

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT G

A Member of the State Bar

No. 89-O-12350

Opinion and Order Denying Request for Reconsideration, filed September 22, 1992

SUMMARY

The State Bar Office of Trials requested that the review department reconsider its conclusion that the circumstances of this case, involving respondent's failure to provide notice of inheritance taxes owed by one of his clients, did not justify ordering respondent to take and pass the California Professional Responsibility Examination as a condition of his private reproof. The Office of Trials argued that any attorney found culpable of violating the Rules of Professional Conduct or State Bar Act should be required to take and pass the examination.

The review department denied the motion for reconsideration, noting that Supreme Court precedent does not require that the examination be routinely ordered in cases not involving misconduct serious enough to warrant suspension, and that conditions on reprovals can only be imposed based on a finding that they will serve the protection of the public and the interests of the respondent. In this matter, no authorities or previously overlooked evidence indicated the appropriateness of ordering respondent to take the examination. Respondent had already changed his office procedures to prevent a repeat of the misconduct which resulted in his private reproof, and the examination was not needed for public protection or rehabilitation.

COUNSEL FOR PARTIES

For Office of Trials: Bruce H. Robinson

For Respondent: No appearance

HEADNOTES

- [1] **163 Proof of Wilfulness**
 204.10 Culpability—Wilfulness Requirement
 270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

A finding of a wilful violation of a Rule of Professional Conduct does not necessarily indicate intent to violate ethical guidelines, but merely an intent to perform an act which results in a violation. Even where there was no evidence of intentional misconduct, evidence of repeated acts of negligence

justified finding respondent culpable of wilfully violating the rule regarding failure to perform services competently.

- [2] **173 Discipline—Ethics Exam/Ethics School**
 179 Discipline Conditions—Miscellaneous
 194 Statutes Outside State Bar Act
 1099 Substantive Issues re Discipline—Miscellaneous

The California Professional Responsibility Examination, when appropriately ordered, does assist in the rehabilitation of an errant attorney and, as a general proposition, the examination is an effective tool to measure an attorney's understanding and appreciation of the rules and statutes which are designed to protect the public and the best interests of the profession. However, when imposed as a condition of a reproof, the examination may only be required based on a finding that the protection of the public and the interests of the attorney will be served thereby. (Cal. Rules of Court, rule 956(a).)

- [3 a, b] **173 Discipline—Ethics Exam/Ethics School**
 1099 Substantive Issues re Discipline—Miscellaneous

No decisional law requires automatic imposition of a requirement to take and pass a professional responsibility examination as a condition of a reproof. Routinely requiring the examination should be limited to cases in which the attorney's behavior has so far deviated from ethical norms as to warrant the serious step of either actual or wholly stayed suspension from practice.

- [4] **173 Discipline—Ethics Exam/Ethics School**

Where the primary problem which caused respondent's misconduct was inadequate law office management, and respondent had already taken appropriate steps to ensure that future office management practices would greatly reduce the risk of a similar violation, ordering respondent to pass the California Professional Responsibility Examination as a condition of respondent's private reproof would not be appropriate for public protection or have rehabilitative value.

ADDITIONAL ANALYSIS

[None.]

OPINION AND ORDER DENYING REQUEST FOR RECONSIDERATION

NORIAN, J.:

The State Bar Office of Trials has requested that we reconsider our conclusion in the opinion in this proceeding filed on August 18, 1992, holding that the circumstances of this case involving failure of an attorney to provide notice of inheritance taxes owed by one of his clients did not justify ordering him to take and pass the California Professional Responsibility Examination ("CPRE") as a condition of his private reproof. The Office of Trials argues that it is the position of that office that "the respondent in this particular case, who has been found culpable of wilfully violating former rule 6-101(A)(2), and any member found culpable of violating any Rule of Professional Conduct or section of the State Bar Act should be required to take and pass the CPRE."

[1] As discussed in our opinion, a finding of a wilful violation of a rule does not necessarily indicate intent to violate ethical guidelines, but merely an intent to perform an act which results in a violation. Here, there was no evidence of intentional misconduct, but sufficient evidence of repeated acts of negligence to justify culpability. (*In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179.)

