FILED JULY 24, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **DAVID MATTHEW SMITHSON,** **Member No. 118338,** A Member of the State Bar.	)	Case No.: **04-O-15101-RMT** **DECISION**

I. INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, Deputy Trial Counsel Eric H. Hsu appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Even though he had actual knowledge of this proceeding, respondent David Matthew Smithson did not appear in person or by counsel.

In the notice of disciplinary charges (hereafter NDC), the State Bar charges respondent with the following four counts of misconduct: (1) engaging in the unauthorized practice of law; (2) engaging in acts involving moral turpitude; (3) failing to obey a superior court sanction order; and (4) failing to maintain a current address with the State Bar. The State Bar contends that the appropriate level of discipline is "three years of stayed suspension with a period of probation to be specified, conditioned on ninety (90) days of actual suspension and until a motion to terminate

Respondent's actual suspension is granted."[1] The court cannot agree because the record establishes only a small part of the charged unauthorized practice of law misconduct. In light of the amount of misconduct actually established by the record, the court concludes that the appropriate level of discipline is two years' stayed suspension and sixty days' actual suspension continuing until respondent makes and the State Bar Court grants a motion to terminate his actual suspension in accordance with Rules of Procedure of the State Bar, rule 205. Moreover, as discussed in more detail *post*, the court independently concludes that respondent should be required to obey the superior court's sanction order before he is relived of his actual suspension.

II. PROCEDURAL HISTORY

A. Case Number 04-O-12130-RAP

On October 28, 2005, the State Bar filed the NDC in this case and properly served a copy of it on respondent at his latest address shown on the official membership records of the State Bar (hereafter official address) by certified mail, return receipt requested in accordance with Business and Professions Code section 6002.1, subdivision (c).[2] That service was deemed complete when mailed even if respondent did not receive it. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108.) On October 28, 2005, the State Bar exceeded its minimum statutory duty to mail a copy of the NDC to respondent at his official address (§ 6002.1, subd. (c)) by mailing a courtesy copy of the NDC to him by first class mail at an address on Milbank

[1]After the March 15, 1999, effective date of rule 205 of the Rules of Procedure of the State Bar, State Bar Court disciplinary recommendations in default proceedings are not to include both a period of actual suspension and a period of probation. (Cf. *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 110 [Under rule 205, "the appropriate time to consider imposing probation and its attendant conditions is when the attorney seeks relief from the actual suspension that may be imposed following his or her default in a disciplinary proceeding."].) Accordingly, the court rejects the State Bar's assertion that the discipline recommendation in this proceeding should include a "period of probation to be specified, conditioned on ninety (90) days of actual suspension."

[2]Unless otherwise indicated, all further statutory references are to this code.

Street in Studio City, California (hereafter the Milbank Street Boulevard address), which is an alternative address that it had for respondent in its file. The United States Postal Service (hereafter Postal Service) returned, to the State Bar, the copy of the NDC that it served on respondent at his official address marked "Return to Sender; Attempted, Not Known." However, the Postal Service did not return the courtesy copy of the NDC, which the State Bar mailed to the Milbank Street address. (See the declaration of DTC Eric Hsu that is attached to the State Bar's March 15, 2006, motion for entry of default.) Accordingly, the court finds that respondent actually received the courtesy copy. (Evid. Code, § 641 [mailbox rule].)

Respondent's response to the NDC was due no later than November 22, 2005. (Rules Proc. of State Bar, rule 103(a).) Respondent, however, failed to timely file a response. Nevertheless, on January 4, 2006, respondent telephoned DTC Hsu and told DTC Hsu that he was ill and needed a continuance of the in person status conference set for later than same day. When DTC Hsu appeared at the status conference later that day, he told the court of respondent's illness. Even though respondent did not file a written motion for a continuance as required under the Rules of Procedure, the court continued the status conference until January 17, 2006, in the interest of justice. Respondent, however, also failed to appear at the status conference on January 17, 2006. Thereafter, on March 15, 2006, the State Bar filed a motion for entry of respondent's default and properly served a copy of it on respondent at his official address by certified mail, return receipt requested. In addition, the State Bar mailed a courtesy copy of its motion to respondent at the Milbank Street address. Respondent failed to respond to the State Bar's motion or to file a response to the NDC. Because all of the statutory and rule prerequisites were met, the court filed an order on April 4, 2006, entering respondent's default and, as mandated in section 6007, subdivision (e)(1), placing him on involuntary inactive enrollment.

