FILED MAY 8, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **DAVID ANTHONY SILVA,** **Member No. 149506,** A Member of the State Bar.	)	Case No.: **12-N-16569-RAH** **DECISION**

Introduction[1]

In this disciplinary matter, respondent **David Anthony Silva** is found culpable, by clear and convincing evidence, of not complying with California Rules of Court, rule 9.20, as ordered by the California Supreme Court on May 17, 2012, in Supreme Court case no. S198614 (State Bar Court case no. 08-N-12671).

In view of respondent's serious misconduct and the evidence in aggravation, the court recommends that respondent be actually suspended from the practice of law for three years, among other things.

Significant Procedural History

The State Bar filed the notice of disciplinary charges (NDC) in this proceeding on October 16, 2012. Respondent filed a verified response to the NDC on January 11, 2013.

[1] Unless otherwise indicated, all references to rules refer to the California Rules of Court. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

On February 1, 2013, the parties filed a Stipulation as to Facts and Admission of Documents. Trial was held that same date. The State Bar was represented by Elizabeth Gonzalez. Respondent represented himself. This matter was submitted for decision on February 21, 2013.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 5, 1990 and has been a member of the State Bar of California at all times since that date.

Respondent has not been eligible to practice law since July 2007. In his immediately prior disciplinary matter, discussed below, the court noted respondent's testimony that, due to his current health issues, he will most likely never practice law again.

Case No. 12-N-16569 - Rule 9.20 Matter

Facts

On May 17, 2012, the California Supreme Court filed order no. S198614 (State Bar Court case no. 08-N-12671) which included the requirement that respondent comply with rule 9.20(a) of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in that matter, and file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order. On that same date, the Clerk of the Supreme Court properly served respondent with the order and respondent later received it.

The Supreme Court order became effective on June 16, 2012. Accordingly, respondent was to comply with rule 9.20(a) and (c) no later than July 16 and 26, 2012, respectively.

On July 27, 2012, respondent filed a rule 9.20 compliance declaration dated August 1, 2012, with the State Bar Court in which he did not answer question no. 5 by not providing an address for future communications.

Respondent credibly testified to his confusion regarding question no. 5. He wanted to keep his same address but, he thought, the form resulted in a changed address if he placed an address in the blank spaces provided in question no. 5. If he had known all he needed to do to answer question no. 5 was to insert his address, he would have done so.

The rule 9.20 declaration form, revised in December 2006, in relevant part, instructs respondents to "answer each question by checking one box per question. If neither option is correct, attach a declaration under penalty of perjury explaining your situation." (Emphasis in original.) The form has a series of five questions. After each numeral one through four, there are two check-off boxes, each followed by a text which may or may not apply to the answering respondent, who can check off one of the two options provided per question.

Question no. 5, however, is different. Its numeral is followed only by one check-off box and the text: "In the future, communications may be directed to me at the following address:" followed by two and one-half blank lines. (Emphasis added.) Thereafter, there is a parenthetical expression which states: "[If this is not your current State Bar membership address, this declaration will change your membership address. See Bus. & Prof. Code § 6002.1(b).]"

Respondent's confusion is understandable. The sole box after the numeral; the use of the permissive "may" and the parenthetical expression below make it look as if respondents have a choice in responding to that question, Further, the parenthetical expression makes it seem that, if respondent does not want to change his address, then he should not fill out that question.

As noted above, the State Bar Court filed respondent's rule 9.20 compliance declaration on July 27, 2012. However, on August 16, 2012, the Office of Probation "rejected" respondent's rule 9.20 declaration and notified him by mail. The letter was not returned. Respondent,

however, did not receive the notification.[2] He believed his compliance declaration filed on July 27, 2012, had been accepted.

He had been speaking with one of the probation deputies who never said anything about the rejection. In early November 2012, he received a call from the State Bar's prosecutor who told him his declaration had been rejected. He told her that he would get a completed declaration on file.

On December 7, 2012, respondent served a copy of a corrected rule 9.20 declaration along with an unverified answer to the NDC on the State Bar's Office of the Chief Trial Counsel in two separate envelopes inside one big envelope. He asked that the deputy trial counsel file the compliance declaration in the court. Respondent did not file an original with the State Bar Court. He did so on January 13, 2013 after finding out earlier in that month that the original he sent in December did not get filed.

