

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of)	Case No. 06-N-13541-PEM
)	
PATRICK JAMES McDONOUGH,)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND
Member No. 66780,)	INVOLUNTARY INACTIVE
)	ENROLLMENT ORDER
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

This matter was initiated by the Office of the Chief Trial Counsel of the State Bar of California (State Bar) alleging that respondent Patrick James McDonough failed to comply with rule 955 of the California Rules of Court¹ as ordered by the Supreme Court. The State Bar was represented by Susan I. Kagan. Respondent did not participate either in person or by counsel.

For the reasons stated below, it is recommended that respondent be disbarred.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed and properly served on respondent on August 29, 2006, by certified mail, return receipt requested, and by first-class mail at the address shown on the official membership records of the State Bar (official address). (Bus. & Prof. Code §6002.1, subd. (c)²; Rules Proc. of State Bar, rules 60(b) and 583.) Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) A courtesy copy was also sent to respondent at an alternate address. All of this correspondence was returned as undeliverable.

¹Future references to rule are to this source. Rule 955 was renumbered as rule 9.20 effective January 1, 2007.

²All future references to section are to this source.

On September 7, 2006, the State Bar Court properly served respondent by first-class mail, postage prepaid at his official and alternate addresses with a notice scheduling a status conference on October 10, 2006. The court judicially notices its records pursuant to Evidence Code section 452, subdivision (h) which indicate that this correspondence was returned as undeliverable.

On September 14, 2006, the State Bar served a copy of the NDC on respondent by first-class mail at another alternate address.

Respondent did not appear at the October 10 status conference. On October 11, 2006, an order memorializing the status conference was properly served on him at his official and alternate addresses. Both items were returned as undeliverable.

Respondent did not file a response to the NDC. On October 18, 2006, the State Bar filed and properly served on respondent a motion for entry of default by certified mail, return receipt requested, at his official address and, by regular mail, at two alternate addresses. (Rules Proc. of State Bar, rule 200(a), (b).) The motion advised respondent that the State Bar would seek disbarment if he was found culpable. (Rules Proc. of State Bar, rule 200(a)(3).)

Respondent did not respond to the default motion. Orders entering respondent's default and involuntarily enrolling him inactive were filed and properly served on him on November 3, 2006, by certified mail, return receipt requested at his official and alternate addresses. This document advised respondent, among other things, that he was enrolled inactive pursuant to section 6007, subdivision (e) effective three days after service of the order. This correspondence was returned as undeliverable.

The State Bar's and the court's efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (April 26, 2006, No. 04-1477) 547 U.S. ___, 126 S.Ct. 1708, 164 L.Ed.2d 415, <<http://www.supremecourtus.gov/opinions/05slipopinion.html>>.)

The case was submitted for decision on November 23, 2006.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (Section 6088; Rules Proc. of State Bar, rule 200(d)(1)(A).) The findings are also based upon matters admitted into evidence or judicially noticed.

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 18, 1975, and has been a member of the State Bar at all times since.

B. Facts

On April 26, 2006, the California Supreme Court filed an order, number S141202 (April 26, 2006 order), in State Bar Court case no. 05-H-02861 in which respondent was ordered, among other things, to comply with rule 955(a) and (c) within 30 and 40 days, respectively, of the effective date of the order.

The April 26, 2006 order was effective on May 26, 2006. (Rule 953(a).³) Accordingly, respondent was to comply with rule 955(c) no later than July 5, 2006.

The Supreme Court sent respondent a copy of its order promptly upon filing.⁴ A copy of it also was attached to the NDC in this proceeding.

As of August 29, 2006, respondent had not filed with the State Bar Court the affidavit required by rule 955(c). He still has not done so.⁵ He has offered no explanation for his

³This rule has been renumbered as rule 9.18(a) effective January 1, 2007.

⁴Although no proof was offered that the Clerk of the Supreme Court served the Supreme Court's order upon respondent, rule 8.532(a) of the California Rules of Court (formerly rule 29.4(a)) requires the Clerk to promptly transmit copies of all opinions and orders to the parties upon filing. Moreover, it is presumed pursuant to Evidence Code section 664 that official duties have been regularly performed. (*In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Therefore, in the absence of evidence to the contrary, this court finds that the Clerk of the Supreme Court performed his duty and transmitted a copy of the Supreme Court's order to respondent promptly after its filing.

