

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 08-N-13140-DFM
)	
KEVIN FRANCIS CHRISTOF,)	
)	DECISION AND ORDER OF
Member No. 194684,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this default disciplinary matter, respondent **Kevin Francis Christof** is found culpable, by clear and convincing evidence, of failing to comply with California Rules of Court, rule 9.20,¹ as ordered by the California Supreme Court on August 24, 2007, in S153713.

In view of respondent’s misconduct and the evidence in aggravation, the court recommends, among other things, that respondent be disbarred from the practice of law.

II. PERTINENT PROCEDURAL HISTORY

On February 27, 2009, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed its First Amended Notice of Disciplinary Charges (NDC)² consisting of a single

¹ All references to rule 9.20 are to California Rules of Court, rule 9.20.

² On September 25, 2008, the original Notice of Disciplinary Charges was filed and served on respondent. Thereafter, on the State Bar’s motion, the court entered respondent’s default; on December 11, 2008, the State Bar submitted a Request for Waiver of Default Hearing and Brief on Culpability and Discipline. On February 25, 2009, the court vacated the entry of default because the Notice of Disciplinary Charges was defective in that it did not comply with

count alleging that respondent failed to comply with a California Supreme Court order that he perform the acts set out in paragraph (c) of rule 9.20 of the California Rules of Court. A copy of the NDC was properly served on respondent on February 27, 2009, by certified mail, return receipt requested, addressed to the official membership records address (official address).³ The United States Postal Service (USPS), however, returned that mailing to the State Bar undelivered and marked, “Not Deliverable as Addressed.” On February 27, 2009, a courtesy copy of the NDC was sent to respondent at his official address by regular first class mail. It was not returned by the USPS.

Respondent did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

On March 27, 2009, the deputy trial counsel (DTC) assigned to this matter, attempted to reach respondent at his official membership records telephone number. She reached an automated messaging system that stated, “You have reached the Christof’s.” The DTC left a message for respondent to return her call. She received no response to her call. On March 27, 2009, the assigned DTC also sent an e-mail to the e-mail address listed for him, in which she advised him that disciplinary charges had been filed against him, that his response was past due, and that if he failed to contact her or serve a response to the charges, she would file a motion for entry of his default. The DTC did not receive a response to her e-mail.

Even though respondent did not receive the service copy of the NDC, service on respondent was complete when the State Bar mailed the service copy to respondent at his official address by certified mail, return receipt requested. (Bus. & Prof. Code, § 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108 [service in a State Bar Court proceeding is deemed complete when mailed even if the attorney does not receive the pleading]; see also

rule 583 of the Rules of Procedure of the State Bar. The court permitted the State Bar to file an amended NDC and serve it on respondent within 20 days.

³ Pursuant to Evidence Code 452, subdivision (h), the court grants the State Bar’s request that the court take judicial notice of respondent’s official membership records address history.

Powers v. State Bar (1988) 44 Cal.3d 337, 341 [attorney 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 (now rule 9.20)].) Moreover, because the State Bar made multiple additional efforts to locate respondent so as to provide him with actual notice of this proceeding, the court finds that all due process requirements have been satisfied. (*Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.)

Respondent was required to file a verified response to the NDC no later than March 24, 2009. (Rules Proc. of State Bar, rules 103(a), 584.) As noted, *ante*, respondent did not file a response to the NDC. On April 8, 2009, the State Bar filed a motion for the entry of respondent's default. A copy of said motion was properly served on respondent on April 8, 2009, by certified mail, return receipt requested, addressed to respondent at his official address.⁴

Respondent did not file a response within 10 days after service of the motion for entry of his default. Consequently, on April 27, 2009, respondent's default was entered. 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 § 6007, subdivision (e), effective April 30, 2009.⁵

On May 11, 2009 the State Bar filed a request for waiver of default hearing and brief on culpability and discipline.

Respondent did not participate in the disciplinary proceedings. On May 18, 2009, the court took the case under submission for decision without a hearing.

⁴ A courtesy copy of the motion for entry of respondent's default was served on respondent on that same date by regular first class mail, addressed to respondent at his official address.

⁵ All references to section (§) are to the Business and Professions Code, unless otherwise indicated.

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).)

Jurisdiction

Respondent was admitted to the practice of law in the State of California on April 4, 1998, and has been a member at all times since that date.

