

FILED

JUN 30 2015 *SPC*

STATE BAR COURT  
CLERK'S OFFICE  
LOS ANGELES

# PUBLIC MATTER

## STATE BAR COURT OF CALIFORNIA HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case No.: 15-N-10508-DFM
	)	
<b>ALANA GERSHFELD,</b>	)	<b>DECISION INCLUDING DISBARMENT</b>
	)	<b>RECOMMENDATION AND</b>
<b>Member No. 196454,</b>	)	<b>INVOLUNTARY INACTIVE</b>
	)	<b>ENROLLMENT ORDER</b>
<u>A Member of the State Bar.</u>	)	

### INTRODUCTION

Respondent Alana Gershfeld (Respondent) is charged here with a single count of failing to comply with the Supreme Court order that she file a declaration of compliance with California Rules of Court, rule 9.20, within 40 days of the effective date of the Supreme Court order. The court finds culpability and recommends discipline as set forth below.

### PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on March 13, 2015.

On April 27, 2015, the initial status conference was held in the case. In attendance were Shane Morrison, representing the State Bar, and Respondent (appearing by telephone). At that time, the case was ordered by the court to commence trial on June 30, 2015; a pretrial conference was scheduled for June 22, 2015; and the parties were ordered to comply with the pretrial requirements of rules 1221-1225 of the Rules of Practice and submit pretrial conference



statements on or before June 15, 2015. During the status conference, the court addressed with Respondent her need to file a response to the NDC. Respondent assured the court that she could and would file a response within two weeks, by May 11, 2015. As a result, in the court's trial-setting order, the court specifically included the following provision: "THE COURT FURTHER ORDERS that Respondent needs to file a response to the Notice of Disciplinary Charges on or before May 11, 2015." This order was sent both to Respondent's official membership address and to an alternative address provided by Respondent during the course of the status conference.

Respondent did not file a response to the NDC by the May 11, 2015 date. As a result, on May 13, 2015, the State Bar filed a motion for entry of Respondent's default. The proof of service indicated that the motion had been sent to Respondent's official membership address, as shown on a reported printed on April 28, 2015. The motion was not sent to the alternative address provided by Respondent to the court and the State Bar during the April 27, 2015 status conference. Unknown to the State Bar attorney filing and serving the motion for entry of default on May 13, 2015, Respondent changed her official membership address to the alternative address on May 13, 2015, the very same day that the default motion was being served. As a result, on June 4, 2015, this court denied the motion for entry of default, based on the technical failure of the State Bar to have properly served it.

On June 15, 2015, more than a month after Respondent had assured the court that she would file a response to the NDC, Respondent filed her response to the NDC. In it she admitted that she had failed to timely file her compliance statement pursuant to rule 9.20(c), but she denied that her failure to do so was willful.

The pretrial conference was conducted on June 22, 2015, as previously scheduled. Despite this court's prior order, Respondent did not appear for it, either personally or by telephone. Nor did she file a pretrial conference statement, as she was required to do by the

Rules of Procedure, rule 5.101, and this court's trial-setting order of April 30, 2015. As a result, the court issued an order to show cause (OSC) on June 24, 2015, requiring Respondent to comply with her pretrial obligations by June 26, 2015, or risk having her evidence at trial excluded.

On June 24, 2015, Respondent filed a motion to continue the trial, based on her stated desire to hire counsel to defend her in this matter. On June 26, 2015, this court issued an order denying the requested continuance, based on the authority of *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 473, in which the Review Department concluded:

Counsel must treat a scheduled disciplinary hearing date as a definite court appointment. [Citations omitted.] A continuance requires a showing of good cause. In general, the need for a continued hearing must result from an emergency which occurs after the setting of the hearing date, which could not have been anticipated or avoided with reasonable diligence, and which can only be properly handled by granting a continuance.

In denying the requested continuance here, this court found that "Respondent has made no effort to explain why she did not secure counsel to represent her in this matter at an earlier date and with sufficient time for such counsel to be prepared to commence trial on June 30."

