PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed November 6, 2014

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	**Case No. 11-H-16868**
	)	
MICHAEL R. CARVER,	)	**OPINION**
	)	
A Member of the State Bar, **No. 203925**.	)	
	)	

I. SUMMARY

This is a default case stemming from respondent Michael R. Carver's misdemeanor convictions in 2008 for driving without a license and resisting arrest after he failed to come to a full stop at an intersection. As a result of these convictions, this court imposed a public reproval with certain conditions. Carver failed to comply with those conditions, and he did not respond to a Notice of Disciplinary Charges (NDC) alleging his non-compliance. As a consequence, the hearing judge entered Carver's default and enrolled him inactive beginning February 18, 2012 and continuing to the present. Carver sought relief from the default in the hearing department on three occasions, and in each instance, his request was denied. After the third denial, Carver filed a petition for interlocutory review, which we denied, finding no error of law or abuse of discretion.

The Office of the Chief Trial Counsel of the State Bar (OCTC) then filed a petition for disbarment under the new default rules, as amended in 2011.[1] The hearing judge granted the

[1] Unless otherwise noted, all further references to rules are to the Rules of Procedure of the State Bar, adopted effective January 1, 2011, which were in effect at the time of the hearing

petition over Carver's opposition, and Carver again petitioned for interlocutory review. We granted his second petition, finding that the hearing judge erred in concluding that disbarment was mandatory in Carver's case and we "declined to interpret the new rules as mandating disbarment after a respondent files a response to the petition for disbarment." We believed that since Carver had participated in the proceedings, the hearing judge should have considered what, if any, relief was appropriate under the new default rules before granting the petition for disbarment. We left Carver's default in place and remanded the case to the hearing judge to exercise his discretion in considering the appropriate relief. Carver remained on inactive status.[2]

Upon remand, the hearing judge indicated that he would not set aside the default, although in effect, he did so for the purpose of holding a limited hearing as to Carver's culpability, mitigation, and aggravation. However, Carver was not permitted to participate in the hearing. Such actions are authorized in attorney discipline cases under the default rules. The hearing judge also reconsidered the appropriate discipline in light of the evidence adduced at that hearing. Upon finding that Carver failed to satisfy his reproval conditions and that his misconduct was aggravated by four factors, including dishonesty, the judge recommended that Carver be suspended from the practice of law for two years and until he proves his rehabilitation in accordance with standard 1.2(c)(1) of the Rules of Procedure of the State Bar, title IV,

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below. The default rules were subsequently amended and renumbered, effective July 1, 2014, but these recent revisions do not affect the analysis herein.

[2] We recognize that our order of December 19, 2012 may have engendered confusion, owing in part to the brevity of the heading, which stated: "Rule 5.85 is Not Mandatory: Hearing Judge has Discretion to Order Appropriate Relief After Respondent files Response to Petition for Disbarment."

To clarify, the heading should have read: "Rule 5.85 Is Not Mandatory *Insofar As* a Hearing Judge has Discretion to Order Appropriate Relief *When* a Respondent Files a Response to a Petition for Disbarment." We note that the text of our order is consistent with this latter heading.

Standards for Attorney Sanctions for Professional Misconduct.[3] In error, however, the hearing judge credited Carver's period of inactive enrollment against the recommended period of actual suspension.

Carver now appeals and asks us to vacate his default in its entirety and remand the matter for a new hearing or, alternatively, impose no more than a stayed suspension. OCTC does not seek review.[4] Based on our independent review (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's decision to deny the petition for disbarment and effectively set aside the default for the limited purpose of holding a hearing. Based on the record before us, we adopt his findings as to culpability, mitigation, and all but one factor in aggravation. However, case law does not support a two-year suspension for Carver's misconduct in violating his reproval conditions. At the present time, Carver has been on suspension for more than two and one-half years. We conclude that a 90-day actual suspension with conditions and a two-year probationary period are more appropriate under the case law, with no credit given for Carver's inactive enrollment.

