

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No. **10-N-07264-DFM**
)
BRIAN LEO DAY,)
) **DECISION AND ORDER OF**
) **INVOLUNTARY INACTIVE**
Member No. 140451,) **ENROLLMENT**
)
A Member of the State Bar.)

INTRODUCTION

In this default disciplinary matter, Respondent **Brian Leo Day** is charged with failure to comply with California Rules of Court, rule 9.20.¹ The court finds, by clear and convincing evidence, that Respondent is culpable of the alleged 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.

PERTINENT PROCEDURAL HISTORY

On October 15, 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.

By order of the court on December 7, 2010, Respondent’s default was entered and Respondent was enrolled as an inactive member on December 10, 2010.

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

Respondent did not participate in the disciplinary proceedings. The matter was submitted on December 28, 2010, following the filing of the State Bar's brief on culpability and discipline.

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.

Jurisdiction

Respondent was admitted to the practice of law in California on June 6, 1989, and has since been a member of the State Bar of California.

Violation of California Rules of Court, Rule 9.20

On May 14, 2010, in California Supreme Court case No. S180855 [State Bar Court case Nos. 08-O-11369 (08-O-12180)], the Supreme Court suspended Respondent for one year, stayed, and actually suspended him for a minimum of six months and until he satisfied certain requirements. In addition, *inter alia*, the Supreme Court ordered Respondent to comply with rule 9.20(a) and (c) of the California Rules of Court, within 30 and 40 days, respectively, after the effective date of the Supreme Court order. This order became effective June 13, 2010, and was duly served on Respondent. (Cal. Rules of Court, rules 8.532(a) and 9.18(b).)

A member required to comply with California Rules of Court, rule 9.20(c) must "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 July 23, 2010. To date, he has not done so and has offered no explanation to this court for his noncompliance. 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 S180855.

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,² stds. 1.2(e) and (b).)

Aggravation

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. (Std. 1.2(b).)

Prior Discipline

Respondent has one prior record of discipline. (Std. 1.2(b)(i).) In the underlying matter, in which he also defaulted, Respondent was found culpable of professional misconduct in two matters, including failing to perform services competently, failing to communicate with clients, failing to return client files, and failing to cooperate with the State Bar. Respondent was suspended for one year, stayed, and actually suspended for six months and until he met certain requirements. (Supreme Court case No. S180855; State Bar Court case Nos. 08-O-11369 and 08-O-12180.)

Lack of Participation in Disciplinary Proceeding

Respondent's failure to participate in this disciplinary proceeding before the entry of his default is also an aggravating factor. (Std. 1.2(b)(vi).)

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² Future references to standard(s) or std. are to this source.

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

Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) No mitigating factors were shown by the evidence presented to this court.

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.”

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’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.

RECOMMENDATIONS

Discipline: Disbarment

Accordingly, the court recommends that Respondent **Brian Leo Day**, Member No. 140451, 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

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 order imposing discipline in this matter.⁴

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.

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

It is ordered that **Brian Leo Day**, Member No. 140451, be transferred to involuntary inactive enrollment status under Business and Professions Code section 6007, subdivision (c)(4), and rule 5.111 (D) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: March _____, 2011

DONALD F. MILES
Judge of the State Bar Court

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.)