

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No. 09-PM-13203-LMA
)	
GREGG LEE KAYS,)	
)	ORDER GRANTING MOTION TO
Member No. 82052,)	REVOKE PROBATION AND FOR
)	INVOLUNTARY INACTIVE
<u>A Member of the State Bar.</u>)	ENROLLMENT

I. Introduction

In this probation revocation proceeding, respondent **Gregg Lee Kays** is charged with violating his probation conditions imposed by the California Supreme Court. The Office of Probation of the State Bar of California (Office of Probation) seeks to revoke his probation, to impose upon respondent the entire period of suspension previously stayed, and to involuntarily enroll respondent as an inactive member of the State Bar.

The court finds, by preponderance of the evidence, that respondent has violated his probation conditions and hereby grants the motion. The court recommends, among other things, that respondent’s probation be revoked; that the previously stayed one year suspension be lifted; and that respondent be actually suspended for one year.

II. Pertinent Procedural History

On June 18, 2009, the Office of Probation filed and properly served a motion to revoke probation on respondent, under rules 60 and 563(a) of the Rules of Procedure of the State Bar of

California.¹ The motion was mailed to respondent's official membership records address. Respondent did not file a response within 20 days of the service of the motion, as required by rule 563(b)(1).

The court took this matter under submission on July 13, 2009.

III. Findings of Fact and Conclusions of Law

All factual allegations contained in the motion to revoke probation and supporting documents are deemed admitted upon respondent's failure to file a response. (Rules Proc. of State Bar, rule 563(b)(3).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on November 29, 1978, and has since been a member of the State Bar of California.

B. Probation Conditions in Supreme Court Case No. S164475

On August 27, 2008, in Supreme Court case No. S164475, the California Supreme Court ordered that:

1. Respondent be suspended from the practice of law for one year, that execution of the suspension be stayed, and that he be placed on probation for two years, including 30 days' actual suspension, as recommended by the Hearing Department of the State Bar Court in its decision filed January 14, 2008 (State Bar Court case No. 06-O-15333); and
2. Respondent comply with certain probation conditions, including, but not limited to:

¹References to rules are to the Rules of Procedures of the State Bar, unless stated otherwise.

- a. Within 30 days from the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the probation conditions;
- b. Submit quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period of probation; and
- c. Answer fully, promptly, and truthfully, any inquiries of the Office of Probation which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the probation conditions.

Notice of this order was properly served upon respondent in the manner prescribed by California Rules of Court, rule 8.532(a), at respondent's official address in accordance with Business and Professions Code section 6002.1.²

C. The Office of Probation and Quarterly Reports

On September 15, 2008, the Office of Probation sent a letter to respondent outlining the terms and condition of his probation. It was not returned to the State Bar as undeliverable.

Respondent did not contact the Office of Probation by October 26, 2008, to schedule a meeting to discuss the terms of his probation.

On May 19, 2009, the Office of Probation sent another letter to respondent, noting that he had not filed his first two quarterly reports due January 10 and April 10, 2009, and that he had not contacted the Office of Probation to complete his meeting. Respondent was further asked to immediately contact the Office of Probation.

Respondent neither contacted the Office of Probation nor responded to the May 2009 letter nor file the two quarterly reports that were due January 10 and April 10, 2009.

²References to sections are to the Business and Professions Code.

D. Conclusions of Law

Section 6093, subdivision (b), provides that violation of a probation condition constitutes cause for revocation of any probation then pending and may constitute cause for discipline.

Section 6093, subdivision (c), provides that the standard of proof is the preponderance of the evidence. Bad faith is not a requirement for a finding of culpability in a probation violation matter. Instead, “a ‘general purpose or willingness’ to commit an act or permit an omission is sufficient.” (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.)

Based on the evidence submitted by the Office of Probation, respondent violated his probation conditions by failing to do the following:

1. Contact the Office of Probation by October 26, 2008, to schedule a meeting to discuss the terms of his probation;
2. Submit two quarterly reports (January 10, 2009, and April 10, 2009); and
3. Answer promptly to the Office of Probation’s May 19, 2009 letter.

Therefore, the State Bar has demonstrated by a preponderance of the evidence that respondent willfully violated the probation conditions ordered by the Supreme Court in its August 27, 2008 order.

As a result, the revocation of respondent’s probation in California Supreme Court case No. S164475 is warranted.

IV. Mitigating and Aggravating Circumstances

The parties bear the burden of proving mitigating and aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)³

³All further references to standards are to this source.

A. Mitigation

Since respondent did not file a response to the probation revocation motion, no evidence in mitigation was presented and none is apparent from the record. (Std. 1.2(e).)

