

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 08-N-14124-RAP
)	
FRANK DENNIS SCHWERTFEGER,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 128041,)	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 (State Bar), alleging that respondent Frank Dennis Schwertfeger (respondent) failed to timely comply with a Supreme Court order requiring compliance with rule 9.20 of the California Rules of Court (rule 9.20) by not filing an affidavit¹ of compliance with rule 9.20 in conformity with the requirements of rule 9.20, subdivision (c). It was alleged that by this conduct, respondent wilfully violated rule 9.20 of the California Rules of Court.

At the time this matter was submitted for decision, the State Bar was represented in this proceeding by Supervising Trial Counsel Geri von Freymann (STC von Freymann) and Deputy

¹ Although the NDC refers to this as a declaration, rule 9.20 refers to the filing of an affidavit. As such, the court will use the term affidavit, rather than declaration, throughout this decision.

Trial Counsel Mia R. Ellis (DTC Ellis). Respondent did not participate in this proceeding either in person or through counsel.

For the reasons stated below, the court finds that respondent failed to timely comply with a Supreme Court order requiring compliance with rule 9.20 by failing to file an affidavit of compliance with rule 9.20 as required by subdivision (c) of rule 9.20. As such, the court finds that respondent wilfully violated rule 9.20. 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 January 12, 2009. A copy of the NDC was properly served on respondent on January 12, 2009, 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 was not returned by the U.S. Postal Service for any reason.²

On February 4, 2009, a Notice of Assignment and Notice of Initial Status Conference was filed in this matter, setting an in person status conference for February 23, 2009. A copy of the notice was properly served on respondent by first-class mail, postage fully prepaid, on February 4, 2009, addressed to respondent at his official address. The copy of the notice was not returned to the court by the U.S. Postal Service as undeliverable or for any other reason.

Additional efforts by DTC Ellis to contact or locate respondent were to no avail.

On February 23, 2009, the court held an in person status conference in this matter. Respondent failed to appear either in person or through counsel at the status conference.

² A 20-day letter was mailed to respondent at his official address on November 3, 2008. The letter was not returned.

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 February 25, 2009, the State Bar filed a motion for the entry of respondent's default. The motion advised respondent that once the court had found culpability, the State Bar would recommend respondent's disbarment. The State Bar also requested in its motion that the court take judicial notice of all respondent's official membership addresses.³ Also included with the motion was the declaration of DTC Ellis and exhibit 1 (a certified copy of respondent's address history on file with the State Bar's Membership Records Department).⁴ A copy of the motion was properly served on respondent by certified mail, return receipt requested, on February 25, 2009, addressed to respondent at his official address.

As of February 25, 2009, the State Bar had not had 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 March 13, 2009, the court filed an Order of Entry of Default (Rule 200 – Failure to File Timely Response), Order Enrolling Inactive⁵ and Further Orders. A copy of the order was properly served on respondent on March 13, 2009, by certified mail, return receipt requested, addressed to respondent at his official address. The copy of the order was returned to the State Bar Court by the U. S. Postal Service.

On April 1, 2009, the State Bar filed a brief on the issues of culpability and discipline and waived the hearing in this matter. Exhibit 1 (a copy of respondent's prior record of discipline) attached to the brief is admitted into evidence. A copy of the brief was properly served on respondent on April 1, 2009, by regular mail, addressed to respondent at his official address.

³ The court grants the State Bar's request and takes judicial notice of all of respondent's official membership addresses pursuant to Evidence Code section 452, subdivision (h).

⁴ The declaration of DTC Ellis, as well as exhibit 1 attached to the motion for the entry of respondent's default, are admitted into evidence.

⁵ Respondent'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.

This matter was submitted for decision on April 2, 2009.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent was admitted to the practice of law in the State of California on June 17, 1987, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

On July 15, 2008, the California Supreme Court filed Order No. S163620 (9.20 Order). The 9.20 Order included a requirement that respondent comply with rule 9.20 of the California Rules of Court and that he perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the 9.20 Order.

On or about July 15, 2008, the Clerk of the Supreme Court of the State of California properly served upon respondent a copy of the 9.20 Order. Respondent received the 9.20 Order.

