

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 13-PM-13809-DFM
)	
MICHAEL H. CROSBY,)	ORDER GRANTING MOTION TO
)	REVOKE PROBATION AND FOR
Member No. 125778,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

INTRODUCTION

On July 12, 2013, the State Bar Office of Probation, represented by Terrie Goldade, filed a motion pursuant to Business and Professions Code sections 6093¹ and rules 5.310 et seq. of the Rules of Procedure of the State Bar² to revoke the probation of Respondent **Michael H. Crosby** (Respondent). On August 14, 2013, Respondent filed a written response to the motion, requesting a hearing.

A hearing on the motion was held on September 6, 2013.

For the reasons stated below, the court finds, by a preponderance of the evidence, that Respondent willfully failed to comply with the terms of his probation. (Section 6093, subd. (c).) As a result, the court grants the motion of the Office of Probation to revoke Respondent’s probation and its request to involuntarily enroll him as an inactive member of the State Bar pursuant to section 6007, subdivision (d). The court recommends that Respondent’s probation

¹Future references to section(s) are to this source.

²Future references to rule(s) are to this source.

be revoked, that the previously-ordered stay of suspension be lifted, and that Respondent be suspended from the practice of law for one year, execution of that period of suspension be stayed, and he be placed on probation for two years on conditions, including that he be suspended from the practice of law for the first year of probation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent was admitted to the practice of law in California on December 15, 1986, and has been a member of the State Bar at all times since.

Probation Conditions and Background

Procedural History of Case No. 11-O-13513

The Notice of Disciplinary Charges (NDC) was filed in case No. 11-O-13513 on September 8, 2011. It was properly served. The NDC alleged four counts of misconduct in a single client matter, including charges that Respondent willfully violated (1) rule 3-110(A) of the Rules of Professional Conduct (failure to perform with competence); (2) section 6068, subdivision (m) (failure to inform client of significant developments); (3) section 6068(m) (failure to respond to client inquiries); and (4) section 6068, subdivision (i) (failure to cooperate in State Bar investigation).

An initial status conference was held in the matter on October 3, 2011. Respondent did not attend. At that time, the case was given a trial date of January 10, 2012, with a one-day trial estimate. On December 1, 2011, Respondent not having filed a response to the NDC, the State Bar filed a motion requesting entry of Respondent's default. On December 19, 2011, Respondent not having filed any opposition to the motion, an order was issued by this court, entering Respondent's default in the matter and enrolling him inactive under section 6007, subdivision (e).

On April 17, 2012, nearly five months later and after the scheduled trial date had passed, Respondent, represented by attorney David Cameron Carr, filed a motion to set aside the default, together with a verified proposed response to the NDC. The proposed response admitted all of the allegations of the NDC and culpability for all four counts. On April 27, 2012, this court issued an order, setting aside the default and re-scheduling the matter to begin a one-day trial on May 24, 2012. Respondent's response was filed by the court on that same day.

Trial was commenced and completed on May 24, 2012. Respondent was represented at trial by David Cameron Carr. On June 1, 2012, this court filed its decision in the case, finding culpability based on Respondent's response to the NDC and recommending that he be suspended for one year, stayed, and placed on probation for one year with conditions, including an obligation to provide quarterly reports.

On October 17, 2012, the Supreme Court filed an order (S204618), accepting this court's recommendation and imposing discipline consisting of a one-year stayed suspension and a one-year probation in State Bar Court case No. 11-O-13513. The Supreme Court order became effective thirty days after it was entered. (Cal. Rules of Court, rule 9.18(a).) It was properly served on Respondent.³

As part of the Supreme Court's order, Respondent was ordered to comply with the condition of probation, spelled out in detail in this court's June 1, 2012 decision, that he submit a written quarterly report to the Office of Probation on January 10, April 10, July 10 and October 10 of each year, or part thereof, during which his probation is in effect, stating under penalty of

³ Although no proof was offered that the Clerk of the Supreme Court served the Supreme Court's order upon Respondent, California Rules of Court, rule 8.264(a), requires clerks of reviewing courts to transmit immediately a copy of all decisions of those courts to the parties on filing. It is presumed pursuant to Evidence Code section 664 that official duties have been regularly performed. (*In re Linde D.* (1970) 3 Cal.App.3d 567, 571.) Therefore, in the absence of evidence to the contrary, the court finds that the Clerk of the Supreme Court performed his or her duty and transmitted a copy of the Supreme Court's order to Respondent immediately after its filing.

perjury that he had complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period.