II. BACKGROUND

A. Prior Disciplinary Proceeding

Carver has been a member of the State Bar since 1999. In 2008, he was driving his car when he was pulled over by a police officer for failing to come to a full stop. Ignoring the

[3] On January 1, 2014, the standards were revised and renumbered. Since this case was submitted for ruling in 2014, we apply the new standards. All further references to standards are to the new standards, and references to the earlier version will be designated former standards.

[4] However, OCTC contends we should dismiss the appeal because Carver remains in default and is not permitted to appeal, citing rule 5.82 of the Rules of Procedure of the State Bar. Under rule 5.82(3), we have the power to allow Carver to participate further in this disciplinary proceeding, and we do so here in permitting him to seek review of the hearing judge's June 26, 2013 decision, which fully disposed of the matter. (See *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 106 [authorizing plenary review of decisions and orders fully disposing of proceedings in hearing department following default].)

officer's requests that he remain in his car, Carver was arrested and convicted of driving without a license and resisting an officer.

On January 6, 2011, we referred this matter to the hearing department for a determination of whether the facts and circumstances surrounding the misdemeanors involved moral turpitude or other misconduct warranting discipline. OCTC and Carver stipulated that the misconduct did not involve moral turpitude and that it was mitigated by a lack of prior discipline. There was no aggravation. The parties further stipulated that a public reproval with conditions was warranted. In April 2011, the hearing judge signed an order imposing the public reproval with conditions, including, inter alia, that Carter must: (1) contact the Office of Probation within 30 days and schedule a meeting with a probation deputy to discuss his probation terms; (2) submit written quarterly reports; and (3) submit with his quarterly reports a statement under penalty of perjury that he was in compliance with all conditions of his probation in the criminal matter.

B. Current Proceeding

Carver did not timely comply with the conditions of his reproval. On December 1, 2011, OCTC filed and served an amended NDC, charging him with a violation of rule 1-110 of the Rules of Professional Conduct.[5] The NDC was served on Carver by certified mail, return receipt requested, at his official membership records address, which was a Postal Annex mailbox. (Rule 5.25(B).) The NDC advised Carver in bold-face, capital letters that failure to respond to the charges would result in the entry of his default, preclude his further participation in the proceedings, and result in an order recommending disbarment should he fail to have his default vacated or set aside.

On December 8, 2011, the court filed and served Carver by first-class mail at his membership records address with a Notice of Assignment and Notice of Initial Status

[5] Rule 1-110 of the Rules of Professional Conduct states: "A member shall comply with conditions attached to public or private reprovals. . . ."

Conference, which was set for January 9, 2012. Shortly before the status conference was to commence, the OCTC prosecutor sent Carver an email stating: "This is a reminder that the initial in-person status conference in your matter is scheduled for today @9:45 before Judge Miles." Carver responded: "What is this about? You send me an email at 9 AM in Tustin for a hearing at 9:45." The prosecutor responded that she was merely extending a courtesy reminder as the court had already served him with notice of the hearing.

Carver then emailed: "I have a couple of unopened letters. A Postal Annex employee signed for them without my consent while I was out of town. I was going to mail them back to the source. Whoever thinks I got proper notice of something is mistaken."

Carver did not appear at the January 9th status conference. The OCTC prosecutor then sent a follow-up email the same morning, advising him that the matter had been heard in his absence and that the judge had ordered pretrial statements to be filed by March 5, 2012, and a trial date had been set for March 20th. She also alerted Carver that the hearing judge expected OCTC to file a default motion if Carver did not respond to the NDC, and she asked him if he intended to file a response. Carver replied: "I haven't seen a complaint. How about I get properly served?" The OCTC prosecutor responded that Carver had indeed been properly served at his official membership address, but she inquired: "Is there an additional address that you would like to provide for future pleadings?" She also followed up immediately by emailing a copy of the NDC to Carver.

On January 10th, the OCTC prosecutor warned Carver via email that she would file a default motion if she did not receive his response by January 12, 2012. Also on January 10th, the hearing judge served Carver with an order setting a March 20, 2012 trial date.

Carver took no action. On January 17, 2012, OCTC filed a motion for entry of default, served on Carver by certified mail, return receipt requested, at his membership records address.