[2] We noted in our opinion that the CPRE, when appropriately ordered, does assist in the rehabilitation of an errant attorney. We agree with the Office of Trials that, as a general proposition, the examination is an effective tool to measure a respondent's understanding and appreciation of the rules and statutes which are designed to protect the public and the best interests of the profession. However, as the Office of Trials itself points out, when imposed as a condition of reproof, it may only be based on a finding in the particular case "that protection of the public and the interests of the attorney will be served thereby." (Cal. Rules of Court, rule 956(a).)

The requirement of a finding linking the particular condition imposed to public protection and rehabilitation of the attorney mirrors the requirement

of section 6093 of the State Bar Act which requires that "Whenever probation is imposed by the State Bar Court or by the Office of Trial Counsel with the agreement of the respondent, any conditions may be imposed which will reasonably serve the purposes of the probation." It also mirrors the requirement of a reasonable relationship between a criminal probation condition and criminal conduct. (See *People v. Lent* (1978) 15 Cal.3d 481, 486 [requiring that terms of criminal probation reasonably relate to the crime or future anticipated criminality of a criminal defendant].)

[3a] In urging us to reconsider our decision in this case, the Office of Trials acknowledged that no decisional law expressly requires automatic imposition of the examination as a condition for a reproof resulting from any violation of the Rules of Professional Conduct or State Bar Act. Indeed, it points to no opinion where the Supreme Court has suggested or implied that a professional responsibility examination should be ordered in every case. To the contrary, we read the Supreme Court's seminal opinion in *Segretti v. State Bar* (1976) 15 Cal.3d 878, 890 as strongly suggesting that routinely requiring the taking of a professional responsibility examination should be limited to more serious misconduct than that which occurred here. Thus, in *Segretti*, the Supreme Court stated that the same rationale that supported the 1975 change in bar admissions procedures to require all new admittees to take a professional responsibility examination applied to "members of the bar whose behavior has so far deviated from ethical norms as to warrant the serious step of suspension from practice." (*Id.*)

[3b] We have interpreted *Segretti* to require the examination to be ordered routinely for respondents with no prior record in all cases including either actual or wholly stayed suspension. However, the Supreme Court and State Bar Court have declined to order the examination to be taken as part of the discipline ordered in a suspension case when the examination was recently taken and passed by a respondent in compliance with a prior disciplinary order. (See, e.g., *In the Matter of Trousil* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 229, 244, recommended discipline adopted by order of the Supreme Court, April 24, 1991 (S019598).)

We have also previously considered in an unpublished opinion a similar argument to that urged here.¹ In that case, the respondent had pled guilty to the misdemeanor offense of possession of a controlled substance. At the hearing, respondent had objected to the examiner's position that he should be ordered to take the professional responsibility examination, contending that no nexus existed between requiring the examination and his misconduct. The referee agreed with the respondent and ordered a public reproof with unsupervised probation, but no educational condition. On review, the examiner saw no necessity for probation, but argued that respondent should have been required to take the examination as a condition of his reproof. We concluded that in light of mitigation evidence and precedent, that a private reproof was more appropriate than a public reproof. On the issue of conditions, we noted the recent adoption of an "Ethics School" program by the Office of Trials which included segments on substance abuse and stress management. We concluded that Ethics School was more appropriate as a condition than the taking of the professional responsibility examination which had no component that related to the offense which caused the respondent to be disciplined. We therefore ordered a private reproof with the condition that the respondent attend Ethics School.

[4] Here, the primary problem which caused the misconduct was inadequate law office management. In our original opinion, we concluded that the respondent had already taken appropriate steps to ensure that his office management practices in the future would greatly reduce the risk of a similar violation. Respondent was a recent admittee at the time he handled the case which resulted in the imposition of discipline. Unlike Segretti, respondent had to take and pass the national Professional Responsibility Examination in order to be certified for admission to practice law in the first place. The Office of Trials has not directed our attention to any authorities or any overlooked evidence that would indicate the appropriateness of ordering the respon-

dent to take the CPRE for public protection or that would indicate its rehabilitative value for this respondent who has already changed his office procedures to prevent a repeat of the misconduct which resulted in his private reproof.

Since there appears to be no basis for reconsideration of our opinion, the State Bar Office of Trials' motion for reconsideration is DENIED.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

1. In that case, the examiner requested review of the referee decision and waived oral argument. Only two judges participated in the ensuing review department opinion. In accordance

with court policy, the opinion was not published. However, the proceeding remained public and the resulting private reproof was anonymously summarized in *California Lawyer*.