Trial commenced on June 30, 2015, as previously scheduled. Respondent appeared and participated. Prior to the commencement of the trial, the parties filed an extensive stipulation of uncontested facts, much of which is set forth below. The State Bar was represented at trial by Deputy Trial Counsel Shane Morrison. Respondent acted as counsel for herself.

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

The following findings of fact are based on Respondent's response to the NDC, the stipulation of undisputed facts previously filed by the parties, and the documentary and testimonial evidence admitted at trial.

**Jurisdiction**

Respondent was admitted to the practice of law in California on September 1, 1998, and has been a member of the State Bar at all relevant times.

**Case No. 15-N-10508 [Non-compliance with Rule 9.20, subd. (c)]**

On June 2, 2014, Respondent executed a Stipulation re Facts, Conclusions of Law and Disposition, in which she agreed to culpability and discipline in case No. 13-O-10587. Respondent's stipulated that, in a single client matter, she had willfully violated rule 3-110(A) of the Rules of Professional Conduct [failure to act with competence] and Business and Professions Code section 6068, subdivision (m) [failure to respond to client inquiries]. As part of the stipulated discipline, Respondent agreed that she would comply with rule 9.20 of the California Rules of Court (rule 9.20), including performing the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the eventual disciplinary order by the California Supreme Court in that matter. This stipulation was approved and recommended to the Supreme Court by the State Bar Court on June 17, 2014.

On October 22, 2014, the California Supreme Court filed an order in case No. S220474 (State Bar Court Case No. 13-O-10587) (disciplinary order), suspending Respondent from the practice of law for two years, stayed, and placing her on probation for three years subject to various conditions, including the condition that she be suspended from the practice of law for the first 90 days of her disciplinary probation. The disciplinary order specifically required Respondent to comply with rule 9.20 of the 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 disciplinary order.

On November 13, 2014, the Office of Probation sent a letter to Respondent's membership records address, wherein the Office of Probation reminded Respondent of the terms of the

disciplinary order. The letter specifically stated, among other things, that Respondent was required to file with the State Bar Court no later than December 31, 2014, the affidavit required by subdivision (c) of rule 9.20. Respondent received the letter at her membership records address.

On November 21, 2014, the disciplinary order became effective. As a result, Respondent was obligated to file the affidavit required by subdivision (c) of rule 9.20 with the State Bar Court no later than December 31, 2014. Respondent failed to file any affidavit required by the Supreme Court's order by that deadline.

On January 27, 2015, the Office of Probation sent a letter to Respondent at her membership records address, wherein the Office of Probation advised Respondent that she had failed to file the affidavit required by subdivision (c) of rule 9.20 with the State Bar Court by the December 31, 2014 deadline. The letter specifically stated, among other things, that if Respondent did not file a compliant 9.20 affidavit with the State Bar Court she would be referred to the Office of the Chief Trial Counsel, which could result in the imposition of additional discipline. Respondent received the letter at her membership records address. On the same day, January 27, 2015, the Office of Probation sent an email to Respondent's membership records email address, attaching copies of the letters sent by the Office of Probation to Respondent on January 27, 2015, and November 13, 2014. Respondent has stipulated, and the court finds, that she received this email.

On January 28, 2015, Respondent sent an email to the Office of Probation, wherein she indicated that she would be out of the county until February 20, 2015, and requested an appointment to meet with her probation deputy.

On January 28, 2015, the Office of Probation sent an email to Respondent, advising her that she could set up an appointment with her probation deputy but that Respondent's rule 9.20

compliance matter would still be referred to the Office of the Chief Trial Counsel for further discipline. Respondent received the email.

As previously noted above, the NDC in this matter was filed on March 13, 2015; the initial status conference was held on April 27, 2015; and Respondent was obligated to file a response to the NDC on or before May 11, 2015.

On May 11, 2015, Respondent sought for the first time to comply with her obligation to comply with rule 9.20. On that date, she filed with the Clerk of the State Bar Court a document entitled "RULE 9.20 COMPLIANCE DECLARATION," wherein Respondent averred under penalty of perjury that, as of the date upon which the disciplinary order was filed, she had no clients. Because Respondent only responded to the first of five inquiries in the compliance declaration form, the document was silent as to whether Respondent had performed the acts specified in subdivisions (a)(2) through (4) of rule 9.20, and/or whether the circumstances were such that Respondent could not perform the acts specified in those provisions of rule 9.20. Hence, this first attempted compliance statement failed to satisfy Respondent's obligations under rule 9.20.

