

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 06-N-11322-RAH
)	
ROBERT MICHAEL NUSBAUM ,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 149672,)	ENROLMENT
)	
<u>A Member of the State Bar.</u>)	

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 (“OCTC”), alleging that respondent Robert Michael Nusbaum (“respondent”), by failing to file with the Clerk of the State Bar Court the compliance affidavit required by rule 955, subdivision (c), of the California Rules of Court (“rule 955”) (renumbered to 9.20 effective January 1, 2007), wilfully disobeyed or violated an order of the California Supreme 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, in wilful violation of Business and Professions Code section 6103. Following the filing of the NDC, the OCTC was represented in this proceeding by Deputy Trial Counsel Melanie J. Lawrence (“DTC Lawrence”). Respondent did not participate in this proceeding either in-person or through counsel.

For the reasons stated below, the court finds that respondent wilfully failed to comply with rule 955, subdivision (c), of the California Rules of Court and thereby wilfully violated Business and Professions Code section 6103. 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 Business and Professions Code section 6007, subdivision (c)(4).

PERTINENT PROCEDURAL HISTORY

This proceeding was initiated by the State Bar's filing of a NDC against respondent on April 17, 2006.¹

A copy of the NDC was properly served upon respondent on April 17, 2006, by certified mail, return receipt requested, addressed to the official membership records address ("official address") maintained by respondent pursuant to Business and Professions Code section 6002.1, subdivision (a) and to 2049 Avenue L 12, Lancaster, California 93536 ("Avenue L 12 address"), an address which was also contained in respondent's case file.

On April 17, 2006, notice was filed that DTC Lawrence was substituted in place of Deputy Trial Counsel Rizamari C. Sitton as Deputy Trial Counsel on behalf of the State Bar of California in this matter. A copy of said notice was properly served upon respondent on April 17, 2006, addressed to respondent at his official address and to the Avenue L 12 address.

On April 21, 2006, a Notice of Assignment and Notice of Initial Status Conference was filed in this matter, setting an in-person status conference for May 31, 2006. A copy of said notice was properly served upon respondent by first-class mail, postage fully prepaid, on April 21, 2006, addressed to respondent at his official address. The copy of said notice was returned to the State Bar Court by the U.S. Postal Service bearing a sticker stating:

RETURN TO SENDER
ATTEMPTED - NOT KNOWN
UNABLE TO FORWARD

On April 24, 2006, OCTC filed a motion to amend the NDC in this matter and a proposed First Amended NDC. The motion sought to amend the case number listed under Count One in the NDC. A copy of said motion and proposed First Amended NDC was properly served upon respondent by certified mail, return receipt requested, on April 24, 2006, addressed to respondent at his official address. A courtesy copy of said motion and proposed First Amended NDC was also

¹On March 28, 2006, a 20-day letter was mailed to respondent at his official membership records address. The 20-day letter was returned by the U.S. Postal Service bearing the stamp "Return to Sender, Attempted Not Known." (Declaration of Melanie J. Lawrence attached to the OCTC's motion for the entry of respondent's default.)

served upon respondent by regular, first-class mail to the Avenue L 12 address on April 24, 2006. The NDC served upon respondent at his official address was returned by the U.S. Postal Service bearing the stamp ““Addressee Unknown.”” (Declaration of Melanie J. Lawrence attached to the OCTC’s motion for the entry of respondent’s default.) The NDC served upon the Avenue L 12 address was not returned by the U.S. Postal Service.

On May 31, 2006, the court held a telephonic status conference in this matter. Respondent failed to appear either in person or through counsel at the status conference. Thereafter, on June 5, 2006, the court filed an Order Pursuant to Telephonic Status Conference granting OCTC’s motion to amend the NDC and ordering respondent to respond to the original NDC filed on April 17, 2006, by July 3, 2006. However, if no response was filed, the Deputy Trial Counsel was ordered to file a motion for default by July 7, 2006. A copy of said order was properly served upon respondent by first-class mail, postage fully prepaid, on June 5, 2006, addressed to respondent at his official address. The copy of said order was returned to the State Bar Court by the U.S. Postal Service bearing a sticker stating:

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On May 31, 2006, DTC Lawrence attempted to reach respondent by telephone at his official membership records telephone number. A recording indicated that the number was out of service.

On May 31, 2006, DTC Lawrence called directory assistance for the area which includes respondent’s official membership records address and asked for all telephone listings for respondent. Directory assistance had no listings for respondent other than those at which DTC Lawrence had already attempted to reach respondent.

On June 1, 2006, DTC Lawrence called a telephone number that she was informed was that of a family member of respondent. DTC Lawrence spoke to a woman who identified herself as respondent’s stepmother. DTC Lawrence left a message that the court had ordered respondent to answer the NDC by July 3, 2006.

