

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case Nos. 05-O-01541-JMR;
)	05-N-04944 (Cons.)
DENNIS VANCE MILNER,)	
)	DECISION AND ORDER OF
Member No. 113464,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. Introduction

In this consolidated default matter, respondent **Dennis Vance Milner** is found culpable, by clear and convincing evidence, of engaging in unauthorized practice of law, failing to communicate with a client and failing to comply with California Rules of Court, rule 955,¹ as ordered by the California Supreme Court on August 23, 2005, in S134619 (State Bar Court case No. 04-O-12057).

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

II. Pertinent Procedural History

A. First Notice of Disciplinary Charges (Case No. 05-O-01541)

On October 26, 2005, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a Notice of Disciplinary Charges (NDC) at his official membership records address. The NDC was returned as undeliverable.

Respondent did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

On November 3, 2005, the State Bar attempted to telephone respondent at his official telephone number, but the number was disconnected. When the State Bar called respondent at an alternative telephone number and e-mailed him at an alternative e-mail address, the State Bar

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

received a message from respondent on November 21, 2005, requesting that the State Bar e-mail him a copy of the NDC. Although the State Bar replied to respondent, it had not had any contact with respondent since November 21, 2005, regarding this first NDC.

On the State Bar's motion, respondent's default was entered on December 19, 2005, and respondent was enrolled as an inactive member on December 22, 2005, 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, but was returned to the court as undeliverable. The matter was deemed submitted on January 8, 2006.

However, when a second NDC was filed against respondent, the submission date of January 8, 2006, for this matter was vacated and the matter was abated on January 10, 2006.

B. Second Notice of Disciplinary Charges (Case No. 05-N-04944)

On December 21, 2005, the State Bar properly filed and served on respondent a second NDC at respondent's official membership records address. The second NDC was not returned as undeliverable. Respondent again did not file a response to the NDC.

On January 17, 2006, a courtesy copy was also sent to respondent at 9110-B Alcosta Blvd., #120, San Ramon, California 94583, whose address respondent gave to the State Bar on December 1, 2005.

On the State Bar's motion, respondent's default was entered on March 2, 2006, and respondent was enrolled as an inactive member on March 5, 2006, under section 6007, subdivision (e). An order of entry of default was sent to respondent's official address by certified mail, but was returned to the court as undeliverable.

On March 10, 2006, the court ordered the first matter unabated and consolidated these two NDCs.

Respondent did not participate in the disciplinary proceedings. Accordingly, this consolidated matter was submitted for decision on March 22, 2006.

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

III. Findings of Fact and Conclusions of Law

All factual allegations of the two 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 June 13, 1984, and has been a member of the State Bar of California at all time since that date.

A. Unauthorized Practice of Law (Case No. 05-O-01541)

On May 23, 2003, the State Bar's Office of Certification sent respondent a MCLE Non-Compliance 60-Day Notice, stating that he had failed to comply with the Minimum Continuing Legal Education (MCLE) requirements applicable to members of the State Bar. The United States Postal Service did not return the 60-Day Notice as undeliverable or for any other reason.

On July 31, 2003, the Office of Certification sent respondent a MCLE Non-Compliance Final Notice by certified mail, return receipt requested, addressed to respondent at his official membership records address.

On August 16, 2003, the United States Postal Service returned the Final Notice to the Office of Certification as "Unclaimed."

On August 28, 2003, the California Supreme Court filed an order in case No. S118232, effective September 16, 2003, suspending respondent from the practice of law as a result of respondent's failure to pay State Bar membership dues.

On September 16, 2003, respondent was placed on "Not Entitled" status by State Bar Membership Records for his failures to comply with the MCLE requirements and to pay membership dues.

On September 22, 2003, the Office of Certification sent respondent a notice stating that he has been enrolled on "Not Entitled" status, effective as of September 16, 2003, for his failure to comply with the MCLE requirements. The notice was sent to respondent at his membership records address, which was not returned as undeliverable or for any other reason.

By on or about September 22, 2003, respondent knew or should have known that he was not entitled to practice law as of September 16, 2003. Respondent has remained suspended and not

entitled to practice law continuously from September 16, 2003 to the present. (Evid. Code, § 452, subd. (d).)

From on or about November 13, 2003, through on or about April 1, 2004, while respondent was not entitled to practice law, respondent represented Angelica Solarek in *Solarek v. Covalt*, Alameda County Superior Court, case No. VG03104462. In addition, respondent filed Case Management Statements (CMS) and appeared in court on Case Management Conferences (CMC) in *Solarek*. Respondent did not inform the court or his client that he was not entitled to practice law.

On April 7, 2004, defendant Covalt filed an answer to the complaint in *Solarek*.

On June 29, 2004, respondent filed a CMS in *Solarek*. In the CMS, respondent stated: “Substitution of counsel for Plaintiff. Current counsel having personal difficulties and must substitute out of case.” But respondent did not withdraw from representing Solarek or file a substitution of counsel.

On July 15, 2004, respondent appeared with Solarek at a CMC. Respondent did not inform the court, his client or opposing counsel of his not entitled status to practice law.

