

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

In the Matter of	)	<b>Case No. 06-O-12853-LMA</b>
<b>DAVID G. FOX</b>	)	<b>DECISION</b>
<b>Member No. 61158,</b>	)	
<u>A Member of the State Bar.</u>	)	

**I. Introduction**

In this default matter, respondent **David G. Fox** is charged with two counts of professional misconduct. The court finds, by clear and convincing evidence, that respondent is culpable of both of the charged acts of misconduct which consist of failing to update his membership records address and failing to cooperate in a State Bar investigation.

The court recommends, among other things, that respondent be 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 with conditions as set forth below.

**II. Pertinent Procedural History**

On April 16, 2007, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a two-count Notice of Disciplinary Charges (NDC) at his official membership records address (official address). The mailing was returned as unclaimed.

On May 21, 2007, the Honorable Pat McElroy conducted an initial status conference.<sup>1</sup> Respondent appeared telephonically and was ordered to file his response as soon as possible or face default.

On June 11, 2007, the State Bar called respondent's membership address telephone number

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<sup>1</sup>On June 27, 2007, the instant matter was reassigned to this court.

and left a message advising respondent that a default motion would be filed if the State Bar did not hear back from him. Respondent did not contact the State Bar; and on June 15, 2007, the State Bar filed its motion for the entry of his default.

While the State Bar's motion for the entry of his default was pending, respondent participated in two voluntary settlement conference proceedings on June 20 and July 3, 2007. However, between these two appearances, on June 26, 2007, respondent failed to appear for a scheduled status conference before the Honorable Pat McElroy.

On July 3, 2007, the settlement judge issued an order stating that the parties had reached a settlement agreement. On July 19, 2007, the State Bar mailed a stipulation of settlement to respondent. Having not heard back from respondent, the State Bar mailed him a follow-up letter on August 15, 2007. Respondent did not reply to either of these mailings.

On August 24, 2007, the State Bar filed a second motion for the entry of respondent's default. Respondent's default was entered on September 11, 2007. A copy of the order of entry of default was properly mailed to respondent's official membership records address. The mailing was returned as unclaimed. Respondent was enrolled as an inactive member under Business and Professions Code section 6007, subdivision (e),<sup>2</sup> on September 14, 2007.

Respondent's participation in the disciplinary proceedings was sporadic and respondent never filed a response to the NDC. (Rules Proc. of State Bar, rule 103.)

The court took this matter under submission on October 1, 2007, following the filing of the State Bar's brief on culpability and discipline which requested waiver of a hearing in this matter.<sup>3</sup>

### **III. Findings of Fact and Conclusions of Law**

#### **A. Jurisdiction**

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

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

<sup>3</sup>Pursuant to Evidence Code section 452, subdivision (h), the court grants the State Bar's request that the court take judicial notice of respondent's official membership address history.

200(d)(1)(A).)

Respondent was admitted to the practice of law in California on December 16, 1974, and has been a member of the State Bar of California at all times since that date.

**B. Counts 1 and 2**

Effective December 7, 2005, respondent's official membership records address was P.O. Box 1544, Carmichael, CA 95609.<sup>4</sup> On May 30, 2006, the State Bar opened an investigation in Case No. 06-O-12853.

On July 31, 2006, State Bar investigator J.D. Pickering sent respondent a letter regarding respondent's conduct in Case No. 06-O-12853. This letter was properly mailed to respondent at his membership records address on July 31, 2006.

On August 4, 2006, the United States Postal Service returned the July 31, 2006 letter to the State Bar with a notation stating, "box closed unable to forward return to sender."

On February 5, 2007, State Bar investigator Amanda Gormley telephoned respondent's then official membership records telephone number. Ms. Gormley received a recording indicating that the number was disconnected.

On February 20, 2007, Ms. Gormley located an advertisement for respondent on Craigslist and telephoned respondent at that number. When respondent answered the phone, Ms. Gormley explained that the State Bar had previously sent respondent a letter at his official membership records address regarding a State Bar investigation, but the letter was returned as undeliverable. Respondent stated that he had a new address and telephone number, but had not updated his membership records. Ms. Gormley informed respondent that she would be sending him another letter to his new address.

On February 20, 2007, respondent changed his official membership records address to 2947 Fulton Avenue, Sacramento, CA 95821. That same day, Ms. Gormley wrote to respondent, at this new address, regarding State Bar case number 06-O-12853. Ms. Gormley's letter was properly mailed to respondent at his membership records address on February 20, 2007. The United States

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<sup>4</sup>This remained respondent's official membership address until February 20, 2007.

Postal Service did not return the letter sent to respondent as undeliverable or for any other reason.

Ms. Gormley's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar on or before March 5, 2007. Respondent did not respond to this letter and did not provide the State Bar with a response to the allegations of misconduct the State Bar was investigating.