On April 20, 2006, the State Bar filed a brief on culpability and discipline. Thereafter, on April 24, 2006, the court took the case under submission for decision without a hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on: (1) the well-pleaded factual allegations (not the legal contentions) contained in the NDC, which allegations are deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)); and (2) the facts in this court's official file in this matter.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 11, 1985, and has been a member of the State Bar since that time.

B. Misconduct

In August 2002, respondent was employed to defend Mark C. Bailey, Bailey & Associates, and Park Row Townhouse Association (hereafter collectively referred to as Bailey) in a civil action that Mark Beattie filed against them in the Los Angeles County Superior Court (hereafter the Beattie lawsuit). Thereafter, on September 3, 2002, respondent was involuntarily enrolled as an inactive member of the State Bar because he did not comply with the State Bar's Minimum Continuing Legal Education (hereafter MCLE) requirements.[3] On September 16, 2002, the State Bar's Office of Certification mailed, to respondent at his official address, a letter informing him that he had been involuntarily enrolled inactive effective September 3, 2002,

[3]The State Bar inaccurately and inappropriately alleges in the NDC that respondent "was enrolled 'not entitled' because of his noncompliance with Mandatory [sic.] Continuing Legal Education . . . requirements." Without question, respondent was not enrolled "not entitled." Instead, he was administratively and involuntarily enrolled as an inactive member of the State Bar in accordance with California Rules of Court, rule 958(d) and the State Bar's Minimum Continuing Legal Education Rules and Regulations, sections 13.1 and 13.2. (See also § 6003 [there are *only* two member classes in the State Bar: active and inactive].) Without condoning the State Bar's pleading error, the court concludes that it is harmless because, notwithstanding the error, the NDC still adequately advises respondent of the precise nature of the charges against him. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929.)

because of his MCLE noncompliance. Respondent actually received that letter. As of the date of this decision, respondent remains on involuntarily inactive enrollment because of his MCLE noncompliance.

On October 29, 2002; November 20, 2002; November 27, 2002; December 12, 2002; February 14, 2003; March 13, 2003; April 10, 2003; April 14, 2003; June 5, 2003; and July 3, 2003, respondent filed pleadings in the Beattie lawsuit on behalf of Bailey. Moreover, on November 20, 2002; January 10, 2003; and March 14, 2003, respondent appeared in superior court in the Beattie lawsuit on behalf of Bailey.

On December 30, 2002, the superior court in the Beattie lawsuit imposed sanctions of $500 against respondent because he failed to appear at a case management conference. Thereafter, on January 2, 2003, Beattie's counsel served notice of the sanctions order on respondent, and respondent actually received that notice. As of the date the State Bar filed the NDC in this proceeding in October 2005, respondent had still not paid the sanctions.

Respondent finally "substituted out" as Bailey's attorney of record in the Beattie lawsuit in July 2003.

In November 2004, the State Bar opened a disciplinary investigation in response to a complaint that Attorney Jeffrey A. Slott filed on behalf of Beattie. In February 2005 and again in March 2005, a State Bar investigator mailed, to respondent at his official address, a letter requesting that respondent respond in writing to specified allegations of misconduct raised by Attorney Slott. However, the Postal Service returned both of those letters to the State Bar marked "return to sender-not at this address."

Counts 1 & 2: Unauthorized Practice of Law (§§ 6125, 6126, 6103, subd. (a)) & Moral Turpitude (§ 6106)

The State Bar charges that, by filing pleadings and appearing in court on behalf of Bailey in the Beattie lawsuit while he was on involuntary inactive enrollment, respondent (1) held

himself out as entitled to practice law and actually practiced law when he was not an active member of the State Bar in willful violation of sections 6125 (only active members of the State Bar may practice law) and 6126 (crime to hold oneself out as entitled to practice law), which are disciplinable violations under section 6068, subdivision (a) (attorneys have a duty to obey laws) and (2) thereby engaged in acts involving moral turpitude in willful violation of section 6106 (acts of moral turpitude are cause for discipline).

The factual allegations of the NDC are insufficient to establish that respondent engaged in any misconduct by filing pleading in the Beattie lawsuit while he was on involuntary inactive enrollment. The mere filing of pleadings alone does not involve the practice of law. Attorney services file thousands of pleading in thousands of lawsuits in this state every day. Without question, preparing or signing of pleading on behalf of another involves the unauthorized practice of law. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 519-520, and cases there cited.) However, the State Bar did not allege that respondent prepared or signed any of the pleadings he filed. Accordingly, the charge that respondent violated sections 6125, 6126, 6103, subdivision (a), and 6106 by filing pleadings in the Beattie lawsuit is dismissed with prejudice.

