

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 10-N-05829-LMA
)	
DAVID G. FOX,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 61158,)	ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this default disciplinary matter, respondent **David G. Fox** is charged with failure to comply with California Rules of Court, rule 9.20,¹ and violating Business and Professions Code section 6103.

The court finds, by clear and convincing evidence, that respondent is culpable of the alleged counts of misconduct. In view of respondent’s serious misconduct and the evidence in aggravation, the court recommends that respondent be disbarred from the practice of law.

II. Pertinent Procedural History

On July 16, 2010, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a Notice of Disciplinary Charges (NDC) at his official membership records address. Respondent did not file a response.

¹ References to rules are to the California Rules of Court, unless otherwise noted.

By order of the court, on September 15, 2010, respondent's default was entered and respondent was enrolled as an inactive member on September 18, 2010.

Respondent did not participate in the disciplinary proceedings. The matter was submitted on October 6, 2010, following the filing of the State Bar's brief on culpability and discipline.

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).)

Respondent was admitted to the practice of law in California on December 16, 1974, and has since been a member of the State Bar of California.

Violation of California Rules of Court, Rule 9.20

On March 15, 2010, in California Supreme Court case No. S161079 (State Bar Court case No. 09-PM-17062), the Supreme Court revoked respondent's probation and suspended respondent from the practice of law for one year. Among other things, the Supreme Court ordered respondent to comply with rule 9.20, subdivisions (a) and (c) within 30 and 40 days, respectively after the effective date of the Supreme Court order. The Supreme Court order became effective April 14, 2010, thirty days after it was filed, and was duly served on respondent. (Cal. Rules of Court, rules 8.532(a) and 9.18(b).)

California Rules of Court, rule 9.20(c) mandates that respondent "file with the Clerk of the State Bar Court an affidavit showing that he or she has fully complied with those provisions of the order entered under this rule."

Respondent was to have filed the rule 9.20 affidavit by May 24, 2010, but to date, he has not done so and has offered no explanation to this court for his noncompliance. 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 which is violated. 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* (1988) 44 Cal.3d 337, 341.)

Therefore, the State Bar has established by clear and convincing evidence that respondent willfully failed to comply with rule 9.20, as ordered by the Supreme Court in S161079.²

Furthermore, respondent’s failure to comply with rule 9.20 constitutes a violation of Business and Professions Code section 6103, which requires attorneys to obey court orders and provides that the willful disobedience or violation of such orders constitutes cause for disbarment or suspension.

IV. Mitigating and Aggravating Circumstances

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,³ stds. 1.2(e) and (b).)

A. Mitigation

No mitigation was submitted into evidence. (Std. 1.2(e).)

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent’s prior record of discipline includes two previous impositions of discipline. (Std. 1.2(b)(i).)

1. On March 15, 2010, in the underlying discipline, respondent’s probation was ordered revoked and he was ordered suspended from the practice of law for one year for

² Specifically, rule 9.20(d) provides that a suspended attorney’s willful failure to comply with rule 9.20 constitutes 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.

³ Future references to standard(s) or std. are to this source.

violating probation conditions in a previous discipline of April 22, 2008 (Supreme Court case No. 161079). His discipline in this case resulted from multiple failures to comply with the terms of probation, including the failure to submit to the Office of Probation his first six quarterly reports due between July 10, 2008 and October 10, 2009; and to provide the Office of Probation with satisfactory proof of attendance at a session of Ethics School and passage of the test given at the end of that session. No mitigating circumstances were found. In aggravation, respondent had a prior record of discipline. (Supreme Court case No. State Bar Court case No. S161079; State Bar Court case No. 09-PM-17062.)

2. On April 22, 2008, in the default disciplinary matter which underlay the above probation violation, respondent was ordered suspended from the practice of law for one year, stayed, with two years' probation for misconduct involving violations of Business and Professions Code section 6068, subdivision (j) [failure to update his membership records address] and section 6068, subdivision (i) [failure to cooperate in a State Bar investigation]. In mitigation, respondent had no prior record of discipline. In aggravation, respondent committed multiple acts of misconduct and failed to consistently participate in the disciplinary proceeding prior to the entry of his default. (Supreme Court case No. 161079; State Bar Court case No. 06-O-12853.)

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 the instant proceeding was filed. (Std. 1.2(b)(v).)

Respondent's failure to cooperate with the State Bar before the entry of his default, including his failure to file an answer to the NDC, is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

Respondent's willful 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.) Such failure 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.) 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.

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. Recommendations

A. Discipline

Accordingly, the court recommends that respondent **David G. Fox** 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.

B. California Rules of Court, Rule 9.20

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

⁴ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

C. Costs

It is further recommended 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 under Business and Professions Code 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.

Dated: January _____, 2011

LUCY ARMENDARIZ
Judge of the State Bar Court