On July 16, 2004, respondent filed a Notice of Stay of Proceedings in *Solarek* on the grounds that “parties have agreed to resolve this matter through binding judicial arbitration.”

On or about February 28, 2005, defendant’s counsel, James Partridge, filed defendant’s CMS, stating that “[p]laintiff’s attorney has been suspended from practice. This defendant has had no notice of any new counsel or if plaintiff is in pro per.”

Following defense counsel’s discovery of respondent’s not entitled status to practice law, on or about March 9, 2005, respondent filed a CMS stating: “Withdraw of counsel for Plaintiff. Counsel is having personal difficulties and hereby withdraws from the case.”

From on or about November 13, 2003, through on or about March 9, 2005, respondent continued to hold himself out as entitled to practice law and practiced law while not entitled to do so.

On or about March 24, 2005, Solarek appeared alone at a CMC. Solarek informed the court that respondent told her a few days ago that he could no longer represent her and that she needed to appear alone.

Count 1: 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 for failing to comply with the MCLE requirements and for failing to pay State Bar membership dues, respondent knew or should have known that he was not entitled to practice law effective September 16, 2003. Yet, he held himself out as entitled to practice law and practiced law by filing Case Management Statements and by appearing at Case Management Conferences as attorney for Solarek during his suspension between November 13, 2003, and March 9, 2005.

However, the court does not find that respondent was culpable of a section 6127 violation because the Legislature did not intend for section 6127 to apply to the offense of a member practicing law while suspended. (See *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 236; *In the Matter of Hazelkorn* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 602, 606.)

Count 2: Violation of Court Order (§ 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.

The State Bar alleges that respondent violated section 6103 by continuing to hold himself out as entitled to practice law and practiced law while not entitled to do so after the effective date of the Supreme Court's order in case No. S118232.

“Respondent’s violation of Business and Professions Code section 6125 for practicing while suspended necessarily encompassed violation of the ... Supreme Court [order] which removed him from practice for failure to pay dues Having found respondent culpable of violating section 6125, we treat the issue of culpability under section 6103 as superfluous.” (*In the Matter of Trousil, supra*, 1 Cal. State Bar Ct. Rptr. 229, 237.) “Any separate charge for wilful violation of a court order is

redundant under the circumstances presented here.” (*Ibid.*) Therefore, the charge of section 6103 is hereby dismissed with prejudice.

Count 3: Failure to Communicate (§ 6068, Subd. (m))

Respondent is charged with a violation of section 6068, subdivision (m), which provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matter with regard to which the attorney has agreed to provide legal services.

By failing to inform Solarek that he was not authorized to practice law prior to on or about September 16, 2003, respondent wilfully failed to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services. In fact, he did not tell her until a few days before her CMC on March 24, 2005, some 18 months later. Therefore, this court concludes, by clear and convincing evidence, that respondent is culpable of the charged violation of section 6068, subdivision (m).

B. Violation of California Rules of Court, Rule 955 (Case No. 05-N-04944)

On August 23, 2005, in California Supreme Court case No. S134619 (State Bar Court case No. 04-O-12057), the Supreme Court suspended respondent from the practice of law for one year, stayed the execution of the suspension, placed him on probation for two years, and actually suspended him for 90 days. Among other things, the Supreme Court ordered respondent to comply with rule 955, subdivisions (a) and (c), within 30 and 40 days, respectively, after the effective date of the Supreme Court order. The order became effective September 22, 2005, and was duly served on respondent.

Rule 955(c) mandates that respondent “file with the Clerk of the State Bar Court an affidavit showing that he ... has fully complied with those provisions of the order entered pursuant to this rule.”

Notice of the order was duly and properly served upon respondent in the manner prescribed by California Rules of Court, rule 24(a) at his address as maintained by the State Bar in accordance with section 6002.1.

Respondent was to have filed the rule 955 affidavit by November 1, 2005, but to date, he has

not done so and has offered no explanation to this court for his noncompliance. 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. The Supreme Court has disbarred attorneys whose failure to keep their official addresses current prevented them from learning that they had been ordered to comply with rule 955. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

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

Violation of Section 6103

Accordingly, respondent’s failure to comply with rule 955 constitutes a violation of section 6103, which requires attorneys to obey court orders and provides that the wilful disobedience or violation of such orders constitutes cause for disbarment or suspension.

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).)

B. Aggravation

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

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

1. On August 1, 2003, respondent, upon stipulation, was suspended for one year, stayed, and placed on probation for three years for failure to perform services in one client matter and failure to comply with the terms of an agreement in lieu of discipline (Supreme Court case No. S115929; State Bar Court case Nos. 99-O-10794 and 02-O-15245 (Cons.));

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.

