

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO**

In the Matter of)	Case No. 04-O-14008 -PEM; 05-O-00390;
)	05-N-02784
LAURA PADILLA BERGER,)	
)	DECISION AND ORDER OF
Member No. 108045,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. Introduction

In this default matter, respondent **LAURA PADILLA BERGER** is charged with professional misconduct in two client matters. The court finds, by clear and convincing evidence, that respondent is culpable of six of the seven charged acts of misconduct: (1) an act of moral turpitude; (2) failure to inform a client of a significant development; (3) failure to withdraw as counsel where mandatory; (4) failure to return a client file; (5) failure to maintain an updated official membership address with the State Bar; and (6) failure to comply with rule 955 of the California Rules of Court,¹ as ordered by the California Supreme Court on November 17, 2004, in case No. S127397 (State Bar Court case No. 03-O-03259).

The court recommends that respondent be disbarred from the practice of law.

II. Pertinent Procedural History

This proceeding was initiated by the filing of a Notice of Disciplinary Charges (NDC) by the Office of the Chief Trial Counsel of the State Bar of California (State Bar) on July 19, 2005. The Notice of Disciplinary Charges (NDC) was properly served on respondent on the same date by certified mail, return receipt requested, addressed to the respondent's official membership records

¹All references to rule 955 are to California Rules of Court, rule 955.

address (official address)² pursuant to Business and Professions Code section 6002.1, subdivision (c)³, and rule 60 of the Rules of Procedure of the State Bar (Rules of Procedure). The NDC was returned by the U. S. Postal Service bearing the stamp, “Moved, Left No Address.”

On August 4, 2005, an investigator for the State Bar located an alternate address for respondent: 25460 Tierra Grande Drive, Carmel, CA 93923. On that same date a copy of the NDC, as well as correspondence from the State Bar informing respondent of the time, date, and location of the initial status conference were sent to respondent at her official address. A courtesy copy of the NDC and the aforementioned correspondence were also sent to the alternate address via United Parcel Service (UPS). The NDC was returned by the U.S. Postal Service bearing a stamp, “Moved, Left No Address.” The UPS parcel was returned with a sticker reading “REASON FOR RETURN: COMPANY OR PERSON UNKNOWN, NOT DELIVERED,” and bearing a handwritten notation, “Return to Sender!!!”

On September 20, 2005, Manuel Jimenez, the State Bar’s Deputy Trial Counsel (DTC), attempted to reach respondent by telephone at respondent’s official membership records telephone number. The number did not belong to respondent. On September 20, 2005, the DTC also called “directory assistance” requesting all telephone listings for respondent within the area code which includes respondent’s official address. No listing was found. The DTC also checked Parker’s Directory which also had no listing for respondent.

As of September 23, 2005, the date of the filing of the State Bar’s Notice of Motion and Motion for Entry of Default, respondent had not filed a response to the NDC. Pursuant to rule 103 of the Rules of Procedure, the response to the NDC was due within 20 days after service of the NDC, or on or before August 8, 2005.

On motion of the State Bar, respondent’s default was entered on October 12, 2005. The Order of Entry of Default was properly mailed to respondent’s official address on the same date by

²At all times since March 21, 2003, respondent’s official membership address has been 3785 Via Nona Marie #311, Carmel, CA 93923.

³All references to sections are to the Business and Professions Code, unless otherwise indicated.

certified mail. The Notice of Entry of Default was returned to the State Bar Court by the U.S. Postal Service bearing a stamp indicating that the mailing was “unclaimed.” Respondent was enrolled as an inactive member under section 6007(e) on October 15, 2005.

Respondent did not participate in the disciplinary proceedings. The court took this matter under submission on November 1, 2005.

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).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 3, 1983, and has been a member of the State Bar since that time.

B. The Douglas Matter

In or about January 2001, Mary Jane Douglas (Douglas) hired respondent to represent her in a marital dissolution matter, entitled *Marriage of Douglas*, Monterey County Superior Court, case No. DR 36759 (*Marriage of Douglas*). Respondent remained Douglas’ counsel of record in *Marriage of Douglas* at all times until on or about December 30, 2003, when a substitution of attorney form (previously signed by Douglas) removing respondent as Douglas’ counsel of record was filed.

