PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES



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| In the Matter of<br>**SCOTT JOHN FLORES,**<br>**Member No. 159494,**<br>A Member of the State Bar. | **Case No. 05-PM-04647-RAH**<br>**ORDER GRANTING MOTION TO REVOKE PROBATION & ORDER OF INACTIVE ENROLLMENT** |

This matter is before the court on the motion to revoke probation that the State Bar's Office of Probation (State Bar) filed on October 24, 2005. In its motion, the State Bar charges that respondent Scott John Flores[1] violated the disciplinary probation that the Supreme Court imposed on him in its November 17, 2004, order in *In re Scott J. Flores on Discipline*, case number S127408 (State Bar Court case number 03-O-04261-PEM) (hereafter the Supreme Court's November 2004 order) by failing to submit, to the State Bar, his first three probation reports, which were due April 10, July 10, and October 10, 2005, respectively.

Supervising Attorney Terrie Goldade represented the State Bar. Respondent did not file a response to the State Bar's motion or otherwise participate in this proceeding even though the State Bar properly served a copy of its motion on him by certified mail, return receipt requested, at his latest address shown on the official membership records of the State Bar (hereafter official address)

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[1]Respondent was admitted to the practice of law in the State of California on June 15, 1992, and has been a member of the State Bar since that time. He has one prior record of discipline.

The court notes, sua sponte, that respondent has been continually on actual suspension since September 16, 2005, because he failed to pay his annual State Bar membership fees. An attorney's actual suspension for nonpayment of State Bar fees is neither disciplinary in nature nor a prior record of discipline. (Rules Proc. of State Bar, rule 216(a).)

(Bus. & Prof. Code, § 6002.1, subd. (c);[2] Rule Proc. of State Bar, rules 60(a), 563(a); see also *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108 [service under section 6002.1 is deemed complete when mailed even if the respondent attorney does not receive it]) and even though he has actual knowledge of this proceeding.[3] On December 8, 2005, the court took the State Bar's motion under submission for ruling without a hearing.

The State Bar requests that this court recommend that respondent's probation be revoked and that respondent be actually suspended from the practice of law for one year. In addition, the State Bar contends that this court "should order Respondent placed on involuntary inactive enrollment until the suspension is effective."

As discussed below, the court finds, by preponderance of the evidence (§ 6093, subd. (c); Rules Proc. of State Bar, rule 561), that respondent wilfully violated the conditions of his probation as charged in State Bar's the motion. Accordingly, the court will grant the State Bar's motion and recommend that the Supreme Court revoke respondent's probation, lift the stay of execution of the one-year suspension it previously imposed on respondent in its November 2004 order, and actually suspend respondent from the practice of law for one year. In addition, the court will sua sponte recommend that the Supreme Court (1) again place respondent on probation for two years on almost all of the same conditions that it previously imposed on him in its November 2004 order and (2) order respondent to comply with California Rules of Court, rule 955. Finally, the court will order

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[2]Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

[3]On October 31, 2005, the Clerk of the State Bar Court properly served a copy a notice of assignment filed in this matter on that same day on respondent by first class mail at his official address. The court finds that respondent received that copy. (Evid. Code, § 641 [mailbox rule – a correctly addressed and properly mailed letter is presumed to have been received in the ordinary course of mail]). This finding is supported by the fact that the foregoing copy was not returned undelivered to the clerk by the United States Postal Service (hereafter Postal Service).

Furthermore, on November 29, 2005, Supervising Attorney Goldade notified the clerk that respondent had asked her for an extension of time until Friday, December 2, 2005, to file his response to the State Bar motion. Respondent, however, did not file a response by December 2. Instead, he telephoned the clerk on Monday, December 5, 2005, and left a voicemail message stating that he decided not to file a response to the State Bar's motion. The clerk informed both the court and Supervising Attorney Goldade of respondent's voicemail message.

that respondent be involuntarily enrolled as an in active member of the State Bar under section 6007, subdivision (d) as requested by the State Bar.

## I. Findings of Fact

Respondent's failure to file a response to the State Bar's motion constitutes an admission of the factual allegations contained in the motion and its supporting documents. (Rules Proc. of State Bar, rule 563(b)(3).)[4]

In the Supreme Court's November 2004 order, which became effective December 17, 2004, (Cal. Rules of Court, rule 953(a)), respondent was placed on one year's stayed suspension and two years' probation on conditions, including a thirty-day period of actual suspension. The Supreme Court imposed this discipline, including each of the conditions of probation, on respondent in accordance with a stipulation as to facts, conclusions of law, and disposition that he entered into with the State Bar and that the State Bar Court approved in an order filed on July 14, 2004, in case number 03-O-04261-PEM (hereafter the parties' July 2004 stipulation).