Failure to Submit Quarterly Reports on a Timely Basis

The State Bar contends that Respondent failed to submit on a timely basis the quarterly reports due on January 10, April 10, and July 10, 2013. The court finds the following with respect to those alleged violations.

After the Supreme Court order was filed on October 17, 2012, the Office of Probation wrote a letter to Respondent on November 9, 2012, reminding him of the terms and conditions of his suspension and probation. Enclosed with the letter, among other things, were copies of the Supreme Court's order, the probation conditions portion of this court's June 1, 2012 decision, instruction sheets, and forms to use in submitting quarterly reports. Respondent, at trial, acknowledged receiving this letter, which included a copy of the Supreme Court's order. Although Respondent saw that the letter was being sent by the State Bar's Office of Probation, he states that he paid little attention while reading it and "set it aside."

Respondent's first quarterly report was due on January 10, 2013. This fact and deadline was explicitly set out in the November 9 letter from the Office of Probation. Nonetheless, Respondent acknowledges that he failed to submit any quarterly report by that deadline.

When Respondent received his bill for State Bar dues in January 2013, he noted that the bill included the costs that were awarded in case No. 11-O-13513, and he paid the costs that were then due.

Respondent's second report was due on April 10, 2013. Respondent also acknowledges that he failed to file the April 10, 2013 quarterly report when it was due.

On April 15, 2013, the Office of Probation sent a letter to Respondent, advising him that it had not received the quarterly reports that he had been obligated to submit on or before

January 10 and April 10, 2013. The letter, in bold print, requested Respondent to “***Please submit the required reports immediately.***” This letter also referred to and attached a copy of the November 9, 2012 letter and its attachments (including the Supreme Court’s order and the probation conditions portion of this court’s June 2012 decision). It then went on to state that the Office of Probation would not send any further reminder letters regarding the prior non-compliance or any future compliance dates. Instead, it warned, his non-compliance “can be automatically referred for review and determination of further action which may lead to the imposition of additional discipline”

This letter was sent to Respondent’s official membership mail address and to his official membership email address. While Respondent agrees that the letter was mailed to his then current address, he testified that the email was sent to an email address that had not been correct “for a long time.” The letter sent to his correct address was not returned to the State Bar as undeliverable. Respondent failed to respond to the letter or to cure the prior non-compliance problems.

In June 2013, a representative of the Office of Probation attempted to call Respondent at the telephone number he had listed with the State Bar’s Membership Records Office.⁴ Respondent is employed as an administrative law judge for the California Unemployment Appeals Board. When the probation office’s representative attempted to reach Respondent at his official membership telephone number, the call was answered with a recorded message that she had reached the “information line” for the Unemployment Appeals Board, a telephone number that neither enabled her to reach Respondent nor allowed her to leave a message for him.

⁴ Section 6002.1 obligates all members of the State Bar to maintain with the State Bar’s membership records office the member’s current office address and telephone number. Where there is any change in the information required by this section, the member is obligated by the statute to notify the membership records office of the change within 30 days.

Respondent's third quarterly report was due on or before July 10, 2012. Once again, he failed to file the required report by the deadline. Two days later, on July 12, 2013, the Office of Probation filed the instant motion to have this court revoke Respondent's probation and impose the stayed suspension.

On August 14, 2013, Respondent, represented by counsel, filed his response to the motion, including a sworn statement regarding the reasons for his prior apparent non-compliance. In his declaration, he sought to explain his prior failures to comply with the conditions of his probation by asserting that he had not received the Supreme Court's order "from the Supreme Court:"

In or about November 2012, I did receive the "reminder letter" from the Office of Probation. I did not focus on the details, and it did not register with me that the disciplinary order. [sic] My thought was that I did not have to focus on the details until I received the disciplinary order itself.

