

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of) Case Nos.: **11-C-11066-RAP; 11-N-16867**
) (Cons.)
BENJAMIN LOUIS PENNACCHIO,)
) **DECISION AND ORDER OF**
Member No. 252242,) **INVOLUNTARY INACTIVE**
) **ENROLLMENT**
A Member of the State Bar.)
_____)

Respondent Benjamin Louis Pennacchio (respondent) was convicted of violating Penal Code section 288.3, subdivision (a) (contact with a minor for a sexual offense), a felony, which may or may not involve moral turpitude or constitute other misconduct warranting discipline. Upon finality of the conviction, the review department issued an order referring this matter to the hearing department for a hearing and decision recommending the discipline to be imposed if the facts and circumstances surrounding the violations involved moral turpitude or other misconduct warranting discipline

In a separate proceeding, respondent was charged with failing to comply with California Rules of Court, rule 9.20 (rule 9.20) by not filing a declaration of compliance in conformity with the requirement of California Rules of Court, rule 9.20(c) (rule 9.20(c)).

Although respondent had actual knowledge of the conviction referral matter and the rule 9.20 matter, he failed to participate either in person or through counsel in the disciplinary

proceeding, and his default was entered. The State Bar filed a petition for disbarment under rule 5.85 of the Rules of Procedure of the State Bar.¹

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.²

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

FINDINGS AND CONCLUSIONS

Respondent was admitted to practice law in this state on December 7, 2007, and has been a member since then.

Procedural Requirements Have Been Satisfied

On October 27, 2010, respondent was convicted of violating Penal Code section 288.3, subdivision (a) (contact with a minor for a sexual offense). On May 16, 2011, the State Bar of California, Office of the Chief Trial Counsel (State Bar) transmitted evidence of finality of respondent's conviction to the review department. On June 9, 2011, the review department placed respondent on interim suspension, effective July 10, 2011, and ordered him to comply

¹ 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.

² 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).)

with California Rules of Court, rule 9.20. Thereafter, the review department issued an order referring case No. 11-C-11066 (the conviction referral matter) to the hearing department for a hearing and decision recommending the discipline to be imposed, if the facts and circumstances surrounding the violation involved moral turpitude or other misconduct warranting discipline.

On October 13 and November 1, 2011, the State Bar Court filed and properly served the NOH and NDC, respectively, on respondent by certified mail, return receipt requested, at his membership records address. The NOH and the NDC notified respondent that his failure to participate in the proceeding would result in a disbarment recommendation. (Rules 5.345 & 5.41.) The return receipt for the NOH was returned bearing a signature of a person with the first name of “Claudia” and an illegible last name. The NDC was returned to the State Bar, bearing a stamp, “Return to Sender-Unclaimed-Unable to Forward.” On November 2, 2011, the NDC was sent to respondent at his official membership records address by regular first-class mail. The NDC was not returned by the U.S. Postal Service.

Between November 1 and November 9, 2011, respondent and the State Bar Deputy Trial Counsel, who was assigned to this matter, communicated via telephone about the conviction referral matter and the rule 9.20 matter, and a potential resolution regarding those matters. Respondent, thereafter, signed a stipulation in connection with the rule 9.20 matter, stipulating to disbarment. That stipulation was received by the court on November 17, 2011, but was rejected.

Subsequently, the DTC and respondent had a phone conversation to discuss further settlement options. They also exchanged emails between December 5 and December 6, 2011. Respondent stated in his December 6, 2011 email to the DTC that she should draft a Stipulation to Disbarment that included an admission that the conduct underlying his criminal conviction matter involved moral turpitude. On December 6, 2011, the DTC sent an email to respondent

and attached a draft stipulation, relating to both the conviction referral matter and the rule 9.20 matter for respondent's signature, as he had requested.

After receiving no further communication from respondent, the DTC sent a letter to him on December 14, 2011, via email and U.S. mail, asking that he notify her of his intentions regarding the stipulation, reminding him as she had done in a previous communication that his response to the NOH had been due on November 7, 2011, and his response to the NDC in the rule 9.20 matter had been due on November 28, 2011. In her letter, the DTC warned respondent that if she did not hear from him or he failed to file a response to the NOH and NDC, she would move the court for his default on December 22, 2011.

On December 15, 2011, the court filed and properly served on respondent an order consolidating the conviction referral matter and the rule 9.20 matter for all purposes.