B. Aggravation

In aggravation, respondent has two prior records of discipline. (Std. 1.2(b)(i).)

1. Effective August 10, 1992, respondent was privately reprovved for failing to perform services competently, failing to communicate with client and failing to properly withdraw from employment. (State Bar Court case No. 90-O-16549.)
2. Effective September 26, 2008, the underlying matter, respondent was ordered suspended for one year, stayed, and placed on probation for two years, and actually suspended for 30 days for failing to perform services competently, failing to communicate with client and failing to properly withdraw from employment in one client matter. (Supreme Court case No. S164475; State Bar Court case No. 06-O-15333.)

Respondent committed multiple acts of wrongdoing, including failing to submit his first two quarterly reports and failing to contact the Office of Probation or respond to its inquiry. (Std. 1.2(b)(ii).)

An attorney's continued failure to comply with his probation conditions after being notified of that noncompliance is properly considered a substantial aggravating circumstance. It demonstrates indifference toward rectification of or atonement for the consequences of one's misconduct. (Std. 1.2(b)(v); *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530.) Although the motion to revoke his probation was filed in June 2009, which put respondent on notice that his probation status was in jeopardy and that his past quarterly reports were delinquent, respondent still failed to timely submit his quarterly reports.

Respondent's failure to participate in this proceeding is an aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

Public protection and attorney rehabilitation are the primary goals of disciplinary probation. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452.)

“[T]here has been a wide range of discipline imposed for probation violations from merely extending probation ... to a revocation of the full amount of the stayed suspension and imposition of that amount as an actual suspension.” (*In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 573.)

In determining the level of discipline to be imposed, the court must consider the “total length of stayed suspension which could be imposed as an actual suspension and the total amount of actual suspension earlier imposed as a condition of the discipline at the time probation was granted.” (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. 525, 540.) The extent of the discipline is dependent, in part, on the nature of the probation violation and its relationship to respondent's prior misconduct. (*Ibid.*)

Here, respondent's two prior records involved misconduct in two client matters. In this third disciplinary matter, respondent failed to comply with the court-ordered conditions of his probation. He failed to file his first two quarterly reports and failed to contact the Office of Probation.

“[A] probation ‘reporting requirement permits the State Bar to monitor [an attorney probationer's] compliance with professional standards.” (*In the Matter of Wiener* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605.) In addition, “an attorney probationer's filing of quarterly probation reports is an important step

towards the attorney's rehabilitation." (*In the Matter of Wiener, supra*, 3 Cal. State Bar Ct. Rptr. at p. 763.)

Respondent's prior misconduct and his present probation violations involve inattention to his professional duties and a continued unwillingness or inability to conform to the standards required of attorneys licensed in this state. Absent compelling mitigating circumstances, an attorney who willfully violates a significant condition of probation can anticipate actual suspension as the expected result. (*In the Matter of Gorman, supra*, 4 Cal. State Bar Ct. Rptr. at p. 574.)

The court finds guidance in *In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445.

In *Howard*, the attorney was actually suspended for one year because he failed to submit two quarterly probation reports, to timely deliver financial records to a former client's accountant, and defaulted in the disciplinary proceeding. The attorney's lack of cooperation with the State Bar was a serious concern.

Respondent also did not participate in this proceeding, completely abandoned his probationary duties and has two prior records of discipline. Therefore, significant discipline is warranted for respondent's probation violations to achieve the goals of attorney disciplinary probation.

The Office of Probation urges that respondent's probation be revoked and that he be actually suspended for one year, the entire original period of stayed suspension. The court agrees.

VI. Recommendations

Accordingly, the court recommends as follows:

A. Discipline

The court recommends that the probation of respondent **Gregg Lee Kays**, previously ordered in Supreme Court Case No. S164475 (State Bar Court Case No. 06-O-15333) be revoked; that the previous stay of execution of the suspension be lifted; and that respondent be actually suspended from the practice of law for one year.

B. California Rules of Court, Rule 9.20

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, 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 order in this matter. Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.⁴

C. Multistate Professional Responsibility Examination

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination since he was previously ordered to do so in S164475. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage.

⁴ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

D. Costs

The court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VII. Order of Involuntary Inactive Enrollment

Respondent is ordered to be involuntarily enrolled inactive under Business and Professions Code section 6007, subdivision (d)(1).⁵ This inactive enrollment order will be effective three calendar days after the date upon which this order is served.

Dated: August ____, 2009

LUCY ARMENDARIZ
Judge of the State Bar Court

⁵The court recommends that any period of involuntary inactive enrollment be credited against the period of actual suspension ordered. (Bus. & Prof. Code, § 6007, subd. (d)(3).)