On June 4, 2015, more than five months after the deadline for compliance had passed, more than four months after Respondent had been reminded on January 27, 2015, of her obligation to comply with rule 9.20, nearly three months after the NDC had been filed in this matter, and less than a month before the scheduled trial of it, Respondent finally filed with the Clerk of the State Bar Court a Rule 9.20 Compliance Declaration that complied with the requirements of rule 9.20(c).

**Count 1 - Rule 9.20(c) [Failure to Obey Rule 9.20]**

A member, ordered by the Supreme Court to comply with rule 9.20, subdivision (c), must file with the Clerk of the State Bar Court, within 40 days after the effective date of the Supreme

Court's order, an affidavit showing that he or she has fully complied with the provisions of the rule. Respondent was required to have filed her rule 9.20(c) affidavit no later than December 31, 2014. She did not file any affidavit of compliance by that deadline. Worse, despite the facts that Respondent was reminded by the Office of Probation in January 2015 of her need to file the compliance declaration and was served with the NDC in this matter based on her failure to comply with the rule 9.20 order, she made no effort to comply with the Supreme Court's order until May 11, 2015, and ultimately did not comply with the order until June 2015. This dilatory conduct by Respondent constitutes a willful violation by her of rule 9.20 and the Supreme Court's Order.

Respondent testified at trial that her failure to file the required compliance statement prior to December 31, 2014, resulted from her failure to have regular access to mail sent to her official membership records address, because she was frequently out of the country. While she argues that this lack of access to her mail prevents her non-compliance from being treated by this court as willful, the State Bar argues, and this court agrees, that the law is to the contrary. (See, e.g., *Dahlman v. State Bar* (1990) 50 Cal.3d 1088, 1093; *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1185-1186; *Powers v. State Bar* (1988) 44 Cal.3d 337, 341-342.)

### **Aggravating Circumstances**

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct, <sup>1</sup> std. 1.5.) The court finds the following with respect to aggravating circumstances.

#### **Prior Discipline**

Respondent has been disciplined on two prior occasions.

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<sup>1</sup> All further references to standard(s) or std. are to this source.

As previously noted, Respondent was disciplined by the California Supreme Court, effective November 21, 2014, in case No. 13-O-10587. In that matter, she was suspended from the practice of law for two years, stayed, and placed on probation for three years subject to various conditions, including the condition that she be suspended from the practice of law for the first 90 days of her disciplinary probation. In that matter, Respondent stipulated that, in a single client matter, she had willfully violated rule 3-110(A) of the Rules of Professional Conduct [failure to act with competence] and Business and Professions Code section 6068, subdivision (m) [failure to respond to client inquiries].

On November 19, 2012, in State Bar case Nos. 11-O-18814 and 12-O-12217, Respondent was suspended for one year, stayed, and placed on probation for three years subject to various conditions, including the condition that she be suspended from the practice of law for the first 90 days of her disciplinary probation.<sup>2</sup> This discipline arose out of two client matters and included violations of Rules of Professional Conduct rules 3-110(A) [failure to act with competence] [two counts] and 4-100(B)(4) [failure to pay client funds promptly] and Business and Professions Code section 6068, subdivision (m) [failure to respond to client inquiries]. In that first disciplinary proceeding, Respondent also stipulated to both culpability and discipline, including an obligation by her to comply with rule 9.20. Pursuant to that obligation, Respondent filed a her 9.20 compliance statement with this court on January 28, 2013. However, Respondent also stipulated in the first disciplinary matter, and the Supreme Court subsequently ordered, that Respondent take and present proof of passing the Multistate Professional Responsibility Examination within one year after the effective date of that discipline. To date, Respondent has failed to comply with that obligation and, after failing the examination on her first attempt, has

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<sup>2</sup> Because the misconduct in both the first and second disciplinary matters occurred during the same time period, the discipline in the second matter was formulated using the analysis set forth in *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602.



not sought to take the examination again. As a result, she has been, and remains, enrolled administratively inactive.

