STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

CHARLES FITZGERALD HOWARD

A Member of the State Bar

No. 91-P-04064

Filed June 17, 1993

SUMMARY

In a probation revocation proceeding, respondent was found to have violated the terms and conditions of his disciplinary probation by failing to timely deliver certain financial records pertaining to his former client to a certified public accountant, by failing to show satisfactory proof that he had complied with a certain superior court order, and by failing to submit certain quarterly reports. Respondent's default was entered for failing to file an answer to the notice to show cause, and the hearing judge, after a default hearing, recommended that 90 days of respondent's previously imposed stayed suspension be revoked and that respondent be actually suspended from the practice of law for 90 days. (Hon. Christopher W. Smith, Hearing Judge.)

The Office of Trial Counsel sought review solely on the issue of the degree of discipline, contending that the recommended discipline should be increased to two years actual suspension along with the requirement that respondent demonstrate his rehabilitation, present fitness to practice and present learning and ability in the general law before being relieved of the actual suspension. The review department concluded that the circumstances of the probation violations and the prior discipline, coupled with respondent's failure to participate in the proceeding, warranted increasing the recommended discipline to one year actual suspension with the requirement that respondent demonstrate his rehabilitation, present fitness to practice and present learning and ability in the general law before being allowed to resume the practice of law. The review department also placed respondent on involuntary inactive enrollment for the probation violations, so that the actual suspension would commence immediately.

COUNSEL FOR PARTIES

For Office of Trials: Gene S. Woo

For Respondent: No appearance (default)

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
107 Procedure—Default/Relief from Default
165 Adequacy of Hearing Decision
565 Aggravation—Uncharged Violations—Declined to Find
1711 Probation Cases—Special Procedural Issues

A respondent may be disciplined only for misconduct properly charged in the notice to show cause. In probation revocation matter, where notice to show cause charged that respondent failed to deliver financial records to an accountant, and hearing judge found that respondent failed to render an accounting, respondent was properly found culpable of failing to deliver the records, based on his admission by default of the allegations of the notice to show cause. Respondent's failure to file quarterly reports other than those listed in the notice to show cause could not be used as a basis for culpability or as aggravating circumstances in a default matter.

[2] **106.30 Procedure—Pleadings—Duplicative Charges**
130 Procedure—Procedure on Review
165 Adequacy of Hearing Decision
214.10 State Bar Act—Section 6068(k)
220.00 State Bar Act—Section 6103, clause 1
251.10 Rule 1-110 [former 9-101]

Where respondent violated Supreme Court order imposing disciplinary probation, and hearing judge properly found that respondent had violated statute requiring compliance with probation conditions, respondent was also culpable of violating statute requiring compliance with court orders. However, review department did not need to modify hearing judge's decision to include additional statute and rule violations where review department's recommendation did not depend on whether the misconduct also violated those additional duplicative violations.

[3] **172.19 Discipline—Probation—Other Issues**
802.30 Standards—Purposes of Sanctions
1719 Probation Cases—Miscellaneous

The primary goal of disciplinary probation is the protection of the public and rehabilitation of the attorney.

[4] **171 Discipline—Restitution**
176 Discipline—Standard 1.4(c)(ii)
214.10 State Bar Act—Section 6068(k)
1714 Probation Cases—Degree of Discipline

Where respondent violated conditions of disciplinary probation by failing to turn over former client's files and records, precluding accountant from assessing losses incurred due to respondent's misconduct so that determination could be made regarding restitution, such probation violations were serious and warranted lengthy actual suspension and requirement to prove rehabilitation, learning in the law, and fitness to practice before returning to law practice.

