

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 10-N-01787-LMA
)	
GREGG LEE KAYS)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND
Member No. 82052)	INVOLUNTARY INACTIVE
)	ENROLLMENT ORDER
<u>A Member of the State Bar.</u>)	

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 Gregg Lee Kays failed to comply with rule 9.20 of the California Rules of Court¹ as ordered by the Supreme Court. The State Bar was represented by Maria J. Oropeza. 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

The Notice of Disciplinary Charges (NDC) was filed and properly served on respondent on April 1, 2010, by certified mail, return receipt requested, at the address shown on the official

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

membership records of the State Bar (official address). (Bus. & Prof. Code §6002.1, subd. (c)²; 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 as undeliverable.

On April 5, 2010, 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 May 3, 2010. Respondent did not appear at the status conference. On that same date, 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 May 11, 2010, 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, at an alternate address in San Jose, California. (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 May 27, 2010, 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 return receipt, executed by "Norland,"³ indicates delivery of this correspondence on May 28, 2010.

The State Bar's efforts to locate and contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding,

² Future references to section are to this source.

³ Respondent's official address includes the firm name "Norland and Kays."

including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415.)

The case was submitted for decision on June 17, 2010.

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 November 29, 1978, and has been a member of the State Bar at all times since.

B. Facts

On November 6, 2009, the California Supreme Court filed an order, number S164475 (November 6 order), in State Bar Court case no. 09-PM-13203 in which respondent was ordered, among other things, to be actually suspended for one year. 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 December 6, 2009. (Rule 9.18(a).⁴) Accordingly, respondent was to comply with rule 9.20(c) no later than January 15, 2010.

The Supreme Court promptly sent respondent a copy of its order upon filing.⁵

⁴ Prior to January 1, 2007, this rule was numbered rule 953(a).

⁵ 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.

As of April 1, 2010, respondent had not filed with the State Bar Court the affidavit required by rule 9.20(c). He still has not done so.⁶ He has offered no explanation for his noncompliance with rule 9.20(c).

C. Legal Conclusions

There is clear and convincing evidence that respondent wilfully violated the Supreme Court's November 6, 2009 disciplinary order directing his compliance with rule 9.20.⁷ In so doing, he did not comply with a court order in violation of section 6103, which makes it a cause for disbarment or suspension for an attorney to wilfully disobey or violate a court order requiring him or her to do or to forbear an act connected with or in the course of his or her profession, which he or she ought in good faith to do or forbear.

IV. FINDINGS AND CONCLUSIONS AS TO AGGRAVATING CIRCUMSTANCES

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,⁸ std. 1.2(b).)

Respondent's prior discipline record is an aggravating circumstance. (Std. 1.2(b)(i).) As

and transmitted a copy of the Supreme Court's order to respondent immediately after its filing.

Moreover, the court notes that the NDC in this matter does not have attached to it a copy of the Supreme Court's disciplinary order as required by rule 853, Rules Proc. of State Bar. In this instance, the court will consider this an insignificant error as the Supreme Court properly served its order on respondent and the order is referenced in the NDC. Accordingly, respondent has sufficient notice of the Supreme Court's order in this instance. However, the State Bar is cautioned to carefully comply with the rules in the future.

⁶ Pursuant to Evidence Code section 452, subdivision (d), the court judicially notices that its records still do not contain a rule 9.20(c) affidavit from respondent.

⁷ 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.)

⁸ Future references to standard or std. are to this source.

previously discussed, in S164475, the Supreme Court imposed discipline consisting of one year actual suspension for noncompliance with probation conditions. In aggravation, the court considered his prior disciplinary record (discussed below); multiple acts of misconduct; his continued failure to comply with probation conditions after the filing of the motion to revoke probation; and his lack of participation in the disciplinary proceedings.

Respondent has two additional records of discipline. (Std. 1.2(b)(i).)

1. Effective August 10, 1992, respondent was privately reprovved for not performing services competently; not communicating with client; and not withdrawing properly from employment. (State Bar Court case no. 90-0-16549.)

2. Effective September 26, 2008, respondent was ordered suspended for one year, stayed, and placed on probation for two years, and actually suspended for 30 days for not performing services competently; not communicating with client; and not withdrawing properly from employment in one client matter. (Supreme Court case no. S164475; State Bar Court case no. 06-0-15333.)

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).) He has demonstrated his contemptuous attitude toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the court to participate therein, a serious aggravating factor. (*In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 109-110.)

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.)

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 repeatedly been given the opportunity to do so. He did not participate in this proceeding and did not comply with rule 9.20(c). More importantly, respondent's noncompliance with rule 9.20 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 at p. 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 unexplained wilful disobedience of the Supreme Court 's order.

VII. DISCIPLINE RECOMMENDATION

It is hereby recommended that respondent GREGG LEE KAYS 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: September ____, 2010

LUCY ARMENDARIZ
Judge of the State Bar Court