On June 1, 2006, DTC Lawrence sent a letter by regular, first-class mail, to respondent’s membership records address. That letter was returned marked, ““Attempted - not known. Unable

to forward.”” (Declaration of Melanie J. Lawrence attached to the OCTC’s motion for the entry of respondent’s default.)

On June 5, 2006, the Amended Notice of Disciplinary Charges was filed.

As respondent did not file a response to the NDC as required by rule 103 of the Rules of Procedure of the State Bar of California (“Rules of Procedure”), on July 5, 2006, the OCTC filed a motion for the entry of respondent’s default. The motion advised respondent that once the court had found culpability, the OCTC would recommend respondent’s disbarment. The OCTC also requested in its motion that the court take judicial notice of all respondent’s official membership addresses. The court grants the OCTC’s request. Also included with the motion was the declaration of DTC Lawrence and Exhibit 1. The court admits this exhibit into evidence. A copy of said motion was properly served upon respondent by certified mail, return receipt requested, on July 5, 2006, addressed to respondent at his official address.

As of July 5, 2006, OCTC had not had any contact with respondent.

When respondent failed to file a written response within 10 days after service of the motion for the entry of his default, on August 8, 2006, the court filed an Order of Entry of Default (Rule 200 - Failure to File Timely Response), Order Enrolling Inactive² and Further Orders. A copy of said order was properly served upon respondent on August 8, 2006, by certified mail, return receipt requested, addressed to respondent at his official address. The copy of said order was returned to the State Bar Court by the U.S. Postal Service bearing a sticker stating:

RETURN TO SENDER
ATTEMPTED - NOT KNOWN
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On August 14, 2006, the OCTC filed a brief on the issues of culpability and discipline and waived the hearing on this matter. The court admits into evidence State Bar Exhibit 1 attached to said brief.

This matter was submitted for decision on August 17, 2006.

²Respondent’s involuntary inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (e), was effective three days after service of this order by mail.

FINDINGS OF FACT AND CONCLUSIONS OF LAW³

Respondent was admitted to the practice of law in the State of California on December 5, 1990, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

On or about December 28, 2005, the Supreme Court of the State of California issued an order (“Order”) in matter S138287 (State Bar Court Case No(s). 04-O-11861, 04-O-13785, 05-O-00291, 05-O-02583 (Cons.)) that respondent be suspended from the practice of law, effective January 27, 2006, for five years and until he makes restitution to Anne E. Stilwagen (or the Client Security Fund, if appropriate) in the amount of \$2,000 plus 10% interest per annum from July 15, 2003, and furnishes satisfactory proof thereof to the State Bar’s Office of Probation; and until he complies with the requirements of standard 1.4(c)(ii), that execution of the suspension be stayed, and that he be placed on probation for five years on condition that he be actually suspended for two years and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. The court further ordered respondent to comply with rule 955 of the California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Order.

Specifically, rule 955(a) required respondent to:

- a. notify all clients and any co-counsel of his suspension;
- b. deliver to all clients any papers or other property to which the clients were entitled;
- c. refund any unearned attorney fees;
- d. notify all clients to seek legal advice elsewhere, calling attention to any urgency in seeking the substitution of another attorney or attorneys; and
- e. notify opposing counsel and adverse parties of his suspension and filing a copy of

³As respondent’s default was entered in this matter, the factual allegations contained in the NDC are deemed admitted pursuant to rule 200(d)(1)(A) of the Rules of Procedure. The findings of fact are therefore based on the deemed admissions as well as the exhibit attached to the OCTC’s brief on the issues of culpability and discipline.

said notice with the court, agency, or tribunal before which the litigation was pending.

Pursuant to subdivision (b) of rule 955, respondent was required to provide the notices required by rule 955(a) in writing, by registered or certified mail, return receipt requested, and the notices were required to contain an address where communications may be directed to respondent.

Rule 955(c) required respondent to file with the Clerk of the State Bar Court an affidavit showing that he fully complied with rule 955.

On or about December 28, 2005, the Clerk of the Supreme Court of the State of California served upon respondent a copy of the Order.

On or about January 20, 2006, Yolanda Acosta (“Acosta”), Probation Deputy, Office of Probation of the State Bar of California, wrote a letter to respondent. In the letter, among other things, Acosta reminded respondent that he was ordered to comply with rule 955, California Rules of Court. Acosta enclosed several documents with the letter, including a true and correct copy of the Order, a Rule 955 Compliance Declaration form, and copies of rules 580 and 581 of the Rules of Procedure. The letter and enclosures, which were sent as a courtesy to respondent, were placed in a sealed envelope correctly addressed to respondent at his State Bar of California membership address. The letter and enclosures were properly mailed by first-class mail, postage prepaid, by depositing for collection by the U. S. Postal Service in the ordinary course of business. The letter and enclosures were returned by the U. S. Postal Service as undeliverable with a notation “returned to sender - addressee unknown.”