**Count 1: Section 6068, subdivision (j)**

The State Bar proved by clear and convincing evidence that respondent willfully violated section 6068, subdivision (j). Section 6068, subdivision (j), provides that it is the duty of an attorney to comply with the requirements of section 6002.1. Section 6002.1 requires that members maintain, on the official membership records of the State Bar, their current office address and telephone number;<sup>5</sup> and in the event that a member's address or office telephone information change, the member must notify the membership records office of the State Bar within 30 days. Respondent willfully violated section 6068, subdivision (j), by changing his address on or before August 4, 2006, and failing to notify the membership records office of the State Bar for more than six months following said change,<sup>6</sup> thereby failing to maintain a current address on the State Bar's official membership records.

**Count 2: Section 6068, subdivision (i)**

The State Bar proved by clear and convincing evidence that respondent willfully violated section 6068, subdivision (i). Section 6068, subdivision (i), requires an attorney to cooperate with and participate in a State Bar disciplinary investigation or proceeding. Respondent willfully violated section 6068, subdivision (i), by failing to respond to the February 20, 2007 letter from Ms. Gormley and by not providing the State Bar with a response to the allegations of misconduct that the State Bar

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<sup>5</sup>If the member does not maintain an office, then they are required to list the address to be used for State Bar purposes.

<sup>6</sup>In Count 1, the State Bar also alleged that respondent violated section 6068, subdivision (j), by failing to change his membership records telephone number. Based upon the factual allegations presented in Count 1, the court finds that the State Bar has not proven by clear and convincing evidence that respondent failed to notify the membership records office of the State Bar of his change of telephone number within 30 days of changing his telephone number.

was investigating.

#### **IV. Mitigating and Aggravating Circumstances**

##### **A. Mitigation**

No mitigating factors were submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)<sup>7</sup> Respondent, however, has no prior record of discipline in 26 years<sup>8</sup> of practice prior to engaging in his first act of misconduct in the current proceeding.<sup>9</sup> Practicing law for more than 25 years before committing misconduct is entitled to considerable weight in mitigation. (*In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749.)

##### **B. Aggravation**

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

Respondent committed multiple acts of misconduct by failing to update his membership address and failing to cooperate in a State Bar investigation. (Std. 1.2(b)(ii).)

#### **V. Discussion**

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

In addition, standard 1.6, subdivision (b), provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with

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<sup>7</sup>All further references to standards are to this source.

<sup>8</sup>Respondent has been a member of the California State Bar for 31 years prior to the instant misconduct; however, he was not entitled to practice for five years, between 1992 and 1997, for failing to pay member fees.

<sup>9</sup>Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of respondent's membership records.

due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards provide for the imposition of sanctions ranging from suspension to disbarment depending on the gravity of the offense or the harm, if any, to the victim. (See standard 2.6.) The standards, however, “do not mandate a specific discipline.” (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has been long-held that the court “is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar recommends, inter alia, that respondent be actually suspended from the practice of law for 30 days. The State Bar’s discipline recommendation, however, only makes reference to the standards and does not cite any case law.

Respondent has been found culpable in this matter of willfully violating section 6068, subdivisions (j) and (i). However, there is no evidence that respondent’s misconduct harmed any clients, and respondent has no prior record of discipline over many years of practice. Nevertheless, of particular concern to this court is respondent’s failure to fully participate in this disciplinary proceeding; especially considering that respondent participated initially and was fully aware of this proceeding. Failing to appear and participate in this hearing shows that respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) His failure to participate in this proceeding leaves the court without any understanding as to the underlying cause or causes for respondent’s misconduct or from learning of any other mitigating circumstances which would justify this court’s departure from the discipline recommended by the standards.

Therefore, after considering the nature of respondent’s misconduct, the aggravating and mitigating circumstances found by the court, the State Bar’s discipline recommendation, and the standards, the court will recommend, inter alia, that respondent be suspended from the practice of law for one year, that the execution of this suspension be stayed, and that respondent be placed on

probation for two years with conditions.

## **VI. Recommended Discipline**

Accordingly, the court hereby recommends that respondent **David G. Fox** be suspended from the practice of law for one year, that said suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. Respondent must comply with the State Bar Act and the Rules of Professional Conduct;
2. Respondent must submit written quarterly reports to the Office of Probation of the State Bar of California on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period;
3. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein;
4. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, **and** to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;
5. Within one (1) year after the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent must provide to the Office of Probation satisfactory proof of his attendance at a session of State Bar Ethics School and of passage of the test given at the end of the session;

6. The period of probation will commence on the effective date of the order of the Supreme Court imposing discipline in this matter; and
7. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for one year will be satisfied and that suspension will be terminated.

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE), administered by the National Conference of Bar Examiners, and to provide proof of passage of the MPRE to the Office of Probation, within one year after the effective date of the discipline herein. Failure to pass the MPRE within the specified time will result in actual suspension by the State Bar Court Review Department, without further hearing, until respondent provides the required proof of passage. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn.8.)

#### **VII. Costs**

It is further 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: December \_\_\_\_, 2007

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LUCY ARMENDARIZ  
Judge of the State Bar Court