The admitted factual allegations in the State Bar's motion establish that the Clerk of the Supreme Court promptly mailed a copy of the Supreme Court's November 2004 order to respondent after it was filed. (Accord, Cal. Rules of Court, rule 29.4(a); Evid. Code, § 644.) Even though there is no allegation or direct evidence establishing that respondent actually received that copy of the Supreme Court's November 2004 order, the court finds that respondent actually received it. (Evid. Code, § 641 [mailbox rule].)

Moreover, on December 2, 2004, the State Bar mailed a letter together with a copy of the Supreme Court's November 2004 order to respondent at his official address. In that letter, the State Bar confirmed each of the probation conditions imposed on respondent under the Supreme Court's November 2004 order. The court finds that respondent received that letter and that copy of the Supreme Court's November 2004 order. (*Ibid.*) This finding is supported by the fact that the foregoing letter and copy were not returned undelivered to the State Bar by the Postal Service.

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[4]The motion's supporting documents, all of which are attached to the motion, are a declaration of State Bar Probation Deputy Cheryl Chisholm and exhibits 1, 2, and 3. Each of these documents is admitted into evidence. (Rules Proc. of State Bar, rule 563(e).)

One of the probation conditions imposed on respondent under the Supreme Court's November 2004 order requires that respondent submit to the State Bar on every January 10, April 10, July 10, and October 10, a written probation report stating under penalty of perjury under the laws of this state whether he has complied with the Rules of Professional Conduct, the State Bar Act, and all the conditions of his probation during the preceding calender quarter. The court finds that, as charged, respondent failed to file his first three probation reports, which were due on April 10, July 10, and October 10, 2005, respectively.

On May 25, 2005, the State Bar mailed, to respondent at his official address, a courtesy letter notifying him that it had not received his first probation report, which was due April 10, 2005. The court finds that respondent received that letter. (Evid. Code, § 641 [mailbox rule].) That finding is supported by the fact that the foregoing courtesy letter was not returned undelivered to the State Bar by the Postal Service. At least as of October 24, 2005, the date the State Bar filed its motion to revoke probation, respondent had still not filed any of his first three probation reports.

**II. Conclusions of Law**

To establish culpability for a probation violation charged in a probation revocation proceeding, the State Bar must prove, by a preponderance of the evidence, the text of probation condition that the attorney is charged with violating, that the attorney had notice of that probation condition, and that the attorney willfully failed to comply with it. (*In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244, 251-252.) Willfulness in this context does not require bad faith; rather it requires only a " 'general purpose or willingness' to commit an act or permit an omission." (*In the Matter of Potack* (Review Dept. 1991)1 Cal. State Bar Ct. Rptr 525, 536.)

The court finds that the State Bar proved, by a preponderance of the evidence, (1) the text of the probation condition that respondent is charged with violating, (2) that respondent had notice of that probation condition, and (3) that respondent willfully failed to comply with that condition when he failed to file his first three probation reports, which were due on April 10, July 10, and October 10, 2005. Respondent's willful failure to file these three reports warrant the revocation of his probation. (§ 6093, subd. (b).)

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## III. Aggravating Circumstances

### A. Prior Records of Discipline

Respondent has one prior record of discipline, which is an aggravating circumstance. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (hereafter standards), std. 1.2(b)(i).) Respondent's prior record is, of course, the Supreme Court's November 2004 order. The parties' July 2004 stipulation establishes that, in his prior record, respondent willfully violated section 6068, subdivision (a) (obey the laws of this state), section 6125 (unauthorized practice of law), section 6106 (moral turpitude), and section 6068, subdivision (m) (failure to communicate significant developments) by making two court appearances, negotiating a plea bargain, and signing documents as counsel of record for a party and then filing the documents with a court. At the time respondent committed those acts, he had actual knowledge that he was not entitled to practice law because he had been involuntarily enrolled as an inactive member of the State Bar because he failed to comply with his Minimum Continuing Legal Education requirements. In addition, he committed those acts without ever informing his clients, opposing counsel, or the court that he was not entitled to practice law. This prior misconduct was aggravated because it harmed significantly a client, the public, or the administration of justice (std. 1.2(b)(iv)) and was mitigated by the lack of a prior record (std. 1.2(e)(i)).

### B. Multiple Acts of Misconduct

The fact that respondent has been found culpable of three separate acts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

### C. Indifference Towards Rectification of Misconduct

Respondent failed to promptly file his probation reports in response to either the State Bar's May 25, 2005, courtesy notice and the State Bar's motion to revoke probation.[5] Respondent's continued refusal to file these three reports not only defies understanding, but also clearly establishes his indifference towards rectification, which is a very serious aggravating circumstance. (Std.

