

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 09-N-11261-LMA
)	
LEWIS R. WIENER)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND
Member No. 41186)	INVOLUNTARY INACTIVE
)	ENROLLMENT ORDER
<u>A Member of the State Bar.</u>)	

I. Introduction

In this disciplinary matter, respondent **Lewis R. Wiener** is found culpable, by clear and convincing evidence, of failing to comply with California Rules of Court, rule 9.20, as ordered by the California Supreme Court on August 8, 2008, in Supreme Court case no. S131704 (State Bar Court case no. 08-PM-11072).

After considering the evidence and the law, the court recommends that respondent be disbarred from the practice of law.

II. Pertinent Procedural History

This proceeding was initiated by the Office of the Chief Trial Counsel of the State Bar of California (State Bar). The Notice of Disciplinary Charges (NDC) was filed on May 19, 2009. Respondent filed a response to the NDC on June 24, 2009.

Trial was held on December 1, 2009 and the court took this matter under submission on January 5, 2010, following the filing of post-trial briefs.

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 21, 1967, and has been a member of the State Bar since that time.

B. Violation of California Rules of Court, Rule 9.20

The following findings of fact are based on the parties' stipulation filed on December 1, 2009, as well as testimony and other evidence introduced during this proceeding.

The court finds that respondent completely lacks credibility whenever he testified about not receiving correspondence from the State Bar.

On December 12, 2004, respondent signed a stipulation in State Bar Court case number 03-O-02167 in which he admitted professional misconduct and stipulated to actual suspension and to comply with specified probation conditions.

On May 19, 2005, the Supreme Court of California filed an order in case number S131704 (State Bar case number 03-O-02167) suspending respondent from the practice of law for two years and until he showed proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct¹, staying imposition of the suspension, and placing respondent on probation for a period of three years on conditions including 90 days' actual suspension, among other things.

The Supreme Court's May 19, 2005 order became effective on June 18, 2005 and at all times thereafter remained in full force and effect.

Respondent received the May 19, 2005 Supreme Court order.

¹Future references to standard or std. are to this source.

On March 13, 2008, the Office of Probation filed and served on respondent a motion to revoke probation based on, among other things, his failure to timely submit quarterly reports. Respondent failed to respond to the motion or participate in the proceedings.

Also, on March 13, 2008, respondent's wife was in the hospital undergoing spine surgery. His mother was also in the hospital in Florida.

On May 7, 2008 the State Bar Court issued an order granting the motion to revoke probation.

On August 8, 2008 the Supreme Court issued an order in case number S131704 (State Bar case number 08-PM-11072) revoking respondent's probation and lifting the previously-granted stay. Respondent was ordered to be actually suspended from the practice of law for two years and until he complied with standard 1.4(c)(ii). He was also ordered to comply with rule 9.20 of the California Rules of Court (rule 9.20) 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 order. The August 8, 2008 Supreme Court order became effective on September 7, 2008 and at all times thereafter remained in full force and effect. Accordingly, respondent was required to comply with rule 9.20, paragraphs (a) and (c) by October 7 and 17, 2008, respectively.

Although respondent received the August 8, 2008 Supreme Court order, he did not comply with rule 9.20(c) by October 17, 2008, as required.

After receiving the August 8, 2008 Supreme Court order, respondent did not communicate with any State Bar entity until February 24, 2009.

On February 24, 2009, respondent contacted the Office of Probation. At that time, the probation supervisor informed him of his noncompliance with certain probation conditions as well as with the rule 9.20 requirement.

On February 24, 2009, a probation deputy mailed a letter to respondent informing him of his noncompliance with certain probation conditions as well as with the rule 9.20 requirement. The probation deputy reminded respondent that he should have filed his affidavit with the State Bar Court by October 17, 2008 and that his first quarterly report, due on January 10, 2009, was late.

Enclosed with the February 24, 2009 letter were, among other things, a rule 9.20 compliance declaration, a copy of rule 9.20, blank quarterly report forms, and quarterly report instructions.

Respondent received the February 24, 2009 letter.

On that same date, the probation deputy also emailed the February 24, 2009 letter and attachments to respondent. Respondent received the February 24, 2009 email.

On April 7, 2009 the Office of the Chief Trial Counsel sent a letter to respondent inviting him to meet to discuss a settlement of the disciplinary matter arising from his noncompliance with rule 9.20. Respondent was informed that an NDC would be filed by the close of business on April 27, 2009 if he did not make arrangements for a meeting to take place prior to that date.

Respondent did not respond to the April 7, 2009 letter.

On June 24, 2009, the probation deputy sent a letter to respondent, enclosing the February 24, 2009 letter.

On June 24, 2009, respondent filed a rule 9.20 declaration in the State Bar Court's San Francisco venue. The next day, he filed one in the court's Los Angeles venue.²

On July 1, 2009, respondent filed the quarterly report for January 10, 2009.

