

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 08-N-12671-RAH
)	
DAVID ANTHONY SILVA,)	
Member No. 149506,)	DECISION
)	
A Member of the State Bar.)	

Introduction

In this disciplinary proceeding, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) charges respondent **DAVID ANTHONY SILVA** with failing to comply with California Rules of Court, rule 9.20 (Rule 9.20) as he was ordered to do by the Supreme Court in its March 3, 2008 order in case number S159816 (State Bar Court case numbers 04-O-15180; 04-O-15710; 05-O-00146; 05-O-00344; and 05-O-02612) (*Silva I*). Specifically, the State Bar charges that respondent willfully failed to comply with rule 9.20(c)¹ by failing to file a declaration of compliance.

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¹ Rule 9.20(c) provides: “Within such time as the order may prescribe . . . , the member must file with the Clerk of the State Bar Court [a declaration] showing that he or she has fully [performed the acts specified in rule 9.20(a)]. The [declaration] must also specify an address where communications may be directed to the disbarred, suspended, or resigned member.”

Significant Procedural History

The State Bar filed the notice of disciplinary charges (NDC) in this proceeding on August 12, 2008. On September 29, 2008, respondent filed a response to the NDC denying each and every allegation of misconduct set forth in the NDC.

On January 20, 2009, respondent tendered his resignation from membership in the State Bar with disciplinary charges pending. (Cal. Rules of Court, rule 9.21.) Thereafter, on January 23, 2009, this disciplinary proceeding was abated pending the Supreme Court's action on respondent's resignation. However, on December 21, 2010, the Supreme Court rejected respondent's resignation. Shortly thereafter, this court unabated this proceeding and set the matter for trial.

On June 9, 2011, the parties filed a partial stipulation of facts and conclusions of law; trial was held; and matter was taken under submission for decision by the court.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 5, 1990, and has since been a member of the State Bar of California.

Findings of Facts

In its March 3, 2008 order in *Silva I*, the Supreme Court placed respondent on five years' stayed suspension and, because respondent defaulted in *Silva I*, suspended respondent for a minimum of two years and until (1) respondent pays restitution to S. Jura in the amount of \$3,000 together with 10 percent interest, (2) respondent makes and the State Bar Court grants a motion to terminate the two-year-minimum suspension under former rule 205 of the Rules of Procedure of the State Bar, and (3) respondent establishes his rehabilitation, 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 *Silva I*, the Supreme Court also ordered respondent 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 its March 3, 2008 order.

The Supreme Court's March 3, 2008 order, which was duly served on respondent (Cal. Rules of Court, rule 8.532(a)), became effective on April 2, 2008 (Cal. Rules of Court, rule 9.18(b)) and has continuously remained in effect since that time. Under the Supreme Court's March 3, 2008 order, respondent was required to file a rule 9.20 compliance declaration no later than May 12, 2008 (i.e., 40 days after the April 2, 2008 effective date of the March 3, 2008 order).

In addition, respondent's two-year-minimum suspension in *Silva I* began on April 2, 2008, the effective date of the Supreme Court's March 3, 2008 order. As of the date of this decision, respondent remains suspended from the practice of law under the Supreme Court's order in *Silva I*.³

On about April 14, 2008, respondent's sister, who lives in Massachusetts, attempted suicide. Later that same day, after having learned of his sister's suicide attempt, respondent filed an incomplete rule 9.20(c) compliance declaration.

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.

³ Respondent has paid restitution of the \$3,000 principal and a large portion of the interest thereon. Nonetheless, he will remain suspended under the Supreme Court's order in *Silva I* until he pays all of the interest; he takes and passes the Multistate Professional Responsibility Examination; he files and the State Bar Court grants a motion to terminate his suspension (Rules Proc. of State Bar, former rule 205); and he establishes his rehabilitation, fitness to practice, and learning in the law (std. 1.4(c)(ii)).

Respondent's April 14, 2008 compliance declaration was incomplete in that he did not reply in the affirmative for all the required conditions. He did not want to do so before he had the opportunity to review all of his client files. At the time, though, all of the files were located in a storage facility 275 miles away. Partly due to his prior career as a special agent of the FBI, respondent was particularly concerned with avoiding perjury. For that reason, he attached an explanation to his 9.20(c) declaration, in which he clarified that he was in the process of locating and reviewing his files and that he would submit a follow-up 9.20(c) declaration once he had reviewed all the files.

Shortly after submitting the compliance declaration, respondent traveled to Massachusetts to take care of and stay with his sister in his sister's home.

On April 16, 2008, the declaration was rejected by the Office of Probation because respondent had not indicated that he had sent the required notification to clients or returned all client papers.

Respondent stayed in Massachusetts and cared for his sister until the beginning of October 2008. Respondent was her primary caregiver during that time. Moreover, respondent encountered significant problems in caring for his sister during that time.