Factual Background

On August 24, 2007, the Supreme Court of California filed a disciplinary order in case No. S153713 [State Bar case No. 06-J-14347] (the Supreme Court order). Among other things, the Supreme Court ordered respondent to comply with rule 9.20(a) and (c), within 30 and 40 days, respectively, after the effective date of the Supreme Court order.

Notice of the order was duly and properly served upon respondent. (Cal. Rules of Court, rule 8.532(a).)

The Supreme Court order became effective on September 23, 2007, thirty days after it was filed, and at all times thereafter remained in full force and effect. Thus, respondent was ordered to comply with rule 9.20(c) no later than November 2, 2007.

Respondent failed to comply with rule 9.20(c) by the November 2, 2007 deadline. To date, respondent has failed to comply with rule 9.20(c).

Failure to Obey Supreme Court Order to Comply with Rule 9.20

The court finds that respondent is culpable of willfully failing to comply with his obligation under rule 9.20.

Rule 9.20(c) mandates that respondent “file with the Clerk of the State Bar Court an affidavit showing that he . . . has fully complied with those provisions of the order entered under this rule.”

The term “willful” in the context of rule 9.20, formerly rule 955, does not require bad faith or any evidence of intent. Whether respondent is aware of the requirements of rule 9.20 or of his obligation to comply with those requirements is immaterial. “Willfulness” in the context of rule 9.20 does not require actual knowledge of the provision that is violated. It is not necessarily even dependent on showing the respondent’s knowledge of the Supreme Court’s order requiring compliance. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341-342; *Hamilton v. State Bar* (1979) 23 Cal.3d 868, 873-874.) 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 9.20. (*Powers v. State Bar, supra*, 44 Cal.3d 337, 341.)

In the instant matter, respondent did not file the rule 9.20(c) affidavit with the clerk of the court by November 2, 2007, as required by the Supreme Court order.

Based on the foregoing, the court concludes that the State Bar has established by clear and convincing evidence that by failing to file the compliance affidavit as mandated under rule 9.20(c) within the time specified in the August 24, 2007 Supreme Court order, respondent willfully failed to comply with rule 9.20, as ordered by the Supreme Court in S153713.

IV. LEVEL OF DISCIPLINE

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)⁶ There are several aggravating factors present here. (Std. 1.2(b).)

⁶ All further references to standard(s) are to this source.

Prior Record of Discipline

Respondent's prior record of discipline is an aggravating circumstance. (Std. 1.2(b)(i).) In the underlying matter, respondent was suspended for two years, stayed, and was actually suspended for 18 months and until the State Bar Court terminates his actual suspension under rule 205 of the Rules of Procedure of the State Bar. The matter arose out of respondent's professional misconduct in three client matters in Arizona, where he was also licensed to practice law. Respondent was found culpable of failing to perform competently in three client matters, failing to communicate in three client matters, and failing to return unearned fees in one client matter.

Indifference Toward Rectification/Atonement

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct by failing to comply with rule 9.20(c), even after the NDC in case No. 08-N-13483 was filed. (Std. 1.2(b)(v).)

Lack of Participation in Disciplinary Proceeding

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).)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) There is no evidence of any mitigating circumstance.

V. DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

The standard here for assessing discipline is set out in the first instance in the rule itself. Rule 9.20(d) states, in pertinent part: “A suspended member’s willful failure to comply with the provisions of this rule is a cause for disbarment or suspension and for revocation of any pending probation.” In addition, standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline.

Respondent’s willful failure to comply with rule 9.20 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 to comply with rule 9.20 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.) Specifically, a suspended attorney’s timely compliance with rule 9.20(a) performs the critical function of ensuring that all concerned parties, including clients, co-counsel, 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 affidavit, this court cannot 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. (Cf. *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187 [construing former rule 955(c)].) 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.

Moreover, 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 information about the underlying cause of respondent's misconduct or of any mitigating circumstances surrounding his misconduct.

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 willful disobedience of the Supreme Court order.

VI. RECOMMENDED DISCIPLINE

Disbarment

The court hereby recommends that respondent **Kevin Francis Christof** 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.

Rule 9.20

The court recommends 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.⁷

⁷ Respondent 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.) In addition to being punished as a crime or a contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

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 Business and Professions Code section 6140.7 and as a money judgment.

VII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to 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 service of this order.

Dated: August _____, 2009

DONALD F. MILES
Judge of the State Bar Court