Conclusions

Count One – Rule 9.20

By filing a rule 9.20(c) compliance declaration one day after it was due, respondent did not comply with Supreme Court order and willfully violated rule 9.20(d).

Respondent was understandably confused about question no. 5 in the compliance declaration form. The language of that question was ambiguous in the use of the permissive "may," the parenthetical expression regarding the address change, and the way the question is formatted by having one check-off box immediately after the numeral 5. As such, respondent will not be held accountable for his failure to initially include his address in answer to question no. 5. When this was brought to his attention, he corrected the "error."

[2] Respondent had been living in Massachusetts. He picked up his mail there. When he moved to California, his sister allowed him to use her Post Office box as his mailing address. However, she let the box lapse, so he did not receive the rejection notification.

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Aggravation[3]

Prior Record of Discipline (Std. 1.2(b)(i).)

As previously noted, on May 17, 2012, the California Supreme Court filed order no. S198614 (State Bar Court case no. 08-N-12671) imposing discipline on respondent including two years' stayed suspension and two years' probation, on conditions including one year actual suspension, among other things, for untimely full compliance with rule 9.20(c) due to an out-of-state family emergency that required his presence. Respondent could not check his records in storage before leaving California and was wary of signing the compliance declaration under penalty of perjury without doing so. He, therefore, timely filed an incomplete declaration. Upon returning to California about six months later and visiting his storage unit, he filed a complete, but untimely, compliance declaration. In aggravation, the court considered one prior disciplinary record, discussed below. Mitigating circumstances included extreme emotional/physical difficulties, candor and cooperation and good character (afforded limited weight).

On March 3, 2008, the California Supreme Court filed order no. S159816 (State Bar Court case numbers 04-O-15180; 04-O-15710; 05-O-00146; 05-O-00344; and 05-O-02612) imposing discipline of five years' stayed suspension and actual suspension for two years and until respondent made specified restitution and complied with rule 205, Rules Proc. of State Bar, among other things. He was also to remain actually suspended until he complied with standard 1.4(c)(ii). Respondent was found culpable on 14 counts of misconduct involving five client

[3] All references to standards (std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

matters, including not performing legal services competently (three counts); improperly withdrawing from employment (one count); not refunding $3,000 in unearned fees (one count); engaging in acts involving moral turpitude (three counts); not communicating (three counts); not supporting the laws of this state (two counts); and violating a court order (one count). Aggravating factors included multiple acts of misconduct, client harm and not participating in the disciplinary proceedings. Because he did not participate, there were no mitigating factors presented or found.

Mitigation

Lack of Harm (Std. 1.2(e)(iii).)

No clients were harmed by respondent's misconduct.

Candor/Cooperation to Victims/State Bar (Std. 1.2(e)(v).)

Respondent fully stipulated to the misconduct and the admission of documents into evidence in this matter which greatly reduced the time necessary for trial.

Good Works

Respondent had a distinguished career as an FBI agent.

He continues his volunteer work with senior citizens in central and northern California, doing handyman work and preparing and bringing meals to shut-ins.

Remorse/Recognition of Wrongdoing (Std. 1.2(e)(vii).)

Respondent has shown sincere remorse for his failure to comply with his obligations and the resulting legal proceedings that followed from his misconduct.

Discussion

Standard 1.3 provides that the primary purposes of disciplinary proceedings "are the protection of the public, the courts, and the legal profession; the maintenance of high

professional standards by attorneys and the preservation of public confidence in the legal profession."

In determining the appropriate level of discipline, the court ordinarily looks to the standards first (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628) and to case law second (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580). However, the standards do not address the appropriate level of discipline in rule 9.20 proceedings. (*In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 295.) Instead, rule 9.20(d) does.

Under rule 9.20(d), an attorney's willful failure to comply with the provisions of rule 9.20 "is a cause for disbarment or suspension and for revocation of any pending probation." Even though rule 9.20(d) provides for the sanctions of suspension and revocation of probation, case law makes clear that, in the absence of compelling mitigating circumstances, disbarment is the ordinary and appropriate level of discipline for violating a provision of rule 9.20. (E.g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 296, and cases there cited.)

