

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 07-N-13243-RAP
)	
KEN SEJIMA HORIO,)	
)	DECISION & ORDER OF
Member No. 182409,)	INACTIVE ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this disciplinary proceeding, which proceeded by default, Deputy Trial Counsel Melanie J. Lawrence appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Respondent **KEN SEJIMA HORIO** did not appear in person or by counsel.

Respondent is charged with violating his duty, under Business and Professions Code section 6103,¹ to comply with court orders in the course of his profession by willfully disobeying a California Supreme Court order directing him to comply with California Rules of Court, rule 9.20 (hereafter rule 9.20). After considering the evidence and the law, the court finds, by clear and convincing evidence, that respondent willfully violated section 6103 as charged and concludes that the appropriate discipline recommendation is disbarment.

¹Unless otherwise indicated, all further statutory references are to this code.

II. Key Procedural History

On September 19, 2007, the State Bar filed the notice of disciplinary charges in this proceeding (hereafter NDC) and, in accordance with section 6002.1, subdivision (c), properly served a copy of it on respondent by certified mail, return receipt requested, at his latest address shown on the official membership records of the State Bar (hereafter official address). However, the United States Postal Service (hereafter Postal Service) returned that copy of the NDC to the State Bar undelivered and bearing the postal stamp: “Attempted, Unknown.” The service of the NDC on respondent was deemed complete when mailed even though respondent did not receive it. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108.)

Respondent was required to file a response to the NDC no later than October 14, 2007, (Rules Proc. of State Bar, rule 103(a); see also Rules Proc. of State Bar, rule 63 [computation of time]), but did not do so. Therefore, on October 23, 2007, the State Bar filed a motion for the entry of respondent's default and served a copy of it on respondent at his official address by certified mail, return receipt requested. Respondent, however, never filed a response to that motion or to the NDC.

Because all of the statutory and rule prerequisites were met, this court filed an order on November 8, 2007, in which it entered respondent's default and, as mandated by section 6007, subdivision (e)(1), ordered respondent's involuntary inactive enrollment. This court's case administrators properly served a copy of the court's order on respondent at his official address by certified mail, return receipt requested; however, it was returned to the court undelivered and bearing the postal stamp: “Return to Sender [¶] Insufficient Address [¶] Unable to Forward.”

On November 13, 2007, the State Bar filed a request for waiver of default hearing and brief on culpability and discipline, and the court took the case under submission for decision without a hearing on that same day.

III. Findings of Fact and Conclusions of Law

The court's findings are based on (1) the allegations contained in the NDC, which are deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)); (2) exhibit 1 to the State Bar's November 13, 2007, request for waiver of hearing and brief on culpability and discipline (which exhibit is a certified copy of respondent's prior record of discipline); and (3) the facts in this court's official file in this matter.

A. Findings of Facts

1. Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 11, 1996, and has been a member of the State Bar since that time.

2. Violation of Section 6103

On May 30, 2007, the Supreme Court filed an order in *In re Ken Sejima Horio on Discipline*, case number S151473 (State Bar Court case number 05-O-03547, et al.) (hereafter Supreme Court's May 30, 2007, order) in which it placed respondent on four years' stayed suspension, four years' probation, and two years' actual suspension, which will continue until respondent makes restitution in the amount of \$5,250 plus interest and until he establishes his rehabilitation, present fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.² In its May 30, 2007, order, the Supreme Court also ordered respondent to comply with rule 9.20 and to 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.

The deemed allegations in the NDC establish that, on or about May 30, 2007, the Clerk of the Supreme Court promptly mailed, to respondent, a copy of the Supreme Court's May 30,

² The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

2007, order. (Accord Cal. Rules of Court, rule 8.532(a); Evid. Code, §§ 606, 660, 664; *In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Moreover, even though there is no allegation in the NDC or any direct evidence establishing that respondent actually received it or otherwise had actual notice of it, the court finds that respondent actually received that copy of the Supreme Court's May 30, 2007, order. (Evid. Code, § 641 [the mailbox rule]; see also Evid. Code, §§ 604, 630.)

