

JUL 31 2003

STATE BAR COURT CLERK'S OFFICE
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THE STATE BAR COURT
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of
GARY J. NEAR,
Member No. 45678,
A Member of the State Bar.

Case No. 02-N-14563-JMR
DECISION AND ORDER OF
INVOLUNTARY INACTIVE
ENROLLMENT

I. INTRODUCTION

This matter was initiated by the Office of the Chief Trial Counsel of the State Bar of California ("State Bar") alleging that respondent Gary J. Near failed to comply with rule 955 of the California Rules of Court as ordered by the Supreme Court. The State Bar was represented by Andrea B. Wachter. Respondent represented himself in the proceedings.

The matter was submitted for decision on May 6, 2003.

For the reasons stated below, it is recommended that respondent be disbarred.

II. JURISDICTION

Respondent was admitted to the practice of law in California on January 15, 1970; and has been a member of the State Bar at all times since.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 1, 2002, the California Supreme Court filed an order ("May 1, 2002 order") in Supreme Court case no. S103853 (State Bar Court case nos. 99-O-10953; 99-O-13512 (Cons.)) imposing discipline on respondent as follows: suspended from the practice of law for two years and until he made specified restitution, that execution of suspension be stayed, and that he be placed on probation for two years on condition that he be actually suspended for 60 days and

1 until he made specified restitution. The Supreme Court further ordered that if respondent
2 remained actually suspended for 90 days or more, respondent was to comply with rule 955 of the
3 California Rules of Court (hereinafter "rule 955"), subdivisions (a) and (c), within 120 and 130
4 days, respectively, after the effective date of the order. The May 1, 2002 order was effective on
5 May 31, 2002. (Cal. Rules of Court, rule 953(a).)

6 Upon filing of the May 1, 2002 order, the Office of the Clerk of the Supreme Court of
7 California sent respondent a copy of the order imposing discipline and directing his compliance
8 with rule 955.¹ Respondent received a copy of the Supreme Court's order in early May of 2002.

9 On May 9, 2002, the Probation Unit of the State Bar sent respondent a courtesy letter
10 regarding his probation conditions and enclosed a copy of the Supreme Court's order and a form
11 for the affidavit regarding compliance with rule 955. The correspondence was sent to
12 respondent's State Bar membership records address ("official address") via regular mail, postage
13 prepaid. It was returned as undeliverable with the notation: "FORWARD TIME EXP RTN TO
14 SEND" and referencing a California Street address in San Francisco. The envelope bore the
15 additional notation: "RETURN TO SENDER." On May 7, 2002, while talking to respondent on
16 an unrelated matter,² the probation deputy of the Probation Unit of the State Bar reminded
17 respondent of his obligation to update his official address in writing, he did not do so until March
18 2003.

19 Respondent failed to make restitution as ordered and remained actually suspended in
20 excess of 90 days. Accordingly, he was to comply with rule 955(a) and (c) by September 30,
21 2002 and October 8, 2002, respectively.

22 As of October 25, 2002, respondent had not filed with the State Bar Court the affidavit
23 required by rule 955(c). Thus, the Notice of Disciplinary Charges ("NDC") in this proceeding
24

25 ¹See, California Rules of Court, rule 24(a), and Evidence Code section 664.

26 ²Yolanda Acosta, a probation deputy, talked with respondent about his failure to timely
27 take and pass the Multistate Professional Responsibility Examination as order by the Supreme
28 Court in case no. S093839 on February 26, 2001. Respondent remains suspended based on,
among other reasons, his failure to provide proof of passage of the examination.

1 was properly served on respondent at his official address on October 25, 2002. A courtesy copy
2 of the NDC was also sent to respondent at the California Street address. A copy of the Supreme
3 Court May 1, 2002 order was attached to the NDC.

4 Respondent finally filed his rule 955 affidavit with the State Bar Court on April 2, 2003,
5 on the second day of trial. However, respondent misrepresented on the proof of service that he
6 executed under penalty of perjury that he served the affidavit personally on the prosecutor on
7 March 31, 2003, a holiday on which the offices of the State Bar of California were closed.
8 During his testimony at trial, respondent admitted that he did not serve the prosecutor until April
9 1, 2003.

