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PUBLIC MATTER

FILED

JAN 24 2005

STATE BAR COURT
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THE STATE BAR COURT

HEARING DEPARTMENT - LOS ANGELES

In the Matter of

JAMES KASMIR O'BRIEN,

Member No. 168485,

A Member of the State Bar.

) **Case No. 04-N-12353-RMT**

) **DECISION AND ORDER OF**
) **INVOLUNTARY INACTIVE**
) **ENROLLMENT**

INTRODUCTION

This matter was initiated by the filing of a Notice of Disciplinary Charges ("NDC") by the State Bar of California, Office of the Chief Trial Counsel ("State Bar"), alleging that Respondent, James Kasmir O'Brien ("Respondent"), wilfully violated Business and Professions Code section 6013 by wilfully violating a Supreme Court order by failing to timely file an affidavit showing that he has fully complied with those provisions of the Supreme Court order entered pursuant to rule 955 of the California Rules of Court. The State Bar was represented in this matter prior to its submission by Deputy Trial Counsel Eric H. Hsu ("DTC Hsu").¹ Respondent did not participate in this proceeding either in-person or through counsel.

For the reasons stated below, the Court finds, by clear and convincing evidence, that Respondent wilfully failed to comply with rule 955 of the California Rules of Court as ordered by the Supreme Court. The Court therefore recommends that Respondent be disbarred from the practice of law and that he be involuntarily enrolled as an inactive member of the State Bar pursuant to

¹On October 28, 2004, the State Bar filed a Substitution of Attorney substituting DTC Desiree Washington in place of DTC Hsu. On January 12, 2005, another substitution was filed and DTC Joseph Carlucci was substituted in place of DTC Washington.

1 Business and Professions Code section 6007(c)(4).

2 **PERTINENT PROCEDURAL HISTORY**

3 This proceeding was initiated by the State Bar's filing of a NDC against Respondent on July
4 29, 2004.² A copy of the NDC was properly served upon Respondent on July 29, 2004, by certified
5 mail, return receipt requested, addressed to the official membership records address ("official
6 address") maintained by Respondent pursuant to Business and Professions Code section 6002.1,
7 subdivision (a). As of September 28, 2004, the date the State Bar filed a motion for entry of
8 Respondent's default, the copy of said NDC had not been returned by the U.S. Postal Service as
9 undeliverable.³

10 On July 29, 2004, DTC Hsu attempted to reach Respondent by telephone at Respondent's
11 official membership records telephone number and left a telephonic voice-mail message for
12 Respondent, requesting that he return the call. DTC Hsu did not receive any telephone call in return
13 from Respondent. (See the declaration of DTC Hsu in support of the motion for default.)

14 On September 28, 2004, DTC Hsu made several attempts to locate Respondent. He
15 consulted with several websites for online directory assistance for the area which includes
16 Respondent's official membership records address and sought all telephone listings for Respondent.
17 (See Exhibit 3 attached to the motion for entry of default, which is a printout for the online directory
18 search.) He checked the 2002 and 2003 editions of Parker Directory, and the 2004 edition of
19 Martindale-Hubbell Law Directory. In addition, he contacted the probation deputy assigned to
20 Respondent's prior disciplinary case, in order to ascertain whether Respondent's probation file

22 ²On June 14, 2004, a 20-day letter was mailed to Respondent at his official membership
23 records address. The 20-day letter was returned by the U.S. Postal Service bearing the stamp
24 "NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD."

25 ³Exhibit 2 attached to the motion for entry of default is a copy of the U.S. Postal Service
26 website printout for certified mail, article number 7160 3901 9844 3982 3755, by which the copy
27 of the NDC was served in this matter. The printout shows the following: on July 31, 2004, at
28 3:00 p.m., notice was left at Los Angeles, CA 90066, which is the zip code of Respondent's
official address; the item was unclaimed as of September 4, 2004, at 4:37 p.m.; and the item was
delivered at 9:47 a.m. on September 15, 2004, in Los Angeles, CA 90015, which is the zip code
of the State Bar's Los Angeles office.