The Supreme Court Order became effective on August 14, 2008,⁶ thirty days after the 9.20 Order was filed. Thus, respondent was ordered to comply with subdivisions (a) and (b)⁷ of rule 9.20 of the California Rules of Court no later than September 13, 2008, and was ordered to comply with subdivision (c) of rule 9.20 no later than September 23, 2008.

Respondent failed to file with the clerk of the State Bar Court an affidavit of compliance with subdivisions (a) and (b) of rule 9.20 of the California Rules of Court as required by rule 9.20, subdivision (c).

⁶ Although the NDC alleges this date as August 15, 2008, this date is incorrect; thirty days after July 15, 2008 is August 14, 2008. However, this error is de minimis.

⁷ The NDC alleges that respondent was ordered to comply with subdivision (a) and/or (b) of rule 9.20. Actually, respondent was ordered to comply with rule 9.20 and was ordered specifically to comply with rule 9.20, subdivision (a), within 30 days after the effective date of the 9.20 Order. Subdivision (a) of rule 9.20 provides, in part, that notice of a respondent's disbarment must be given to certain individuals or entities; subdivision (b) proscribes the manner of that notice. Thus, respondent was effectively ordered to comply with both subdivisions (a) and (b) of rule 9.20 within 30 days after the effective date of the 9.20 Order.

By not filing a declaration of compliance with rule 9.20 as required by rule 9.20, subdivision (c), respondent did not timely comply with the provisions of Supreme Court Order No. S163620 requiring compliance with rule 9.20 of the California Rules of Court.

“Wilfulness” in the context of rule 9.20 (formerly rule 955) 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 (formerly rule 955). (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) The filing of an affidavit pursuant to rule 9.20 (formerly rule 955), subdivision (c), is required even if the respondent does not have any clients to notify. (*Ibid.*)

Based on 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 by failing to timely comply with the provisions of Supreme Court Order No. 163620 by failing to file an affidavit of compliance with rule 9.20 as required by rule 9.20, subdivision (c).

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 prior record of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i) (standards).) On July 15, 2008, the Supreme Court filed an order suspending respondent from the practice of law for two years, the execution of the suspension was stayed, and respondent was actually suspended from the practice of law for 90 days and until he makes and furnishes satisfactory proof of specified

restitution and until the State Bar Court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure. In this prior disciplinary matter, in which respondent's default was also entered, respondent was found culpable of willfully violating rules 3-700(D)(2) and 4-100(B)(3) of the Rules of Professional Conduct of the State Bar of California and Business and Professions Code section 6068, subdivision (i). In mitigation, respondent had no prior record of discipline (17 years of discipline-free practice). In aggravation, respondent engaged in multiple acts of misconduct; his misconduct harmed his client; and his failure to participate in the disciplinary proceedings prior to the entry of his default demonstrated indifference toward rectification of or atonement for the consequences of his misconduct.

In this present disciplinary matter, respondent's failure to participate in this proceeding prior to the entry of his default is a further 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, subdivision (d), provides in part that "[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." Furthermore, standard 1.7(a) provides that if a member is found culpable of misconduct in any proceeding and the member has a record of one prior imposition of discipline, the degree of discipline imposed in the current proceeding must be greater than that imposed in the prior proceeding unless the prior discipline was remote in time and the offense was minimal in severity.

Timely compliance with rule 9.20 (formerly rule 955) 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 (formerly rule 955). (*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 this matter and in his prior disciplinary matter and by his failure to comply with rule 9.20, subdivision (c). More importantly, respondent's failure to comply with rule 9.20 (formerly rule 955) undermines the basic function that rule 9.20 (formerly rule 955) 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. His 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 willful and unexplained disobedience of an order of the California Supreme Court.

RECOMMENDED DISCIPLINE

Based on the foregoing, the court recommends that the Supreme Court issue an order imposing the following discipline:

Frank Dennis Schwertfeger, State Bar No. 128041, is disbarred from the practice of law in California and that his name is stricken from the roll of attorneys.

Frank Dennis Schwertfeger must also comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of this order.

COSTS

It is also recommended that the Supreme Court order that costs are 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.

ORDER REGARDING INACTIVE ENROLLMENT

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's 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.

Dated: May 6, 2009.

RICHARD A. PLATEL
Judge of the State Bar Court