

PUBLIC MATTER

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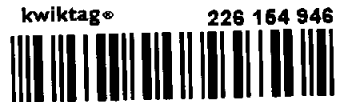
JAN 29 2018

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of
HERMAN JASON COHEN,
A Member of the State Bar, No. 188783

) Case No.: 17-PM-07095-DFM
)
) **ORDER GRANTING MOTION TO**
) **REVOKE PROBATION AND FOR**
) **INVOLUNTARY INACTIVE**
) **ENROLLMENT**



INTRODUCTION

On November 29, 2017, the State Bar Office of Probation, represented by Supervising Attorney Terrie Goldade, filed a motion pursuant to rules 5.310 et seq. of the Rules of Procedure of the State Bar¹ to revoke the probation of respondent **Herman Jason Cohen** (Respondent). On December 26, 2017, Respondent filed a written response to the motion, opposing the motion and requesting a hearing.

A hearing on the motion was held on January 26, 2018. The Office of Probation was represented by Supervising Attorney Goldade. Respondent was represented by James Ham of the Law Offices of James I. Ham.

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. As a result, the court recommends that Respondent's probation be revoked; that the previously-ordered stay of

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

suspension be lifted; and that a new two-year period of probation, with conditions including an actual suspension of 60 days, be imposed. In addition to the above, the court grants the request of the Office of Probation to involuntarily enroll Respondent as an inactive member of the State Bar pursuant to section 6007, subdivision (d).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent was admitted to the practice of law in California on June 3, 1997, and has been a member of the State Bar at all relevant times.

Probation Violations

On April 25, 2016, the State Bar Court filed a decision in case No. 13-O-15706, finding Respondent culpable of one count of misconduct and recommending discipline consisting of a one-year stayed suspension and two years' probation. No period of actual suspension was recommended.

On September 15, 2016, the California Supreme Court filed an order, No. S235951, accepting the State Bar Court's discipline recommendation and ordering Respondent to comply, *inter alia*, with the following conditions of probation:

(a) Submit a written quarterly report to the Office of Probation on or before January 10, April 10, July 10 and October 10 of each year, or part thereof, during which the probation is in effect, stating under penalty of perjury that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period (quarterly report); and

(b) Within one (1) year of the effective date of the discipline, provide to the Office of Probation satisfactory proof of Respondent's attendance at sessions of the State Bar Ethics and Client Trust Accounting Schools and passage of the test given at the end of each such session.

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.

On September 29, 2016, the Office of Probation wrote a letter to Respondent, reminding him of the terms and conditions of his suspension and probation. Enclosed in the letter were, among other things, copies of the Supreme Court's order and the language of the conditions of probation, instruction sheets and forms to use in submitting quarterly reports, a schedule of the dates in 2016 and 2017 when the State Bar Ethics and Client Trust Accounting Schools would be conducted, and specific deadlines for Respondent's compliance with each of the obligations imposed by the Supreme Court order. This letter also included the following warning:

You are responsible for timely complying with each and every term and condition whether or not it is reflected in this letter and/or the Quarterly Report form. You are reminded that proof of compliance must be received in the Office of Probation by your due date. **Being even one day late** means that you are **NOT** in compliance." [Emphasis and underlining in original.]

In addition, the above letter stated that the Office of Probation did not have authority to extend compliance due dates or to modify the terms and conditions of the discipline order. Instead, it noted that any requests by Respondent for extensions of time or modifications of the terms and conditions of the Supreme Court's order needed to be filed with the State Bar Court.

After Respondent's receipt of this letter, he participated in a meeting with his probation deputy shortly after the Supreme Court's order became effective, during which the obligations, deadlines, and means for compliance with Respondent's disciplinary obligations were again communicated to Respondent by the Office of Probation.

In its motion to revoke Respondent's probation and to impose the stayed one-year period of suspension, the Office of Probation alleges that Respondent willfully violated both of the

conditions of probation summarized above. The court finds the following with respect to those claimed violations.