1 contained any other address. None of these sources provided any additional information about
2 Respondent.

3 As Respondent did not file a response to the NDC as required by rule 103 of the Rules of
4 Procedure of the State Bar of California ("Rules of Procedure"), on September 28, 2004, the State
5 Bar filed a motion for the entry of Respondent's default. The motion also contained a request that
6 the Court take judicial notice, pursuant to Evidence Code section 452, subdivision (h), of all of
7 Respondent's official membership addresses.⁴ The motion advised Respondent that once the Court
8 found culpability, the State Bar would recommend Respondent's disbarment. A copy of said motion
9 was properly served upon Respondent by certified mail, return receipt requested, on September 28,
10 2004, addressed to Respondent at his official address.

11 When Respondent failed to file a written response within 10 days after service of the motion
12 for the entry of his default, on October 16, 2004, the Court filed an Order of Entry of Default (Rule
13 200-Failure to File Timely Response) and Order of Involuntary Inactive Enrollment.⁵ A copy of said
14 order was properly served upon Respondent on October 18, 2004, by certified mail, return receipt
15 requested, addressed to Respondent at his official address. The return receipt was received by the
16 State Bar Court on October 19, 2004, without a signature, the date of delivery or any indication of
17 who, if anyone, received the order.

18 Thereafter, by order filed on October 18, 2004, the matter was taken under submission for
19 decision. However, on November 18, 2004, the Court vacated the submission and ordered the State
20 Bar to file an authenticated copy of Respondent's prior record of discipline as required by rule 216(a)
21 of the Rules of Procedure. Thereafter, the State Bar filed the prior record of discipline and the
22 matter was submitted for decision on November 24, 2004.

23 Upon review of the prior record filed by the State Bar, the Court found it is incomplete.
24 Therefore, by order filed January 7, 2005, the submission was vacated a second time, and the State
25

26 ⁴The Court grants the State Bar's request and takes judicial notice of all of Respondent's
27 official membership addresses to the date of the filing of this decision.

28 ⁵Respondent's involuntary inactive enrollment pursuant to Business and Professions Code
section 6007(e) was effective three days after the service of this order by mail.

1 Bar was ordered to rectify the problem with its earlier filing of Respondent's prior record. On
2 January 14, 2005, the State Bar filed a complete copy of Respondent's prior record.

3 On January 14, 2005, this matter was taken under submission for decision.

4 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**⁶

5 Respondent was admitted to the practice of law in California on December 20, 1993 , and has
6 been a member of the State Bar at all times since.⁷

7 On March 16, 2004, the Supreme Court of California entered a final disciplinary order in *In*
8 *re James Kasmir O'Brien on Discipline*, Supreme Court Case No. S106727 (State Bar Court Case
9 No. 03-PM-00559.) In its order, the Supreme Court revoked Respondent's probation and lifted the
10 previously ordered stay of execution of suspension, and suspended Respondent from the practice of
11 law for 24 months, with credit for the period of involuntary inactive enrollment which commenced
12 on December 25, 2003. (Bus. & Prof. Code § 6007(d)(3).)

13 As relevant to this proceeding, the Supreme Court also ordered Respondent to comply with
14 subdivisions (a) and (c) of rule 955 of the California Rules of Court within 30 and 40 days,
15 respectively, after the effective date of the Supreme Court's order. The order of the Supreme Court
16 became effective on April 15, 2004.

17 Upon filing of the March 16, 2004, order, in accordance with rule 24(a) of the California Rules
18 of Court, the Office of the Clerk of the Supreme Court of California served Respondent with a copy
19 of the Supreme Court's order imposing discipline and directing Respondent's compliance with rule
20 955. (See Evid. Code, § 664.)

