

legally reasonable and enforceable” probation conditions, then even if State Bar proved respondent had consumed alcohol, respondent could have avoided perjury conviction by contending he did not consider abstinence condition to be valid, legally reasonable, and/or enforceable.

- [6]      **163      Proof of Wilfulness**  
**204.10   Culpability—Wilfulness Requirement**  
**1712      Probation Cases—Wilfulness**  
**1913.11   Rule 955—Substantive Issues—Wilfulness—Definition**  
 Violations of probation require the same mental state to justify discipline as violations of rule 955, Cal. Rules of Court. For such purposes, wilfulness need not involve bad faith; a general purpose or willingness to commit an act or permit an omission is sufficient. Accordingly, despite respondent’s asserted good faith belief that probation reports were sufficient, respondent’s intentional failure to include a required statement in such reports was wilful for purposes of a probation violation. Respondent’s subjective intentions were relevant only with regard to aggravation and mitigation.
- [7]      **130      Procedure—Procedure on Review**  
**146      Evidence—Judicial Notice**  
**161      Duty to Present Evidence**  
**802.21   Standards—Definitions—Prior Record**  
 Where examiner failed to introduce appropriate documentary evidence of respondent’s prior discipline record, review department notified parties of intent to take judicial notice of specified documents from official State Bar Court records regarding such discipline, and took such notice after neither party objected.
- [8]      **591      Aggravation—Indifference—Found**  
**1719      Probation Cases—Miscellaneous**  
 Respondent’s belief that he had not violated probation in framing his probation reports was unreasonable, at least once respondent was advised by probation department that his interpretation of probation conditions was incorrect. Hearing judge was therefore correct in treating respondent’s failure to file corrected reports as a failure to rectify his misconduct and therefore an aggravating factor.
- [9 a, b] **142      Evidence—Hearsay**  
**146      Evidence—Judicial Notice**  
**191      Effect/Relationship of Other Proceedings**  
 Taking judicial notice of court records does not mean noticing the existence of facts asserted in the documents in the court file; a court cannot take judicial notice of the truth of hearsay just because it is part of a court record. Notice may be taken of another court’s findings of fact and conclusions of law in support of a judgment, but not of hearsay allegations, even those of a judge-declarant. Accordingly, hearing judge erred in taking judicial notice of truth of testimony by respondent’s criminal probation officer in criminal probation revocation proceeding.
- [10]     **142      Evidence—Hearsay**  
**165      Adequacy of Hearing Decision**  
**545      Aggravation—Bad Faith, Dishonesty—Declined to Find**  
 Where aggravating factor of bad faith found by hearing judge rested entirely on inadmissible hearsay evidence, review department declined to adopt such finding.

- [11]      **159      Evidence—Miscellaneous**  
          **191      Effect/Relationship of Other Proceedings**  
Where superior court appellate department had reversed decision revoking respondent's criminal probation due to municipal court's refusal to permit respondent's counsel to cross-examine prosecution's witness, transcript of municipal court proceeding could not have been considered as evidence pursuant to Business and Professions Code section 6049.2.
- [12 a-c] **715.50   Mitigation—Good Faith—Declined to Find**  
          **1719      Probation Cases—Miscellaneous**  
Where respondent unreasonably persisted in refusing to include certain language in probation reports even after being informed by probation department employees that his interpretation of probation conditions as not requiring such language was incorrect, this effectively refuted respondent's contention that he acted in good faith, which would have constituted a mitigating factor if factually correct.
- [13]      **142      Evidence—Hearsay**  
          **146      Evidence—Judicial Notice**  
          **1711      Probation Cases—Special Procedural Issues**  
Documentary evidence of communications to respondent from probation department regarding interpretation of probation conditions was judicially noticeable. It was not admissible to show truth of statements contained in such documents; for that purpose, it was hearsay. However, it was admissible to show that respondent had notice of probation department's interpretation, which was relevant to issue of respondent's good faith.
- [14]      **142      Evidence—Hearsay**  
          **165      Adequacy of Hearing Decision**  
          **1711      Probation Cases—Special Procedural Issues**  
Written report from respondent's probation monitor was inadmissible as hearsay where it did not establish that respondent had notice of anything unless probation monitor's recitals of what he told respondent were accepted as true. However, where such evidence was merely cumulative on question of notice, any reliance thereon by hearing judge was harmless error.
- [15 a, b] **745.39   Mitigation—Remorse/Restitution—Found but Discounted**  
          **750.39   Mitigation—Rehabilitation—Found but Discounted**  
Where respondent included declaration regarding abstinence in probation reports after hearing judge ruled that such declaration was required, such probation reports were relevant to issue of mitigation. However, respondent's change of behavior was not given very great weight in mitigation, where respondent could have avoided probation revocation proceeding altogether if respondent had heeded advice of probation department staff instead of continuing to follow respondent's own interpretation of probation conditions until rejected by source respondent considered sufficiently authoritative.
- [16 a, b] **116      Procedure—Requirement of Expedited Proceeding**  
          **755.10   Mitigation—Prejudicial Delay—Found**  
          **1714      Probation Cases—Degree of Discipline**  
Excessive delay in conducting disciplinary proceedings, not attributable to respondent and resulting in prejudice to respondent, should be taken into account in mitigation, especially in probation revocation proceedings which are required to be expedited. Where, due to delay in

proceedings, actual suspension in probation matter would not commence until after start of actual suspension in separate matter which was supposed to be served concurrently with prior suspensions, review department modified recommended discipline in probation matter to provide for actual suspension to be served concurrently with previously ordered actual suspension to extent it was still in effect.