On or about August 28, 2001, respondent signed a document (under penalty of perjury) requesting to be enrolled as an inactive member of the State Bar of California, retroactive to January 1, 2001. The enrollment document instructions contained an admonition warning the enrollee that if “you practiced law or were active during any part of 2001 you must pay the active membership fees.” The enrollment document stated in relevant part: “Signing the declaration below confirms that you have read and understand the instructions and the State Bar Act.” Article 1, Section 2 of the Rules and Regulations of the State Bar states: “No member of the State Bar practicing law in this state, or occupying a position where he or she is called upon to give legal advice or counsel or

examine the law or pass upon the legal effect of any act, document or law, shall be enrolled as an inactive member.”

Pursuant to respondent’s request, on or about August 30, 2001, respondent was enrolled as an inactive member of the State Bar of California retroactive to January 1, 2001. Respondent’s purpose in submitting the request for inactive enrollment was to reduce her obligation to pay membership fees and avoid a suspension for nonpayment of membership fees and resulting penalties. Despite the fact that when she submitted the request on August 29, 2001, she was aware that individuals are not entitled to retroactive enrollment as inactive members for periods of time during which they actively practiced law, respondent nonetheless submitted the request. Thus, pursuant to respondent’s request in which she falsely represented that she had not actively practiced law from January 1, 2001, through August 28, 2001, she was retroactively enrolled inactive from January 1, 2001, through August 28, 2001.

Specifically, respondent was actively practicing law between January 1, 2001, through August 28, 2001, in that respondent undertook the following actions on Douglas’ behalf in relation to *Marriage of Douglas*, all constituting the practice of law:

- (1) On or about January 21, 2001, respondent filed a Summons, Petition for Legal Separation and Declaration Under Uniform Child Custody Jurisdiction, under her signature as Douglas’ counsel;
- (2) On or about January 25, 2001, respondent served a copy of the Summons, Petition for Legal Separation and Declaration Under Uniform Child Custody Jurisdiction Act on Douglas’ husband;
- (3) Between January 5, 2001, through approximately August 28, 2001, respondent provided Douglas with legal advice concerning issues related to *Marriage of Douglas*;
- (4) Between approximately January 25, 2001, through approximately August 28, 2001, respondent discussed settlement of issues in *Marriage of Douglas* with Douglas’ then-husband; and

- (5) On or about February 28, 2001, respondent charged and collected fees for legal services performed on or about January 5, January 24, January 25, and February 15, 2001.

At no time did respondent inform Douglas that she had requested a transfer to inactive status on August 28, 2001, or that she was otherwise ineligible to practice law on Douglas' behalf from August 28, 2001, until November 20, 2002, when respondent was again placed on active status.

On or about December 30, 2004, Douglas wrote to respondent and requested her client file. Douglas indicated that she had previously attempted to reach respondent by phone, but that she had not been successful. Respondent received Douglas' request for her client file and failed to comply with Douglas' request.

On or about January 10, 2005, Douglas renewed her request for her client file. At no time did respondent inform Douglas as to how she could obtain her client file.

As of July 19, 2005, the date of the filing of the NDC, respondent still had not provided Douglas with her client file.

Count 1: Moral Turpitude (Bus. & Prof. Code, § 6106)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. By fraudulently evading her duty to pay active membership fees and applicable penalties, and by falsely representing in her request for retroactive inactive enrollment that she had not actively practiced law when she had in fact done so, respondent committed acts involving dishonesty, misrepresentation, and moral turpitude in wilful violation of section 6106.

Count 2: Failure to Inform Client of Significant Development (§6068, Subd.(m))

Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

By failing to inform Douglas that respondent was not entitled to continue to represent her in the dissolution proceeding due to respondent's transfer to inactive status, respondent failed to keep a client reasonably informed of a significant development in a matter in which respondent had agreed to provide legal services, in wilful violation of section 6068, subdivision (m).

Count 3: Failure to Withdraw (Rules Prof. Conduct, Rule 3-700(B)(2))⁴

The State Bar proved by clear and convincing evidence that respondent wilfully violated rule 3-700(B)(2). Rule 3-700(B)(2) states: “(B) Mandatory Withdrawal. A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment if: (2) [t]he member knows or should know that continued employment will result in violation of these rules or of the State Bar Act. . . .”

By remaining as Douglas’ attorney of record in *Marriage of Douglas*, after failing to inform Douglas that she had requested transfer to inactive status or that she was otherwise ineligible to practice law on Douglas’ behalf from August 28, 2001, until November 20, 2002, respondent failed to withdraw from employment when she knew or should have known that continued employment would result in violation of the Rules of Professional Conduct and of the State Bar Act. Thus, respondent failed to withdraw from employment in wilful violation of rule 3-700(B)(2).