### **Mitigating Circumstances**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with regard to mitigating factors.

#### **No Harm**

Respondent is entitled to some mitigation credit because her misconduct caused no actual harm to the client or person who is the object of the misconduct. (Std. 1.6(c).)

#### **Cooperation**

Respondent entered into a brief stipulation of facts, but did not admit culpability for failing to comply with her Rule 9.20 obligation. For this cooperation, she is entitled to mitigation credit, albeit limited. (Std. 1.6(e); *In the Matter of Esau* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 131, 137; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [credit for stipulating to facts but “very limited” where culpability is denied].)

### **DISCUSSION**

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*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.) Although the standards are not binding, they are to be afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.)

Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the court considers relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.7(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

The standard for assessing discipline for a violation of rule 9.20 is set out, in the first instance, in the rule itself. Rule 9.20(d) states, in pertinent part: “A suspended member’s willful failure to comply with the provisions of this rule is a cause for disbarment or suspension and for revocation of any pending probation.” Respondent’s willful failure to comply with rule 9.20 is extremely serious misconduct for which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) That said, both this court and the Supreme Court have, on occasion, imposed lesser discipline in situations where there has been timely compliance with subdivision (a) and the violation merely arises from a late submission of the compliance affidavit mandated by subdivision (c). (See, e.g. *Shapiro v. State Bar* (1990) 51 Cal.3d 251; *Durbin v. State Bar* (1979) 23 Cal.3d 461; *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192; *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State

Bar Ct. Rptr. 527.) In those cases, however, the courts emphasized the respondent's good faith, the presence of significant mitigating circumstances, and the absence of substantial aggravating circumstances. Respondent does not fall within the aegis of the above cases.

In addition, Standard 1.8(b) provides that disbarment is appropriate in instances where the respondent has had two or more prior records of discipline, including a period of actual suspension, unless the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct. This will be Respondent's third discipline. Neither of the above two exceptions applies to Respondent.

As discussed above, Respondent's failure to comply with rule 9.20 is not the only instance during the last year where she has failed during the disciplinary process to conform her conduct to that required of a member of the bar. That, coupled with her repeated failures to comply with her procedural and court-ordered obligations in this matter, make clear that a recommendation of disbarment is both necessary and appropriate to protect the public, the profession, and the courts. (*In the Matter of Snyder* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 593, 599-601.)

## **RECOMMENDED DISCIPLINE**

### **Disbarment**

The court recommends that respondent **Alana Gershfeld**, Member No. 196454, be disbarred from the practice of law in the State of California and that her name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

### **Rule 9.20**

The court further recommends that Respondent be ordered to comply with 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 calendar days, respectively, after the effective date of the Supreme Court order in this matter.


**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 such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. Respondent must also reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds, and such payment is enforceable as provided under Business and Professions Code section 6140.5.

**ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **Alana Gershfeld**, Member No. 196454, be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 5.111(D)(1).)<sup>3</sup>

Dated: June 30, 2015.

  
**DONALD F. MILES**  
Judge of the State Bar Court

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<sup>3</sup> An inactive member of the State Bar of California cannot lawfully practice law in this state. (Bus. & Prof. Code, § 6126, subd. (b); see also Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to practice law, or to even hold himself or herself out as entitled to practice law. (*Ibid.*) Moreover, an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)

**CERTIFICATE OF SERVICE**

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on June 30, 2015, I deposited a true copy of the following document(s):

**DECISION INCLUDING DISBARMENT RECOMMENDATION AND INVOLUNTARY INACTIVE ENROLLMENT ORDER**

in a sealed envelope for collection and mailing on that date as follows:

- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**ALANA GERSHFELD  
1155 N LA CIENEGA BLVD # 409  
WEST HOLLYWOOD, CA 90069**

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

**SHANE MORRISON, Enforcement, Los Angeles**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on June 30, 2015.



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Tammy Cleaver  
Case Administrator  
State Bar Court