- [17] **135 Procedure—Rules of Procedure**  
**755.32 Mitigation—Prejudicial Delay—Found but Discounted**  
**2409 Standard 1.4(c)(ii) Proceedings—Procedural Issues**  
 Nothing in lengthy pendency of probation revocation proceeding delayed or prevented respondent's filing of application for termination of suspension pursuant to standard 1.4(c)(ii). (Trans. Rules Proc. of State Bar, rules 810-826.)
- [18 a, b] **106.10 Procedure—Pleadings—Sufficiency**  
**1714 Probation Cases—Degree of Discipline**  
 The respondent in a probation revocation matter may not be subjected to greater discipline than imposition of the entire period of suspension previously stayed if the notice to show cause does not appropriately charge violations that could result in greater discipline. Where notice to show cause stated that respondent was to show cause why stay of suspension should not be set aside and stayed suspension imposed, imposing entire stayed suspension was maximum discipline that State Bar Court could recommend.
- [19] **801.41 Standards—Deviation From—Justified**  
**806.59 Standards—Disbarment After Two Priors**  
**1714 Probation Cases—Degree of Discipline**  
 Because of limitation on discipline available in probation revocation matter, disciplinary standard calling for disbarment in third disciplinary matter absent compelling mitigation did not apply.
- [20 a, b] **511 Aggravation—Prior Record—Found**  
**805.10 Standards—Effect of Prior Discipline**  
**1714 Probation Cases—Degree of Discipline**  
 Maximum available discipline in probation revocation matter was appropriate where respondent's priors, which included a prior probation violation, combined with misconduct in current case, showed both a persistent problem with drugs and alcohol and a persistent problem with conforming conduct to requirements of law and court orders. Policy underlying disciplinary standard calling for disbarment after two priors, and standard calling for increasing severity of discipline in successive matters, also militated toward imposing severe discipline given respondent's extensive prior record.
- [21] **172.20 Discipline—Drug Testing/Treatment**  
**172.30 Discipline—Alcohol Testing/Treatment**  
**750.59 Mitigation—Rehabilitation—Declined to Find**  
**1714 Probation Cases—Degree of Discipline**  
 Absence of evidence of rehabilitation from drug and alcohol problems was significant where respondent's probation violation involved failure to give adequate assurance of compliance with probation requirement of abstention from alcohol and drugs.

- [22 a, b] **176 Discipline—Standard 1.4(c)(ii)**  
**2409 Standard 1.4(c)(ii) Proceedings—Procedural Issues**  
Where respondent was still on suspension in prior matter due to failure to make showing under standard 1.4(c)(ii), hearing judge's recommendation that actual suspension in current matter be consecutive to such suspension was inconsistent with recommendation that only one 1.4(c)(ii) hearing be required to terminate both suspensions. Review department therefore recommended that actual suspension in current matter be prospective to Supreme Court's order, but concurrent with balance of all suspensions in effect as of entry of such order.
- [23] **135 Procedure—Rules of Procedure**  
**179 Discipline Conditions—Miscellaneous**  
**1715 Probation Cases—Inactive Enrollment**  
Where respondent in probation revocation matter had been continually suspended from practice of law for preceding four years, review department did not need to order that respondent be placed on inactive enrollment under Business and Professions Code section 6007(d) pending final Supreme Court order. (Trans. Rules Proc. of State Bar, rule 612(b).)

ADDITIONAL ANALYSIS

**Discipline**

1815.08 Actual Suspension—2 Years

**Probation Conditions**

1830 Standard 1.4(c)(ii)

**Other**

112 Procedure—Assistance of Counsel

173 Discipline—Ethics Exam/Ethics School

1751 Probation Cases—Probation Revoked

## OPINION

NORIAN, J.:

Respondent, Kenneth L. Carr, was placed on disciplinary probation in 1988. (*In re Carr* (1988) 46 Cal.3d 1089.) In the present matter, respondent was charged with failing to comply with the conditions of that probation, by failing to state expressly in his first two probation reports that he had abstained from intoxicants and non-prescription drugs. The hearing judge found respondent violated his probation and recommended revoking it and imposing the previously stayed two-year suspension ordered by the Supreme Court.

Respondent requested review, contending that his probation reports satisfied his probation requirements by stating that he had complied with all "valid, legally reasonable and enforceable terms and conditions" of his probation. He also contends that the requirement that he report compliance with the alcohol/drug abstinence condition (probation condition number 5) did not mean that he had to include such a report in his regular quarterly reports (required by probation condition number 3). Finally, he contends that counsel should have been appointed to represent him in the probation revocation proceeding, and that prejudicial evidentiary errors committed by the hearing judge require a remand for a new hearing.

Although we modify the hearing judge's findings as to aggravation and mitigation, we adopt her conclusion that respondent was culpable of the probation violations with which he was charged. With minor modifications, we also adopt the hearing judge's recommendation as to discipline.

