

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO**

In the Matter of)	Case Nos. 05-N-02782-PEM; 05-O-03595;
)	06-O-10276 (Cons.)
DAVID EUGENE ROBERTS,)	
)	DECISION AND ORDER OF
Member No. 51430,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. Introduction

In this consolidated default matter, respondent **David Eugene Roberts** is found culpable, by clear and convincing evidence, of (1) engaging in the unauthorized practice of law; (2) violating his probation conditions; and (3) failing to comply with California Rules of Court, rule 955,¹ as ordered by the California Supreme Court on December 23, 2004, in S128322.

In view of respondent's misconduct and three prior records of discipline, the court recommends that respondent be disbarred from the practice of law.

II. Pertinent Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing three Notices of Disciplinary Charges (NDCs) against respondent, as follows:

1. Case No. 05-N-02782 filed July 29, 2005;
2. Case No. 05-O-03595 filed August 30, 2005; and
3. Case No. 06-O-10276 filed February 14, 2006.

Respondent filed responses to these three NDCs, which were later consolidated. The State Bar was represented by Deputy Trial Counsel Sherrie B. McLetchie and respondent represented himself.

¹All references to rule 955 are to California Rules of Court, rule 955.

Thereafter, between February and June 2006, respondent repeatedly failed to comply with State Bar's discovery requests and court orders, despite several opportunities given respondent to produce the requested documents and warnings that failure to comply would result in discovery sanctions.

After he had exasperated the court's leniency, on July 14, 2006, the court issued an order granting terminating sanctions, striking respondent's answer and entering his default. Respondent was enrolled as an inactive member on July 17, 2006, under Business and Professions Code section 6007, subdivision (e).² An order of entry of default was sent to respondent's official address by certified mail. The matter was deemed submitted on July 27, 2006, following the filing of State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

All factual allegations of the three NDCs are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

Respondent was admitted to the practice of law in California on January 5, 1972, and has since been a member of the State Bar of California.

Background – S128322

Respondent's misconduct in these three consolidated matters arises from his failure to comply with a disciplinary order – S128322. On December 23, 2004, the California Supreme Court ordered respondent suspended from the practice of law for one year, that execution of the suspension be stayed, and that he be placed on probation for two years subject to the conditions of probation, including an actual suspension of 120 days, as recommended by the Hearing Department of the State Bar Court in its order approving stipulation filed August 18, 2004. (Supreme Court case No. S128322, State Bar Court case No. 01-O-04182 et al.) The Supreme Court ordered respondent to comply with rule 955(a) and (c), within 30 and 40 days, respectively, after the effective date of the

²All references to section (§) are to the Business and Professions Code, unless otherwise indicated.

Supreme Court order. The order became effective January 22, 2005, and was duly served on respondent.

Among other probation conditions, respondent was required to:

1. Comply with the provisions of the State Bar Act and the Rules of Professional Conduct;
2. Report within 10 days to the Office of Probation any change of information, including current telephone number;
3. Submit quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation stating under penalty of perjury whether he had complied with the State Bar Act and the Rules of Professional Conduct;
4. Subject to an assertion of applicable privileges, answer fully, promptly and truthfully any inquiries of the Office of Probation relating to whether he was complying or had complied with the probation conditions; and
5. Attend and pass both State Bar Ethics School and Client Trust Accounting School within one year of the effective date of the Supreme Court order.

By letter dated January 10, 2005, the Office of Probation reminded respondent of his prospective obligations under the Supreme Court order, and, among other things, sent him a copy of the probation conditions to which he had stipulated, as well as specific instructions on how to file his quarterly report forms and an information sheet regarding State Bar Ethics School and Client Trust Accounting Schools. A copy of the Supreme Court order was also enclosed.

A. First NDC (Case No. 05-N-02782)

Under S128322, respondent was required to comply with rule 955(a) no later than February 21, 2005 by (1) notifying all clients and any co-counsel of his suspension; (2) delivering to all clients any papers or other property to which the clients were entitled; (3) refunding any unearned attorney fees; (4) notifying opposing counsel and adverse parties of his suspension; and (5) filing a copy of said notice with the court, agency, or tribunal before which the litigation was pending.

Rule 955(b) requires that all notices under rule 955(a) must be given by registered or certified

mail, return receipt requested, and must contain an address where communications may be directed to the suspended member.

Respondent was further required to comply with rule 955(c) no later than March 3, 2005, by filing with the Clerk of the State Bar Court an affidavit showing that he had fully complied with those provisions of the order regarding rule 955.

On or about March 4, 2005, the Clerk of the State Bar Court received and filed a declaration of respondent, in which respondent stated that he did not take any steps to return client files, that there was one case in particular where there were unearned fees and that “in most cases” he hand-delivered a notice of his suspension to his clients rather than mailing the notice by registered or certified mail as required under rule 955(b).