Respondent, however, did not communicate further with the DTC, did not enter a stipulation in the consolidated matter, and did not respond to the NOH or NDC. On December 22, 2011, the State Bar filed and properly served a motion for entry of respondent's default. The motion complied with all the requirements for a default, including a supporting declaration of reasonable diligence by the DTC declaring the additional steps taken to provide notice to respondent. (Rule 5.80.) The motion also 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 the motion and his default was entered in the consolidated matter on January 13, 2012. The order entering the default was served on respondent at his membership records address by certified mail, return receipt requested. Additionally, the court 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 the order, and he has remained inactively enrolled since that time.

Respondent also did not seek to have his default set aside or vacated. (Rule 5.83(C)(1) [attorney has 180 days to file motion to set aside default].) On July 19, 2012, the State Bar filed a petition for disbarment. As required by rule 5.85(A), the State Bar reported in the petition that: (1) it has had no contact with respondent since the default was entered; (2) there are no pending disciplinary investigations against respondent; (3) respondent has no prior record of discipline; and (4) the Client Security Fund has not made any payments resulting from respondent's misconduct. Respondent did not respond to the petition for disbarment or move to set aside or vacate the default. The case was submitted for decision on August 15, 2012.

The Admitted Factual Allegations Warrant the Imposition of Discipline

Upon entry of 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 contact with a minor for a sexual offense 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, subd. (E)(1)(d).)

Case No. 11-C-11066 (Conviction Matter)

Respondent was convicted of violating Penal Code section 288.3, subdivision (a) (contact with a minor for a sexual offense), as a result of his ongoing contacts and communications with a 14 year-old girl, whom he knew or should have known was a minor, and carried out with the intent to commit a sexual offense involving said minor. Respondent, who was 29 years old at the time of his arrest in March 2010, engaged in an online relationship with the 14-year old minor (Victim) for two to three months prior to his arrest. Respondent "chatted" online with the Victim for about two weeks. Victim then provided respondent with her cell phone number and they then

began to speak via phone and through text messages. According to Victim, she and respondent sent at least 100 text messages back and forth every day. Victim told the police that on more than one occasion respondent had told her that he loved her. Respondent and Victim met in-person a total of three times. During those meetings, Victim and respondent hugged and on at least one occasion respondent and Victim kissed on the mouth. During one meeting, respondent touched the top of Victim's buttocks down the back of her pants. Respondent claimed the touching was inadvertent and that his hand slipped while he was hugging Victim in his car.

Contact with a minor for a sexual offense is a crime that may or may not involve moral turpitude or other misconduct warranting discipline, depending upon the facts and circumstances surrounding the conviction. The court finds that the facts and circumstances surrounding respondent's conviction involve moral turpitude. Conviction of a crime involving moral turpitude is cause for discipline. (Bus. & Prof. Code, § 6101, subd. (a).)

Case No. 11-N-16867 (Rule 9.20 Matter)

Respondent willfully violated California Rules of Court, rule 9.20 (duties of disbarred, resigned or suspended attorneys) by not filing a declaration of compliance with rule 9.20 in conformity with the requirements of rule 9.20(c), thereby failing to timely comply with the provisions of a review department order that was filed on June 9, 2011, requiring compliance with California Rules of Court, rule 9.20.

Disbarment is Mandated under the Rules of Procedure

Based on the above, the court concludes that the requirements of rule 5.85(E) have been satisfied, and respondent's disbarment must be recommended. In particular:

- (1) the NOH and NDC were properly served on respondent under rule 5.25;
- (2) respondent had actual notice of the proceeding, as he and the DTC exchanged emails and spoke by telephone regarding the rule 9.20 matter and the criminal conviction matter and

about settlement options. Respondent knew that an NDC and NOH had been filed. Respondent had signed a stipulation to disbarment in connection with the rule 9.20 matter. After that stipulation was rejected by the court, respondent sent an email to the DTC requesting that she draft another stipulation for him to sign.

(3) the default was properly entered under rule 5.80; and

(4) respondent's conviction, and the factual allegations in the statement of facts and circumstances surrounding respondent's conviction and in the NDC, deemed admitted by the entry of the default, support a finding that respondent violated a statute, rule or court order that would warrant the imposition of discipline.

Despite adequate notice and opportunity, respondent failed to participate in this consolidated disciplinary proceeding. As set forth in the Rules of Procedure of the State Bar, the court must recommend his disbarment.

RECOMMENDATION

Disbarment

The court recommends that respondent Benjamin Louis Pennacchio be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys.

California Rules of Court, 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 and that the costs be 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 Benjamin Louis Pennacchio, State Bar Number 252242, 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. (Rule 5.111(D).)

Dated: November 9, 2012

RICHARD A. PLATEL
Judge of the State Bar Court