### I. FACTS

#### A. Background

Respondent was admitted to practice law in California on June 28, 1976. On October 13, 1988,

the California Supreme Court filed an opinion disciplining respondent in connection with two criminal convictions for driving under the influence. (*In re Carr, supra*, 46 Cal.3d 1089.) This discipline ("the 1988 discipline") consisted of a two-year suspension which was stayed on conditions of six months actual suspension, five years of probation and compliance with other duties recommended by the former volunteer review department and incorporated into the Supreme Court's opinion by reference. (*Id.* at p. 1091.)

Among the probation conditions imposed as part of the 1988 discipline were a quarterly reporting condition and a condition that respondent abstain from the use of intoxicants and non-prescribed drugs "and report that he has done so in *any* report that he is required to render under these conditions of probation." (Probation condition 5, emphasis added).<sup>1</sup> Respondent's quarterly reports dated April 10, 1989, and July 10, 1989, both stated that respondent had complied with the State Bar Act and Rules of Professional Conduct and with all "other valid, legally reasonable and enforceable terms and conditions of my probation" during the period covered by the report. The reports did not state that respondent had abstained from the use of intoxicants and non-prescribed drugs. Respondent testified at the hearing in this matter that the reports did not "attempt or intend to so state." (R.T. p. 107.) After each of the two reports was received, respondent was notified by employees of the probation department of its contention that the reports were inadequate due to their failure to state that respondent had abstained from the use of intoxicants and non-prescribed drugs as required by condition 5. Although invited to do so, respondent did not thereafter amend the two reports.

#### B. Procedural History and Decision Below

On September 12, 1989, a notice to show cause was filed charging respondent with violating the conditions of his probation by failing to state, in his quarterly reports filed April 10, 1989, and July 10,

1. The quarterly reporting condition read in pertinent part as follows: "3. That during the period of probation, [respondent] shall report not later than January 10, April 10, July 10 and

October 10 . . . [¶] that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct . . . ."

1989, that he had abstained from the use of intoxicants and non-prescribed drugs. A hearing was held on January 8, 1990, and the hearing judge filed a decision on May 31, 1990. Respondent then requested reconsideration and a hearing de novo. The request for hearing de novo was denied, but respondent was given an opportunity to submit additional evidence, which he failed to do within the time allowed.

On January 10, 1992, the hearing judge filed an amended decision which modified the original decision in response to some of the points raised by respondent on reconsideration. The amended decision, like the original decision, found respondent to have violated his probation as charged. The judge recommended that the stay of respondent's two-year suspension be lifted and that respondent be placed on actual suspension for two years and until he shows rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct ("standards"). (Trans. Rules Proc. of State Bar, div. V.) The judge recommended that the actual suspension in this matter be "consecutive and in addition to any period of actual suspension which [r]espondent may be serving" as of the entry of the Supreme Court's order in this matter, and that respondent "be required to undergo only one [standard] 1.4(c)(ii) hearing at the conclusion of his actual suspension."<sup>2</sup>

## II. DISCUSSION

### A. Probation Violation

#### 1. Respondent's contentions.

Respondent's principal argument on review is that his probation reports did in fact comply with the

conditions of his probation. He contends, in effect, that the probation conditions did not require the quarterly reports to state explicitly, or in any particular words, that respondent had abstained from intoxicants and non-prescribed drugs. Thus, he argues, the statements in his reports that he had complied with all "other valid, legally reasonable and enforceable terms and conditions of [his] probation" constituted adequate compliance with his probation.

In the alternative, respondent contends that the correct interpretation of the conditions of his probation is that they did not require him to report his abstinence in the regular quarterly reports, but only in reports made in response to specific requests from his probation monitor, the alcohol abuse consultant, or the presiding referee or his designee. There is no evidence in the record that any such request was made. Finally, respondent contends that he should not be found culpable because he believed in good faith that his reports did satisfy the requirements of his probation conditions.<sup>3</sup>

#### 2. Adequacy of respondent's probation reports.

[1a] Respondent raises several challenges to the hearing judge's evidentiary rulings. However, these arguments need not be reached in order to uphold the hearing judge's ultimate findings. All of the essential elements of the probation violation were established by evidence to which respondent did not object at the hearing and which he does not challenge on review, and any evidentiary errors did not result in the denial of a fair hearing. (See Trans. Rules Proc. of State Bar, rule 556.) [2] The evidence needed to establish culpability is: (1) the text of the probation conditions in question, which respondent acknowledged was admissible (R.T. p. 7); (2) evidence that respondent had notice of the probation conditions, a fact to which he repeatedly stipulated (R.T. pp. 12, 26);

2. Respondent had already been ordered to comply with standard 1.4(c)(ii) in connection with earlier discipline. (See discussion *post*.)

3. Respondent also argues that, as an indigent, he should have had counsel appointed to represent him at State Bar expense. Respondent's argument does not require extended discussion,

since both we and the Supreme Court have previously expressly rejected it. (*In the Matter of Carr* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 756, 759, fn. 2, citing *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 447-448; see also *Slaten v. State Bar* (1988) 46 Cal.3d 48, 57.) Respondent himself states that he is only raising the issue before the review department in order to preserve it for Supreme Court review.