The Supreme Court's May 30, 2007, order became effective on June 29, 2007, (Cal. Rules of Court, rule 9.18(a)) and has remained in effect since that time. Thirty days after June 29, 2007, was July 29, 2007. And 40 days after June 29, 2007, was August 8, 2007. Accordingly, respondent was required to comply with rule 9.20(a) no later than July 29, 2007, by, among other things, giving notice of his actual suspension and disqualification to act as an attorney to all clients; opposing counsel or, if none, opposing parties; courts, agencies, and tribunals before which he represented clients. In addition, respondent was required to comply with rule 9.20(c) no later than August 8, 2007, by filing a declaration with the Clerk of the State Bar Court (1) stating that he had fully and timely complied with the requirements in rule 9.20(a) and (2) setting forth an address where communications may be sent to him in the future.

The record does not establish whether respondent properly gave notice of his suspension and disqualification to act as an attorney as required by rule 9.20(a). However, the record clearly establishes that, as of the date of this decision, respondent has never filed a rule 9.20(c) compliance declaration (i.e., a declaration stating that he complied with rule 9.20(a) and setting forth an address for future communications).

B. Conclusions of Law

The record establishes, by clear and convincing evidence, that respondent failed to comply with the Supreme Court's May 30, 2007, order because he never filed, with the Clerk of

the State Bar Court, a rule 9.20(c) compliance declaration. Respondent was required to file a rule 9.20(c) affidavit even if he had no law practice, clients, or pending cases when the Supreme Court filed its May 30, 2007, order in which it directed respondent to comply with rule 9.20. (Cf. *Powers v. State Bar* (1988) 44 Cal.3d 337, 341 [applying former rule 955; renumbered rule 9.20].) Accordingly, the court holds that respondent willfully violated his duty, under section 6103, to obey court orders requiring him to do an act connected with and in the course of his profession, which he ought in good faith do. This is true even if respondent was not aware of his obligation to comply with rule 9.20. (Cf. *Powers v. State Bar, supra*, 44 Cal.3d at p. 341 [attorney was disbarred when his failure to keep his official address current prevented him from learning that he had been ordered to comply with former rule 955 (renumbered rule 9.20)].)

IV. Level of Discipline

A. Factors in Mitigation

There are no factors in mitigation.

B. Factors in Aggravation

1. Prior Record of Discipline

Respondent has one prior record of discipline. (Std. 1.2(b)(i).) Respondent's prior record of discipline is the Supreme Court's May 30, 2007, order in which, as noted above, respondent was placed on four years' stayed suspension, four years' probation, and two years' actual suspension, which will continue until respondent makes restitution and complies with standard 1.4(c)(ii). Notably, the Supreme Court imposed that discipline on respondent and ordered respondent to comply with rule 9.20 in accordance with a stipulation regarding facts, conclusions of law, and disposition that respondent entered into with the State Bar in State Bar Court case number 05-O-03547, et al, and that was approved by the State Bar Court in an order

filed on January 5, 2007, which was thereafter modified by an order filed February 5, 2007, (hereafter parties' January 2007 stipulation).

The parties' January 2007 stipulation conclusively establishes, inter alia, that respondent engaged in serious misconduct in four client matters in 2004 and 2005 and failed to cooperate with the State Bar's investigations in three of those four client matters. In short, respondent's prior record of discipline is an extremely serious aggravating factor.

2. Failure to File a Response to the NDC

Respondent's failure to file a response to the NDC in the present proceeding, which allowed his default to be entered, is an aggravating circumstance. (See *Conroy v. State Bar* (1990) 51 Cal.3d 799, 805.) First, it indicates that he fails to appreciate the seriousness of the charges against him. (*Ibid.*) Second, it indicates "that he does not comprehend the duty as an officer of the court to participate in disciplinary proceedings. [Citation.]" (*In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 109, citing *Conroy v. State Bar* (1992) 53 Cal.3d 495, 507-508; but see *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074, 1080 [failure to participate after entry of default is not an aggravating circumstance].)