21 Respondent did not file an affidavit with the State Bar Court evidencing his compliance with
22

23 ⁶As Respondent's default was entered in this matter, the factual allegations contained in
24 the NDC are deemed admitted pursuant to rule 200(d)(1)(A) of the Rules of Procedure of the
25 State Bar of California.

26 ⁷Effective September 27, 1999, Respondent was suspended from the practice of law as a
27 result of his failure to pay annual membership fees. Effective September 3, 2002, Respondent
28 was enrolled as an inactive member because he failed to comply with mandatory continuing legal
education requirements. Both the suspension and inactive enrollment remain in effect. (Evidence
Code § 452.)

1 the requirements of rule 955, as ordered by the Supreme Court, either by the date ordered by the Court
2 or at any time thereafter.

3 The fact that Respondent may not be aware of the requirements of rule 955 or of his obligation
4 to comply with those requirements is immaterial. "Wilfulness" in the context of rule 955 does not
5 require actual knowledge of the provision which is violated. The Supreme Court has disbarred
6 attorneys whose failure to keep their official addresses current prevented them from learning that they
7 had been ordered to comply with rule 955. (See *Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

8 Accordingly, this Court concludes that the State Bar has established by clear and convincing
9 evidence that Respondent wilfully failed to comply with rule 955 by failing to file an affidavit
10 attesting to his compliance with subdivision (a) of that rule, as ordered by the Supreme Court in its
11 March 16, 2004, order. Respondent's failure to comply with rule 955, as ordered by the Supreme
12 Court, also constitutes a wilful violation of Business and Professions Code section 6103 which
13 provides that the wilful disobedience or violation of an order of a court constitutes cause for
14 disbarment or suspension.

15 LEVEL OF DISCIPLINE

16 Factors in Mitigation

17 There are no mitigating factors presented by the record in this proceeding.

18 Factors in Aggravation

19 Respondent has been disciplined on three previous occasions, which is an aggravating
20 factor pursuant to Standard 1.2(b)(i) of the Standards for Attorney Sanctions for Professional
21 Misconduct.

22 In the underlying matter, a probation revocation proceeding, Respondent was found culpable
23 of failing to comply with the probation conditions imposed in an earlier disciplinary matter,
24 specifically, failing to timely submit quarterly reports, and in two instances, failing to submit the
25 reports at all; failing to comply with a request for random testing; and failing to submit evidence of
26 attendance at recovery meetings for the period April through September 2003.

27 Effective August 17, 2002, in S106727 (State Bar Court case no. 98-O-02697, et al), the
28 Supreme Court suspended Respondent from the practice of law for 24 months, stayed execution of

1 the suspension, and placed him on probation for 36 months, with conditions that included, among
2 other things, 10 months actual suspension and the payment of restitution. Respondent was found
3 culpable of commingling personal funds with trust funds, writing checks without sufficient funds in
4 his trust account, multiple instances of practicing law while not entitled to do so, failing to perform
5 and return unearned fees in a client matter, and failing to perform in a second client matter.

6 Effective April 2, 2001, in S094642 (State Bar Court case no. 96-O-07217, et al), the
7 Supreme Court suspended Respondent from the practice of law for one year, stayed execution of the
8 suspension, and actually suspended him for 90 days, among other things. Respondent was found to
9 have failed to comply with conditions of an agreement in lieu of discipline that he had entered into
10 with the State Bar on February 2, 1998, specifically, taking and passing the Multistate Professional
11 Responsibility Examination, and completing both ethics school and client trust account school.

12 Respondent's failure to file the rule 955 compliance affidavit with the Clerk of the State Bar
13 Court significantly harmed the public and the administration of justice. (Standard 1.2(b)(iv).)

14 Respondent's failure to participate in the this matter prior to the entry of his default
15 demonstrates a lack of cooperation, and is an aggravating circumstance pursuant to standard
16 1.2(b)(vi).