(3) the text of respondent's two quarterly reports which are at issue, to which respondent did not object except on the technical ground (not raised on review) that they were duplicated elsewhere among the exhibits (R.T. pp. 30-31); and (4) evidence of respondent's willful failure to comply, which is established by respondent's testimony that he intentionally did not include the statement in his reports because of his interpretation of the conditions. (R.T. p. 107.)

[1b] The hearing judge's amended decision contains factual findings on other issues, some of which are based on evidence which respondent challenges, but these findings are not necessary to the decision. Since we can make our own factual findings, and may decline to adopt findings made by the hearing judge which are not necessary, no remand for a new hearing is necessary even if there are evidentiary errors underlying some of the hearing judge's non-essential findings. Respondent's culpability is established by a preponderance of the undisputed evidence (see Bus. & Prof. Code, § 6093 (c)), and we make our own assessment of the appropriate discipline (*post*) based on our independent review of the record.

[3a] We affirm the hearing judge's conclusion that the conditions of respondent's probation did require him to include in each quarterly report a statement that he had abstained from intoxicants and non-prescribed drugs. [4] In so doing, we emphasize that the question of how a court order should be interpreted is a question of law for the court, not a question of fact, and the parties' subjective beliefs as to its meaning are not relevant to the court's interpretation. In other words, whether the language in respondent's probation reports complied with the requirements of the probation conditions is a legal

issue, not a factual one.<sup>4</sup> Moreover, respondent is in error in contending that the probation order, like a contract, should be construed against the drafter. The probation order in this case is an order of the Supreme Court, not a contract. (Cf. *John Siebel Associates v. Keele*, *supra*, 188 Cal.App.3d at p. 565 [stipulated judgments have same effect as judgments after trial on the merits].) The rules of contract interpretation do not apply to court orders.

[3b] As a matter of law, the hearing judge's interpretation of the probation conditions and of respondent's reports was correct. As we stated, *ante*, the abstinence condition required that respondent "abstain from the use of intoxicants and non-prescribed drugs and report that he has done so in *any* report that he is required to render under *these conditions* of probation." (Probation condition 5, emphasis added.) This language unambiguously requires respondent to report his abstinence in *all* reports required by *any* of the various conditions of his probation, including the quarterly reporting condition. Respondent's argument to the contrary strains the plain meaning of the order.

[3c] The hearing judge also correctly found that respondent's reports did not comply with the quoted requirement. Respondent's statements that he had complied with all "valid, legally reasonable and enforceable terms and conditions of [his] probation" did not necessarily mean that he had abstained from intoxicants and non-prescribed drugs, because the reports did not indicate whether respondent viewed that particular probation condition as "valid, legally reasonable and enforceable." Respondent admitted that he did not intend the reports to state that he had complied with the abstinence provision. (R.T. p. 107.) Thus, the language of the reports did not constitute a clear and unequivocal statement of

4. See *John Siebel Associates v. Keele* (1986) 188 Cal.App.3d 560, 565 ("The interpretation of the effect of a judgment is a question of law within the ambit of the appellate court."); see also, e.g., *Moore v. City of Orange* (1985) 174 Cal.App.3d 31, 34-37 (interpreting intent of prior appellate opinion in same case); *Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 146-149 (same); *Widener v. Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, 436-437, 443, disap-

proved on another point by *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 846, fn. 9 (interpreting trial court's order granting new trial); *Charbonneau v. Superior Court* (1974) 42 Cal.App.3d 505, 513-514 (in affirming order holding attorney in contempt for violating order in limine, treating interpretation of order and question whether attorney's acts violated it as questions of law).

respondent's compliance with the abstinence condition.<sup>5</sup> [5 - see fn. 5] Respondent therefore wilfully violated his probation. (See *Potack v. State Bar* (1991) 54 Cal.3d 132, 138-139 [finding wilful violation of probation due to failure to comply with precise language of probation order].)

### 3. Respondent's good faith.

[6] Respondent also argues, in essence, that he should be found to have complied with his probation because he had a good faith belief that his reports were sufficient. We have held that violations of probation require the same mental state to justify discipline as violations of rule 955 of the California Rules of Court. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.) Wilfulness for purposes of such violations "need not involve bad faith; instead, a 'general purpose or willingness' to commit an act or permit an omission is sufficient." (*Ibid.*) Respondent's intentional failure to include the required statement in his reports was clearly wilful for purposes of a probation violation. His subjective intentions are relevant only with regard to aggravation and mitigation. (See discussion *post.*)

## B. Aggravation

The hearing judge found three aggravating factors: (1) respondent's prior disciplinary record; (2) respondent's failure to rectify his misconduct by filing amended probation reports, and (3) respondent's

deliberate, intentional, bad faith failure to comply with his probation conditions. We modify the decision to eliminate one of these factors, to wit, respondent's asserted bad faith.

