

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 09-N-11520-DFM
)	
CONCETTA JOAN SCIMECA,)	
)	DECISION AND ORDER OF
Member No. 96147,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this default disciplinary matter, respondent **Concetta Joan Scimeca** 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 November 6, 2008, in S166493.

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

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 and properly served via certified mail, return receipt requested, on respondent at her official membership records

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

address (official address) on April 29, 2009. The United States Postal Service (USPS), however, returned that mailing to the State Bar, bearing the stamp, “Attempted Not Known.”

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

On May 11, 2009, the deputy trial counsel (DTC) assigned to this matter, caused a State Bar investigator to conduct a database search for respondent. The DTC reviewed the information obtained from the database search and found a new telephone listing for respondent. The DTC called the number; but it was disconnected.

On June 2, 2009, a courtesy copy of the NDC was sent to respondent at her official address by regular first class mail. The mailing was returned by the USPS bearing the stamp, “Return to Sender, Attempted – Not Known, Unable to Forward.”

Thereafter, on June 9, 2009, the DTC conducted an internet search using “Concetta J. Scimeca” as the search term. That search resulted in an office listing and phone number for an attorney in California. The DTC called the office phone number twice and both times received a recorded message. The DTC left a message, stating that he was calling regarding the instant case. His message also stated that, based on respondent’s failure to file a response to the NDC, he intended to file a motion for entry of default. The DTC left his phone number and requested an immediate return call.

On June 9, 2009, the DTC also called directory assistance for the area that includes respondent’s official address and asked for all listings for respondent’s name. No listing was found for respondent. On that same date, the DTC conducted an internet search for a telephone listing for respondent. None of the results yielded a telephone listing for respondent different from those already known by the State Bar.

In further reviewing the official membership records for respondent, the DTC noted an e-mail address. Therefore, on June 9, 2009, the DTC sent an e-mail to respondent identifying himself as a deputy trial counsel with the State Bar of California and stating that he was contacting respondent regarding the instant case. In his e-mail, the DTC stated that based on respondent's failure to file a response to the NDC, he would be filing a motion for entry of default. The DTC also left his telephone number and requested a return call or e-mail reply.

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 her 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 *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 her 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 May 26, 2009. (Rules Proc. of State Bar, rules 103(a), 584.) As noted, *ante*, respondent did not file a response to the NDC. On June 9, 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 June 9, 2009, by certified mail, return receipt requested, addressed to respondent at her official address.

Respondent did not file a response within 10 days after service of the motion for entry of her default. Consequently, on July 1, 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 section 6007, subdivision (e), effective July 4, 2009.²

On July 10, 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 July 21, 2009, the court took the case under submission for decision without a hearing.

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 December 16, 1980, and has been a member at all times since that date.

Factual Background

On November 6, 2008, the Supreme Court of California filed a disciplinary order in case No. S166493 [State Bar case No. 06-O-13658] (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.

² All references to section (§) are to the Business and Professions Code, unless otherwise indicated.

On or about November 6, 2008, the Clerk of the California Supreme Court served upon respondent a copy of the Supreme Court order imposing discipline and directing respondent to comply with rule 9.20. Respondent received the Supreme Court order.

The Supreme Court order became effective on December 6, 2008, thirty days after it was filed, and at all times thereafter remained in full force and effect. Thus, respondent was required by the Supreme Court order to comply with rule 9.20(a) no later than January 5, 2009 and to comply with rule 9.20(c) no later than January 15, 2009.

Respondent failed to comply with rule 9.20(c) by the January 15, 2009 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 her 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 . . . she 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 her 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 January 15, 2009, 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 a declaration of compliance as mandated under rule 9.20(c) within the time specified in the November 6, 2009 Supreme Court order, respondent willfully failed to comply with rule 9.20, as ordered by the Supreme Court in S166493.

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).)³ There are several aggravating factors present here. (Std. 1.2(b).)

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 90 days and until the State Bar Court terminates her actual suspension under rule 205 of the Rules of Procedure of the State Bar. Her misconduct involved misusing her trust account during a two-month period by issuing four checks from the account for personal purposes, committing acts involving moral turpitude during a four-day period based

³ All further references to standard(s) are to this source.

on issuing three checks on an account having insufficient funds to pay for them, and failing to cooperate in the State Bar's investigation of her misconduct.

Indifference Toward Rectification/Atonement

Respondent demonstrated indifference toward rectification of or atonement for the consequences of her misconduct by failing to comply with rule 9.20(c), even after the NDC in case No. 09-N-11520 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 her 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. Additionally, such failure may be punished as a contempt or a crime." 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 she 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 her, nor her duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) Her 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 her 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 her willful disobedience of the Supreme Court order.

VI. RECOMMENDED DISCIPLINE

Disbarment

The court hereby recommends that respondent **Concetta Joan Scimeca** be disbarred from the practice of law in the State of California and that her 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.⁴

⁴ Respondent is required to file a rule 9.20(c) affidavit even if she 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: October _____, 2009

DONALD F. MILES
Judge of the State Bar Court