

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of	)	Case No.: 08-O-13899-LMA
	)	09-N-13628 (Cons.)
<b>JOHN W. EVANS</b>	)	<b>DECISION INCLUDING DISBARMENT</b>
	)	<b>RECOMMENDATION AND</b>
<b>Member No. 92161</b>	)	<b>INVOLUNTARY INACTIVE</b>
	)	<b>ENROLLMENT ORDER</b>
A Member of the State Bar.	)	

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**I. INTRODUCTION**

This matter was initiated by the Office of the Chief Trial Counsel of the State Bar of California (State Bar) alleging that respondent John W. Evans failed to comply with rule 9.20 of the California Rules of Court<sup>1</sup> as ordered by the Supreme Court and engaged in the unauthorized practice of law. The State Bar was represented by Wonder J. Liang. Respondent did not participate either in person or by counsel.

For the reasons stated below, it is recommended that respondent be disbarred.

**II. SIGNIFICANT PROCEDURAL HISTORY**

**Case No. 08-O-13628**

The Notice of Disciplinary Charges (NDC) in case no. 08-O-13628 was filed and properly served on respondent on May 7, 2009, by certified mail, return receipt requested, at the

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<sup>1</sup>Future references to rule are to this source. Prior to January 1, 2007, rule 9.20 was numbered rule 955.

address shown on the official membership records of the State Bar (official address). (Bus. & Prof. Code §6002.1, subd. (c)<sup>2</sup>; Rules Proc. of State Bar, rules 60(b) and 583.) Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) This correspondence was returned unclaimed.

On May 13, 2009, the State Bar Court properly served respondent by first-class mail, postage prepaid at his official address with a notice scheduling a status conference on June 15, 2009. Respondent did not appear at the status conference. On June 16, 2009, an order memorializing the status conference was properly served on him at his official address.

Respondent did not file a response to the NDC. On July 7, 2009, the State Bar filed and properly served on respondent a motion for entry of default by certified mail, return receipt requested, at his official address and, by regular mail. (Rules Proc. of State Bar, rule 200(a), (b).) The motion advised respondent that the State Bar would seek minimum discipline of disbarment if he was found culpable. (Rules Proc. of State Bar, rule 200(a)(3).)

Respondent did not respond to the default motion. Orders entering respondent's default and involuntarily enrolling him inactive were filed and properly served on him on July 23, 2009, by certified mail, return receipt requested at his official address. This document advised respondent, among other things, that he was enrolled inactive pursuant to section 6007, subdivision (e) effective three days after service of the order. The court judicially notices its records pursuant to Evidence Code section 452, subdivision (h) which indicate that this correspondence was returned as undeliverable.

A closing brief including certified copies of respondent's prior disciplinary matters was filed on August 14, 2009.

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<sup>2</sup>Future references to section are to this source.

**Case No. 09-N-13899**

The NDC in case no. 09-N-13899 was filed and properly served on respondent on September 9, 2009, by certified mail, return receipt requested, at his official address. This correspondence was returned as undeliverable.

On September 11, 2009, the State Bar Court properly served respondent by first-class mail, postage prepaid at his official address with a notice scheduling a status conference on October 5, 2009. Respondent did not appear at the status conference. On October 5, 2009, an order memorializing the status conference was properly served on him at his official address.<sup>3</sup>

Respondent did not file a response to the NDC. On October 23, 2009, the State Bar filed and properly served on respondent a motion for entry of default by certified mail, return receipt requested, at his official address. The motion advised respondent that the State Bar would seek minimum discipline of disbarment if he was found culpable.

Respondent did not respond to the default motion. Orders entering respondent's default and involuntarily enrolling him inactive were filed and properly served on him on November 10, 2009, by certified mail, return receipt requested at his official address. This document advised respondent, among other things, that he was enrolled inactive pursuant to section 6007, subdivision (e) effective three days after service of the order. The court judicially notices its records pursuant to Evidence Code section 452, subdivision (h) which indicate that this correspondence was returned as undeliverable.

The State Bar's efforts to locate and contact respondent were fruitless.