### 1. Prior discipline.

Other than the disciplinary matter in which the probation conditions at issue in this matter were imposed, the examiner did not introduce any evidence of respondent's prior disciplinary record.<sup>6</sup> [7 - see fn. 6] In her amended decision, the hearing judge took into account as aggravating factors those of respondent's disciplinary priors which were final as of the date of her decision. These consisted of: (1) the matter in which the probation at issue in this case was imposed (*In re Carr, supra*, 46 Cal.3d 1089); (2) an earlier matter (Bar Misc. Nos. 4426, 4575) which was cited in the Supreme Court's opinion in *In re Carr, supra*, and (3) the revocation of respondent's probation in the earlier matter (Bar Misc. Nos. 4426, 4575). All of these prior matters were properly considered in aggravation by the hearing judge (see std. 1.2(b)(i)), and we consider them also.

### 2. Failure to rectify.

[8] The hearing judge considered respondent's refusal to amend his probation reports as a failure to rectify his misconduct and therefore an aggravating factor. (See std. 1.2(b)(v).) Although respondent does not raise this issue in his brief on review, he does contend that his decision not to file amended reports

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5. [5] Respondent argues on review that his reports did contain the required statement, because if the State Bar had proved that he had consumed alcohol during the period covered by the reports, he could have been convicted of perjury based on the reports' statement that respondent had complied with all "valid, legally reasonable and enforceable" probation conditions. Under these hypothetical facts, however, respondent could have avoided a perjury conviction by contending that he did not consider, at the time he made the statement, that the abstinence condition was valid, legally reasonable, and/or enforceable. "Even though a declarer knows his interpretation is contrary to the interpretation found by the person making an order or posing a question, so long as the declarer states the literal truth 'in light of the meaning that he, not his interrogator, attributed to the questions and answers,' it will not support a perjury conviction." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 338, quoting *Bronston v. United States*

(1973) 409 U.S. 352, 359; see also *In re Rosoto* (1974) 10 Cal.3d 939, 949-950.)

6. [7] We have previously discussed the need for the examiner to introduce appropriate documentary evidence of the respondent's priors. (*In the Matter of Kizer* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 87, 93-94.) The examiner in this matter did not have the benefit of the *Kizer* opinion, which was filed after the hearing in this matter, and did not seek to introduce the relevant documents. Accordingly, we notified the parties shortly after oral argument, by letter from the clerk, that we intended to take judicial notice of specified documents from the official State Bar Court records regarding respondent's prior discipline. Neither party having objected, we hereby take judicial notice, under Evidence Code sections 459 and 452, of those specified documents.

was the result of his continued belief that the requested amendments were not required by the terms of his probation. We hold that respondent's belief that he had not violated probation in framing his reports as they originally read was unreasonable, at least once he was advised by the probation department that his interpretation of the probation conditions was incorrect.<sup>7</sup> The hearing judge was therefore correct in treating respondent's failure to file corrected reports as an aggravating factor. (Cf. *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 700; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647.)

### 3. Bad faith.

The third aggravating factor found by the hearing judge was based on the transcript of a municipal court hearing on a criminal probation revocation matter involving respondent, which was introduced by the examiner for the purpose of showing that respondent had used drugs while on his State Bar probation. At the municipal court hearing, respondent's criminal probation officer testified that during June, July and August 1989, respondent's urine samples had tested positive for drugs and respondent had admitted using drugs. At the conclusion of that hearing, the municipal court judge stated from the bench that respondent's criminal court probation would be revoked.

In the matter before us, in the discipline phase of the hearing, the hearing judge took judicial notice of the municipal court transcript "for the sole purpose of looking at the state of mind" of respondent in filing his probation reports. (R.T. p. 139.) No judgment, minute order, or other document regarding the criminal probation revocation proceeding was offered or admitted in evidence. Respondent's criminal probation officer was not called to testify in this disciplinary proceeding, and no other evidence was offered regarding respondent's alleged drug use during mid-1989.

In the amended decision, on the basis of the municipal court transcript, the judge found that "In June 1989, Respondent's urine tested positive for morphine and cocaine" and that "Respondent admitted to his criminal probation officer that in June 1989 he was using drugs." (Amended decision, p. 22.) Based on these factual findings, the judge found as an aggravating factor that "Respondent's 'dirty' urine samples demonstrate that his failure to file the statement required in probation Condition No. 5 with his quarterly reports was deliberate, intentional and in bad faith." (*Id.*, p. 23.)

[9a] Respondent correctly contends that the hearing judge should not have taken judicial notice of the truth of the criminal probation officer's testimony. As one Court of Appeal has put it, there is a "widespread misunderstanding of the scope of judicial notice of court records." (*Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 22.) Taking judicial notice of court records does not mean noticing the existence of facts asserted in the documents in the court file; a court cannot take judicial notice of the truth of hearsay just because it is part of a court record. (*Ibid.*, citing *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914; see also *Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1056.)