Failure to Submit Quarterly Reports on a Timely Basis

The Office of Probation contends that Respondent failed to submit on a timely basis the quarterly reports due on April 10, 2017; July 10, 2017; and October 10, 2017. It alleges that the report due on April 10, 2017, was filed on April 11, 2017, one day late; that the report due on July 10, 2017, was filed on July 11, 2017; also one day late; and that the report due on October 10, 2017, had not yet been filed at the time the revocation motion was being filed.

In his response, Respondent agrees that his reports of April 10, 2017; July 10, 2017; and October 10, 2017, were all untimely.

With regard to the report due by April 10, 2017, Respondent attributes its being one day late to the fact that Respondent and his son traveled to Rochester, New York, from April 6 to April 11, 2017. The report was completed and transmitted electronically to the Office of Probation shortly after noontime on the first day of Respondent's return from this trip. Hence, the report was late by slightly less than 13 hours. No explanation is provided as to why the report was not completed and submitted prior to the commencement of that trip.

With regard to the report due by July 10, 2017, Respondent prepared that report on its ultimate due date, July 10, 2017, but did not email it to the Office of Probation until 12:18 a.m. on July 11, 2017. Hence, by 18 minutes, it was also untimely.

With regard to the October 10, 2017 report, Respondent candidly admits that he forgot to prepare and file the required report by the October 10, 2017 deadline. Instead, he prepared and signed a quarterly report on November 2, 2017, and sought to email it to his probation deputy that day. Unfortunately, in addressing this email message, to which this report was appended,

Respondent misspelled the name of his probation deputy and, as a result, the email was never received by the Office of Probation. It was not until December 10, 2017, when Respondent learned of the instant revocation motion, that he discovered that his admittedly tardy report due in October 2017 had not been received when it was emailed in November. Respondent then quickly prepared and successfully filed another quarterly report for the prior quarter.

For the reasons stated above, this court concludes that Respondent's acknowledged failure to timely file the above three quarterly reports constituted willful violations by him of a condition of his probation.

Failure to Take the State Bar Ethics and Client Trust Accounting Schools

The Office of Probation alleges, and Respondent acknowledges, that he failed to take the State Bar Ethics and Client Trust Accounting Schools before the deadline imposed by the Supreme Court's order. At the time of the trial of this matter, Respondent had still not completed either of those two schools but had enrolled in the schools scheduled to be given in February 2018.

This condition of probation, that a disciplined member must take and pass both the State Bar Ethics School and its Client Trust Accounting School, is an important component to this court assuring itself that a previously-errant member, if allowed to continue to practice law, will both know and honor his or her professional obligations in the future. The failure of a recently disciplined attorney to comply with this particular condition of probation is especially troubling. It not only indicates that the attorney feels no urgency to be reminded of the rules of professional conduct but also shows that the individual remains indifferent to complying with those professional obligations, notwithstanding the sting of the recent discipline.

The two State Bar schools were each conducted 11 times during the one-year period after Respondent's probation began, six times for each school in Los Angeles and five times in San Francisco. Respondent was aware of his obligation to take and pass the two State Bar schools during the first year of his probation. In fact, Respondent inquired of his probation deputy in January 2017 whether his prior attendance at the schools in 2014 would be sufficient to comply with his new probation obligations. In response, he was reminded of the language in this court's 2016 decision, in which this court specifically indicated that future attendance at the two schools was required, notwithstanding Respondent's prior attendance at the two schools in 2014. Thereafter, in each of the quarterly reports completed by Respondent, he was asked by the form to report on whether he had yet completed his obligation to attend each of the two schools. In his April 11, 2017 report, he reported that he had enrolled in the schools scheduled to be conducted in San Francisco on July 11 and 12, 2017. In his subsequent reports in 2017, Respondent failed to provide any further information regarding his attendance at these schools.