Count 4: Failure to Return Client File (Rule 3-700(D)(1))

Rule 3-700(D)(1) requires an attorney whose employment has terminated to promptly release to a client, at the client’s request, all the client papers and property. Respondent wilfully violated rule 3-700(D)(1) by failing to promptly return the client file to Douglas despite her requests in December 2004 and in January 2005. As of July 19, 2005, respondent still had failed to return the file to Douglas.

C. The Seva’aetasi Matter

On or about January 15, 2003, David Seva’aetasi and Laura Seva’aetasi (“the Seva’aetasis”) hired respondent as a mediator in their marital dissolution proceeding. The parties signed a contract retaining respondent as a family law mediator. Subsequently, the Seva’aetasis paid approximately \$4,500 in mediation fees to respondent.

The Seva’aetasi matter proceeded routinely through March 2004. However, in March 2004, without notice, respondent ceased performing mediation services on the Seva’aetasis’ behalf. At no

⁴References to rule are to current Rules of Professional Conduct, unless otherwise noted.

time did respondent inform the Seva'aetasis that she intended to terminate the mediation services she was providing to them. As a result of respondent's cessation of services, the Seva'aetasis remained married contrary to their wishes.

Count 5: Failure to Comply with Laws (§6068, Subd. (a))

Section 6068, subdivision (a), provides that an attorney has a duty "to support the laws of the United States and of this state." The State Bar alleges that by ceasing to perform mediation services without notice to the Seva'aetasis, respondent failed to meet her common law fiduciary obligations to complete the mediation, thereby violating section 6068, subdivision (a). The allegation in the NDC, however, fails to set forth sufficient facts to support the conclusion that respondent violated her "common law fiduciary obligations." Given the paucity of facts alleged, there is no clear and convincing evidence which would support a finding of culpability under section 6068, subdivision (a).

D. Respondent's Official Address

By September 15, 2004, respondent had vacated the premises and ceased maintaining an office, her official address. Respondent, however, took no action to change her official address after vacating the premises. As of July 19, 2005, the date of the filing of the NDC, respondent's official address still remained the same.

Count 6: Failure to Update Membership Address (§6068, Subd.(j))

Section 6068, subdivision (j), states that a member must comply with the requirements of section 6002.1, which provide that a member must maintain on the official membership records of the State Bar a current address and telephone number to be used for State Bar purposes.

By clear and convincing evidence, respondent wilfully violated section 6068, subdivision (j), when she failed to maintain a current official membership records address and did not provide the State Bar with an alternative address to be used for State Bar purposes. Respondent's official address has not been changed since March 21, 2003, despite the fact that by September 15, 2004, she had vacated her official address premises. As a result, letters sent to her official address from the State Bar were returned as undeliverable.

E. The Rule 955 Matter

On or about November 17, 2004, the California Supreme Court entered a final disciplinary order (the Supreme Court order) in *In re Laura P. Berger on Discipline*, Supreme Court case No. S127397 (State Bar Court case No. 03-O-03259). The Supreme Court order required, among other things, that respondent comply with California Rules of Court, rule 955, by performing the acts specified in subdivisions (a) and (c) within 30 and 40 days, respectively, after the effective date of the Supreme Court's order.⁵ The order of the Supreme Court became effective on December 17, 2004.

On or about December 28, 2004, a probation deputy of the Office of Probation of the State Bar of California wrote a letter to respondent reminding her of the obligation to comply with rule 955 and enclosing a copy of the Supreme Court order, as well as a form approved by the State Bar Court Executive Committee for reporting compliance with rule 955. On that same date, the probation deputy mailed the letter and enclosures via the U. S. Postal Service to respondent at her official address. The mailing was returned by the U. S. Postal Service, marked "unclaimed," on or about March 23, 2005.

Respondent did not file an affidavit of compliance with the State Bar Court evidencing her compliance with the requirements of rule 955, as ordered by the Supreme Court, either by the date ordered by the Court (i.e., January 26, 2005) or by the date of the filing of the NDC (i.e., July 19, 2005.)

Count 7: Failure to Obey a Court Order (§6103)

Pursuant to the Supreme Court's order, respondent was to have filed the rule 955 affidavit by January 26, 2005. As of July 19, 2005, the date of the filing of the NDC, respondent had not filed the court-ordered affidavit. Whether respondent is aware of the requirements of rule 955 or of her obligation to comply with those requirements is immaterial. "Wilfulness" in the context of rule 955

⁵Rule 955(c) mandates that respondent "file with the clerk of the State Bar court an affidavit showing that [s]he. . . has fully complied with those provisions of the order entered pursuant to the rule." Respondent's affidavit was required to have been filed on or about January 26, 2005.