C. Discussion

Because the State Bar has charged respondent's violation of the Supreme Court's May 30, 2007, order as a violation of section 6103,³ the court must first look to standard 2.6 for guidance.

³It is unclear why the State Bar elected to charge respondent's failure to comply with rule 9.20 as ordered by the Supreme Court as a violation of section 6103. In the past, the State Bar has also charged such failures as violations of, among other things, section 6068, subdivision (b), which requires attorneys "To maintain the respect due to the courts of justice and judicial officers." (E.g., *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 498.) Without question, the addition of a section 6103 charge (or a section 6068, subdivision (b) charge) adds nothing to the simple (and direct) charge that respondent willfully violated the Supreme Court's May 30, 2007, order directing him to comply with rule 9.20, which violation is expressly disciplinable under rule 9.20(d). (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 128, 148 [appropriate level of discipline for an act of misconduct does not depend upon how many rules or statutes proscribe the misconduct].)

As the State Bar notes, that standard provides that a violation of section 6103 is to “result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3.” Under standard 1.3, the primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Accord, *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) Unfortunately, the generalized language of standard 2.6 provides little guidance. (*In re Morse* (1995) 11 Cal.4th 184, 206.)

Standard 1.7(a), which is applicable because respondent has a prior record of discipline, provides more guidance. That standard provides that, when an attorney has a prior record of discipline, “the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.” Under standard 1.7(a) respondent’s section 6103 violation warrants very substantial discipline, if not disbarment.

Next, the court looks to case law. More than 12 years ago, the review department held that the standards do not address the appropriate level of discipline for a violating a Supreme Court order to comply with former rule 955 (renumbered rule 9.20). (*In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 295.) Instead, rule 9.20(d) does. Rule 9.20(d) provides, in relevant part, that an attorney’s willful failure to comply with rule 9.20 constitutes cause for disbarment or suspension and for revocation of any pending probation. Moreover, at least in the absence of *compelling* mitigating circumstances, the most consistently imposed sanction under rule 9.20(d) is disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d

116, 131 [applying former rule 955(d) (renumbered rule 9.20(d))]; *In the Matter of Lynch, supra*, 3 Cal. State Bar Ct. Rptr. at p. 296, and cases there cited.)

Among other things, a suspended attorney's timely compliance with rule 9.20(a) performs the critical function of ensuring that all concerned parties, including clients, cocounsel, opposing counsel, courts, agencies, and other tribunals, promptly learn of the attorney's actual suspension and consequent disqualification to act as an attorney. When an attorney fails to file a rule 9.20(c) compliance declaration, neither this court nor the Supreme Court can determine whether this critical function has been performed. In addition, compliance with rule 9.20(c) keeps this court and the Supreme Court apprised of the location of attorneys who are subject to their disciplinary authority. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187 [construing former rule 955(c) (renumbered rule 9.20(c))].) Respondent's unexplained failure to file a rule 9.20(c) compliance declaration strongly suggests a conscious disregard for both this court's and the Supreme Court's efforts to fulfill their respective responsibilities to oversee the practice of law in the State of California. Moreover, there are no mitigating circumstances, much less compelling mitigating circumstances, that would warrant a departure from the ordinary sanction of disbarment under rule 9.20(d).

Furthermore, the court concludes that only disbarment will adequately fulfill the purposes of attorney discipline. Anything short of disbarment for respondent's willful and unexplained failure to comply with rule 9.20(c) as ordered by the Supreme Court would certainly undermine the integrity of the disciplinary system and damage public confidence in the legal profession.

V. Discipline Recommendation

Accordingly, the court recommends that respondent **KEN SEJIMA HORIO** be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

VI. Rule 9.20 and Costs

The court further recommends that **KEN SEJIMA HORIO** again be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

The court further 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 Business and Professions Code section 6140.7 and as a money judgment.

VII. Order of Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **KEN SEJIMA HORIO** be involuntary enrolled as an inactive member of the State Bar of California effective three calendar days after the service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).

Dated: February 7, 2008.

RICHARD A. PLATEL
Judge of the State Bar Court