[9b] The fact that the municipal court judge revoked respondent's criminal probation on the basis of the probation officer's testimony (no other evidence was offered) does not itself make the truth of every aspect of that testimony judicially noticeable. The transcript does not reflect any specific findings of fact by the municipal court judge, other than an ultimate finding that respondent had violated his probation. Even if it were judicially noticeable that respondent's criminal probation was revoked, the specific factual basis for that revocation is not shown from the transcript, and no findings of fact, judgment, or minute order were introduced to estab-

7. See discussion under mitigation, *post*, regarding the notice given respondent by the probation department on this issue. Respondent contends that the employees who advised him that his reports were incomplete did not have authority to do so under the terms of his probation. This argument misses the point. The employees in question may not have had authority

to make a binding interpretation of respondent's probation conditions, but in failing either to heed their advice or to test it by taking the issue to someone with superior authority, respondent took the risk that he would be found to have been unreasonable in persisting in his own interpretation.

lish what facts were found by the municipal court. "Ordinarily a court may notice the existence of another court's findings of fact and conclusions of law in support of a judgment, because they are conclusive and incontrovertible in character and not reasonably subject to dispute. But judicial notice cannot be taken of hearsay allegations as being true, even those made by a judge-declarant, just because they are part of a court record or file (citations)." (*People v. Tolbert* (1986) 176 Cal.App.3d 685, 690; see also *Day v. Sharp, supra*, 50 Cal.App.3d at p. 914, quoting Jefferson, Cal. Evidence Benchbook (1972) Judicial Notice, § 47.3, p. 840 ["... A court ... can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments."].) [10] Thus, the aggravating factor of bad faith found by the hearing judge rested entirely on inadmissible hearsay evidence. We decline to adopt this finding.

[11] In offering and admitting the criminal probation revocation transcript, neither the examiner nor the hearing judge relied on section 6049.2 of the Business and Professions Code.<sup>8</sup> Because of subsequent developments in this matter, we need not decide whether the testimony in the transcript would have been admissible if offered under this section. On review, after oral argument, respondent moved to augment the record to include a superior court appellate department decision reversing the criminal probation revocation due to the municipal court's refusal to permit respondent's counsel to cross-examine the prosecution's witness (i.e., the probation officer). In his response to this motion, the examiner stated that he did not object to our considering this appellate department decision. We therefore take judicial notice of it, and hold that the transcript could not have been considered under section 6049.2 due to the lack of opportunity for full cross-examination of the criminal probation officer by respondent's defense counsel.

### C. Mitigation

Respondent offered no evidence in mitigation either at the hearing or thereafter, although he was given an opportunity to do so. However, respondent argued that his good faith belief in his interpretation of the probation conditions was a mitigating factor. On review, respondent also seeks to introduce evidence that his more recent quarterly probation reports have included the requisite language regarding compliance with the abstinence provision of respondent's probation conditions. We must also consider the mitigating effect, if any, of the delay in resolving this matter, particularly the 20 months which elapsed between the filing of respondent's timely (and partially meritorious) motion for reconsideration in June 1990, and the filing of the hearing judge's amended decision in January 1992.

#### 1. Respondent's good faith.

[12a] Respondent defends his failure to include the required abstinence language in his probation reports on the basis of his asserted good faith belief that the language was not required under the terms of his probation conditions. While not negating culpability, this contention, if factually correct, would constitute a mitigating factor. (Std. 1.2(e)(ii).)

[12b] In finding that respondent refused to rectify his misconduct, however, the hearing judge implicitly rejected respondent's testimony regarding his good faith. The record supports this finding. As already noted, respondent unreasonably persisted in refusing to include the language in his reports even after being informed by employees of the probation department that his interpretation was not correct.

[13] The hearing judge admitted evidence of the communications to respondent from the probation department on this subject, over respondent's hear-

8. Section 6049.2 provides in pertinent part that "In all disciplinary proceedings . . . the testimony of a witness . . . in a contested civil action or special proceeding to which the [respondent was] a party . . . may be received in evidence, so far as relevant and material to the issues in the disciplinary proceedings, by means of a duly authenticated transcript of

such testimony and without proof of the nonavailability of the witness; provided, the [State Bar Court] may . . . decline to receive in evidence any such transcript . . . when it appears that the testimony was given under circumstances that did not . . . allow an opportunity for full cross-examination."

say objections, on the ground that it was judicially noticeable, but she stated that she was not admitting such evidence for the truth of the statements contained in the documents. This result is correct. Such evidence would not be admissible to show that the probation department's statements were true (i.e., that its interpretation was the correct one). For that purpose, it is hearsay, and in any event the issue is one of law for the court, and the probation department's interpretation is not controlling.<sup>9</sup> However, on the issue of good faith, evidence that respondent had notice of the probation department's interpretation (a fact which respondent admitted at the hearing (R.T. p. 26)) is both relevant and admissible. (Cf. *Potack v. State Bar*, *supra*, 54 Cal.3d at p. 139 [failure to comply with probation conditions after being given opportunity to do so constituted wilful violation of probation].) The probation department material admitted into evidence by the hearing judge is proper evidence on this issue.<sup>10</sup>[14 - see fn. 10]

[12c] This evidence effectively refutes respondent's contention that he acted in good faith based on his interpretation of the probation conditions. If respondent was acting on the basis of an innocent misunderstanding of the import of his probation conditions, he should not have persisted in his interpretation of the probation conditions after receiving advice to the contrary.

## 2. Subsequent probation reports.

Respondent has requested that we augment the record in this matter to include copies of 10 additional quarterly probation reports ("the subsequent reports"), which were filed by respondent after he had received the hearing judge's initial decision in this matter holding that the two reports at issue here

were not in compliance with respondent's probation conditions. Each of the subsequent reports contains the necessary declaration regarding respondent's abstinence from intoxicants and non-prescribed drugs. The examiner does not object to our consideration of the subsequent reports on the issue of mitigation. We therefore grant respondent's request to include the subsequent reports as part of the record in this matter.