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 955. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)⁶

Thus, the State Bar has established by clear and convincing evidence that respondent wilfully failed to comply with rule 955, as ordered by the Supreme Court.

Accordingly, respondent's failure to comply with rule 955 constitutes a violation of section 6103, which requires attorneys to obey court orders and provides that the wilful disobedience or violation of such orders constitutes cause for disbarment or suspension.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating evidence was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁷

B. Aggravation

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

Respondent has been disciplined on one previous occasion, which is an aggravating factor pursuant to Standard 1.2 (b)(i). In California Supreme Court case No. S127397 (State Bar Court case No. 03-O-03259), a default matter, respondent was suspended for two years, stayed, and was actually suspended for 90 days, for her misconduct in a single client matter. Respondent's culpability in that proceeding resulted from: (1) improper withdrawal from employment; (2) failing to perform services; (3) failing to communicate; (4) failing to return unearned fees; (5) failing to render an accounting; and (6) failing to return a client file.

In the current proceeding, respondent committed multiple acts of wrongdoing, including: (1) committing an act of dishonesty and misrepresentation; (2) failing to inform a client of a significant

⁶Specifically, rule 955(d) provides that a suspended attorney's wilful failure to comply with rule 955 constitutes a cause for disbarment or suspension and for revocation of any pending probation.

⁷All further references to standards are to this source.

development; (3) failing to withdraw as counsel; (4) failing to return a client file; (5) failing to maintain a current State Bar address; and (6) failing to obey a court order. (Std. 1.2(b)(ii).)

Respondent's failure to participate in this disciplinary matter before the entry of her default is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

The purpose of 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; standard 1.3.)

Respondent's misconduct involved two client matters, multiple acts of misconduct, and a violation of her obligations under rule 955 of the California Rules of Court. The standards applicable to this proceeding are standards 1.6, 1.7(a), 2.3, 2.6, and 2.10. They provide a broad range of sanctions ranging from reproof to disbarment, depending upon the gravity of the offenses and the harm to the client.

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court or a client must result in actual suspension or disbarment. As discussed above, respondent was culpable of misrepresentation and dishonesty, an act of moral turpitude.

Standard 2.6 provides that culpability of a member of a violation of section 6103 must also result in disbarment or suspension. Respondent's failure to obey the order of the Supreme Court to comply with rule 955 resulted in a finding of culpability under section 6103.

Although the standards are guidelines and are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges disbarment citing, among other cases, *Powers v. State Bar, supra*, 44 Cal.3d 337, *Lydon v. State Bar* (1988) 45 Cal.3d 1181, and *Dahlman v. State Bar* (1990) 50 Cal.3d 1088. The court agrees with the recommendation of the State Bar.

Respondent's wilful failure to comply with rule 955(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, supra*, 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 she has been given the opportunity to do so.

The court is unaware of any facts or circumstances that would justify a departure from the usual sanction of disbarment for respondent's wilful violation of rule 955 and her resulting violation of section 6103. One of the State Bar Court's obligations is to ensure that its disciplinary recommendations to the Supreme Court are fair and consistent. (*In re Young* (1989) 49 Cal.3d 257, 268.)

In addition to wilfully violating the Supreme Court's order requiring her to give notice of her prior disciplinary suspension, respondent has also committed multiple acts of misconduct, including an act of moral turpitude and intentional dishonesty. She misrepresented to the State Bar that she did not practice law in 2001, when in fact she did. Respondent has repeatedly failed to participate in these disciplinary proceedings by defaulting in the underlying matter and in the instant case. Such misconduct further demonstrates respondent's inability to conform to professional norms and a lack of concern for potential harm to her clients and the public. Accordingly, the public interest and the administration of justice would be served by respondent's disbarment. (See, *In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, 332-334.)

Respondent's disbarment is necessary to protect the public, the courts and the legal profession, to maintain high professional standards and to preserve public confidence in the profession. It would seriously undermine the integrity of the disciplinary system and damage public confidence in the legal profession if respondent were not disbarred for her wilful and unexplained disobedience of the Supreme Court's November 17, 2004 order in combination with her other misconduct.

VI. Recommended Discipline

The court recommends that respondent **LAURA PADILLA BERGER** 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.

It is also recommended that the Supreme Court order respondent to comply with rule 955, paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.

VII. Costs

The court recommends that costs be awarded to the State Bar pursuant to 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.

VIII. Order of Involuntary Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007(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 27, 2006

PAT McELROY
Judge of the State Bar Court