

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

In the Matter of)	Case No. 07-N-13648-RAH
)	
DAVID TURNER HARNEY,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 142760,)	ENROLLMENT
)	
<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 David Turner Harney (respondent), by failing to file with the Clerk of the State Bar Court, the compliance affidavit required by rule 9.20 of the California Rules of Court (rule 9.20), as required by an order of the California Supreme Court, wilfully disobeyed or violated an order of the court requiring him to do an act connected with or in the course of his profession, which he ought in good faith to do, in wilful violation of Business and Professions Code section 6103. The OCTC was represented in this proceeding by Supervising Trial Counsel Geri Von Freymann (STC Von Freymann). 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 9.20 (former rule 955) 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

October 15, 2007.¹ Attached to the NDC as Exhibit 1 was a copy of the Supreme Court order filed on January 18, 2007, in Supreme Court matter S147880 (State Bar Court Case No. 05-O-03054). Exhibit 1 attached to the NDC is admitted into evidence.

A copy of the NDC was properly served upon respondent on October 15, 2007, by regular, first-class mail and 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). The copy of the NDC sent by certified mail was returned by the U.S. Postal Service bearing the stamp “UNDELIVERABLE”. The copy of the NDC sent by regular, first-class mail was not returned by the U.S. Postal Service for any reason.

On October 18, 2007, a Notice of Assignment and Notice of Initial Status Conference was filed in this matter, setting an in person status conference for November 27, 2007. A copy of said notice was properly served on respondent by first-class mail, postage fully prepaid, on October 18, 2007, 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

Efforts by the OCTC to locate respondent were unsuccessful.²

¹On September 24, 2007, a 20-day letter was mailed to respondent at his official membership records address. The 20-day letter was not returned by the U.S. Postal Service for any reason. (Declaration of STC Von Freymann attached to the OCTC’s motion for the entry of respondent’s default.)

²STC Von Freymann telephoned respondent’s official membership records telephone number. However, the telephone was not answered by either an individual or an answering machine. In addition, a copy of the NDC was served on respondent to an address discovered for respondent in Hawaii. The copy of the NDC was returned by the U.S. Postal Service marked “Return to Sender. Not at this hotel. No forwarding address.” A review of the declaration of STC Von Freymann and Exhibit 2 (a copy of the search result for respondent) attached to the OCTC’s motion for the entry of respondent’s default, however, reveals that the copy of the NDC sent to the Hawaii address bore an incorrect four digit zip code extension. However, the main five digit zip code was correct. The court therefore finds this error de minimus, and that the address, to which the copy of the NDC was sent, was sufficient to have been received at the intended address.

On November 27, 2007, the court held a status conference in this matter. Respondent failed to appear either in person or through counsel at the status conference. Thereafter, on November 28, 2007, the court filed an Order Pursuant to In Person Status Conference, ordering that a motion for the entry of respondent's default be filed within two days. A copy of said order was properly served on respondent by first-class mail, postage fully prepaid, on November 28, 2007, 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
UNABLE TO FORWARD

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 January 8, 2008, 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 STC Von Freymann and Exhibits 1 and 2. The court admits these exhibits into evidence. A copy of said motion was properly served on respondent by regular, first-class mail and by certified mail, return receipt requested, on January 8, 2008, addressed to respondent at his official address.

As of January 8, 2008, the 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 January 29, 2008, the court filed an Order of Entry of Default (Rule 200 - Failure to File Timely Response), Order Enrolling Inactive³ and Further Orders. A copy of said order was properly served on respondent on January 29, 2008, 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 marked "Insufficient Address" and "Attempted, Not

³Respondent'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.

Known”.

On January 30, 2008, the OCTC filed a brief on the issues of culpability and discipline and requested waiver of the hearing on this matter. A copy of the brief was properly served on respondent by regular mail on January 30, 2008. The court admits into evidence State Bar Exhibit 1 attached to said brief.

This matter was submitted for decision on January 30, 2008.

FINDINGS OF FACT AND CONCLUSIONS OF LAW⁴

Respondent was admitted to the practice of law in the State of California on December 11, 1989, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

On January 18, 2007, the California Supreme Court filed Order No. S147880 (suspension order) requiring, in pertinent part, that respondent comply with California Rules of Court, rule 9.20,⁵ by performing the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the suspension order. The suspension order became effective on February 17, 2007, thirty days after the suspension order was filed.

