

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case Nos.: <b>12-C-15287-DFM;</b>
	)	<b>13-N-12033-DFM</b>
<b>ROBERT S. TABACHNICK,</b>	)	<b>(Consolidated)</b>
	)	
<b>Member No. 147646,</b>	)	<b>DECISION AND ORDER OF</b>
	)	<b>INVOLUNTARY INACTIVE</b>
A Member of the State Bar.	)	<b>ENROLLMENT</b>
	)	
_____	)	

This is a consolidation of two separate disciplinary actions filed against Respondent Robert S. Tabachnick (Respondent). The first action, case No. 12-C-15287, arises out of Respondent's criminal conviction of violating Penal Code section 311.11, subdivision (a) (possession of child pornography), a felony which involves moral turpitude per se.<sup>1</sup> Following the transmittal of the records of that conviction to the State Bar Court, the Review Department issued an order placing Respondent on interim suspension effective February 8, 2013, and ordering him to comply with California Rules of Court, rule 9.20. In the second proceeding, case No. 13-N-12033, Respondent was charged with wilfully disobeying or violating a court order

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<sup>1</sup> Upon finality of that conviction, the Review Department issued an order referring that matter to the Hearing Department for a hearing and decision recommending the discipline to be imposed if the Hearing Department finds that the facts and circumstances surrounding the felony violation involved moral turpitude or other misconduct warranting discipline. However, subsequent to that referral order, the Supreme Court filed an opinion in *In re Grant* (2014) 58 Cal.4<sup>th</sup> 469, in which the Supreme Court found that a violation of Penal Code section 311.11, subdivision (a) involves moral turpitude per se. (*Id.* at p. 480.)

(Bus & Prof. Code, § 6103) by failing to comply with the Review Department's order that he comply with California Rules of Court, rule 9.20.

Although Respondent was properly served in both of the above matters (and had actual knowledge of at least the conviction proceeding), he nonetheless failed to participate in either. As a result, his default was entered in both. The State Bar then filed petitions for disbarment under rule 5.85 of the Rules of Procedure of the State Bar.<sup>2</sup>

Rule 5.85 provides the procedure to follow when an attorney fails to participate in a disciplinary proceeding after receiving adequate notice and opportunity. The rule provides that, if an attorney's default is entered for failing to respond to the notice of hearing on conviction (NOH) or notice of disciplinary charges (NDC) and the attorney fails to have the default set aside or vacated within 180 days, the State Bar will file a petition requesting the court to recommend the attorney's disbarment.<sup>3</sup>

In the instant case, the court concludes that the requirements of rule 5.85 have been satisfied, and therefore, grants the petitions and recommends that Respondent be disbarred from the practice of law.

### **FINDINGS AND CONCLUSIONS**

Respondent was admitted to practice law in this state on July 20, 1990, and has been a member at all times since then.

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<sup>2</sup> Unless otherwise indicated, all references to rules are to this source. Rule 5.345(C) makes the default procedures in rules 5.80-5.86, with certain exceptions, applicable in conviction proceedings.

<sup>3</sup> If the court determines that any due process requirements are not satisfied, including adequate notice to the attorney, it must deny the petition for disbarment and take other appropriate action to ensure that the matter is promptly resolved. (Rule 5.85(E)(2).)

## **Procedural Requirements Have Been Satisfied**

On March 6, 2013, the court filed and properly served the NOH on Respondent by certified mail, return receipt requested, at his membership records address. On May 22, 2013, the State Bar filed and properly served the NDC on Respondent by certified mail, return receipt requested, at his membership records address. Both the NOH and the NDC notified Respondent that his failure to participate in the proceeding would result in a disbarment recommendation. (Rules 5.41 & 5.345.) The NOH was returned to the State Bar Court unclaimed. As of June 21, 2013, the NDC had not been returned to the State Bar.<sup>4</sup>

In connection with the conviction referral matter, Respondent had actual notice of the proceeding, as Respondent participated at an in-person status conference on April 15, 2013, at which time the court reminded Respondent that his response to the NOH was overdue, and he needed to file and serve a response to the NOH immediately to avoid default being entered against him. In addition, Respondent telephoned the Supervising Trial Counsel (STC) assigned to this matter on May 22, 2013. During this conversation, the STC and Respondent discussed the possibility of resolving this matter and agreed to work on a stipulation. However, the STC told Respondent that because he had not yet filed a response to the NOH, she would be filing a motion for entry of his default. The STC informed Respondent that she wanted a motion for entry of default on file so that in the event the parties could not reach a stipulation to resolve the matter, the motion would be on file. The STC prepared and sent a proposed stipulation to Respondent via email and first-class mail on May 23, 2013. Despite a follow-up email regarding the proposed stipulation and voicemail messages left for Respondent to call the STC regarding the proposed stipulation, Respondent failed to contact the STC again prior to the entry of his default.