[15a] We agree with the examiner that the relevance of the subsequent reports is limited to the issue of mitigation. The examiner contends that respondent's reports should receive no weight on that issue, because of the claimed lack of credibility of respondent's assertions of abstinence. However, the question in this matter is not whether respondent was in fact abstinent, but whether respondent complied with the conditions of his probation with respect to reporting that he had been abstinent. We need not consider respondent's credibility here. The subsequent reports speak for themselves as to what was included therein.

[15b] The subsequent reports establish that respondent did include an abstinence declaration in his probation reports once the hearing judge had ruled that such a declaration was required. This change of behavior on respondent's part is a legitimate mitigating factor, and we consider it as such. (Cf. stds. 1.2(e)(vii), 1.2(e)(viii).) We do not give it very great weight, however, because respondent might have avoided this proceeding (and the ensuing discipline) altogether if he had heeded the advice of the probation department staff on the subject to begin with, instead of continuing to follow his own interpretation of the probation conditions until it had been rejected by a source which respondent considered sufficiently authoritative.

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9. The hearing judge ruled that the probation file materials were relevant to show the process by which the probation department arrived at the decision to issue the notice to show cause in this matter. For that purpose, they would not be admissible, because how the probation department reached its decision to initiate this proceeding is not relevant to any issue in the case. Nonetheless, much of this evidence is relevant to rebut respondent's contention that his misconduct arose out of a good faith misunderstanding of his probation conditions, and for that purpose it is admissible.

10. [14] Respondent objects to the admission of exhibit 10, a report from respondent's probation monitor. As to this particular exhibit, respondent's hearsay objections are well-taken. The probation monitor's report does not establish that respondent had notice of anything unless the probation monitor's recitals of what he told respondent are accepted as true, in violation of the hearsay rule. However, this evidence is merely cumulative on the question of notice, so any reliance on this report by the hearing judge was harmless error.

3. Delay.

[16a] Under the standards, we should take into account in mitigation any “excessive delay in conducting disciplinary proceedings, which delay is not attributable to the [respondent] and which delay prejudiced the [respondent].” (Std. 1.2(e)(ix).) This standard is all the more relevant in probation revocation proceedings, which are required by statute to be expedited. (Bus. & Prof. Code, § 6093 (c).)<sup>11</sup> In this matter, respondent’s timely motion for reconsideration was not finally disposed of until some 20 months after it was filed, primarily for reasons not attributable to respondent.

It does not appear that respondent has been seriously prejudiced by the delay. He has not even raised the issue before us. During the entire pendency of this proceeding, respondent has been suspended from practice in connection with a prior disciplinary matter, subject to a requirement that he comply with standard 1.4(c)(ii) before returning to practice. (*In re Carr*, *supra*, 46 Cal.3d at p. 1091.)

[17] Respondent has not yet sought to terminate such suspension by filing an application for a standard 1.4(c)(ii) hearing. (See Trans. Rules Proc. of State Bar, rules 810-826.) Nothing in the extended pendency of this proceeding delayed or prevented respondent’s filing of such an application.

[16b] Nonetheless, there is one respect in which respondent has been slightly prejudiced by the delay in this matter. After this matter was taken under submission on review, the Supreme Court adopted our recommendation in another matter (“*Carr 1992*”) that respondent be given an additional six-month actual suspension.<sup>12</sup> (*In re Carr* (S028443), minute

order filed November 4, 1992, adopting recommended discipline in *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 108.) The six-month actual suspension in *Carr 1992* must be served before respondent may apply to be relieved from his actual suspension under standard 1.4(c)(ii). If the matter now before us had not been delayed in the hearing department, the actual suspension to be served in this matter would likely have commenced prior to the filing of our discipline recommendation in *Carr 1992*. In *Carr 1992*, we recommended that the actual suspension, while prospective to the entry of the Supreme Court’s order, be concurrent with any other actual suspension then in effect. (*In the Matter of Carr*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 119.) To achieve the same result, as nearly as possible, as if the delay in this matter had not occurred, we will modify the hearing judge’s recommended discipline in the present matter to recommend that the actual suspension herein shall be served *concurrently* with the actual suspension in *Carr 1992*, to the extent that it is still in effect as of the entry of the Supreme Court’s order in this matter.

D. Recommended Discipline

[18a] The notice to show cause in this matter stated that respondent was to “show cause why it should not be recommended to the Supreme Court . . . that the stay of the Order of your suspension entered by the Supreme Court be set aside and revoked and that you be suspended from the practice of law in the State of California for a period of up to two (2) years.” Accordingly, the hearing judge’s recommended discipline—lifting the stay of suspension and imposing the entire stayed suspension—is the maximum that we can recommend.<sup>13</sup>[18b, 19 - see fn. 13]

11. We note that a revision of the State Bar Court’s rules has been proposed which would permit probation revocation to proceed by motion rather than via the filing of a separate proceeding, thus expediting the process.

