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PUBLIC MATTER

FILED

JAN - 6 2005

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

THE STATE BAR COURT
HEARING DEPARTMENT - LOS ANGELES

In the Matter of

ANDREW J. SPERLING

Member No. 189965,

A Member of the State Bar.

Case No. 04-N-11775-RAH

DECISION INCLUDING DISBARMENT
RECOMMENDATION AND ORDER OF
INVOLUNTARY INACTIVE
ENROLLMENT

INTRODUCTION

This matter was initiated by the Office of the Chief Trial Counsel of the State Bar of California ("the State Bar") alleging that Respondent Andrew J. Sperling failed to comply with rule 955, California Rules of Court ("CRC 955") as ordered by the Supreme Court. The State Bar was represented by Timothy G. Byer, Deputy Trial Counsel. Respondent did not participate either in person or by counsel.

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

PROCEDURAL HISTORY

The Notice of Disciplinary Charges ("NDC") was filed and properly served on Respondent on June 15, 2004, by certified mail, return receipt requested, at the address shown on the official membership records of the State Bar ("official address"). (Business and Professions Code section 6002.1(c)¹; Rules 60(b) and 583, Rules Proc. of State Bar ("rule(s)").) Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.)

¹Unless otherwise stated, all future references to "section(s)" are to the California Business and Professions Code.



1 However, on June 21, 2004, the mailing was returned to the State Bar by the United States
2 Postal Service ("USPS") with a notation "moved, left no address." (See the declaration of
3 Timothy Byer, Deputy Trial Counsel, submitted in support of the motion for entry of default.)²

4 No response to the NDC having been filed, on July 20, 2004, the Deputy Trial Counsel
5 wrote a letter to Respondent advising him that the response to the NDC was overdue, and that
6 unless he had heard from Respondent by August 3, 2004, he would file a motion for entry of
7 Respondent's default and seek Respondent's disbarment. The letter was sent by regular U.S.
8 mail, but was returned by the postal service with a notation that the Respondent had moved and
9 left no address.

10 Respondent did not file a response to the NDC. On September 30, 2004, the State Bar
11 filed and properly served on Respondent a motion for entry of default by certified mail, return
12 receipt requested, at his official address. The motion advised Respondent that the State Bar
13 would seek minimum discipline of disbarment if he was found culpable. (Rule 200(a)(3).)

14 Respondent did not respond to the default motion. An order entering Respondent's
15 default and involuntarily enrolling him inactive was filed and properly served on Respondent on
16 October 22, 2004, by certified mail, return receipt requested, at his official address. This
17 document advised Respondent, among other things, that he was enrolled inactive pursuant to
18 section 6007(e) effective three days after service of the order. The Court judicially notices its
19 records which indicate that the postal service returned the order as undeliverable.

20 On October 26, 2004, the State Bar filed its brief regarding discipline, and a waiver of its
21 right to a default hearing pursuant to rule 202(c) of the Rules of Procedure. The State Bar's brief
22 included a certified copy of Respondent's prior record of discipline. The State Bar recommends
23 in this proceeding that Respondent be disbarred.

24 The case was submitted for decision on October 26, 2004.

27
28 ²The motion for entry of default erroneously states that the NDC was filed and served on
Respondent on June 10, 2004. However, the correct date is June 15, 2004.

1 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

2 The Court's findings are based on the allegations contained in the NDC as they are deemed
3 admitted and no further proof is required to establish the truth of those allegations. (Section 6088;
4 Rule 200(d)(1)(A).) The findings are also based upon matters admitted into evidence or judicially
5 noticed.

6 Respondent was admitted to the practice of law in California on October 28, 1997, and has
7 been a member of the State Bar at all times since.³

8 On February 3, 2004, the California Supreme Court filed an order, number S120614 ("the
9 February 3, 2004, order") in a consolidated State Bar Court case, identified by numbers
10 02-O-12779, 02-O-13939, and 02-O-14541, in which Respondent was ordered, among other
11 things, to be actually suspended for two years and until he made specified restitution, and until
12 this Court granted a motion to terminate his actual suspension pursuant to rule 205, Rules Proc. of
13 State Bar, and until he complied with standard 1.4(c)(ii) of the Standards for Attorney Sanctions
14 for Professional Misconduct. The Supreme Court further ordered Respondent to comply with
15 California Rules of Court ("CRC"), rule 955, subdivisions (a) and (c), within 30 and 40 days,
16 respectively, after the effective date of the February 3, 2004, order. The February 3, 2004, order
17 was effective on March 4, 2004. (Rule 953(a), Cal. Rules of Court.) Respondent was to comply
18 with CRC 955(a) no later than April 3, 2004, and with CRC 955(c) no later than April 13, 2004.

19 Upon filing of the February 3, 2004, order, the Supreme Court sent Respondent a copy of
20 the said order imposing discipline and directing his compliance with CRC 955.⁴

21 A copy of the February 3, 2004, order also was attached to the NDC in the instant
22 proceeding.

23 On March 11, 2004, the State Bar's Office of Probation sent a letter to Respondent
24

25 ³Effective September 3, 2002, Respondent was placed on inactive membership status as a
26 result of his failure to comply with continuing legal education requirements. Effective
27 September 4, 2002, Respondent was suspended from the practice of law for failure to pay
28 membership fees. Both the inactive enrollment and the suspension remain in effect.

⁴See, rule 24(a), California Rules of Court, and Evidence Code section 664.

1 reminding him of the terms and conditions of the discipline imposed in the February 3, 2004,
2 order, including his obligation to comply with CRC 955, and specifically that the affidavit was to
3 be filed with the State Bar Court no later than April 13, 2004. A copy of the suspension order, as
4 well as a copy of the text of rule 955, and a form for compliance with the rule, were enclosed with
5 the letter. The letter was sent by first-class mail, postage prepaid, addressed to Respondent's
6 official address. The letter was returned by the postal service with a notation that Respondent had
7 moved and left no address.