Upon returning to California, respondent reviewed his files in storage and verified that he had indeed already both notified all clients and returned all client papers in accordance with rule 9.20(a) at the time that he filed his April 14, 2008 compliance declaration. On October 16, 2008, respondent filed a second rule 9.20(c) compliance declaration, which was complete and approved by the Office of Probation.

Conclusions of Law

The court concludes that respondent willfully failed to comply with rule 9.20(c) in accordance with the Supreme Court's order in *Silva I*. The facts (1) that respondent had actually

complied with rule 9.20(a) by April 14, 2008, when he filed his incomplete rule 9.20(c) compliance declaration and (2) that respondent later filed a complete rule 9.20(c) compliance declaration in October 2008 do not absolve respondent of his failure to file a complete rule 9.20(c) compliance declaration no later than the May 2, 2008 filing deadline. (*In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192; *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527.)

Aggravation Findings

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)

Prior Record of Discipline (Std. 1.2(b)(i).)

Respondent has one prior record of discipline: *Silva I.*

In *Silva I*, the Supreme Court suspended respondent from the practice of law for five years, stayed the execution of that five-year suspension and then suspended respondent for a minimum of two years. (See Supreme Court's March 3, 2008 order in *Silva I*.)

In *Silva I*, respondent was found culpable on a total of 14 counts of misconduct involving five client matters. Three counts of failing to perform legal services competently (Rules Prof. Conduct, rule 3-110(A)); one count of improperly withdrawing from employment (Rules Prof. Conduct, rule 3-700(A)(2)); one count of failing to refund \$3,000 in unearned fees (Rules Prof. Conduct, rule 3-700(D)(2)); three counts of engaging in acts involving moral turpitude (Bus. & Prof. Code, § 6106); three counts of failing to communicate (Bus. & Prof. Code, § 6068, subd. (m)); two counts of failing to support the laws of this state (Bus. & Prof. Code, § 6068, subd. (a)); and one count of violating a court order (Bus. & Prof. Code, § 6103).

Mitigation Findings

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The court finds the following factors in mitigation.

Extreme Emotional/Physical Difficulties (Std. 1.2(e)(iv).)

Respondent presented mitigating evidence of a family emergency that delayed his timely compliance with rule 9.20(c). In or around April 2008, shortly after receiving the March 3, 2008 Supreme Court order, respondent's sister was hospitalized after a suicide attempt. Within a couple of days respondent left for Massachusetts to care for his sister. Before leaving, he filed an affidavit, though incomplete because he was wary of signing under penalty of perjury without being absolutely certain of his compliance. As her only sibling, respondent remained in Massachusetts as his sister's primary caretaker until October 2008. He spent much of his time in Massachusetts acting as a companion to his sister and assisting elderly relatives. Upon returning in October 2008, and visiting his storage, he filed a complete compliance declaration.

Candor/Cooperation to Victims/State Bar (Std. 1.2(e)(v).)

Respondent displayed spontaneous cooperation and candor to the victim by paying the flat amount of \$9,433.08 in restitution to the Client Security Fund (CSF) on February 25, 2010. However, he still owes the client 10 percent interest per annum from March 27, 2002 until the time CSF paid the client, as well as 10 percent interest per annum from the time CSF paid the client until February 25, 2010. Therefore, the court gives limited mitigation credit for his cooperation with the victim of his misconduct.

In addition, respondent is entitled to mitigation for his cooperation with the State Bar Court and the State Bar during these proceedings. For example, when respondent entered into the June 9, 2011 partial stipulation of facts with the State Bar, he stipulated to the facts establishing his culpability for failing to comply with rule 9.20(c).

Good Character (Std. 1.2(e)(vi).)

Respondent's good character was established by his own credible testimony as to his service to the nation and his pro bono activities. Respondent was a special agent of the FBI from 1979 to 1987. Respondent also testified that he entered the field of law because he wanted to help people. In early 2003, he received the Fresno County Bar Association Pro Bono Attorney of the Year award. He is also currently involved with a program in Providence, Rhode Island that donates men's suits to homeless men who want to apply for jobs, and has donated 8 of his own suits. But respondent's good character was not corroborated by a wide range of references in the legal and general communities. (Std. 1.2(e)(vi).) Accordingly, the court assigns only limited mitigation credit to respondent's good character testimony.

Discussion

In determining the appropriate level of discipline, the court ordinarily looks to the standards first (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628) and to caselaw second (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580). However, the standards do not address the appropriate level of discipline in rule 9.20 proceedings. (*In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 295.) Instead, rule 9.20(d) does.