17 **Discussion**

18 Rule 955(d) provides in part that "[a] suspended member's wilful failure to comply with the
19 provisions of this rule constitutes a cause for disbarment or suspension and for revocation of any
20 pending probation."

21 Timely compliance with rule 955 is essential to ensure that all concerned parties (including
22 clients, co-counsel, opposing counsel and all courts in which the attorney has pending litigation) learn
23 about the attorney's actual suspension from the practice of law. Compliance with rule 955 also keeps
24 the State Bar Court and the Supreme Court informed of the location of attorneys who are subject to
25 their respective disciplinary authority. (*Lydon v. State Bar* (1988) 45 Cal.3d 118, 1187.)

26 Disbarment is generally the appropriate sanction to be imposed for a wilful violation of rule 955.
27 (*Bercovich v. State Bar* (1990) 50 Cal.3d 116,131.)

28 Respondent has exhibited a disregard for both the Supreme Court and the State Bar Court in

1 their efforts to fulfill their respective responsibilities to oversee the practice of law in the State of
2 California. Respondent's disregard is exemplified by (1) his failure to comply with rule 955; and (2)
3 his failure to participate in this disciplinary matter.

4 This Court is unaware of any facts or circumstances that would justify a departure from the
5 usual sanction of disbarment for Respondent's wilful violation of rule 955 and his resulting violation
6 of Business and Professions Code section 6103. One of this Court's obligations is to ensure that its
7 disciplinary recommendations to the Supreme Court are fair and consistent. (*In re Young* (1989) 49
8 Cal.3d 257, 268.)

9 Respondent's disbarment is necessary to protect the public, the courts and the legal profession,
10 to maintain high professional standards and to preserve public confidence in the profession. It would
11 seriously undermine the integrity of the disciplinary system and damage public confidence in the legal
12 profession if Respondent were not disbarred for his wilful and unexplained disobedience of the
13 Supreme Court's March 6, 2004, order.

14 **RECOMMENDED DISCIPLINE**

15 This Court recommends that Respondent **JAMES KASMIR O'BRIEN** be disbarred from
16 the practice of law in the State of California and that his name be stricken from the roll of attorneys
17 in this State.

18 It is also recommended that the Supreme Court order Respondent to comply with rule 955(a)
19 of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court
20 order in this matter and to file the compliance affidavit required by rule 955(c) within 40 days of the
21 effective date of the Court's order.

22 **ORDER REGARDING INACTIVE ENROLLMENT**

23 Respondent is ordered transferred to involuntary inactive status pursuant to Business and
24 Professions Code section 6007(c)(4). Said inactive enrollment will be effective three days after this
25 order is served by mail, and will terminate upon the effective date of the Supreme Court's order
26 imposing discipline herein, as provided for by rule 490(b) of the Rules of Procedure of the State Bar
27 of California, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

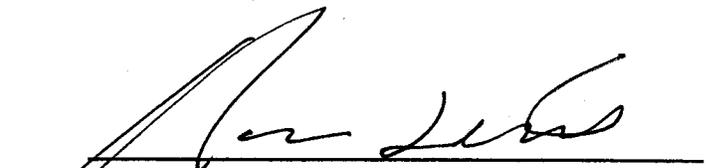
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COSTS

It is further recommended that costs be awarded to the State Bar pursuant to Business and Professions Cod section 6086.10.

Dated: January 24, 2005



ROBERT M. TALCOTT
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 24, 2005, I deposited a true copy of the following document(s):

**DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT,
filed January 24, 2005**

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

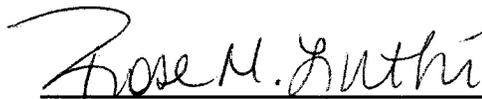
by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**JAMES K. O'BRIEN
4343 LYCEUM AVE
MARINA DEL REY CA 90066**

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

JOSEPH CARLUCCI, ESQ., Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **January 24, 2005**.



Rose M. Luthi
Case Administrator
State Bar Court