[5] **176 Discipline—Standard 1.4(c)(ii)**
179 Discipline Conditions—Miscellaneous
802.69 Standards—Appropriate Sanction—Generally
1099 Substantive Issues re Discipline—Miscellaneous
2329 Section 6007—Inactive Enrollment for Failure to Answer—Miscellaneous

Normally, the requirement that a disciplined attorney show rehabilitation, fitness to practice, and learning in the law prior to returning to practice is imposed where the attorney's actual suspension is two years or greater. However, where period of time that attorney was enrolled inactive on account of failure to answer notice to show cause, coupled with one-year actual suspension recommended by review department, resulted in attorney being continuously ineligible to practice law for greater than two years, it was appropriate to recommend compliance with such requirement.

[6] **172.19 Discipline—Probation—Other Issues**
176 Discipline—Standard 1.4(c)(ii)
179 Discipline Conditions—Miscellaneous
802.30 Standards—Purposes of Sanctions
802.69 Standards—Appropriate Sanction—Generally
1099 Substantive Issues re Discipline—Miscellaneous

In attorney disciplinary matters, a period of stayed suspension subject to probation conditions is applied primarily as an additional measure to protect the public, courts and legal profession. However, where one-year actual suspension, coupled with requirement that attorney demonstrate rehabilitation, present fitness to practice and present learning in the law before being relieved of his actual suspension, would protect public, courts and profession, review department concluded that stayed suspension and probation were not necessary.

[7 a, b] **106.90 Procedure—Pleadings—Other Issues**
130 Procedure—Procedure on Review
165 Adequacy of Hearing Decision
166 Independent Review of Record
1715 Probation Cases—Inactive Enrollment

In probation revocation matter, where notice to show cause informed respondent who was subject to stayed suspension that he could be enrolled inactive upon finding of probation violation and recommendation of actual suspension therefor, it would have been appropriate for hearing judge to order such inactive enrollment with or without request from Office of Trial Counsel, and where hearing judge had not done so, review department made such order. Under statute providing that inactive enrollment for probation violation shall be credited against ensuing actual suspension, review department recommended that respondent's one-year actual suspension commence as of the date of his inactive enrollment.

[8] **173 Discipline—Ethics Exam/Ethics School**
1719 Probation Cases—Miscellaneous

In probation revocation matter, where order imposing probation had also required that respondent pass professional responsibility examination and respondent had not yet done so, review department recommended that this provision of original discipline order remain in effect notwithstanding revocation of probation.

ADDITIONAL ANALYSIS

Culpability

Found

214.11 Section 6068(k)
220.01 Section 6103, clause 1

Not Found

251.15 Rule 1-110 (former 9-101)

Aggravation

Found

511 Prior Record
611 Lack of Candor—Bar

Discipline

1815.06 Actual Suspension—1 Year

Probation Conditions

1830 Standard 1.4(c)(ii)

Other

1093 Substantive Issues re Discipline—Inadequacy
1751 Probation Cases—Probation Revoked

OPINION

NORIAN, J.:

We review this matter at the request of the Office of Trial Counsel of the State Bar. A hearing judge of the State Bar Court found that respondent, Charles Fitzgerald Howard, was culpable of violating certain conditions of his previously imposed disciplinary probation and recommended that he be actually suspended from the practice of law for a period of 90 days. Respondent's default was entered because he failed to file an answer to the notice to show cause and he has been inactively enrolled as a member of the State Bar since March 1992 pursuant to Business and Professions Code section 6007 (e). The Office of Trial Counsel sought review solely on the issue of the degree of discipline, contending that the recommended discipline should be increased to two years actual suspension along with the requirement pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) ("standard(s)") that respondent demonstrate his rehabilitation, present fitness to practice and present learning and ability in the general law before being relieved of the actual suspension. Although our opinion modifies the hearing judge's decision, we adopt his basic conclusion that respondent is culpable of violating his previously imposed disciplinary probation conditions. Based on our independent review of the record, we conclude that the recommended discipline should be increased to one year actual suspension and until he has satisfied the requirements of standard 1.4(c)(ii) that he demonstrate his rehabilitation, fitness to practice and learning and general ability in the law before being allowed to resume the practice of law.