On March 8, 2005, attorney Jayne Kim of State Bar’s Office of Probation, wrote to ask respondent for clarification regarding the cases in which respondent appeared to be still practicing law during his actual suspension. Attorney Kim asked respondent to refile his declaration to comply with all parts of rule 955(a).

In response, respondent wrote that he had “not engaged in the practice of law,” but, at the same time, stated that he had received phone calls from “former clients” and answered their legal questions.

On or about March 16, 2005, the Clerk of the State Bar Court received a second declaration from respondent, which consisted of the State Bar Court rule 955 compliance form with certain words and phrases interlined. By virtue of the interlineations, respondent indicated that he had not properly notified all clients, opposing counsel, and adverse parties not represented by counsel of his suspension by certified or registered mail.

Attorney Kim again asked respondent for clarification regarding his March 16 declaration and reminded him that full compliance with rule 955(a) was required.

By letter dated March 21, 2005, respondent confirmed that he did not use certified or registered mail in delivering notice of his suspension.

Count 1: Failure to Comply With Court Order (Bus. & Prof. Code, § 6103)

Section 6103 requires attorneys to obey court orders and provides that the wilful disobedience

or violation of such orders constitutes cause for disbarment or suspension.

Whether respondent is aware of the requirements of rule 955 or of his obligation to comply with those requirements is immaterial. “Wilfulness” in the context of rule 955 does not require actual knowledge of the provision which is violated. Here, the Office of Probation had repeatedly reminded respondent to fully comply with rule 955. Instead of heeding the advice, he admitted that he did not properly notify clients, opposing counsel, and adverse parties not represented by counsel through registered or certified mail of his suspension, and that he continued to give legal advice to “former clients.” Therefore, the State Bar has established by clear and convincing evidence that respondent wilfully failed to comply with rule 955, as ordered by the Supreme Court.³

Respondent’s failure to comply with rule 955(a), as required by the suspension order, constitutes a violation of an order of the court requiring him to do acts, which he ought in good faith to do or forbear, connected with respondent’s profession, in wilful violation of section 6103.

Count 2: Unauthorized Practice of Law (Bus. & Prof. Code, §§ 6068, Subd. (a), 6125, and 6126)

Section 6068, subdivision(a), provides that an attorney has a duty to support the laws of the United States and of this state. Section 6125 prohibits the practice of law by anyone other than an active attorney and section 6126 prohibits holding oneself out as entitled to practice law by anyone other than an active attorney.

By clear and convincing evidence, respondent wilfully violated sections 6068, subdivision (a), 6125 and 6126. While he was on suspension, respondent knew or should have known that he was not entitled to practice law effective January 22, 2005. Yet, he held himself out as entitled to practice law and practiced law by giving legal advice to his clients during his suspension.

Count 3: Moral Turpitude (Bus. & Prof. Code, § 6106)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

Respondent was fully aware of his suspension and knew or should have known that he was

³Specifically, rule 955(d), provides that a suspended attorney’s wilful failure to comply with rule 955 constitutes a cause for disbarment or suspension and for revocation of any pending probation.

not entitled to practice law during his suspension. Yet, he knowingly held himself out as entitled to practice law and provided legal advice to his clients. Such misconduct constituted acts of moral turpitude and dishonesty in wilful violation of section 6106. (*In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585.)

B. Second NDC (Case No. 05-O-03595)

Since March 8, 2002, and to date, respondent's office telephone number for State Bar purposes is (559)435-7917. On July 29, 2005, attorney Kim of the Office of Probation attempted to reach respondent by telephone but the telephone number had been disconnected.

Respondent received the January 10, 2005 letter from the Office of Probation shortly after January 10, 2005, regarding S128322, but he did not submit a quarterly report for the period January 22 through April 1, 2005, which was due April 10 until May 16, 2005. His filing was late.⁴

Furthermore, respondent did not file any quarterly report for the period between May 16, 2005, and July 1, 2005, which report was due no later than July 10, 2005.

Failure to Comply With Probation Conditions (§ 6068, Subd. (k))

Section 6068, subdivision (k), provides that it is the duty of an attorney to comply with all conditions attached to a disciplinary probation.

By not maintaining a current office telephone number for State Bar purposes as required by Business and Professions Code sections 6002.1 and 6068(j) and by failing to timely file the April 10, 2005 quarterly report, respondent failed to comply with conditions attached to his probation under S128322, in violation of section 6068, subdivision (k).⁵

C. Third NDC (Case No. 06-O-10276)

By letters dated November 22, 2005, and January 6, 2006, the State Bar reminded respondent

⁴In the decision filed June 20, 2006, in case No. 05-O-04536 (respondent's third prior record of discipline), the court had already found that respondent did not timely file the probation report due April 10, 2005, and had not filed the reports due July 10, 2005 and October 10, 2005.