Although Respondent apparently had enrolled in the schools scheduled for July 11 and 12, 2017, he did not attend either of those two sessions. His explanation for not showing up for those schools in July 2017 was the fact that he was scheduled to commence trial in Los Angeles on July 10, 2017. However, when that case was dismissed by the plaintiff on July 10, 2017, Respondent neither sought to fly up to San Francisco to attend either of the two schools scheduled for the following two days nor enrolled in any of the schools scheduled during the remaining months of his probation. He also did not seek to file a motion with this court to have the deadline for his attendance at the two schools postponed. Instead, it was only when Respondent learned of the instant revocation motion that he promptly enrolled in the two schools offered in February 2018.

Respondent seeks to explain his failure to attend the two schools by providing information regarding his busy schedule during the first year of his probation. That explanation, however, fails both legally and factually to justify his yearlong failure to comply with this condition of probation ordered by the Supreme Court.

For the reasons stated above, this court concludes that Respondent's failures to attend either the State Bar Ethics School or the State Bar Client Trust Accounting School constituted willful violations by him of the conditions of his 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. 1.5.)² The court finds the following with regard to aggravating factors.

Prior Discipline

As noted above, Respondent has one prior record of discipline, consisting of the underlying disciplinary proceeding, case No. 13-O-15706. Respondent's misconduct in that matter involved depositing and commingling his own funds in his client trust account and paying personal expenses from that account, in willful violation of rule 4-100(A) of the Rules of Professional Conduct. As previously noted, Respondent received a one-year stayed suspension and two years of probation as a result of that misconduct.

This prior record of discipline is an aggravating factor. (Std. 1.5(a); *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 311.)

² All further references to standard(s) or std. are to this source.

Multiple Acts of Misconduct

Respondent's numerous violations of the conditions of his probation represent multiple acts of misconduct. This is an aggravating factor. (Std. 1.5(b); *In the Matter of Laden* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 678, 683.)

Indifference

Respondent's failure to comply with the probation conditions, despite being repeatedly reminded by the Office of Probation of those obligations, demonstrates indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.5(g).)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with regard to mitigating factors.

No Harm

Respondent is entitled to mitigation credit because his misconduct caused no actual harm to any client or person. (Std. 1.6(c).)

Candor

Respondent demonstrated candor to the State Bar and this court regarding the circumstances showing his misconduct. Such is a mitigating factor. (Std. 1.6(e).)

Family Problems

Although Respondent argues that his family problems over the last year are a mitigating factor, there was no expert testimony offered in support of that contention. There also was neither a demonstrated nexus between these problems and his probation violations. Therefore, the court does not find that these family problems are a mitigating factor in this matter. (*In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 572-573.)

DISCUSSION

Section 6093 authorizes the revocation of probation for a violation of a probation condition. Standard 2.14 provides:

Actual suspension is the presumed sanction for failing to comply with a condition of discipline. The degree of sanction depends on the nature of the condition violated and the member's unwillingness or inability to comply with disciplinary orders.

In turn, standard 1.8 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.)

While the Office of Probation seeks to have the entire one-year period of stayed suspension imposed on Respondent as a result of his violations of the conditions of his probation, this court does not find that any such lengthy period of discipline is necessary or appropriate.

At the outset, none of Respondent's misconduct, either in this proceeding or in his prior disciplinary matter, resulted from a client complaint or involved harm to a client or anyone else. While Respondent was ordered to attend the State Bar's Ethics and Client Trust Accounting Schools as a prophylactic measure against possible future harm to a client or the public, there is no evidence that Respondent's failure to again attend those schools has, in fact, resulted in any client complaints or harm.

Further, Respondent's first two failures to provide timely quarterly reports did not result from any complete indifference on his part to his need to provide those reports. Each of the two reports was provided by Respondent to the Office of Probation; they were both just slightly late. In fact, the cumulative time of the delinquency of these two reports totals less than 13 hours.

Respondent's third failure to provide a timely report is far more troublesome, but Respondent did seek to file a report prior to the filing of this action. Those breaches, if standing alone, certainly would not warrant any substantial period of actual suspension. In that regard, the court notes the evidence provided to this court by the Office of Probation - that Respondent timely filed his quarterly report due on January 10, 2018.

More serious are Respondent's ongoing failures to obtain the legal ethics education ordered by the Supreme Court. While Respondent has now enrolled in classes scheduled to be conducted in February 2018, he has not yet actually attended those programs.

