

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

In the Matter of)	Case Nos. 06-N-14173-PEM
)	and 06-N-14174
DAVID ELIAS FETTERMAN,)	
)	DECISION AND ORDER OF
Member No. 189990,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. Introduction

In this default disciplinary matter, respondent **David Elias Fetterman** is found culpable, by clear and convincing evidence, of failing to comply with California Rules of Court, rule 955,¹ as ordered by the California Supreme Court on June 9, 2006, in two disciplinary orders – S114424 (State Bar Court case No. 06-PM-10545) and S129198 (State Bar Court case No. 06-PM-10546).

In view of respondent's misconduct and the evidence in aggravation, including his four prior records of discipline, the court recommends that respondent be disbarred from the practice of law.

II. Pertinent Procedural History

This proceeding was initiated by the Office of the Chief Trial Counsel of the State Bar of California (State Bar). The Notice of Disciplinary Charges (NDC) was filed and properly served via certified mail, return receipt requested, on respondent at his official membership records address on October 23, 2006. The mailing was returned as undeliverable.

On motion of the State Bar, respondent's default was entered on December 13, 2006. The order of entry of default was properly mailed to respondent's official membership records address. Respondent was enrolled as an inactive member under Business and Professions Code section 6007,

¹All references to rule 955 are to California Rules of Court, rule 9.20 (renumbered effective January 1, 2007). Because the Notice of Disciplinary Charges was filed prior to the change in the numbering of this rule, the original numbering will be used in this decision.

subdivision (e),² on December 16, 2006.

Respondent never filed a response to the NDC. (Rules Proc. of State Bar, rule 103.)

Respondent did not participate in the disciplinary proceedings. The court took this matter under submission on January 2, 2007, following the filing of the State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC 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).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on November 4, 1997, and has been a member of the State Bar since that time.

B. Violation of California Rules of Court, Rule 955

On June 9, 2006, the California Supreme Court issued two disciplinary orders suspending respondent from the practice of law:

1. S114424 (State Bar Court case No. 06-PM-10545) and
2. S129198 (State Bar Court case No. 06-PM-10546).

In both orders, the Supreme Court revoked respondent's probation and actually suspended him for two years and until he shows proof satisfactory to the State Bar Court of rehabilitation, present fitness to practice, and present learning and ability in the law, pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct and until he makes certain restitution. Among other things, 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 Supreme Court order. The orders became effective July 9, 2006, and were duly served on respondent.

Rule 955(c) mandates that respondent "file with the Clerk of the State Bar Court an affidavit

²All references to sections are to the Business and Professions Code, unless otherwise indicated.

showing that he . . . has fully complied with those provisions of the order entered pursuant to this rule.”

Notices of the June 9, 2006 orders were properly served upon respondent. (Cal. Rules of Court, rule 8.532(a).)

Respondent was to have filed the rule 955 affidavit by August 18, 2006, 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 in S114424 and S129198.³

C. Counts One and Two: Business and Professions Code Section 6103

In counts one and two, 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 evidence was offered or received. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁴

B. Aggravation

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

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

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.

⁴All further references to standards are to this source.

1. Effective August 1, 2003, the Supreme Court suspended 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; stayed execution of said suspension; and placed respondent on probation for two years subject to certain conditions of probation, including a one-year actual suspension. In this first prior disciplinary matter, respondent stipulated to culpability in two client matters and one criminal conviction matter. His professional misconduct included failure to return unearned fees, failure to provide an accounting of fees, failure to respond promptly to reasonable client status inquiries, failure to perform legal services with competence, improper withdrawal from employment, and failure to cooperate in a disciplinary investigation. In the criminal conviction matter, respondent's criminal conduct involved moral turpitude. Respondent was convicted of one count of Penal Code section 311.11 (possession or control of child pornography), a misdemeanor. (Supreme Court case No. S114424; State Bar Court case Nos. 01-C-01980, 01-O-03732 and 02-O-12711 (Cons.))
2. Effective March 2, 2005, the Supreme Court suspended 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; stayed execution of said suspension; and placed respondent on probation for two years subject to certain conditions of probation, including a six-month actual suspension. In this second prior disciplinary matter, respondent stipulated to a wilful violation of Business and Professions Code section 6103 based on his failure to comply with rule 955 of the California Rules of Court. In mitigation, respondent displayed spontaneous candor and cooperation. It was also noted that respondent was diagnosed with Hodgkin's disease in July 2003, and immediately commenced chemotherapy which continued through January 2004. Thereafter,

respondent had radiation therapy which was completed in April 2004. (Supreme Court case No. S129198; State Bar Court case No. 03-N-04421.)

3. In the underlying matter, effective July 9, 2006, respondent's probation was revoked, the previously stayed suspension was lifted and he was actually suspended for two years and until he makes restitution for failing to comply with his probation conditions as ordered in his first prior record of discipline. (Supreme Court case No. S114424; State Bar Court case No. 06-PM-10545.)
4. In the underlying matter, effective July 9, 2006, respondent's probation was revoked, the previously stayed suspension was lifted and he was actually suspended for two years and until he makes restitution for failing to comply with his probation conditions as ordered in his second prior record of discipline. (Supreme Court case No. S129198; State Bar Court case No. 06-PM-10546.)

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 prior to the entry of his default is a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

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.

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. Recommended Discipline

The court recommends that respondent **David Elias Fetterman** 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 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.⁵

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 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: March 26, 2007

PAT McELROY
Judge of the State Bar Court

⁵Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar, supra*, 44 Cal.3d 337, 341.)