Despite acknowledging his awareness in January 2013 that he was now obligated to pay costs in the case, and without discussing why he had not responded to the April 15, 2013 letter, Respondent then stated, "After I received a copy of the motion to revoke probation and accompanying paperwork, I saw that I had been very wrong about the status of the disciplinary order, and about my probation." His declaration finished by stating that he had submitted the delinquent reports on the same day that he was executing the declaration, August 13, 2013.

The court concludes that Respondent's failure to file the above three reports constituted willful violations by him of the conditions of his probation. The Supreme Court issued its order on October 17, 2012. There is a presumption that the order was properly served by the court on Respondent. Whether or not that presumption is rebutted by Respondent's sworn statement that he did not receive it from the Supreme Court, the evidence is uncontradicted that he received a copy of the order from the Office of Probation prior to the commencement of his probation, together with the November 9, 2012 letter, instructing Respondent on both the need and the

details of how he was to comply with his obligation to provide quarterly reports as a condition of the probation scheduled to start on November 16, 2012. Respondent's thought that he "did not have to focus on the details" of his probation until he received the disciplinary order itself provides no basis for justifying his ongoing non-compliance with the conditions of that probation.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)⁵ The court finds the following with regard to aggravating factors.

Prior Record of Discipline and Disregard for Disciplinary Proceeding

Of substantial concern to this court is the history of Respondent's continuing disregard of his professional obligations as a member of the State Bar.

As noted above, Respondent has a prior record of discipline consisting of the underlying disciplinary proceeding, State Bar Court case No. 11-O-13513. That prior discipline is, by itself, an aggravating factor. (Std. 1.2(b)(i).) Worse, part of the misconduct for which Respondent was disciplined in that prior action was his failure to comply with his statutory duty to cooperate in a State Bar disciplinary proceeding. Another count, for which Respondent admitted culpability, resulted from Respondent's failure to respond to a notification by the United States Bankruptcy Court that he was required to attend a meeting of the creditors of his client.

After the disciplinary charges in case No. 11-O-13513 were filed by the State Bar on September 8, 2011, and despite notices sent to Respondent by both the State Bar and this court, Respondent did not participate in that disciplinary proceeding until April 17, 2012, more than seven months after the charges were filed; four months after the successful motion for entry of

⁵ All further references to standard(s) or std. are to this source.

his default was filed in December 2011; and three months after the scheduled January 2012 trial date had passed. It was only as the waiting period was expiring before the State Bar could file its petition requesting that he be disbarred that he filed his request for relief from the default.

In the instant proceeding, despite the prior disciplinary proceeding, Respondent has demonstrated a continuing indifference to complying with his professional obligations as a member of the State Bar. He has demonstrated a complete indifference to being disciplined by the Supreme Court, to complying with the conditions of his probation, and to responding to compliance efforts by the Office of Probation. (Std. 1.2(b)(v).)

Further, when the Office of Probation sought to communicate with Respondent about his non-compliance, it was hampered by Respondent's past indifference to his statutory obligation to maintain valid contact information with the State Bar Official Membership Records office.

Multiple Acts of Misconduct

Respondent failed to file quarterly reports on three separate occasions. Respondent's culpability of multiple acts of misconduct is also an aggravating circumstance. (Std. 1.2(b)(ii).)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The court finds the following with regard to mitigating factors.

As noted, Respondent is currently an administrative law judge with the Unemployment Appeals Board. During trial, he presented evidence that his supervisor has indicated that he will be terminated if he is suspended in this proceeding, and he asked that this potential consequence be used by the court to reduce any sanctions resulting from his probation violations. While this court is not unsympathetic to the adverse economic impact that suspension or disbarment will likely have on the disciplined member, it does not view that impact to be a significant mitigating

factor in this case, especially given Respondent's testimony that this supervisor was frequently inquiring of him through the relevant period about whether the Supreme Court order had issued. Respondent's negative responses to those inquiries, made without further inquiry and after he had actually received a copy of the Supreme Court order, border on being acts of moral turpitude.