12. *Carr 1992* was not referenced as prior discipline in the hearing judge’s decision in this matter, evidently because it was not yet final at that time. We see no need to rely on it in aggravation. We take judicial notice of it here only in order to assess its proper temporal relationship to the discipline imposed in the matter now before us.

13. [18b] We need not and do not decide in this matter whether, and if so, under what circumstances, revocation of disciplin-

ary probation may result in a degree of discipline greater than imposition of the entire period of suspension previously stayed. We decide only that the respondent may not be subjected to greater discipline if the notice to show cause does not appropriately charge violations that could result in greater discipline. [19] We note also that because of the limitation on the discipline available in this matter, standard 1.7(b), calling for disbarment in a third disciplinary matter unless compelling mitigation predominates, does not apply. (See also *In the Matter of Carr*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 118 [declining to apply standard 1.7(b) in disciplinary matter arising out of Vehicle Code and drug use convictions, where prior convictions and State Bar discipline all appeared to result directly or indirectly from substance abuse].)

[20a] Despite our modifications of the decision below as to aggravation and mitigation, we concur in the hearing judge's conclusion that the maximum available discipline is appropriate here. Respondent's priors, which include one prior probation violation matter, when combined with the misconduct in this case, show both a persistent problem with drugs and alcohol and a persistent problem with conforming his conduct to the requirements of law and of court orders. [21] In *In the Matter of Carr, supra*, 2 Cal. State Bar Ct. Rptr. 108, which was heard in May 1989, respondent introduced evidence that he had taken steps toward rehabilitation from his drug and alcohol problems. (*Id.* at p. 116.) In this matter, in which the hearing took place in January 1990, no such evidence was introduced.<sup>14</sup> The absence of such evidence is significant since the probation violation at issue here involves respondent's failure to give the State Bar adequate assurance of his compliance with a very significant probation requirement that he abstain from alcohol and drugs. [20b] Moreover, even though standard 1.7(b) is not directly applicable, the policy underlying it, and standard 1.7(a), militate toward imposing severe discipline given respondent's extensive prior record.

[22a] However, there is a technical problem with the hearing judge's recommended discipline. As previously noted, respondent is still on suspension in the underlying discipline matter in which this probation was imposed, because he has not yet complied with the requirement that he make a showing under standard 1.4(c)(ii). The hearing judge recommended (1) that the additional two years of actual suspension imposed in this matter be consecutive to the existing suspension, and (2) that respondent comply with standard 1.4(c)(ii) in this matter, but that only one standard 1.4(c)(ii) hearing be held to meet the requirements in this matter and the prior. These two recommendations are mutually inconsistent. For the suspension in this matter to be consecutive, the prior suspension would have to end before the suspension in this matter can begin. But the prior suspension cannot end until respondent has complied

with standard 1.4(c)(ii). Once he does so, then holding a standard 1.4(c)(ii) hearing at the end of the suspension in this matter would necessitate two separate hearings.

[22b] We resolve this problem by adopting the same approach that we did in respondent's most recent prior matter. (*In the Matter of Carr, supra*, 2 Cal. State Bar Ct. Rptr. 108.) We recommend that the actual suspension in this case be made prospective to the Supreme Court's order in this case, but concurrent with the balance of any and all other actual suspensions which are in effect at the time that the order is entered (including, as already noted, the actual suspension ordered on November 4, 1992). That way, respondent will serve at least two more years on actual suspension after the Supreme Court enters its order in this matter, but at the end of that two years (and assuming no further discipline in the interim), only one standard 1.4(c)(ii) hearing will be needed in order to end all of respondent's previously-imposed actual suspensions.

### III. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court: (1) that the probation ordered in *In re Carr, supra*, 46 Cal.3d 1091 be revoked; (2) that the stay of the two-year suspension imposed by the Supreme Court in that matter be set aside; and (3) that respondent be actually suspended from the practice of law for two (2) years from the entry of the Supreme Court's order herein, and until respondent has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), provided, however, that respondent's compliance with standard 1.4(c)(ii) as ordered in prior disciplinary matters shall also satisfy such requirement in this matter.

We further recommend that the actual suspension in this matter run concurrently with all other actual suspensions in effect as of the entry of the Supreme Court's order herein.

14. Respondent stated at the hearing that he had not had a drink for three and one-half years (R.T. p. 146), but this statement

was made during argument, not as testimony under oath, and respondent said nothing about drug use.

We further recommend that costs be awarded to the State Bar in this matter pursuant to Business and Professions Code section 6086.10.

Because respondent has been continually suspended from the practice of law since November 1988, we do not recommend that respondent be required to comply with rule 955, California Rules of Court. (See *In the Matter of Carr, supra*, 2 Cal. State Bar Ct. Rptr. at p. 119.) [23] For the same reason we need not order that respondent be placed on involuntary inactive enrollment pending a final Supreme Court order in this matter. (Bus. & Prof. Code, § 6007 (d); Trans. Rules Proc. of State Bar, rule 612(b).) We also do not recommend that respondent be required to take and pass any professional responsibility examination, since he took and passed such an examination in August 1989 in connection with prior discipline. (*In the Matter of Carr, supra*, 2 Cal. State Bar Ct. Rptr. at p. 119.)

We concur:

PEARLMAN, P.J.  
STOVITZ, J.