⁵As noted in the above footnote, since the court had already found in case No. 05-O-04536 that respondent violated section 6068, subdivision (k), by failing to file the July 10 and October 10, 2005, quarterly reports, it would be duplicative to make the same culpability finding in this matter.

that his quarterly report for the period between October 1, 2005, and January 1, 2006, was due no later than January 10, 2006, pursuant to S128322. Respondent received the November 22, 2005, and January 6, 2006 letters.

Not until January 17, 2006, did respondent submit the quarterly report for the period between October 1, 2005, and January 1, 2006, which report was due no later than January 10, 2006.

To date, respondent has not attended either the State Bar Ethics School or Client Trust Accounting School.

Failure to Comply With Probation Conditions (§ 6068, Subd. (k))

By not timely filing a probation report due January 10, 2006, and not attending the State Bar Ethics School or Client Trust Accounting School within one year after the effective date of the Supreme Court order, despite having stipulated to do so, respondent wilfully failed to comply with conditions attached to his probation in violation of section 6068, subdivision (k).

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁶

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent has three prior records of discipline. (Std. 1.2(b)(i).)

1. In his first prior record, on October 24, 1990, respondent was suspended for two years, stayed, placed on probation for two years and actually suspended for 80 days for his criminal conviction for failing to file two income tax returns (Supreme Court case No. S011361; State Bar Court case No. 89-C-12745). Respondent's conviction did not involve moral turpitude but did involve other misconduct warranting discipline.
2. In his second prior record, the underlying matter, respondent stipulated to one year

⁶All further references to standards are to this source.

of stayed suspension, two years of probation and 120 days of actual suspension for his misconduct involving six matters (Supreme Court case No. S128322 filed December 23, 2004; State Bar Court case No. 01-O-04182 et al.). His misconduct included aiding another in the unauthorized practice of law, failing to promptly pay a client of settlement funds, failing to perform competently, failing to appear in court, and issuing insufficiently funded checks.

3. In his third prior record, the court recommended that respondent be suspended for one year, stayed, and be actually suspended for eight months and until he files and the State Bar Court grants a motion to terminate his actual suspension. He was found to have violated his probation conditions imposed in S128322 and of failing to notify the State Bar of the bringing of an information charging him with a felony violation of possession of a controlled substance. Since the prior discipline is not final as of the date of this decision, the court hereby adopts the recommendation therein. (Rules Proc. of State Bar, rule 216; State Bar Court case No. 05-O-04536 filed June 20, 2006.)

Respondent's misconduct demonstrates a pattern of misconduct involving his inattention to the disciplinary order (S128322). (Std. 1.2(b)(ii); *In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, 334.) Despite repeated warnings and advice from the Office of Probation, respondent failed to comply with rule 955, engaged in the unauthorized practice of law, failed to file probation reports and failed to attend the State Bar Ethics School and Client Trust Accounting School.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct despite repeated warnings from the Office of Probation. (Std. 1.2(b)(v).)

Respondent's failure to participate in this disciplinary matter before the entry of his default, particularly his repeated failure to comply with discovery requests, is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

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

Respondent's misconduct included continuous violations of his probation conditions and failure to comply with rule 955. The standards provide a broad range of sanctions ranging from suspension to disbarment, depending upon the gravity of the offenses and the harm to the victim. (Stds. 1.6, 1.7, 2.3, and 2.6.)

Standard 1.7(b) provides that if a member has a record of two prior impositions of discipline, the degree of discipline in the current proceeding must be disbarment unless the most compelling mitigating circumstances clearly predominate. Respondent has three prior records of discipline and no mitigation.

The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) “[E]ach case must be resolved on its own particular facts and not by application of rigid standards.” (*Id.* at p. 251.) The court will look to applicable case law for guidance. Nevertheless, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges disbarment.

As discussed in the June 20, 2006 decision (respondent's third prior record of discipline):

“[A] probation ‘reporting requirement permits the State Bar to monitor [an attorney probationer’s] compliance with professional standards.’” (*In the Matter of Weiner* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605.) In addition, “an attorney probationer’s filing of quarterly probation reports is an important step towards the attorney’s rehabilitation.” (*In the Matter of Weiner, supra*, 3 Cal. State Bar Ct. Rptr. at p. 763.) Thus, respondent’s failure to file a quarterly report warrants significant discipline.

Here, in these three consolidated matters, not only did respondent fail to timely file his quarterly reports but more important, he failed to comply with rule 955. Respondent's wilful failure to comply with rule 955(c) is extremely serious misconduct for which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Such failure undermines its prophylactic function in ensuring that all concerned parties learn about an attorney's suspension from the practice of law. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.) Respondent has demonstrated an unwillingness to comply with the professional obligations and rules of court imposed on California attorneys although he has been given opportunities to do so. He simply ignored the advice from the Office of Probation and the necessity for him to be in full compliance with rule 955.

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

VI. Discipline Recommendation

The court recommends that respondent **David Eugene Roberts** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 955(a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.

VII. Costs

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.

VIII. Order of Involuntary Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: October 17, 2006

PAT McELROY
Judge of the State Bar Court