The State Bar's December 7, 2009, motion for late filing of its closing brief is GRANTED.

The consolidated cases were submitted for decision on December 7, 2009.

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<sup>3</sup>This case was consolidated with case no. 08-O-13899 at this status conference.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (Section 6088; Rules Proc. of State Bar, rule 200(d)(1)(A).) The findings are also based upon matters admitted into evidence or judicially noticed.

#### **A. Jurisdiction**

Respondent was admitted to the practice of law in California on May 30, 1980, and has been a member of the State Bar at all times since.

#### **B. Case No. 08-O-13628**

##### **1. Facts**

In case no. S137836 (State Bar Court case no. 03-H-4534), the California Supreme Court ordered, among other things, that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) within one year of the effective date of its order filed on December 16, 2005.

On July 24, 2007, the Review Department of the State Bar Court filed and properly served an order in which respondent was ordered suspended from the practice of law in California effective August 15, 2007 pending proof of passage of the MPRE since he had not passed it within the time prescribed in the Supreme Court's order.<sup>4</sup> Respondent's suspension continued as of the date the NDC was filed in this matter.

Respondent knew or should have known that he was suspended from the practice of law in California effective August 15, 2007 and that his suspension continued as of the date the NDC was filed in this matter.

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<sup>4</sup>The NDC erroneously referenced the July 24, 2007 order as having been issued and served by the Supreme Court.

In August 2007, respondent represented Ed Cosgrove in litigation with Richard Quader. (*Quader v. Cosgrove, et al*, Contra Costa County Superior Court case no. C 07-01150.)

On November 8, 2007, respondent wrote a letter to Sean Chen, opposing counsel in the litigation, on letterhead that identified him as an attorney. The substance of the letter addressed various matters regarding the litigation, including his and his client's availability for mediation during certain dates in January and February, discovery issues and the exchange of mediation briefs.

In December 2007, Chen left respondent two telephone messages asking to discuss respondent's status with the State Bar.

On December 13, 2007, Chen faxed and mailed a letter to respondent at his State Bar membership records address. Respondent received it. Chen asked respondent to confirm whether he was on active status with the State Bar and whether his client would be seeking new counsel. The next day, respondent told Chen that he was checking with the State Bar with regard to the status of his license.

On January 3, 2008, Cosgrove filed a substitution of attorney, stating that he was representing himself and removing respondent as counsel.

On October 24 and November 12, 2008, a State Bar investigator sent respondent letters requesting that respondent answer in writing specific allegations of misconduct regarding the complaint by Richard Quader. The letters were addressed to respondent's official membership records address and sent by first-class mail, postage prepaid. They were not returned to the State Bar as undeliverable. Respondent did not answer the letters or otherwise respond to the investigator.

In Supreme Court case no. S137836 (State Bar Court case no. 03-H-04534; 03-0-05101 (Cons.)), effective January 15, 2006, respondent was placed, among other things, on a two-year

probationary period pursuant to a stipulation between him and the State Bar which was approved by the State Bar Court. A copy of the Supreme Court's order was properly served on respondent pursuant to rule 8.532(a) of the California Rules of Court at his State Bar membership records address. He received the order and was aware of its contents.

One of respondent's probation conditions required him to comply with the provisions of the State Bar Act and the Rules of Professional Conduct during the probation period. He did not comply with this probation condition because, as set forth above, he violated sections 6068, subdivisions (a) and (i) and 6106.

## **2. Legal Conclusions**

### **a. Count One - Section 6068, subd. (a) (Unauthorized Practice of Law)**

Section 6068, subdivision (a) requires an attorney to support the Constitution as well as state and federal laws.

Section 6125 requires an individual to be a member of the State Bar in order to practice law in California.

In relevant part, section 6126, subdivision (b) makes a person who has been suspended from membership in the State Bar and practices or attempts to practice, to advertise or to hold him- or herself out as practicing or entitled to practice law guilty of a crime punishable by imprisonment in the state prison or county jail.