Respondent also testified during the hearing of this matter regarding his prior acts of community service. That community service, however, all preceded Respondent's discipline in 2012, and the evidence of that service was expressly stated to be a mitigating factor that was considered by this court in determining the level of the discipline, including the period of stayed suspension, to recommend in that matter. Given that the only evidence of that community service was, once again, the uncorroborated testimony of Respondent and that the mitigating weight of the evidence is already built into the level of the stayed suspension, this court declines to treat the evidence as having any weight in mitigation.

DISCUSSION

Section 6093 authorizes the revocation of probation for a violation of a probation condition. Standard 1.7 requires that the court recommend a greater discipline in this matter than that imposed in the underlying disciplinary proceeding. The extent of the discipline to recommend is dependent, in part, on the seriousness of the probation violation and Respondent's recognition of his misconduct and his efforts to comply with the conditions. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.)

It is clear that Respondent remains indifferent to operating "within the lines" of his professional obligations, especially those arising from his obligations to the State Bar and its consumer protection functions. Under such circumstances, the court concludes that his original probation should be revoked and the one-year suspension, previously stayed, should now be

imposed. (*Potack v. State Bar* (1991) 54 Cal.3d 132; *Barnum v. State Bar* (1990) 52 Cal.3d 104, 107.)

RECOMMENDED DISCIPLINE

Probation Revocation/Actual Suspension/Probation

For all of the above reasons, the court recommends that the probation of Respondent **Michael Howard Crosby**, Member No. 125778, previously ordered in Supreme Court matter S204618 (State Bar Court case No. 11-O-13513), be revoked; that the previous stay of execution of the suspension be lifted; that Respondent be suspended from the practice of law for one year; that execution of such suspension be stayed; and that Respondent be placed on probation for two years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first one year of probation.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.
3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4. Within thirty (30) days after the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation and must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.
5. Respondent must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which Respondent is on probation (reporting dates).⁶ However, if Respondent's probation begins less than 30 days before a reporting date, Respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, Respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, Respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, Respondent must certify to

⁶ To comply with this requirement, the required report, duly completed, signed and dated, must be received by the Office of Probation on or before the reporting deadline.

the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

6. Subject to the proper or good faith assertion of any applicable privilege, Respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to Respondent, whether orally or in writing, relating to whether Respondent is complying or has complied with the conditions of this probation.
7. Within one year after the effective date of the Supreme Court order in this matter, Respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation. This condition of probation is separate and apart from Respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, rule 3201.)
8. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter.⁷

Rule 9.20

The court recommends that Respondent be ordered to comply with California Rules of Court, rule 9.20, and 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.⁸

⁷ The court does not recommend that Respondent be ordered in this proceeding to take and pass the MPRE because Respondent is already subject to an obligation to complete that requirement under the Supreme Court's 2012 order.

⁸ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment.

ORDER REGARDING INACTIVE ENROLLMENT

It is hereby ORDERED that Respondent **Michael Howard Crosby**, Member No. 125778, be involuntarily enrolled as an inactive member of the State Bar of California pursuant to Business and Professions Code section 6007, subdivision (d). This enrollment shall be effective three days following service of this order. The requirements of section 6007, subdivision (d)(1) have been met: Respondent was subject to a stayed suspension, was found to have violated probation conditions, and it has been recommended that Respondent be actually suspended due to said violations.

It is also ordered that his inactive enrollment be terminated as provided by Business and Professions Code section 6007, subdivision (d)(2).

Finally, it is recommended that that any period of involuntary inactive enrolment under section 6007, subdivision (d), be credited against the period of actual suspension ordered. (Bus. & Prof. Code, § 6007, subd. (d)(3).)

Dated: October _____, 2013

DONALD F. MILES
Judge of the State Bar Court