Nonetheless, the record clearly establishes that respondent engaged in the unauthorized practice of law in willful violation of sections 6125, 6126, and 6103, subdivision (a) when he appeared in court on behalf of Bailey on November 20, 2002; January 10, 2003; and March 14, 2003. Except for a few exceptions not relevant here (such as certain appearances in small claims cases), the appearance in court on behalf of another is the practice of law. (*In the Matter of Valinoti, supra*, 4 Cal. State Bar Ct. Rptr. at pp. 519-520, and cases there cited.) Moreover, because respondent had actual knowledge that he was involuntarily enrolled inactive at the time he appeared in court, his unauthorized practice of law on three separate occasions (days) also

involved moral turpitude in willful violation of section 6106. (*In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639, 642.)

Count 3: Violation of Court Order (§ 6103)

Section 6103 provides that the willful "disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." Moreover, before an attorney may be disciplined for violating a court order under section 6103, the State Bar must prove, by clear and convincing evidence, that the attorney had actual knowledge that there was a final, binding court order requiring him or her to act or to forbear from acting. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787-788.)[4]

The record in the present proceeding clearly establishes that respondent had such actual knowledge of the superior court's December 2002 sanctions order because the record establishes that respondent actually received the notice of that order which Beattie's counsel served on him in January 2003. Moreover, the record clearly establishes that, at least at the time the NDC was filed this disciplinary proceeding in October 2005, respondent still had not paid the $500 as ordered. Accordingly, the court finds that respondent willfully violated his duty under section 6103 to obey the superior court's December 2002 sanctions order.

[4]As the review department aptly note in *In the Matter of Valinoti*, *supra*, 4 Cal. State Bar Ct. Rptr. at page 788, footnote 18, there is no such actual knowledge "requirement" when the State Bar charges that an attorney failed to obey a Supreme Court order to comply California Rules of Court, rule 955. That is because a violation of such a Supreme Court order is disciplinable under California Rules of Court, rule 955(d). Under rule 955(d), the Supreme Court will disbar an attorney for not complying with rule 955 as ordered even if the attorney was unaware of the court's order if it was the attorney's failure to keep his or her official address at the State Bar current. (E.g., *Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

Count 4: Failure to Maintain Official Address (§ 6068, subd. (j))

In light of the fact that the Postal Service returned as undeliverable the letters that the State Bar investigator sent respondent in February and March 2005, the court finds that the record clearly establishes that respondent willfully violated his duty, under section 6068, subdivision (j), to maintain his current office address and telephone number or, if no office is maintained, a current address for State Bar purposes on the official membership records of the State Bar as required by section 6002.1, subdivision (a)(1).

IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravating Circumstances

1. Multiple Acts of Misconduct

The fact that respondent has been found culpable on four counts of misconduct is an aggravating circumstance. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(ii).)

2. Failure to Cooperate

Respondent's failure to participate in this disciplinary proceeding before the entry of his default is an aggravating factor. (Std. 1.2(b)(vi).) However, contrary to the State Bar's contention, it warrants little weight in aggravation because the conduct relied on for this aggravating factor closely equals the misconduct relied on to find respondent culpable of violating section 6068, subdivision (j) and to enter his default. (Cf. I*n the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

3. Harm

The court rejects the State Bar contention that respondent's misconduct significantly harmed the administration of justice, which is an aggravating circumstance under standard 1.2(b)(iv). Harm to the administration of justice is inherent in the unauthorized practice of law.

(*In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 240.) Therefore, it is improper to find such harm as aggravation at least when, as in the present case, there is no clear and convincing evidence of any significant harm above and beyond the inherent harm. (*Id.* at pp. 239-240; cf. *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 76.)

B. Mitigating Circumstances

The State Bar has not proffered any evidence indicating that respondent has a prior record of discipline, which would be an aggravating circumstance under standard 1.2(b)(i). As noted above, respondent was admitted to practice on June 11, 1985. Furthermore, the State Bar's official membership records show that respondent has continually been an active member of the State Bar since that time. In addition, the State Bar's official records indicate that respondent practiced law at various law firms in Los Angeles area at least from December 1989 until September 2002 (more than 11 years), which was when he was involuntarily enrolled inactive for his MCLE noncompliance. The misconduct found in this proceeding began in October 2002. Thus, contrary to the State Bar's contention, the record establishes that respondent has practiced law discipline-free for many years, which is a substantial mitigating circumstance (std. 1.2(e)(i)).