⁵Pursuant to Evidence Code section 452, subdivision (d), the court judicially notices that its records still do not contain a rule 955(c) affidavit from respondent.

noncompliance with rule 955(c).

C. Legal Conclusions

There is clear and convincing evidence that respondent wilfully violated the April 26, 2006 order directing his compliance with rule 955.⁶ This constitutes a violation of rule 955(d), which makes the wilful noncompliance with the provisions of rule 955 a cause for disbarment, suspension or revocation of probation, in relevant part.

Respondent was also charged with a violation of section 6103. However, it is generally inappropriate to find redundant charged allegations. The appropriate level of discipline for an act of misconduct does not depend on how many rules of professional conduct or statutes proscribe the misconduct. “There is ‘little, if any, purpose served by duplicative allegations of misconduct.’” (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) Accordingly, this charge is dismissed with prejudice.

IV. FINDINGS AND CONCLUSIONS AS TO AGGRAVATING CIRCUMSTANCES

It is the prosecution’s burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct⁷, std. 1.2(b).)

Respondent’s three prior disciplinary records are an aggravating circumstance. (Std. 1.2(b)(i).) As previously discussed, in Supreme Court order number S141202, a default matter, the court imposed discipline consisting of actual suspension for 90 days and until respondent complied with rule 205 of the Rules of Procedure of the State Bar, among other things. In that matter, respondent was found culpable of violating rule 1-110 of the Rules of Professional Conduct for not attending Ethics School, a condition of his private reproof.

In State Bar Court case no. 02-O-11151, a private reproof with conditions was imposed

⁶Wilfulness in the context of rule 955 does not require actual knowledge of the provision which is violated. The Supreme Court has disbarred an attorney whose failure to keep his official address current prevented him from learning that he had been ordered to comply with rule 955. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

⁷Future references to standard or std. are to this source.

for one violation of section 6068, subdivision (m) in one client matter. The parties stipulated that respondent's one prior record of discipline was an aggravating factor and that his candor and cooperation were mitigating circumstances. The order of reproof was effective on April 9, 2004.

In State Bar Court case no. 91-O-1126, a public reproof with conditions was imposed, effective January 15, 1993, for violations of sections 6002.1, 6068, subdivisions (i) and (j), 6106, 6125 and 6126. The parties stipulated to mitigating factors of no prior discipline and misconduct indirectly attributable to a substance abuse problem for which he had sought rehabilitation. There were no aggravating factors.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct by not complying 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 proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) He has demonstrated his contemptuous attitude toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the court to participate therein, a serious aggravating factor. (*In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 109-110.)

V. FINDINGS AND CONCLUSIONS AS TO MITIGATING CIRCUMSTANCES

Respondent did not participate in these proceedings or present any mitigating circumstances pursuant to standard 1.2(e). Since respondent bears the burden of establishing mitigation by clear and convincing evidence, the court has no basis for finding mitigating factors.

VI. LEVEL OF DISCIPLINE

The purpose of State Bar 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 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; rule 9.20(d).) Disbarment has been consistently imposed by the Supreme Court as the sanction for noncompliance with rule 955. (*Bercovich v. State Bar, supra*, 50 Cal.3d at p. 131; *Lydon v. State Bar, supra*, 45 Cal.3d at p. 1188; *Powers v. State Bar, supra*, 44 Cal.3d at p. 342.)

Respondent has demonstrated an unwillingness to comply with the professional obligations and rules of court imposed on California attorneys although he has been given the opportunity to do so. He did not participate in this proceeding and did not comply with rule 955(c). More importantly, respondent's noncompliance with rule 955 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, supra*, 45 Cal.3d at p. 1187.)

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 unexplained wilful disobedience of the Supreme Court 's order.

VII. DISCIPLINE RECOMMENDATION

It is hereby recommended that respondent PATRICK JAMES McDONOUGH 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 9.20(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 rule 9.20(c) within 40 days of the effective date of the order showing his compliance with said order.

VIII. 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.

IX. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: January 31, 2007

PAT McELROY
Judge of the State Bar Court