Furthermore, standard 1.7(b) provides that, if an attorney has two prior records of discipline, the degree of discipline in the current proceeding must 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.) The standards, however, are not mandatory, and they may be deviated from when there is a compelling, well-defined reason to do so. (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Further, despite the unequivocal language of standard 1.7(b), disbarment is not mandated by standard 1.7(b) even if compelling mitigating circumstances do not predominate (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507, citing *Arm v. State Bar* (1990) 50 Cal.3d 763, 778-779, 781) because the ultimate disposition of the charges varies according to proof (*In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121, 125) and because the standards can be tempered by "considerations peculiar to the offense and the offender" (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222; see also *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994).

A disbarment recommendation under standard 1.7(b) made solely on the number of times a respondent has been disciplined would require the court to blindly treat all prior records of discipline as equally aggravating. It should be made only after the court has carefully examined the nature and extent of the respondent's prior records of discipline and given due regard to the facts and circumstances of the present misconduct. (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 704; Accord, *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841-842.)

In determining the appropriate level of discipline, the court found some guidance in *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697. In *Meyer*, the respondent had two prior records of discipline. The first involved one client matter and was mitigated because respondent committed the misconduct during a period of time when he was under unusually great business pressures. The second record of discipline involved three instances in which respondent failed to comply with the conditions attached to a private reproval. This matter was mitigated by extreme emotional difficulties and depression caused by marital difficulties. The court held that despite two prior records of discipline, the nature and extent of

the prior records of discipline were not sufficiently severe to justify recommending disbarment in the proceeding under standard 1.7(b).

Similarly, in the present case, respondent has two prior instances of discipline. The present misconduct, although serious, is mitigated by compelling circumstances. No clients were harmed by respondent's misconduct; respondent has shown remorse and recognized his wrongdoing; he has engaged in community service as well as entered into a stipulation in this matter. It is evident from his behavior in this and the prior matter that he was not shirking his ethical duties or being indifferent to orders of the Supreme Court[4] but that exigent circumstances intervened. He was one day late in filing his rule 9.20 compliance declaration which was incomplete only due to an ambiguity in relation to question no. 5, and, later, when the ambiguity was clarified, filed one that included his address information.[5] Moreover, in his prior disciplinary matter, respondent credibly testified that, due to his current health issues, he will most likely never practice law again. In consideration of these factors, the court does not recommend disbarment as appropriate pursuant to standard 1.7(b).

However, respondent has been through the disciplinary system before and, as an attorney, should have a heightened sense of the importance of conforming his conduct to the requirements of the law. Although he does not intend to practice law again, his repeated failures to do so may call into question his integrity as an officer of the court and his fitness to represent clients. (*In re Kelley* (1990) 52 Cal.3d 487, 497.) Accordingly, after thorough consideration of the present misconduct, the standards and case law, as well as the mitigating and aggravating circumstances,

[4] "Disbarment is particularly appropriate when a respondent repeatedly demonstrates indifference to successive disciplinary orders of the Supreme Court." (*In the Matter of* Pierce (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, 388.)

[5] Respondent has not practiced law since July 2007 and has since twice filed correct and complete rule 9.20 compliance declarations, most recently in January 2013. Accordingly, the court does not recommend that he be ordered to file another one in this matter.

the court recommends, among other things, that respondent be actually suspended for three years.[6]

Recommendations

It is recommended that respondent David Anthony Silva, State Bar Number 149506, be suspended from the practice of law in California for five years, that execution of that period of suspension be stayed, and that respondent be placed on probation[7] for a period of five years subject to the following conditions:

1. Respondent David Anthony Silva is suspended from the practice of law for the first three years of probation.

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.

3. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

5. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State

[6] It is noted that respondent is still subject to the order in S159816 that requires him, if he wishes to practice law again, to prevail in a State Bar Court proceeding pursuant to standard 1.4(c)(ii) by demonstrating his rehabilitation, fitness to practice and present learning and ability in the general law. Accordingly, there is no need to recommend such a requirement again.

[7] The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

7. It is not recommended that respondent attend Ethics School, as respondent was ordered to do so in connection with S198614.

At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Rule 9.20, California Rules of Court

It is not recommended that respondent be ordered to comply with California Rules of Court, rule 9.20 because he has already done so, most recently in January 2013, and has not been eligible to practice law in California since July 2007.

Multistate Professional Responsibility Examination

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) because he was ordered to do so in connection with S159816.

Costs

It is 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.

Dated: May _____, 2013

RICHARD A. HONN
Judge of the State Bar Court