V. DISCUSSION ON DISCIPLINE

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Ba*r (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) However, as noted below, the standards provide little guidance in the present case. Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In this case, the most severe sanction for respondent's misconduct is found in standard 2.3, which applies to respondent's violations of section 6106.

Standard 2.3 provides "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." This generalized language provides little guidance to the court. (See, e.g., *In re Brown* (1995) 12 Cal.4th 205, 220; *In re Morse* (1995) 11 Cal.4th 184, 206.)

Turning to case law, the State Bar argues that *In the Matter of Mason, supra,* 3 Cal. State Bar Ct. Rptr. 639 supports its contention that the appropriate level of discipline in this proceeding is three years' stayed suspension and ninety days' actual suspension. The court cannot agree. Even though respondent's unauthorized practice of law is comparable to that found in *Mason,* where the attorney made one court appearance and signed and filed a one brief, there are distinguishing facts. The most notable being that, in *Mason,* the attorney had a prior record of discipline, which included a 75-day period of actual suspension. In *Mason,* the review department applied standard 1.7(a), which required that the review department recommend a period of actual suspension greater than 75 days.

In *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, the attorney was placed on two years' stayed suspension, two years' probation, and thirty days' actual suspension for accepting employment from a client and appearing in court while on actual

suspension under a Supreme Court disciplinary order. Even though the attorney in *Trousil* had a prior record of discipline, he was entitled to far more mitigation that respondent. Thus, the court concludes that, on balance, respondent's misconduct warrants more actual suspension than the 30 days' imposed in *Trousil*. Accordingly, the court will recommend 60 days' actual suspension continuing until respondent makes and the State Bar Court grants a motion to terminate his actual suspension under Rules of Procedure of the State Bar, rule 205.

Further, even though not addressed by the State Bar, the court independently concludes that respondent should be required to obey the superior court's December 2002 sanctions order. "To conclude otherwise would terminate respondent's professional obligation under section 6103 to obey the order and pay the sanctions. Such a result would be inconsistent with the purposes of attorney discipline." (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 869.) In short, the court will recommend that respondent be required to pay the $500 in sanctions together with interest thereon at the rate of 10 percent per annum from February 1, 2003 (which is 30 days after he was served with notice of the superior court's sanctions order) until paid. Furthermore, the court will recommend that respondent be required to obey the superior court's order before he is relieved of his actual suspension. (Cf. *In the Matter of Elliott* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 541, 545.)

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent David Matthew Smithson be suspended from the practice of law in the State of California for two years, that execution of the two-year suspension be stayed, and that Smithson be actually suspended from the practice of law for sixty days and until (1) he obeys the superior court's December 2002 sanctions order by paying the $500 sanctions imposed on him therein together with interest thereon at the rate of 10 percent simple interest per annum from February 1, 2003, until paid; (2) he provides proof satisfactory of such

payment to State Bar's Office of Probation in Los Angeles; and (3) he makes and the State Bar Court grants a motion, under Rules of Procedure of the State Bar, rule 205, to terminate his actual suspension.

The court also recommends that, if Smithson's actual suspension in this matter continues for two or more years, he remain actually suspended from the practice of law until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

The court also recommends that Smithson be ordered to comply with the conditions of probation, if any, hereinafter imposed on him by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

VII. PROFESSIONAL RESPONSIBILITY EXAM, RULE 955 & COSTS

The court also recommends that Smithson be ordered (1) to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners (MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, telephone number (319) 337-1287) within the greater of one year after the effective date of the Supreme Court order in this matter or the period of his actual suspension and (2) to provide satisfactory proof of his passage to the State Bar's Office of Probation in Los Angeles within that same time period. Failure to pass the MPRE within the specified time results, without a hearing, in actual suspension by the review department until passage. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; but see also Cal. Rules of Court, rule 951(b); Rules Proc. of State Bar, rules 320, 321(a)(1)& (3).)

Further, the court recommends that, if the period of his actual suspension in this proceeding extends for 90 or more days, Smithson be required to comply with California Rules

of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[5]

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: July 21, 2006

ROBERT M. TALCOTT
Judge of the State Bar Court

[5]Smithson is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) Moreover, an attorney's failure to comply with rule 955 almost always results in disbarment in the absence of compelling mitigating circumstances. (See, e. g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 296.)