The Supreme Court Order became effective 30 days after the order was entered, i.e., on January 27, 2006. Thus, respondent was ordered to comply with subdivision (a) of rule 955 of the California Rules of Court no later than February 26, 2006,⁴ and was ordered to comply with subdivision (c) of rule 955 no later than March 8, 2006.

Respondent did not file an affidavit pursuant to rule 955(c) by March 8, 2006.

“Willfulness” in the context of rule 955 implies simply a purpose or willingness to commit

⁴Although the Amended NDC alleges this date as February 27, 2006, thirty days following the January 27, 2006, effective date of the Supreme Court’s Order was February 26, 2006.

the act, or make the omission, referred to. It requires neither bad faith nor an intent to violate the rule. (*Durbin v. State Bar* (1979) 23 Cal.3d 461, 467.) The Supreme Court has disbarred attorneys whose failure to keep their official address 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.) The filing of an affidavit pursuant to rule 955, subdivision (c), is required even if the respondent does not have any clients to notify. (*Id.*)

Based upon the foregoing, the court concludes that the State Bar has proven by clear and convincing evidence that respondent wilfully failed to comply with rule 955 of the California Rules of Court and the Supreme Court's Order filed December 28, 2005, in Supreme Court matter S138287 (State Bar Court Case No(s). 04-O-11861; 04-O-13785; 05-O-00291; 05-O-02583 (Cons.)) by failing to file an affidavit of compliance with rule 955 as required by rule 955, subdivision (c). As a result of respondent's wilful failure to comply with the order of the Supreme Court, he violated Business and Professions Code section 6103 which provides, in pertinent part, that the wilful violation or disobedience of a court order which requires an attorney to do or forbear an act connected with or in the course of his profession, which the attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment.

MITIGATING/AGGRAVATING CIRCUMSTANCES

As respondent's default was entered in this matter, respondent failed to introduce any mitigating evidence on his behalf, and none can be gleaned from the record.

In aggravation, respondent has a record of four prior impositions of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i) ("standards").)

A. On November 29, 2001, the Supreme Court issued an order in matter S100819 (State Bar Court Case No. 00-O-11042; 01-O-01841; 01-O-01179; 99-O-12413; 00-O-13842; 00-O-12925 (Cons.)) suspending respondent from the practice of law for one year and until he makes specified restitution and furnishes satisfactory proof thereof to the Probation Unit; staying execution of said suspension; and placing respondent on probation for two years on condition that he be actually suspended from the practice of law for 60 days.

In this prior disciplinary matter, respondent was found culpable of wilfully violating:

rule 3-110(A) of the Rules of Professional Conduct of the State Bar of California (“RPC____”) (four matters); section 6068, subdivision (m), of the Business and Professions Code⁵ (four matters); RPC 3-700(D)(2); section 6068, subdivision (i); and RPC 3-500. In addition, respondent was found culpable of failing to refund promptly any part of a fee paid in advance that had not been earned. In aggravation, respondent engaged in multiple acts of wrongdoing or demonstrated a pattern of misconduct. In mitigation, it was noted that respondent had no prior record of discipline; was candid and cooperate to the State Bar and to the victims of his misconduct; promptly took steps spontaneously demonstrating recognition of wrongdoing and remorse; and suffered extreme difficulties in his personal life at the time of the misconduct which were other than physical or emotional in nature.

B. On July 8, 2004, the Supreme Court issued an order in Supreme Court matter S124138 (State Bar Court Case No. 02-O-13937; 03-O-01330; 03-O-01476) suspending respondent from the practice of law for two years, staying execution of said suspension, and placing him on probation for two years on condition that he be actually suspended for 60 days.

In this second prior disciplinary matter, respondent was found to have violated RPC 4-100(A), RPC 3-110(A), RPC 4-100(B)(3) (three violations) and RPC 4-100(B)(4). In aggravation, it was noted that respondent had a prior record of discipline. No mitigating circumstances were found.