10 Based on the foregoing, it has been shown by clear and convincing evidence that
11 respondent wilfully violated the Supreme Court's May 1, 2002 order directing his compliance
12 with rule 955.³ This constitutes a violation of section 6103 of the Business and Professions
13 Code, which requires attorneys to obey court orders.

14 **IV. MITIGATING CIRCUMSTANCES**

15 There are no mitigating circumstances. (Rules Proc of State Bar, tit. IV, Stds. for Atty.
16 Sanctions for Prof. Misconduct, standard 1.2(e) ("standards".) The evidence does not support
17 respondent's claim that, although he had actual notice of the rule 955 requirement, he reasonably
18 and in good faith believed that it did not apply to him. The court does not find credible
19 respondent's averment that he first found out about the rule 955 requirement at a voluntary
20 settlement conference in March 2003.

21 Further, there is no clear and convincing evidence supporting respondent's alleged
22 medical problems as a mitigating factor.

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26 ³"Wilfulness" in the context of rule 955 does not require actual knowledge of the
27 provision which is violated. The Supreme Court has disbarred an attorney whose failure to keep
28 his official address current prevented him from learning that he had been ordered to comply with
rule 955. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

1 **V. AGGRAVATING CIRCUMSTANCES**

2 There are numerous aggravating circumstances.

3 Respondent's prior instances of discipline are an aggravating circumstance. (Standard
4 1.2(b)(i).) As previously discussed, in Supreme Court case no. S103853 (State Bar Court case
5 nos. 99-O-10953; 99-O-13512 (Cons.)), filed May 1, 2002, the Supreme Court actually
6 suspended respondent for 60 days and until he made specified restitution for violations of the
7 Rules of Professional Conduct, rules 3-110(A), 3-700(D)(1) and 3-700(D)(2) in one client matter
8 and for violating rule 3-700(D)(2) in another client matter.

9 In Supreme Court case no. S093839 (State Bar Court case nos. 95-O-17445; 97-O-16745
10 (cons.)), filed February 26, 2001, the Supreme Court imposed discipline including one year
11 stayed suspension and one year probation with conditions for violations of the Rules of
12 Professional Conduct, rule 3-700(D)(2), and Business and Professions Code sections 6068(i),
13 6068(j) and 6002.1(a)(1) in one client matter, and rule 3-700(D)(2) of the Rules of Professional
14 Conduct in another client matter.

15 Finally, a private reproof was imposed effective May 20, 1976, in State Bar Court case
16 no. SF2244 for withholding material information to induce a client to settle a class action suit.

17 Respondent's misconduct was surrounded by bad faith, dishonesty and other violations of
18 the ethics rules. (Standard 1.2(b)(iii).) Respondent misrepresented that he personally served the
19 rule 955 affidavit on the prosecutor on a day on which the offices of the State Bar of California
20 were closed. The court also finds respondent dishonest in his testimony that he called a
21 probation deputy regarding the rule 955 affidavit and that she did not return his call.

22 Moreover, there is misconduct that has not been charged in this matter. Respondent did
23 not change his official address as required by sections 6068(j) and 6002.1(a)(1) of the Business
24 and Professions Code. He admits that he did not attend Ethics School, provide proof of
25 restitution or file quarterly reports with the Probation Unit, all of which were ordered by the
26 Supreme Court as part of the underlying discipline herein.

27 Respondent demonstrated indifference toward rectification of or atonement for the
28 consequences of his misconduct by failing to comply with rule 955(c) even after the NDC in the

1 instant proceeding was filed. (Standard 1.2(b)(v).) Also, he blamed everyone else for his
2 misconduct rather than accepting responsibility for his actions. For example, he blamed a
3 probation deputy for not sending a courtesy reminder letter to his California Street address rather
4 than to his official address as is the Probation Unit's policy. Although the probation deputy had
5 reminded him to update his official address in writing, he did not do so for almost a year.