8 As of October 26, 2004, the date of filing of the State Bar's discipline brief, Respondent
9 had not filed with the State Bar Court the affidavit required by CRC 955(c). He still has not done
10 so.⁵ Respondent has offered no explanation to this Court for his failure to comply with CRC
11 955(c).

12 Based on the foregoing, it has been proved by clear and convincing evidence that
13 Respondent wilfully violated the February 3, 2004, order of the Supreme Court, directing his
14 compliance with CRC 955.⁶ This constitutes a violation of section 6103, which requires attorneys
15 to obey court orders.

16 **FINDINGS AND CONCLUSIONS AS TO MITIGATING CIRCUMSTANCES**

17 Respondent did not participate in these proceedings or present any mitigating
18 circumstances pursuant to standard 1.2(e), Rules of Procedure of the State Bar of California, Title
19 IV, Standards for Attorney Sanctions for Professional Misconduct, ("standards"). Since
20 Respondent bears the burden of establishing mitigation by clear and convincing evidence, the
21 Court has been provided no basis for finding mitigating factors.

22 **FINDINGS AND CONCLUSIONS AS TO AGGRAVATING CIRCUMSTANCES**

23 Respondent has one prior discipline matter, which is an aggravating circumstance.

24
25 ⁵Pursuant to Evidence Code section 452(d), the Court judicially notices that its records
26 still do not contain a CRC 955(c) affidavit from Respondent.

27 ⁶"Wilfulness" in the context of CRC 955 does not require actual knowledge of the
28 provision which is violated. The Supreme Court has disbarred an attorney whose failure to keep
his official address current prevented him from learning that he had been ordered to comply with
CRC 955. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

1 (Standard 1.2(b)(i).)

2 In the underlying matter, Respondent was found culpable of misconduct in two client
3 matters, and of mishandling his client trust account, specifically, issuing a check from his trust
4 account when he knew, or should have known, that there were insufficient funds in the trust
5 account to cover the check. In addition, Respondent was found culpable of failing to cooperate
6 with the State Bar's investigation of the subject matters.

7 Respondent demonstrated indifference toward rectification of or atonement for the
8 consequences of his misconduct by failing to comply with CRC 955(c) even after the NDC in the
9 instant proceeding was filed. (Standard 1.2(b)(v).)

10 Respondent's failure to participate in this proceeding prior to the entry of default is also an
11 aggravating factor. (Standard 1.2(b)(vi).) He has demonstrated his contemptuous attitude toward
12 disciplinary proceedings as well as his failure to comprehend the duty of an officer of the court to
13 participate therein, a serious aggravating factor. (*In the Matter of Stansbury* (Review Dept. 2000)
14 4 Cal. State Bar Ct. Rptr. 103, 109 - 110.)

15 **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 CRC 955(c) is extremely serious misconduct for
21 which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990)
22 50 Cal.3d 116,131; rule 955(d), Cal. Rules of Court.) Disbarment has been consistently imposed
23 by the Supreme Court as the sanction for noncompliance with CRC 955. (*Bercovich v. State Bar*
24 (1990) 50 Cal.3d at p. 131; *Lydon v. State Bar* (1988) 45 Cal.3d at p. 1188; *Powers v. State Bar*
25 (1988) 44 Cal.3d at p. 342.)

26 Respondent has demonstrated an unwillingness to comply with the professional obligations
27 and rules of court imposed on California attorneys although he has been given the opportunity to
28 do so. He failed to participate in this proceeding and did not comply with CRC 955(c). More

1 importantly, Respondent's failure to comply with CRC 955 undermines its prophylactic function in
2 ensuring that all concerned parties learn about an attorney's suspension from the practice of law.
3 (*Lydon v. State Bar* (1988) 45 Cal.3d at p. 1187.)

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

9 **DISCIPLINE RECOMMENDATION**

10 IT IS HEREBY RECOMMENDED that Respondent Andrew J. Sperling be DISBARRED
11 from the practice of law in the State of California and that his name be stricken from the rolls of
12 attorneys in this state.

13 It is also recommended that the Supreme Court order Respondent to comply with rule 955,
14 paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of the
15 Supreme Court order in the present proceeding, and to file the affidavit provided for in paragraph
16 (c) within 40 days of the effective date of the order showing his compliance with said order.

17 **COSTS**

18 The Court recommends that costs be awarded to the State Bar pursuant to Business and
19 Professions Code section 6086.10, and that those costs be payable in accordance with section
20 6140.7.

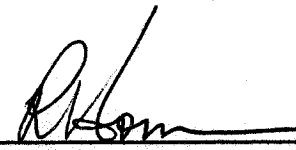
21 **ORDER REGARDING INACTIVE ENROLLMENT**

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

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Dated: January 6, 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. 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 6, 2005, I deposited a true copy of the following document(s):

**DECISION INCLUDING DISBARMENT RECOMMENDATION AND
ORDER OF INVOLUNTARY INACTIVE ENROLLMENT, filed January 6,
2005**

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

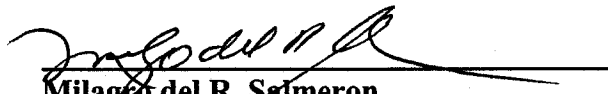
[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**ANDREW J SPERLING
ATTORNEY AT LAW
3841 4TH AVE #283
SAN DIEGO, CA 92103**

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

Timothy Byer, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **January 6, 2005**.


Milagros del R. Salmeron
Case Administrator
State Bar Court