FACTS

The hearing judge made limited findings of fact. We augment those findings with the following, which we conclude are established by clear and convincing evidence in the record.

A. Previous discipline

Respondent was admitted to practice law in California in June 1949. Effective September 21, 1990, the Supreme Court suspended him from the practice of law for three years, stayed the execution of that suspension, and placed him on probation for three years subject to certain conditions, including actual suspension for the first thirty days of probation. (*In the Matter of Howard* (S015607), minute order filed August 22, 1990.)

The discipline was based on respondent's stipulation to facts and discipline. The stipulated facts revealed that respondent was appointed trustee of a testamentary trust which was established upon the death of Bessie Fouts in 1973. For several years, respondent managed the trust assets in a satisfactory manner and assisted the beneficiary, Margaret Fouts (Fouts), in the handling of her personal financial matters. In 1985, Fouts became concerned with respondent's handling of her financial matters.

In early 1987, Fouts terminated respondent's services and requested an accounting and return of both her personal and the estate files. Respondent agreed to release the files, but did not do so. Fouts made several more unsuccessful attempts during 1987 to have respondent return her files. In November 1987, Fouts filed a malpractice lawsuit against respondent.[1] In December 1987, respondent stipulated that he would, within certain designated time frames, submit his resignation as trustee, deliver Fouts's personal assets to her new attorneys, turn over copies of Fouts's files and records to her new attorneys, and file a petition of resignation and render an accounting of the trust assets. The stipulation was filed with the court and the order attached to the stipulation was signed by the court in December 1987. Respondent released some documents to Fouts's new attorneys, but he did not comply with any of the other terms of the stipulation and order.

In March 1988, Fouts subpoenaed her files and records from respondent. Respondent failed to provide the requested documents by the specified date.

1. The record in the current proceeding does not reveal the outcome of the lawsuit.

In April 1988, respondent released to Fouts certain documents. In January 1989, an order granting a motion to surrender all files and financial records was signed by the judge. The order required respondent to file a petition for resignation, render an accounting, and to turn over copies of the files and related records in his possession forthwith. At the time of the prior State Bar case, respondent had not rendered an accounting of the trust assets or filed a petition for resignation or released additional records and documents in his possession to Fouts.

Respondent failed to cooperate in the State Bar's investigation of this prior matter and he allowed his default to be entered in the formal proceeding. Pursuant to the stipulation to facts and discipline, respondent's default was vacated; his conduct was stipulated to be in wilful violation of sections 6068 (b), 6068 (i), and 6103 of the Business and Professions Code;[2] and he stipulated to the discipline, including the probation conditions, imposed by the Supreme Court.

Among other provisions, the probation conditions required that, within designated time frames, respondent was to have a certified public accountant ("CPA") render an accounting of the trust assets, determine the amount of additional tax liabilities and other financial losses incurred by Fouts as a result of respondent's conduct, and to release to the accountant all records, files, documents, and papers pertaining to Fouts's financial matters; to comply with the January 1989 court order to the extent that he had not done so, and submit proof of his compliance to the probation department; and to submit to the probation department quarterly reports regarding his compliance with the probation conditions no latter than January 10, April 10, July 10, and October 10 of each year of the probation.[3]

B. Present misconduct

In September 1990, the State Bar Court, through its probation department, informed respondent by letter of the name, address and phone number of his probation monitor. Enclosed with the letter were copies of the Supreme Court order and the probation conditions, and other information necessary to comply with the order. In October 1990, respondent met with his probation monitor to discuss the terms and conditions of this probation. Respondent confirmed that he would comply with the various terms. The probation monitor spoke with respondent twice in January 1991, at which time respondent said that he understood the probation conditions and would act upon them. The probation monitor received no further communication from respondent.

The probation department received the CPA's report in February 1991. The report contained an accounting of the trust assets and accounts for certain trust fund checks. However, the report stated that the accountants were not provided with enough information to determine the tax liabilities or other financial losses, if any, incurred by Fouts. As of the date of the current State Bar trial (May 1992), respondent had not furnished the probation department with proof that he complied with the January 1989 court order, and had not filed the quarterly reports that were due January 10 and April 10, 1991.