Under rule 9.20(d), an attorney's willful failure to comply with the provisions of rule 9.20 "is a cause for disbarment or suspension and for revocation of any pending probation." Even though rule 9.20(d) provides for the sanctions of suspension and revocation of probation, caselaw makes clear that, in the absence of compelling mitigating circumstances, disbarment is the ordinary and appropriate level of discipline for violating a provision of rule 9.20. (E.g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch, supra*, 3 Cal. State Bar

Ct. Rptr. at p. 296, and cases there cited.) Nonetheless, the imposition of disbarment in rule 9.20 proceedings is far from absolute. Over the years, the courts have weighed the facts and circumstances of each case individually. In several published decisions, the California Supreme Court and the Review Department of the State Bar Court have found that, due to various extenuating circumstances, an attorney's failure to comply with rule 9.20's predecessor – former rule 955 of the California Rules of Court (former rule 955) -- may warrant a discipline significantly less than disbarment. (See *Shapiro v. State Bar* (1990) 51 Cal.3d 251; *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192; *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527.)

In the present matter, the State Bar urges the court to impose disbarment. However, there are compelling mitigating circumstances that warrant a departure from the ordinary sanction of disbarment under rule 9.20(d). In determining the appropriate level of discipline, the court finds *Shapiro v. State Bar* (1990) 51 Cal.3d 251 to be particularly instructive.

In *Shapiro*, the attorney had timely notified the proper parties of his suspension, but was five months late in filing the affidavit. The former rule 955 violation stemmed from the attorney's prior discipline for misconduct in three separate matters, which involved client abandonment, failure to return unearned fees, failure to act competently, and practicing law while suspended.⁴ The Supreme Court found that the attorney's violation of former rule 955(c) was substantially mitigated by his diligent though unsuccessful attempts to comply with the rule, his late-filed affidavit, and by his many years of practice without discipline. The court imposed a one-year actual suspension for the rule 9.20 violation and for one count of misconduct involving client abandonment.

⁴ Effective January 1, 2007, rule 955 was re-numbered as rule 9.20.

Similarly here, respondent was not in conscious disregard for 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. Respondent did attempt to timely file the first affidavit, due May 12, 2008, before going out of state for a family emergency, and attached an explanation for why certain conditions had not yet been met. Though he had fully complied with rule 9.20(a) when he filed the first affidavit on April 14, 2008, he was unable to complete the affidavit because of his grave concern for avoiding perjury.

Upon returning to California, five months later, he checked his files, verified that he had complied with rule 9.20(a), and filed a proper, completed compliance declaration that satisfied rule 9.20(c) on October 16, 2008. Therefore, like in *Shapiro*, respondent's violation of rule 9.20(c) is substantially mitigated by his diligent, though unsuccessful, attempts to comply with the rule.

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) The court is certainly concerned with respondent's inability to comply with professional standards. It is particularly worrisome that respondent did not comply with rule 9.20(c) in the first instance; however, his efforts to comply demonstrate that he had no intention to disregard his obligation with regard to rule 9.20.

The court finds that the State Bar's recommendation of disbarment is excessive in light of the present facts and circumstances and respondent's compelling mitigation. In addition, respondent's actions following his misconduct demonstrate that he "has awakened to his responsibilities to the discipline system." (*In the Matter of Friedman*, supra, 2 Cal. State Bar Ct. Rptr. 527, 533.) Respondent also testified that, due to his current health issues, he will most likely never practice law again.

Due to substantial compliance and convincing mitigation, the court concludes that two years' stayed suspension and two years' probation on conditions, including a one-year suspension is the appropriate level of discipline in this proceeding.⁵

Recommendations

Accordingly, the court recommends that respondent **David Anthony Silva**, State Bar number 149506, be suspended from the practice of law in the State of California for two years, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. Respondent is suspended from the practice of law for the first year of his probation;
2. Respondent must comply with the State Bar Act and the Rules of Professional Conduct;
3. Within 10 days of any change, respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar (Office of Probation), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;
4. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. Respondent must promptly meet with the probation deputy as directed and upon request;
5. Respondent must submit written quarterly reports to the Office of Probation 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

⁵ Even though not directly applicable to this rule 9.20 proceeding, the court notes that standard 1.7(a) supports the imposition of a lengthy suspension of at least one year. Standard 1.7(a) provides: "If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one prior imposition of discipline as defined by standard 1.2(f), 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."

- during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next 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 20 days before the last day of the period of probation and no later than the last day of the probation period;
6. 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 probation conditions;
 7. Respondent must, within one year of the effective date of the discipline herein, provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar Ethics School given periodically by the State Bar at either 180 Howard Street, San Francisco, California 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015, and passage of the test given at the end of the session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fees. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive and is ordered not to claim any MCLE credit for attending Ethics School. (Accord, Rules of Proc. of State Bar, rule 3201.);
 8. The period of probation will commence on the effective date of the order of the Supreme Court imposing discipline in this matter; and
 9. 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 two years will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination because he was previously ordered to do so in *Silva I* and respondent will remain suspended from the practice of law in *Silva I* until he takes and passes that examination.

California Rules of Court, Rule 9.20

The court recommends that respondent 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.⁶

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that those costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: July 28, 2011.

RICHARD A. HONN
Judge of the State Bar Court

⁶ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this matter. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)