On January 18, 2007, the Clerk of the California Supreme Court properly served by mail a copy of the suspension order on respondent.

The suspension order required, in part, that respondent comply with subdivision (a) of rule 9.20 of the California Rules of Court⁶ no later than March 19, 2007, by notifying all clients and any

⁴As 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, rule 9.20 of the California Rules of Court, of which the court takes judicial notice, as well as Exhibit 1 attached to the NDC and Exhibit 1 attached to the OCTC’s brief on the issues of culpability and discipline.

⁵The suspension order actually required respondent to comply with rule 955 of the California Rules of Court. Effective January 1, 2007, however, rule 955 was renumbered 9.20, but the requirements of the rule remained the same. The court will therefore refer to former rule 955 as rule 9.20 in this decision.

⁶Pursuant to Evidence Code section 452, subdivision (e), the court takes judicial notice of rule 9.20 of the California Rules of Court.

co-counsel of his suspension, delivering to all clients any papers or other property to which the clients are entitled, refunding any unearned attorney fees, notifying opposing counsel or, if appropriate, adverse parties of his suspension, and filing a copy of said notice with the court, agency, or tribunal before which the litigation is pending.

The suspension order required that respondent comply with subdivision (c) of rule 9.20 of the California Rules of Court no later than March 29, 2007, by filing with the Clerk of the State Bar Court an affidavit showing that he fully complied with those provisions of the suspension order regarding rule 9.20.

Respondent did not file, with the Clerk of the State Bar Court, an affidavit stating compliance with rule 9.20 by March 29, 2007. To date, respondent has not filed a valid rule 9.20 affidavit.

“Willfulness” in the context of rule 9.20 implies simply a purpose or willingness to commit 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 9.20. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) The filing of an affidavit pursuant to rule 9.20, 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 9.20 of the California Rules of Court and the Supreme Court’s Order filed January 18, 2007, in Supreme Court matter S147880 (State Bar Court Case No. 05-O-03054) by failing to file an affidavit of compliance with rule 9.20 as required by rule 9.20, 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 two prior impositions of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i) (“standards”).)⁷

A. On January 18, 2007, the Supreme Court issued an order in matter S147880 (State Bar Court Case No. 05-O-03054) suspending respondent from the practice of law for one year; staying execution of said suspension; and actually suspending respondent from the practice of law for six months and until the State Bar Court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California.

In this prior disciplinary matter, in which respondent’s default was also entered, respondent was found culpable of one count each of wilfully violating rule 3-110(A) of the Rules of Professional Conduct of the State Bar of California by recklessly failing to competently perform the legal services for which he was employed; section 6103 of the Business and Professions Code by wilfully disobeying and violating court orders; and section 6068, subdivision (i) by failing to cooperate in a disciplinary investigation. In aggravation, respondent engaged in multiple acts of wrongdoing; his misconduct significantly harmed his client; and he demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. In mitigation, it was noted that respondent had no prior record of discipline.

B. On January 29, 2007, in another disciplinary matter which proceeded by default, respondent was publicly reprimanded by the State Bar Court in State Bar Court Case No. 05-O-02544 for failing to respond to letters from a State Bar investigator and by failing to otherwise communicate with the investigator in wilful violation of section 6068, subdivision (i). In aggravation, respondent had a prior record of discipline (noted above). It was also noted that respondent failed to participate in the disciplinary proceeding prior to the entry of his default, but little weight was given to this in aggravation as it closely equaled the misconduct relied on to support culpability and to enter respondent’s default. No mitigating circumstances were found.

⁷Pursuant to Evidence Code section 452, subdivision (d), the court takes judicial notice of respondent prior record of discipline in State Bar Court Case No. 05-O-02544.

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 9.20 (formerly 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 two prior records of discipline. In both these prior disciplinary matters, as well as in this disciplinary proceeding, respondent failed to participate and permitted his default to be entered against him. 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 9.20 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 9.20. (*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 9.20 , subdivision (c). The court also notes that respondent failed to participate in his two prior disciplinary matters. More importantly, respondent's failure to comply with rule 9.20 undermines the basic function that rule 9.20 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. Respondent's 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 DAVID TURNER HARNEY 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 rule 9.20 of the California Rules of Court, and that he be ordered 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 Supreme Court order imposing discipline in this matter.

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: April __, 2008

RICHARD A. HONN
Judge of the State Bar Court