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[5]In light of the fact that the State Bar has not notified the court to the contrary, the court presumes that respondent has still not filed any of his first three probation reports.

1.2(b)(v); *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 702.)

## IV. MITIGATING CIRCUMSTANCES

There is no evidence of any mitigating circumstance in the record.

## V. DISCIPLINE DISCUSSION

The first discussion of the origin and use of probation in attorney disciplinary proceedings is in *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 298-300. There the review department noted that the first reported use of attorney disciplinary probation by the Supreme Court was in 1963. (*Id.* at p. 298.) The review department also noted that, since 1963, the use of attorney disciplinary probation has increased with such frequency that probation is now imposed in almost every disciplinary proceeding in which either actual or stayed suspension is ordered. (*Ibid.*) Moreover, the review department concluded that the primary aims of attorney disciplinary probation are (1) protection of the public and (2) rehabilitation of the attorney. (*Ibid.*) "It is for this reason that discipline imposed for the willful violation of probation often calls for substantial discipline as a reflection of the seriousness with which compliance with probationary duties is held." (*In the Matter of Laden* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 678, 686.) In fact, an attorney's compliance with the conditions of probation imposed on him or her is so fundamental to rehabilitation that, when an attorney who has been actually suspended until the attorney establishes rehabilitation, present fitness to practice, and present learning and ability in the general law under standard 1.4(c)(ii) seeks relief from actual suspension, the attorney, at a minimum, must show, among other things, strict compliance with all probation conditions. (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 581.)

In determining the appropriate level of discipline, "the greatest amount of discipline would be merited for violations which show a breach of a condition of probation significantly related to the misconduct for which probation was given. This would be especially significant in circumstances raising a serious concern about the need for public protection or showing the probationer's failure to undertake rehabilitative steps. Conversely, the least amount of discipline would appear appropriate for a violation of a less significant condition in circumstances which did not call into question either the need for public protection or the attorney's progress toward rehabilitation. Also

to be considered are the total length stayed suspension which could be imposed as an actual suspension and the total amount of actual suspension earlier imposed as a condition of the discipline at the time probation was granted." (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.) Also relevant are the attorney's recognition of his misconduct and his efforts to comply with the conditions. (*Ibid.*) Furthermore, when an attorney repeatedly violates the same condition of probation, as respondent did with respect to his quarterly reporting probation condition, the gravity of each violation increases and warrants greater discipline. (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 531.)

Attorney disciplinary probation is effective "only when the attorneys placed on probation are effectively monitored to ensure (1) that they do not again engage in misconduct and (2) that they are undertaking to conform their conduct to the ethical strictures of the profession. (Citations.)" (*In the Matter of Weiner* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763.) It is in that context that the review department has repeatedly held that "an attorney probationer's filing of quarterly probation reports is an important step towards the attorney's rehabilitation" (*ibid.*, and cases there cited)[6] and an important means of protecting the public as it permits "the State Bar to monitor [the attorney's] compliance with the State Bar Act and the Rules of Professional Conduct" (*In the Matter of Meyer, supra*, 3 Cal. State Bar Ct. Rptr. at p. 705, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605). In light of the foregoing, the court concludes that respondent's continued unwillingness or inability to comply with his quarterly reporting probation condition raises serious public protection concerns and establishes that respondent is not seriously engaged in the rehabilitative process. Accordingly, the court further concludes that respondent's present probation violations warrant one year's actual suspension, which is the greatest level of actual suspension that the court may recommend under rule

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[6]At a minimum, quarterly probation reporting is an important step towards an attorney probationer's rehabilitation because it requires the attorney, four times a year, to review and reflect upon his professional conduct in light of the minimum professional standards that are set forth in the State Bar Act and the Rules of Professional Conduct of the State Bar. In addition, it requires the attorney, four times a year, to review his conduct to ensure that he complies with all of the conditions of his disciplinary probation. (*In the Matter of Weiner, supra*, 3 Cal. State Bar Ct. Rptr. at p. 763.)

562 of the Rules of Procedure of the State Bar.

In addition, the court concludes that just placing respondent on actual suspension for one year is inadequate to protect the public and effectuate respondent's rehabilitation. When it disciplined respondent with actual suspension and probation in its November 2004 order, the Supreme Court implicitly held that respondent's compliance with the terms of his 30 days' actual suspension and with the conditions of probation are necessary to effectuate the respondent's rehabilitation and to permit him to become a productive attorney once again. (Cf. *In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 578.) The court concludes that it is necessary to require respondent to demonstrate that he is now willing and capable of engaging in the rehabilitative process by complying with the probation conditions that were originally imposed on him in the Supreme Court's November 2004 order (and to which he stipulated) by imposing those same conditions on him prospectively. (Cf. *In the Matter of Meyer, supra*, 3 Cal. State Bar Ct. Rptr. at p. 705.) To conclude otherwise would be inconsistent with the foregoing authorities. In sum, even though the State Bar has not requested it, the court will also recommend that respondent again be placed on probation for two years on the same conditions that were originally imposed on him in the Supreme Court's November 2004 order.