In June 1991, a notice to show cause was filed alleging that respondent violated the terms and conditions of his disciplinary probation by failing to timely deliver the appropriate financial records to the CPA so "as to render an accounting of losses incurred by client Fouts"; by failing to show satisfactory proof that he had complied with the January 1989 court order; and by failing to submit the quarterly reports that were due January 10 and April 10, 1991. The notice charged that respondent thereby violated sections 6093 (b), 6068 (k), and 6103, and rule 1-110 of the Rules of Professional Conduct of the State Bar.[4]

Respondent participated in a status conference that was held in November 1991. At this conference, respondent informed the hearing judge that he intended

2. All further references to statutes are to the Business and Professions Code unless otherwise noted.

3. The probation conditions also required respondent to pay restitution to Fouts in an amount that was to be determined by the probation department, subject to review of the State Bar Court, based on the CPA report of the losses Fouts incurred as a result of respondent's misconduct. The restitution and proof of payment were to be submitted to the probation department within one year of the effective date of the Supreme Court's order.

4. All further references to rules are to the Rules of Professional Conduct of the State Bar of California, effective May 27, 1989.

to file an answer to the notice to show cause. Respondent did not file an answer and his default was entered in February 1992. (Rule 552.1, Trans. Rules Proc. of State Bar.) Based upon respondent's failure to answer the notice and on application of the Office of Trial Counsel, the hearing judge ordered respondent's involuntary inactive enrollment as a member of the State Bar in March 1992. (See Bus. & Prof. Code, § 6007 (e).)

After a default hearing the hearing judge found respondent culpable of violating the conditions of his probation by failing to render an accounting of the financial losses incurred by the trust; by failing to show satisfactory proof of compliance with the January 1989 court order; and by failing to file the January 10 and April 10, 1992, quarterly reports, "or any other required quarterly reports." The hearing judge concluded that respondent had thereby wilfully violated section 6068 (k), and dismissed the remaining charges. Finding respondent's prior discipline and failure to participate in the disciplinary proceeding as aggravating circumstances and finding no mitigating circumstances, the hearing judge recommended that 90 days of respondent's previously imposed stayed suspension be revoked and that respondent be actually suspended from the practice of law for 90 days.[5]

DISCUSSION

The Office of Trial Counsel argues on review that respondent has failed to demonstrate rehabilitation because he has failed to comply with the conditions of his probation. According to the Office of Trial Counsel, respondent's failure to demonstrate rehabilitation, combined with his failure to participate in the current proceeding, indicates that the discipline recommendation should be increased to two years actual suspension along with the requirement that, before being relieved of his actual suspension, respondent comply with standard 1.4(c)(ii).[6]

A. Culpability

[1a] Before we consider the Office of Trial Counsel's arguments, we must clarify respondent's culpability in this default matter. Respondent may only be disciplined for misconduct properly charged in the notice to show cause. (*Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 36.) As pertinent here, the notice charged that respondent failed to deliver appropriate financial records to the CPA so an accounting of the losses incurred by Fouts could be rendered. The hearing judge found that respondent failed to render an accounting of the financial losses incurred by the trust. Nevertheless, by defaulting, respondent admitted the allegation in the notice that he failed to deliver Fouts's financial records (see rule 552.1, Trans. Rules Proc. of State Bar), and the CPA's accounting (exh. 3) supports this allegation.[7] Thus the record establishes that respondent failed to deliver Fouts's financial records as charged in the notice to show cause and we so modify the hearing judge's decision.

[1b] The notice to show cause also charged that respondent failed to file the quarterly reports that were due January 10 and April 10, 1991. We modify the hearing judge's decision to delete, as a basis for culpability, respondent's failure to file quarterly reports other than these two reports. We also do not consider the uncharged violations as aggravating circumstances in this default matter. (*In the Matter of Heiner* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 301, 316, fn. 32.)