On July 7, 2009, respondent filed the quarterly report for April 10, 2009.

²The court judicially notices its records which indicate that a second rule 9.20 declaration was filed in Los Angeles on June 25, 2009. (Evid. Code, §452, subd. (d)(1).)

In September and October 2009, respondent was suffering from several medical ailments. Thus, he mailed the quarterly report that was due on October 10, 2009, on October 9 and it was not filed until October 15, 2009.

C. Legal Conclusions

There is clear and convincing evidence that respondent wilfully violated the Supreme Court's August 8, 2008, order directing his compliance with rule 9.20.³ This constitutes a violation of rule 9.20(d), which makes the wilful noncompliance with the provisions of rule 9.20 a cause for disbarment, suspension or revocation of probation, in relevant part.

IV. Mitigating and Aggravating Circumstances

A. Aggravation

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)

Respondent's five prior disciplinary records are a significant aggravating circumstance. (Std. 1.2(b)(i).) Effective June 22, 1990, respondent was privately reprimanded for not performing services competently, not communicating with the client and violating his oath and duties as an attorney in one client matter. (State Bar Court case no. 88-O-15438.)

Effective May 14, 1998, respondent was ordered suspended for one year, stayed, and placed on probation for 18 months, and actually suspended for 30 days for not performing services competently, not communicating with the client and not cooperating in the State Bar investigation in one client matter. (Supreme Court case no. S067805 [State Bar Court case no. 95-O-14361].)

³Wilfulness in the context of rule 9.20 does not require actual knowledge of the provision which is violated. The Supreme Court has disbarred an attorney whose failure to keep his official address current prevented him from learning that he had been ordered to comply with rule 955 (now rule 9.20). (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

Effective August 17, 2000, respondent was ordered suspended for two years, stayed, and placed on probation for two years, and actually suspended for 45 days for not filing his quarterly reports, continuing to practice law during his suspension, and not completing Ethics School. (Supreme Court case no. S088226 [State Bar Court case no. 99-O-12270].)

Effective June 18, 2005, respondent was ordered suspended for two years, stayed, and placed on probation for three years, and actually suspended for 90 days for not performing services competently, improperly withdrawing from employment, not communicating with the client and not cooperating in the State Bar's investigation in one client matter. (Supreme Court case no. S131704 [State Bar Court case no. 03-O-02167].)

Finally, as previously noted, on August 8, 2008 the Supreme Court issued an order in case number S131704 revoking respondent's probation and lifting the previously granted stay. He was actually suspended from the practice of law for two years and until he complied with standard 1.4(c)(ii), among other things, for not filing one quarterly report, not timely filing nine other quarterly reports, and not submitting proof of completion of five hours of MCLE courses.

Bill Stephens, a State Bar investigator, testified credibly that respondent's office building signage listed respondent as an attorney as of November 20, 2009. He was, therefore, holding himself out to be an attorney authorized to practice law although he was suspended from practice.

B. Mitigation

Pursuant to standard 1.2(e), respondent bears the burden of establishing mitigation by clear and convincing evidence.

Extreme emotional difficulties or physical disabilities suffered by the attorney at the time of the misconduct may be mitigating factors. (Std. 1.2(e)(iv).) Respondent's wife was in the hospital on March 13, 2008 and his mother was very sick at the same time. This was during the

same time that the Office of Probation filed a motion to revoke probation which was later granted by the State Bar Court. Further, respondent was sick in September and October 2009 and was not able to timely file his October 10, 2009, quarterly report.

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.)

Respondent's wilful failure to comply with rule 9.20(c) is extremely serious misconduct for which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116,131; rule 9.20(d).) Disbarment has been consistently imposed by the Supreme Court as the sanction for noncompliance with rule 9.20. (*Bercovich v. State Bar, supra*, 50 Cal.3d at p. 131; *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1188; *Powers v. State Bar, supra*, 44 Cal.3d at p. 342.)

Standard 1.7(b) also applies. It provides that, if an attorney has two prior records of discipline, the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

In this instance, respondent has five prior disciplinary records. Lesser discipline than

disbarment is not warranted because there are no extenuating circumstances that clearly predominate in this case. (Std. 1.7(b).)

Respondent has demonstrated an unwillingness to comply with the professional obligations imposed on California attorneys although he has had many opportunities to do so. More importantly, respondent's noncompliance 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, supra*, 45 Cal.3d at p. 1187.)

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 unexplained wilful disobedience of the Supreme Court's order.

VI. Recommended Discipline

The court recommends that respondent **Lewis R. Wiener** 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 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.⁴

VII. 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.

⁴Respondent 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 at p. 341.)

VIII. Order of Involuntary Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive enrollment status under 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 this order is filed and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: March _____, 2010

LUCY ARMENDARIZ
Judge of the State Bar Court