6 Respondent demonstrated a lack of cooperation during these proceedings. (Standard
7 1.2(b)(vi).) For example, he did not participate in this matter until after a motion for entry of
8 default was filed although the NDC had been served at his official and alternate addresses. He
9 did not timely file a pretrial statement and exhibits as ordered by the court and he never filed a
10 post-trial brief even though he sought an extension. He offered the balance of his exhibits
11 without timely lodging them with the court or without serving them on the prosecutor. He made
12 unsupported allegations of prosecutorial misconduct and judicial bias, and utilized inappropriate
13 aggressive mannerisms in court. In general, respondent behaved unprofessionally during these
14 proceedings.

15 **VI. LEVEL OF DISCIPLINE**

16 The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to
17 protect the public, to preserve public confidence in the profession, and to maintain the highest
18 possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111;
19 *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.)

20 Respondent's wilful failure to comply with rule 955(c) is extremely serious misconduct
21 for which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar*
22 (1990) 50 Cal.3d 116,131; rule 955(d), Cal. Rules of Court.) Disbarment has been consistently
23 imposed by the Supreme Court as the sanction for noncompliance with rule 955. (*Bercovich v.*
24 *State Bar, supra*, 50 Cal.3d at p. 131; *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1188; *Powers v.*
25 *State Bar, supra*, 44 Cal.3d at p. 342.) There are no mitigating circumstances warranting
26 deviation from the norm.

27 Respondent has demonstrated an unwillingness to comply with the professional
28 obligations and rules of court imposed on California attorneys although he has been given several

1 opportunities to do so. Most recently, he did not comply with rule 955. He persists in blaming
2 everyone but himself for his failure to comply with the Supreme Court's order. Respondent's
3 failure to accept responsibility for his misconduct and to rectify it are of great concern to this
4 court, particularly in this, his fourth discipline matter. Further, respondent's failure to comply
5 with rule 955 undermines its prophylactic function in ensuring that all concerned parties learn
6 about an attorney's suspension from the practice of law. (*Lydon v. State Bar, supra*, 45 Cal.3d at
7 p. 1187.)

8 Respondent's disbarment is necessary to protect the public, the courts and the legal
9 community, to maintain high professional standards and to preserve public confidence in the
10 legal profession. It would undermine the integrity of the disciplinary system and damage public
11 confidence in the legal profession if respondent were not disbarred for his wilful disobedience of
12 the Supreme Court's order.

13 The provisions of Business and Professions Code section 6007(c)(4) are applicable and
14 mandatory. Accordingly, the court will order respondent's inactive enrollment pursuant to that
15 provision.

16 17 **VII. DISCIPLINE RECOMMENDATION**

18 IT IS HEREBY RECOMMENDED that respondent GARY J. NEAR be DISBARRED
19 from the practice of law in the State of California and that his name be stricken from the rolls of
20 attorneys in this state.

21 It is also recommended that the Supreme Court order respondent to comply with rule 955,
22 paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of
23 the Supreme Court order in the present proceeding, and to file the affidavit provided for in
24 paragraph (c) of the rule within 40 days of the effective date of the order showing his compliance
25 with said order.

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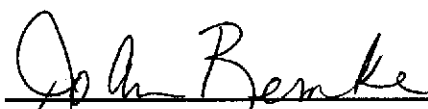
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VII. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to Business and Professions Code section 6007(c)(4). The inactive enrollment shall become effective three days from the date this order is filed and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: July 31, 2003



JOANN REMKE
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. 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 San Francisco, on July 31, 2003, I deposited a true copy of the following document(s):

DECISION AND ORDER OF 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 San Francisco, California, addressed as follows:

GARY JOSEPH NEAR
1550 CALIFORNIA ST #135
SAN FRANCISCO CA 94109

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

ANDREA T. WACHTER, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **July 31, 2003**.



Bernadette C. O. Molina
Case Administrator
State Bar Court