By corresponding with Chen on November 8, 2007, about the litigation and on letterhead identifying him as an attorney at law, respondent held himself out as entitled to practice law and actually practiced law when he was not so entitled. In so doing, he violated sections 6125 and 6126, subdivision (b) and failed to support the laws of this State in wilful violation of section 6068, subdivision (a).

**b. Count Two - Section 6106 (Moral Turpitude)**

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106 by misrepresenting to Chen that he was entitled to practice law when he was not an active member of the State Bar. Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106. However, as the same facts support this and the violation of section 6068, subdivision (a), the court will not attach any additional weight in determining the appropriate discipline in this matter. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 155.)

**c. Count Three - Section 6068, subd. (i) (Not Participating in Disciplinary Investigation)**

Section 6068, subdivision (i) requires an attorney to participate and cooperate in any disciplinary investigation or other disciplinary or regulatory proceeding pending against him- or herself.

By not responding to the State Bar's October 24 and November 12, 2008 letters, respondent did not participate in the investigation of the allegations of misconduct regarding the Quader complaint in wilful violation of 6068, subdivision (i).

**d. Count Four - Section 6068, subd. (k) (Noncompliance with Probation Conditions)**

Section 6068, subdivision (k) requires an attorney to comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

Respondent did not comply with disciplinary probation conditions as set forth above in

wilful violation of section 6068, subdivision (k). This is a technical violation which does not increase the level of discipline as respondent has already been found culpable of violating sections 6068, subdivisions (a) and (i) and 6106.

**C. Case No. 09-N-13899**

**1. Facts**

On April 3, 2009, the California Supreme Court filed an order, number S170188, in State Bar Court case no. 08-O-11094 in which respondent was ordered, among other things, to be actually suspended from the practice of law for two years and until he complied with standard 1.4(c)(ii), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct<sup>5</sup> and with rule 205, Rules Proc. of State Bar. He was also ordered to comply with rule 9.20(a) and (c) within 30 and 40 days, respectively, of the effective date of the order. The order was effective on May 3, 2009. (Rule 9.18(a).<sup>6</sup>) Accordingly, respondent was to comply with rule 9.20(c) no later than June 12, 2009.

The Supreme Court promptly sent respondent a copy of its order upon filing.<sup>7</sup> A copy of it also was attached to the NDC in this proceeding.

As of September 9, 2009, respondent had not filed with the State Bar Court the affidavit required by rule 9.20(c). He still has not done so.<sup>8</sup> He has offered no explanation for his

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<sup>5</sup>Future references to standard or std. are to this source.

<sup>6</sup>Prior to January 1, 2007, this rule was numbered rule 953(a).

<sup>7</sup>Although no proof was offered that the Clerk of the Supreme Court served the Supreme Court's order upon respondent, rule 8.532(a) of the California Rules of Court requires the Clerk to promptly transmit a copy of opinions and orders to the parties upon filing. Moreover, it is presumed pursuant to Evidence Code section 664 that official duties have been regularly performed. (*In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Therefore, in the absence of evidence to the contrary, this court finds that the Clerk of the Supreme Court performed his duty and transmitted a copy of the Supreme Court's order to respondent immediately after its filing.

<sup>8</sup>Pursuant to Evidence Code section 452, subdivision (d), the court judicially notices that its



noncompliance with rule 9.20(c).

## **2. Legal Conclusions**

There is clear and convincing evidence that respondent wilfully violated the Supreme Court's order directing his compliance with rule 9.20.<sup>9</sup> This constitutes a violation of rule 9.20(d), which makes the wilful noncompliance with the provisions of rule 9.20 a cause for disbarment, suspension or revocation of probation, in relevant part.

## **IV. FINDINGS AND CONCLUSIONS AS TO AGGRAVATING CIRCUMSTANCES**

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)

Respondent's three prior discipline records are a significant aggravating circumstance. (Std. 1.2(b)(i).) In his first prior record, filed on August 21, 2002, respondent was privately reprimed with public disclosure for trust account violations (State Bar Court case no. 00-O-13342). In mitigation, the parties stipulated to several factors, including no prior discipline, no harm and candor and cooperation. There were no aggravating circumstances.