2. On September 10, 2004, respondent's probation was revoked and he was suspended for one year, stayed, placed on probation for three years, and actually suspended for 30 days for violating a probation condition requiring him to pay restitution (Supreme Court case No. S115929; State Bar Court case No. 04-PM-12035);
3. On August 23, 2005, upon stipulation, respondent was suspended for one year, stayed, placed on probation for two years and actually suspended for 90 days for engaging in unauthorized practice of law (Supreme Court case No. S134619; State Bar Court case No. 04-O-12057); and
4. On February 17, 2006, respondent's probation was revoked and was suspended for one year, stayed, placed on probation for three years and actually suspended for one year for failure to comply with his probation conditions by failing to submit proof of restitution payments and by failing to submit written quarterly reports (Supreme Court case No. S115929; State Bar Court case No. 05-PM-04241).⁴

Respondent committed multiple acts of wrongdoing, including engaging in unauthorized practice of law, failing to communicate with a client, and failing to obey a court order. (Std. 1.2(b)(ii).)

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

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

⁴Although the State Bar submitted respondent's three prior records of discipline, it omitted the fourth prior record of discipline, which decision was filed December 6, 2005, and became final on February 17, 2006. (Rules Proc. of State Bar, rule 216 [a prior record of discipline consists of decisions, whether or not final, recommending imposition of discipline on a party who is presently the subject of a State Bar Court proceeding].) Nevertheless, this court sua sponte notes respondent's fourth prior record of discipline and takes judicial notice of the decision in State Bar Court case No. 05-PM-04241 and of the Supreme Court order case No. S115929 filed February 17, 2006. (Evid. Code, § 452, subd. (d).)

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 in two matters included unauthorized practice of law, failure to communicate with a client and failure to comply with rule 955. The standards provide a broad range of sanctions ranging from reproof to disbarment, depending upon the gravity of the offenses and the harm to the victim. (Stds. 1.6, 1.7, 2.4, 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 four 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, citing *Chasteen v. State Bar* (1985) 40 Cal.3d 586 and *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563 in support of its recommendation. The court agrees.

In *Taylor*, the attorney had committed serious misconduct in three client matters, including repeatedly practicing law while suspended, deceiving a court and client by filing an unauthorized lawsuit and failing to comply with his criminal probation. He also had a prior record of discipline. Because the risk of future misconduct was great, disbarment was necessary.

In recommending discipline, the “paramount concern is protection of the public, the courts and the integrity of the legal profession.” (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) Here, respondent had clearly demonstrated indifference to the importance of his discipline. His

misconduct began in 1998 and he has continued this course of professional violations (failure to perform competently, unauthorized practice of law, failure to communicate, failure to obey court orders, and repeated probation violations), resulting in four prior records of discipline in the past three years.

Accordingly, disbarment is particularly appropriate when a respondent repeatedly demonstrates indifference to successive disciplinary orders of the Supreme Court. (*Morgan v. State Bar* (1990) 51 Cal.3d 598, 607.)

Respondent has displayed total indifference and lack of remorse by ignoring both his present and his fourth disciplinary proceedings. Such failure to participate leaves the court without information about the underlying cause of respondent's offense or of any mitigating circumstances surrounding his misconduct. His lack of participation indicates that far more severe discipline is required to achieve the purposes of attorney discipline set forth in standard 1.3.

In *Baca v. State Bar* (1990) 52 Cal.3d 294, the Supreme Court disbarred the attorney for one client abandonment and misappropriation in another matter, stating, "Baca's failure to cooperate until the recommendation of disbarment was made reflects a disdain and contempt for the orderly process and rule of law on the part of an attorney who has sworn to uphold the law." (*Id.* at p. 305.)

In *Barnum v. State Bar* (1990) 52 Cal.3d 104, the Supreme Court disbarred the attorney for collecting an unconscionable fee and disobeying court orders to return the fee and refusing to participate in the disciplinary proceeding. The court concluded that Barnum was "not a good candidate for suspension and/or probation. He has breached two separate terms of our prior disciplinary order, leading to the imposition of additional sanctions. He also defaulted before the State Bar here and in one other proceeding." (*Id.* at p. 106.)

Similarly, respondent here is not a candidate for suspension and/or probation. He has repeatedly failed to comply with his probation conditions and has failed to participate in three disciplinary proceedings. These facts reflect respondent's disdain and contempt for the orderly process and rule of law and clearly demonstrate that the risk of future misconduct is great.

Moreover, respondent's failure to comply with successive orders of the Supreme Court has repeatedly burdened the resources of this court and the State Bar disciplinary system, also a matter

of great concern to the court. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508 [contemptuous attitude toward disciplinary proceedings is relevant to determination of appropriate sanction].) Respondent had ample opportunity to conform his conduct to the ethical requirements of the profession, but has repeatedly failed or refused to do so. Probation and suspension have proven inadequate in the past to prevent continued misconduct. (See *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646.)

In conclusion, in view of his extensive prior disciplinary record and the lack of any mitigating factors, the court recommends disbarment to protect the public and the integrity of the legal profession.

VI. Discipline Recommendation

It is hereby recommended that respondent **Dennis Vance Milner** be disbarred from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

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

VII. Costs

It is recommended 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 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 will become effective three calendar days from the date of service of this order.

Dated: June 20, 2006

JOANN M. REMKE
Judge of the State Bar Court