The State Bar has not requested that the court recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (hereafter MPRE). Respondent was ordered to take and pass the MPRE in the Supreme Court's November 2004 Order. Even if respondent's probation is revoked, that portion of the Supreme Court's November 2004 order will remain in effect, and respondent will be actually suspended if he fails to take and pass the MPRE (see *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891 fn. 8). Moreover, all of the acts of misconduct found in this present proceeding are probation violations, a subject that most likely is not tested on the MPRE. Thus, the court concludes that a MPRE requirement is not necessary and does not recommend one.

## VII. Order Granting Motion and Discipline Recommendation

The motion to revoke probation filed by the State Bar's Office of Probation on October 24, 2005, is GRANTED. The court RECOMMENDS that the probation imposed on respondent Scott

John Flores by the Supreme Court in its November 17, 2004, order in *In re Scott J. Flores on Discipline*, case number S127408 (State Bar Court case number 03-O-04261) be revoked; that the stay of execution of the one-year suspension previously imposed on Flores in that case be lifted; that Flores be actually suspended from the practice of law in the State of California for one year with credit being given for the period of time he is involuntarily enrolled as an inactive member of the State Bar of California under the court's order of inactive enrollment below (Bus. & Prof. Code, § 6007, subd. (3)); and that respondent be placed on a new two-year period of probation on the same probation conditions previously imposed on him under the Supreme Court's November 17, 2004, order except: (1) that the previous condition requiring that respondent be actually suspended for 30 days is not imposed; (2) that, if respondent has timely complied with the previous condition requiring that he attend and complete the State Bar's Ethics School, he is not required to attend Ethics School again; and (3) that, if respondent has not timely complied with the previous Ethics School probation condition, he is required to attend and complete Ethics School and ordered not to claim any Minimum Continuing Legal Education credit for attending and completing that school. (See Rules Proc. of State Bar, rule 3201.)

## VIII. Rule 955 & Costs

The court further recommends that Flores be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's order in this matter.[7]

Finally, the court recommends that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that

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[7]When an attorney has been ordered to comply with rule 955, the attorney must file a rule 955(c) affidavit even if he or she has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341). Furthermore, an attorney's failure to fully and timely comply with rule 955 is extremely serious misconduct for which *disbarment* is ordinarily the sanction ordered. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; see also Bus. & Prof. Code, § 6126, subd. (c) [failure to obey a Supreme Court order to comply with rule 955 is also a crime punishable by imprisonment in the state prison or county jail].)

such costs be payable in accordance with Business and Professions Code section 6140.7.

## IX. Order of Inactive Enrollment

The requirements for inactive enrollment under Business and Professions Code section 6007, subdivision (d)(1) have been met -- respondent is subject to a stayed suspension, and this court has found that he violated the conditions of his probation and is recommending that he be actually suspended from the practice of law because of those violations. Therefore, it is ordered that Scott John Flores be involuntarily enrolled as an inactive member of the State Bar of California under section 6007, subdivision (d)(1), effective immediately upon the service of this order on the parties by the State Bar Court Clerk (Rules Proc. of State Bar, rule 564). Unless otherwise ordered by the State Bar Court or the Supreme Court, Flores's involuntary inactive enrollment under this order will terminate, without further court order, on the earliest of the effective date of the Supreme Court's order in this matter or one year after the service of this order. (See Bus. & Prof. Code, § 6007, subd. (d)(2); Rules Proc. of State Bar, rule 564.)

Dated: December 23, 2005.

RICHARD A. HONN
Judge of the State Bar Court

# CERTIFICATE OF SERVICE

**[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]**

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on December 23, 2005, I deposited a true copy of the following document(s):

**ORDER GRANTING MOTION TO REVOKE PROBATION & ORDER OF INACTIVE ENROLLMENT**

in a sealed envelope for collection and mailing on that date as follows:

[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**SCOTT J FLORES**
**ATTORNEY AT LAW**
**1860 6TH AVE**
**SAN DIEGO, CA 92101 2715**

[X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

**Terrie Goldade, Supervising Attorney Office of Probation, Los Angeles**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **December 23, 2005**.

**Milagro del R. Salmeron**
Case Administrator
State Bar Court