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<sup>4</sup> According to the State Bar's disbarment petition filed on March 3, 2014, in case No. 13-N-12033, the return receipt was not returned to the State Bar.

In connection with the matter involving failing to obey a court order, the State Bar: (1) left a voicemail for Respondent at his official membership records telephone number advising Respondent that the response to the NDC was overdue and that the court had scheduled the case for trial; and (2) mailed a copy of the NDC to Respondent at his membership records address by first-class mail.

The court finds that Respondent was properly served with a copy of the NOH and NDC and that all due process requirements have been adequately satisfied. (See *Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.) Respondent, nevertheless, failed to file a response to the NOH or the NDC. On May 28 and June 21, 2013, in connection with the conviction and the failure to obey a court order matters, respectively, the State Bar filed and properly served a motion for entry of Respondent's default.<sup>5</sup> The motions complied with all the requirements for a default, including a supporting declaration of reasonable diligence by the assigned STC or deputy trial counsel regarding efforts to provide notice of these matters to Respondent. (Rule 5.80.) The motions again notified Respondent that, if he did not timely move to set aside his default, the court would recommend his disbarment. Respondent did not file a response to either motion, and his default was entered in connection with the conviction and failure to obey a court order matters on June 20 and July 26, 2013, respectively. The order entering Respondent's default in each matter was served on Respondent at his membership records address by certified

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<sup>5</sup> Both motions were served on Respondent by certified mail, return receipt requested, to his membership records address. In addition, the motion in the conviction matter was also served on Respondent by first-class mail to his membership records address and to an alternate address in Los Angeles. The return receipt in the failure to obey a court order matter was not signed. The motion in the conviction matter served on Respondent by certified mail, return receipt requested, was returned by the U.S. Postal Service as unclaimed. The motions served by first-class mail in the conviction matter were not returned.

mail, return receipt requested.<sup>6</sup> In each matter, the court also ordered Respondent's involuntary inactive enrollment as a member of the State Bar under Business and Professions Code section 6007, subdivision (e), effective three days after service of each order. He has remained inactively enrolled since that time.

Respondent has not sought to have his default set aside or vacated. (Rule 5.83(C)(1) [attorney has 180 days to file motion to set aside default].) The State Bar filed and properly served petitions for disbarment on March 3, 2014, in both matters.<sup>7</sup> As required by rule 5.85(A), the State Bar reported in the petition that: (1) it has had contact with Respondent since his default was entered/served in the conviction matter,<sup>8</sup> but it has had no contact with Respondent since his default was entered/served in the failure to obey a court order matter; (2) in the conviction matter, the State Bar reported that case No. 13-N-12033 is pending against Respondent, and in the failure to obey a court order matter, the State Bar reported that case No. 12-C-15287 was pending against Respondent; (3) Respondent has no prior record of discipline; and (4) the Client Security Fund has not paid out any claims as a result of Respondent's misconduct. Respondent did not respond to the petitions for disbarment or move to set aside or

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<sup>6</sup> Both orders were returned by the U.S. Postal Service as unclaimed. The order entering Respondent's default in the conviction matter, however, was also served on Respondent by first-class mail to an alternate address in Los Angeles and was not returned by the U.S. Postal Service.

<sup>7</sup> The petitions were served on Respondent by certified mail, return receipt requested, to his membership records address and by U.S. mail to his membership records address and to the alternate address in Los Angeles.

<sup>8</sup> On June 25, 2013, the STC received an undated letter from Respondent postmarked June 21, 2013, in which Respondent raised various objections to the proposed stipulation that was sent to him in May 2013. On July 2, 2013, the STC wrote a letter to Respondent in which she notified Respondent that the court had entered Respondent's default on June 20, 2013; enclosed a copy of the default order; notified Respondent that due to the entry of his default, the facts set forth in the State Bar's statement of facts and circumstances surrounding the conviction had been deemed admitted and if he failed to timely move to set aside his default, the court would eventually enter an order recommending his disbarment; and informed Respondent that in light of the entry of his default, the proposed stipulation is moot. The letter was sent to Respondent via first-class mail, postage prepaid, addressed to Respondent at his membership records address and to the alternate address for Respondent in Los Angeles. Neither letter was returned as undeliverable.

vacate the default. These cases were submitted for decision on April 9, 2014. The court filed an order on May 6, 2014, consolidating case No. 12-C-15287 and case No. 13-N-12033.