[2] Finally, we adopt the hearing judge's conclusion that respondent wilfully violated section 6068 (k) by failing to comply with the conditions attached to his disciplinary probation. We also note that respondent is culpable of violating section 6103 as his failure to comply with his disciplinary proba-

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5. The hearing judge made no other recommendation. It is not clear whether he intended respondent's probation to be continued, and if so, on the same, or different, terms and conditions.

6. Standard 1.4(c)(ii) provides that "Normally, actual suspensions imposed for a two (2) year or greater period shall require proof satisfactory to the State Bar Court of the member's rehabilitation, present fitness to practice and present learning and ability in the general law before the member shall be relieved of the actual suspension . . . ."

7. The CPA's accounting was included as attachment D to exhibit 3. Exhibit 3 was marked for identification, but was not introduced into evidence. The failure to introduce the exhibit was apparently an oversight as exhibit 3-A, which modified exhibit 3, was introduced. We correct this oversight by admitting exhibit 3.

tion was a wilful violation of the Supreme Court order which imposed the probation. (Cf. *Read* v. *State Bar* (1991) 53 Cal.3d 394, 406; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 575.) Nevertheless, it is not necessary to modify the hearing judge's decision to include this additional violation as our recommendation does not depend on whether the misconduct violated both sections 6068 (k) and 6103. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1059-1060.) For the same reason, we need not address the hearing judge's dismissal of the other duplicative charges.

B. Discipline

Except for *Potack* v. *State Bar* (1991) 54 Cal.3d 132, past probation revocations have been by Supreme Court minute order and therefore do not provide express guidance in determining the appropriate discipline to recommend in such cases. (See *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.) **[3]** However, the primary goal of disciplinary probation is the protection of the public and rehabilitation of the attorney. (*Ibid.*; *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291.)

In *Potack* v. *State Bar*, *supra*, 54 Cal.3d 132, the Supreme Court revoked the attorney's disciplinary probation and imposed two years actual suspension based on the attorney's failure to file a quarterly report which was aggravated by the attorney's failure to timely comply with his restitution probation condition. The misconduct which led to the imposition of Potack's probation included the failure to perform services competently, the failure to maintain a proper client trust account, the failure to promptly refund an unearned advanced fee, and the representation of conflicting interests without written consent. As a result of the original misconduct, the Supreme Court suspended Potack for three years, stayed, with three years probation on conditions including one year actual suspension. (*Id.* at pp. 134-135.)

Potack defaulted in the probation revocation proceeding. He attempted to file a tardy quarterly report, but it was rejected by the probation department because it did not comply with requirements of his probation reporting condition. He did not file an amended report. Potack also made full, though tardy, restitution during the pendency of the probation revocation proceeding. The Supreme Court concluded that the failure to abide by the terms and conditions of the probation was a serious violation that warranted two years actual suspension. (*Id.* at p. 139.)[8]

[4] Respondent's misconduct for which the probation was ordered was not as egregious as Potack's underlying misconduct. However, respondent has not turned over the files and records in his possession as he was ordered to do by the superior court in the malpractice action and by the Supreme Court in the discipline case. In addition, he has not demonstrated that he has complied with the other requirements of the January 1989 order. Although respondent has released to the CPA the files and records regarding the trust, his failure to release Fouts's personal files has precluded the CPA from assessing any losses incurred by Fouts as a result of respondent's misconduct and has precluded a determination of whether disciplinary restitution is appropriate. These probation violations are serious and warrant a lengthy period of actual suspension. In light of respondent's underlying misconduct and the seriousness of the probation violations, we conclude that the purpose of disciplinary probation will best be served by increasing the recommended discipline from three months actual suspension to one year actual suspension and imposing a standard 1.4(c)(ii) requirement prior to his resumption of practice.