Respondent has been ordered ineligible to practice law since December 4, 2017, as a result of his concomitant failure to take and pass the MPRE during the first year of his probation. As the matter now stands, he will remain ineligible, at a minimum, until he takes the MPRE in March 2018, when it is next offered, and until he receives word that he then passed that examination. In the event that he fails to sit for that March examination or to pass it, he will remain ineligible to practice.

This court concludes that a similar approach should be adopted by this court with regard to Respondent's need to take and pass the two State Bar schools. Because of his multiple violations of the conditions of his probation, Respondent should be actually suspended for a minimum period of 60 days, and this actual suspension should continue until he presents proof to the Office of Probation of his successful completion of both schools. Such discipline is consistent with the recent published decisions of this court addressing comparable, albeit not identical, probation revocation cases. (See, e.g., *In the Matter of Gorman, supra*, 4 Cal. State Bar Ct. Rptr. 567 [30 days actual for failure to attend ethics school, pay restitution], and cases

discussed therein; *In the Matter of Laden, supra*, 4 Cal. State Bar Ct. Rptr. 678 [minimum of 90 days and until restitution paid for untimely quarterly reports and restitution payments].)

RECOMMENDED DISCIPLINE

Probation Revocation/Actual Suspension/Probation

For all of the above reasons, the court recommends that the probation of respondent **Herman Jason Cohen**, State Bar No. 188783, previously ordered in Supreme Court order S235951 (State Bar Court case No. 13-O-15706), be revoked; that the previous stay of execution of the suspension be lifted; that Respondent be suspended from the practice of law in California for one year; that execution of that period of suspension be stayed; and that Respondent be placed on probation for a period of two years subject to the following conditions:

1. Respondent must be suspended from the practice of law for a minimum of the first sixty (60) days of Respondent's probation, and Respondent will remain suspended until the following requirements are satisfied:
 - a. Respondent submits to the Office of Probation satisfactory evidence of his completion of the State Bar's Ethics and Client Trust Accounting Schools and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending those schools. (Rules Proc. of State Bar, rule 3201); and,
 - b. If Respondent remains suspended for two years or longer, Respondent must provide proof to the State Bar Court of Respondent's rehabilitation, fitness to practice, and present

learning and ability in the general law. (Rules Proc. of State Bar,
tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std.

1.2(c)(1).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.
3. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.
4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
5. He must submit written quarterly reports to the Office of Probation on or before each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same

information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if Respondent has complied with all conditions of probation, the stayed suspension will be satisfied.

MPRE

It is not recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination. He is already subject to that obligation as a result of the Supreme Court's order of September 15, 2016, and is currently enrolled ineligible to practice because of his ongoing failure to pass that examination prior to the expiration of the deadline for doing so.

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 **Herman Jason Cohen**, Member No. 188783, 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 can be terminated in the future as provided by Business and Professions Code section 6007, subdivision (d)(2).

Finally, it is recommended that Respondent's actual suspension in this matter commence as of the date of his inactive enrollment pursuant to this order. (Bus. & Prof. Code, § 6007, subd. (d)(3).)³

IT IS SO ORDERED.

Dated: January 29, 2018


DONALD F. MILES
Judge of the State Bar Court

³ Because Respondent has been enrolled involuntarily ineligible to practice since December 4, 2017, this court concludes that there is no need for him to be ordered, either now or at the time of the Supreme Court's subsequent order in this matter, to comply with rule 9.20 of the California Rules of Court.

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); 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 January 29, 2018, I deposited a true copy of the following document(s):

**ORDER GRANTING MOTION TO REVOKE PROBATION AND FOR
INVOLUNTARY INACTIVE ENROLLMENT**

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


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

JAMES IRWIN HAM
LAW OFFICE OF JAMES I. HAM A PROF. CORP.
655 N CENTRAL AVE FL 17
GLENDALE, CA 91203 - 1439

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

TERRIE GOLDADE, Probation, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on January 29, 2018.



Mazie Yip
Case Administrator
State Bar Court