### **The Admitted Factual Allegations Warrant the Imposition of Discipline**

Upon entry of a respondent's default, the factual allegations set forth in the State Bar's statement of facts and circumstances surrounding Respondent's conviction and in the NDC are deemed admitted and no further proof is required to establish the truth of such facts. (Rules 5.345(C) & 5.82.) As set forth below in greater detail, Respondent's conviction for possession of child pornography and the factual allegations in the NDC support the conclusion that Respondent violated a statute, rule or court order that would warrant the imposition of discipline. (Rule 5.85(E)(1)(d).)

#### **1. Case Number 12-C-15287 (Conviction Matter – Penal Code § 311.11, subd. (a))**

Respondent was convicted of violating Penal Code section 311.11, subdivision (a) (possession of child pornography).

Respondent lived at his mother's home (the residence) with his elderly mother who required 24-hour care which was provided by female, live-in caregivers on a rotational basis. Respondent installed a hidden camera in the heater vent in the bathroom used by the female caregivers. With the hidden camera, Respondent recorded and monitored images and/or videos of the caregivers in the bathroom.

On October 18, 2011, one of the caregivers discovered the hidden camera in the bathroom and reported it to the police. When the police arrived, they collected the hidden camera and two computers (digital devices) all belonging to Respondent and used exclusively by him.

A police computer forensic specialist discovered hundreds of videos and images depicting child sexual exploitation of one of Respondent's computers taken from the residence.

Also on the computer were iPhone backup files. The iPhone Internet history contained numerous references to child sexual exploitation web pages. The iPhone also contained images that appeared to be video stills showing the breasts and buttocks of the female caregivers.

The police computer forensic specialist found videos on one of Respondent's computers that were taken by Respondent in the residence which focused on the clothed breasts and buttocks of various female caregivers in the residence and the clothed breasts and buttocks of various females in an art class Respondent attended at a junior college. These videos were taken without the knowledge or consent of these women.

Later, the police seized a second set of digital devices from Respondent's mother's residence which belonged to Respondent and were used exclusively by him. The devices contained files of child sexual exploitation including images of children engaged in explicit sexual acts, nude children displaying their genitals, and children posing provocatively while wearing swimwear or underwear. Also found were images of another caregiver's clothed buttocks as she walked around the residence.

Respondent was charged with one count of violating Penal Code section 311.11, subdivision (a), a felony, and four counts of violating Penal Code section 647(j)(3) (unauthorized invasion of privacy), misdemeanors. Respondent ultimately pleaded no contest to a violation of Penal Code section 311.11, subdivision (a) by unlawfully and knowingly possessing and controlling child pornography images and video, the production of which involved a person under 18 years of age, and knowing that the matter depicted a person under 18 years of age personally engaging in and simulating sexual conduct. The other charges were dismissed. The imposition of sentence was suspended, and Respondent was placed on formal probation for five years on certain terms and conditions including, among others, payment of fines and assessments, cooperating with his Probation Officer in a plan for counseling for child

pornography, enrolling in and completing a sex offender program, and registering as a convicted sex offender.

Knowingly possessing child pornography is a crime that necessarily involves moral turpitude. Conviction of a crime involving moral turpitude is cause for discipline. (Bus. & Prof. Code, § 6101, subd. (a).)

## **2. Case Number 13-N-12033 (Failure to Obey a Court Order)**

Respondent willfully violated Business and Professions Code section 6103 (failure to obey a court order) by failing to file a declaration of compliance with California Rules of Court, rule 9.20 as required by rule 9.20(c), as ordered by the Review Department in its January 14, 2013, order placing Respondent on interim suspension and ordering him to comply with California Rules of Court, rule 9.20.

Based on the above, the court concludes that the requirements of rule 5.85(E) have been satisfied, and Respondent's disbarment is recommended.

## **RECOMMENDATION**

### **Disbarment**

The court recommends that Respondent **Robert S. Tabachnick**, State Bar number 147646, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys.

### **Rule 9.20**

The court also recommends that Respondent be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.



## **Costs**

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

## **ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that **Robert S. Tabachnick**, State Bar number 147646, be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after the service of this decision and order. (Rules Proc. of State Bar, rule 5.111(D).)

Dated: August \_\_\_\_\_, 2014

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DONALD F. MILES  
Judge of the State Bar Court