In the second matter, respondent stipulated to a one-year stayed suspension, two-year probation and 30-day actual suspension for his misconduct in a consolidated matter (Supreme Court case no. S137836 (State Bar Court case no. 03-H-04534; 03-0-05101 (Cons.), filed December 16, 2005). In case no. 03-H-04534, respondent did not comply with the conditions of his private reprimand; in case no. 03-0-05101, involving one client matter, respondent did not communicate or competently perform legal services or return the client's file to the client's new attorney. He also did not cooperate in a State Bar investigation. In aggravation, the parties

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records still do not contain a rule 9.20(c) affidavit from respondent.

<sup>9</sup>Wilfulness in the context of rule 9.20 does not require actual knowledge of the provision which is violated. The Supreme Court has disbarred an attorney whose failure to keep his official address current prevented him from learning that he had been ordered to comply with rule 955 (now rule 9.20). (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

stipulated to a prior disciplinary record, client harm and lack of candor or cooperation. In mitigation, the parties agreed to extreme emotional difficulties (depression).

As previously discussed, in S170188, the Supreme Court imposed discipline consisting of three years' stayed suspension and actual suspension for two years and until respondent complied with standard 1.4(c)(ii) and with rule 205, Rules Proc. of State Bar, among other things. In that matter, respondent was found culpable of not complying with probation conditions. In aggravation, the court found prior disciplinary records, multiple acts of misconduct, not participating in the disciplinary proceedings prior to the entry of default and demonstrating indifference toward rectification of or atonement for the consequences of his misconduct. There were no mitigating factors.

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct by not complying with rule 9.20(c) even after the NDC in the instant proceeding was filed. (Std.1.2(b)(v).)

Respondent's failure to participate in proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) However, it warrants little weight in aggravation because this conduct closely parallels that used to find respondent culpable of violating section 6068, subdivision (i) and to enter his default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

#### **V. FINDINGS AND CONCLUSIONS AS TO MITIGATING CIRCUMSTANCES**

Respondent did not participate in these proceedings or present any mitigating circumstances pursuant to standard 1.2(e). Since respondent bears the burden of establishing mitigation by clear and convincing evidence, the court has no basis for finding mitigating factors.

## **VI. LEVEL OF DISCIPLINE**

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.)

Standard 1.7(b) applies. It provides that, if an attorney has two prior records of discipline, the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate. In this instance, respondent has three prior instances of discipline and no mitigating circumstances have been offered for the court's consideration.

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.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) In this case, no reason for deviation from the standards is apparent.

Moreover, respondent's wilful 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; rule 9.20(d).) Disbarment has been consistently imposed by the Supreme Court as the sanction for noncompliance with rule 9.20. (*Bercovich v. State Bar*, *supra*, 50 Cal.3d at p. 131; *Lydon v. State Bar*, *supra*, 45 Cal.3d at p. 1188; *Powers v. State Bar*, *supra*, 44 Cal.3d at p. 342.)

Respondent has demonstrated an unwillingness to comply with the professional

obligations and rules of court imposed on California attorneys although he has been given the opportunity to do so. He engaged in misconduct in one client matter and did not comply with rule 9.20(c). He has three prior disciplinary records. He did not participate in this proceeding and, therefore, did not present any mitigating circumstances for the court's consideration. In accordance with the standards and with rule 9.20(d) of the California Rules of Court, and in the absence of any mitigating factors, the court recommends respondent's disbarment as 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.

#### **VII. DISCIPLINE RECOMMENDATION**

It is hereby recommended that respondent John W. Evans be disbarred from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

It is also recommended that the Supreme Court order respondent to 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 the present proceeding, and to file the affidavit provided for in rule 9.20(c) within 40 days of the effective date of the order showing his compliance with said order.

#### **VIII. 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.

#### **IX. ORDER REGARDING INACTIVE ENROLLMENT**

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the

Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: March \_\_\_\_\_, 2011

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LUCY ARMENDARIZ  
Judge of the State Bar Court