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8. Our opinion in *In the Matter of Potack*, *supra*, 1 Cal. State Bar Ct. Rptr. 525, preceded the Supreme Court's opinion regarding the same attorney and was based on a second probation revocation notice to show cause which charged Potack with violating his probation by failing to make the restitution which was considered as an aggravating circumstance in *Potack* v. *State Bar*. We recommended that if the Supreme Court imposed a two-year or greater actual suspension in *Potack* v. *State Bar*, taking into account the belated restitution as an aggravating circumstance, that no additional discipline be imposed in *In the Matter of Potack*. (*In the Matter of Potack*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 541.) The Supreme Court imposed two years actual suspension in *Potack* v. *State Bar*, and accepted our recommendation that no additional discipline be imposed in *In the Matter of Potack*. (*In the Matter of Potack* (Bar Misc. 5066), minute order filed November 6, 1991.)

[5] Normally, the requirement that a disciplined attorney comply with standard 1.4(c)(ii) is imposed where the actual suspension is two years or greater. Respondent has been inactively enrolled as a member of the State Bar since March 1992. Coupled with the one-year actual suspension we recommend, respondent will thus have been continuously ineligible to practice law for greater than two years by the time the one-year suspension terminates. It is therefore appropriate to recommend that respondent comply with standard 1.4(c)(ii).

[6] We have previously noted that in attorney disciplinary matters, a period of stayed suspension subject to probation conditions "is applied primarily as an additional measure to protect the public, courts and legal profession." (*In the Matter of Marsh, supra*, 1 Cal. State Bar Ct. Rptr. at p. 298.) We do not believe stayed suspension and probation are necessary in the present case. The one-year actual suspension coupled with the requirement, pursuant to standard 1.4(c)(ii), that respondent demonstrate his rehabilitation, present fitness to practice and present learning in the law before he is relieved of his actual suspension will protect the public, courts and profession.

[7a] We also consider that it would have been appropriate for the hearing judge, with or without a request from the Office of Trial Counsel, to have ordered respondent's inactive enrollment pursuant to section 6007 (d). Under the provisions of this subdivision, the State Bar Court may order the involuntary inactive enrollment of an attorney: where the attorney is under a suspension order, any portion of which has been stayed during a period of probation; where we find that the probation has been violated; and where we recommend to the Supreme Court that the attorney receive an actual suspension on account of the probation violation. The notice to show cause in the present matter informed respondent that he could be enrolled inactive under this statute, but the Office of Trial Counsel did not request, and the hearing judge did not make, such an order. Nevertheless, the requirements of the subdivision are satisfied in this case and we therefore order respondent's inactive enrollment pursuant to section 6007 (d).

[7b] We also note that section 6007 (d) provides that any period of inactive enrollment under the subdivision shall be credited against the period of actual suspension ordered. We therefore recommend that respondent's period of actual suspension commence as of the date of his inactive enrollment under section 6007 (d).

FORMAL RECOMMENDATION

We recommend that the probation ordered by the Supreme Court in respondent's underlying disciplinary matter (S015607) be revoked; that the stay of the two-year suspension be set aside; and that respondent be actually suspended for one year from the effective date of his inactive enrollment pursuant to the provisions of section 6007 (d) of the Business and Professions Code, and until he 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) of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V).

We further recommend that respondent be ordered to comply with the provisions of rule 955, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the date the Supreme Court order is effective. **[8]** As respondent's State Bar membership record indicates that he was suspended for failing to take and pass the professional responsibility examination as ordered by the Supreme Court (S015067), we also recommend that this provision of the Supreme Court's August 1990 order remain in effect. We also recommend that the State Bar be awarded costs in this matter pursuant to section 6086.10 of the Business and Professions Code.

Finally, we order that respondent be immediately enrolled as an inactive member of the State Bar pursuant to the provisions of section 6007 (d) of the Business and Professions Code.

We concur:

PEARLMAN, P.J.
STOVITZ, J.