C. On December 28, 2005, the Supreme Court issued an order in Supreme Court matter S138287 (State Bar Court Case No(s). 04-O-11861; 04-O-13785; 05-O-00291; 05-O-02583 (Cons.)) suspending respondent from the practice of law for five years and until he makes, and furnishes satisfactory proof of, specified restitution; and until he complies with the requirements of standard 1.4(c)(ii), staying execution of said suspension, and placing him on probation for five years on condition that he be actually suspended for two years and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general

⁵Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

In this third prior disciplinary matter, respondent was found to have violated section 6068, subdivision (m) (two matters), RPC 3-700(D)(2) (four matters), RPC 4-100(B)(4) (two matters), and RPC 3-110(A) (two matters). In aggravation, it was noted that: (1) respondent had two prior records of discipline; (2) trust funds or property were involved and respondent was unable to or refused to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property; (3) respondent's misconduct caused harm; and (4) the misconduct involved multiple acts of wrongdoing or demonstrated a pattern of misconduct. In mitigation, it was noted that respondent was experiencing family difficulties.

D. On June 9, 2006, the Supreme Court issued an order in Supreme Court matter S124138 (State Bar Court Case No. 06-PM-10061)⁶ revoking respondent's probation, lifting the previously ordered stay of execution of the suspension in Supreme Court matter S124138, and actually suspending respondent from the practice of law for two years and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. Respondent was given credit toward the period of actual suspension for the period of involuntary inactive enrollment which commenced on April 7, 2006.

In this fourth prior disciplinary matter, respondent was found to have violated the conditions of his probation imposed in Supreme Court matter S124138 (State Bar Court Case Nos. 02-O-13937, et seq.) by failing to file or timely file certain quarterly reports in 2005 and by failing to attend State Bar Ethics School and to provide, within one year from the effective date of the Supreme Court order, proof that he had attended and passed the test at the end of such course. In aggravation, it was noted that: (1) respondent had three prior records of discipline; (2) respondent engaged in multiple acts of misconduct; (3) his misconduct significantly harmed the administration

⁶Pursuant to Evidence Code section 452, subdivision (d), the court takes judicial notice of respondent's prior record of discipline in Supreme Court matter S124138 (State Bar Court Case No. 06-PM-10061).

of justice; and (4) his failure to comply with probation conditions after being reminded by the Office of Probation demonstrated indifference toward rectification of, or atonement for, the consequences of his misconduct. No mitigation was found.

_____ Respondent's failure to participate in this matter prior to the entry of his default is also an aggravating circumstance. (Standard 1.2(b)(vi).)

DISCUSSION

The primary purpose of disciplinary proceedings conducted by the State Bar is to protect the public, the courts and the legal profession, the maintenance of high professional standards and the preservation of public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.)

Rule 955, subdivision (d), provides in part that “[a] suspended member’s wilful failure to comply with the provisions of this rule constitutes cause for disbarment or suspension and for revocation of any pending probation.” Furthermore, standard 1.7(b) provides that where an attorney has two prior records of discipline, the degree of discipline imposed in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate. No mitigating circumstances were found in this matter. The court also notes that respondent has four prior records of discipline. Obviously, discipline short of disbarment has not been sufficient to impress upon respondent his duty to comply with his professional obligations and responsibilities.

Timely compliance with rule 955 of the California Rules of Court performs the critical function of ensuring that all concerned parties, including clients and co-counsels, opposing attorneys and the courts, learn about an attorney’s actual suspension from the practice of law. Compliance with this rule also keeps the State Bar Court and the Supreme Court apprised of the location of attorneys who are subject to their respective disciplinary authorities. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.) Disbarment is generally the appropriate sanction imposed for wilful violation of rule 955. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Similar discipline has been recommended by the State Bar Court Review Department. (*In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322.)

Respondent has demonstrated an unwillingness or an inability to comply with his

professional obligations and the rules of conduct imposed on lawyers. This is exemplified by his failure to participate in these State Bar proceedings and by his failure to comply with rule 955, subdivision (c). The court also notes that respondent also failed to participate in his last prior disciplinary matter. More importantly, respondent's failure to comply with rule 955 undermines the basic function that rule 955 serves, i.e., ensuring that all concerned parties learn about an attorney's suspension from the practice of law. (*Lydon v. State Bar, supra*, 45 Cal.3d at p. 1187.)

Respondent's disbarment is necessary to protect the public, the courts and the legal profession. His disbarment is also important to the maintenance of high professional standards and to the preservation of 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 and unexplained disobedience of an order of the California Supreme Court.

RECOMMENDED DISCIPLINE

Based on the foregoing, it is hereby recommended that respondent ROBERT MICHAEL NUSBAUM 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 respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court (renumbered to 9.20 effective January 1, 2007) within 30 calendar days after the effective date of the Supreme Court order in this matter and file the affidavit provided for in paragraph (c) within 40 days after the effective date of the order showing his compliance with said order.

ORDER REGARDING INACTIVE ENROLLMENT

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

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.

Dated: November __, 2006

RICHARD A. HONN
Judge of the State Bar Court