The motion advised Carver in bold-face, capital letters that should he fail to respond, the court would enter his default, deem the factual allegations in the NDC admitted, preclude his further participation in the proceedings, and recommend disbarment if he failed to have his default vacated or set aside.

Carver did not file an opposition to the motion or a response to the NDC. The hearing judge granted OCTC's motion and entered Carver's default on February 2, 2012. Pursuant to this order, which was served on Carver, the judge placed him on involuntary inactive enrollment, effective February 18, 2012, in accordance with rule 5.82(1) of the Rules of Procedure of the State Bar and section 6007, subdivision (e)(1) of the Business and Professions Code. Carver remains on inactive enrollment pursuant to this order.

On April 2, 2012 — four months after he was served with the NDC, two months after his default was entered, and two weeks after his trial date had passed — Carver finally responded by filing a "Petition" seeking to set aside the default.[6] He did not, however, submit a proposed response to the NDC as required by rule 5.83(E). The hearing judge denied the petition on April 17, 2012, finding that Carver failed to establish good cause. In a second attempt to seek relief, Carver filed an amended petition on April 26, 2012, this time including a proposed verified response to the NDC. On May 8, 2012, the hearing judge again denied Carver's petition, finding that the NDC had been properly served, that Carver also had actual notice of the pendency of the proceedings as of January 9, 2012, and that none of the stated grounds for relief justified his delay in waiting until after the trial date to file his petition.

Carver sought relief for a third time on May 29, 2012, when he filed a request for reconsideration of the hearing judge's prior default order. The hearing judge again denied the request, finding that Carver had failed to show relief was justified. Carver sought interlocutory

[6] Although identified as a "petition," rule 5.83(C) provides for relief upon the filing of a motion to set aside a default.

review. We summarily denied his petition on July 18, 2012, finding no error of law or abuse of discretion by the hearing judge. OCTC then filed a petition for disbarment after default on August 10, 2012, which Carver opposed. The hearing judge granted OCTC's petition and filed a decision recommending Carver's disbarment.

Carver filed a second petition for interlocutory review, which we granted. By order dated December 19, 2012, we concluded that the hearing judge committed an error of law because Carver had filed a response to the petition and the record did not indicate that the judge had first considered what, if any, relief was appropriate under the new default rules before recommending Carver's disbarment. We reversed the hearing judge's order and remanded the matter for a determination of the appropriate relief, if any, to be granted. However, we declined to vacate the default or return Carver to active status.

On remand, the hearing judge denied OCTC's petition for disbarment, concluding that Carver's "multiple attempts to have his default set aside show that he has not abandoned his law license" and that Carver had "participated in his prior discipline case and the alleged misconduct in this case would not alone warrant disbarment. Disbarring [Carver] under the circumstances presented [] would be based solely on his default. Such an outcome would not advance the ends of justice." The hearing judge then held a hearing as to culpability, aggravation, and mitigation. As the rules of procedure permit in attorney discipline cases, the judge did not afford Carver full relief from default and ordered that the facts alleged in the NDC were deemed admitted. He also prohibited Carver from participating in the hearing, and ordered that he remain on inactive enrollment. In the same order, the judge notified OCTC under section 455 of the Evidence Code that he was considering taking judicial notice of the pleadings and documents in Carver's court file as potential evidence of bad faith, dishonesty, and lack of candor and cooperation in aggravation.

On June 26, 2013, the hearing judge filed his decision finding Carver culpable as charged of violating rule 1-110 of the Rules of Professional Conduct. The judge also found extensive aggravation with no mitigation, and recommended that Carver be suspended for two years and until he provided proof of his rehabilitation. The judge recommended Carver receive credit for his period of actual suspension from April 2, 2012, the date he first sought relief from the entry of default. Carver filed a request for review on July 30, 2013.

III. ANALYSIS

A. Procedural Issues Relating to Default

The availability and extent of relief from default have been a source of contention and confusion in this case. This is not surprising, given that the consequences of default changed dramatically when the Rules of Procedure of the State Bar were amended in 2011. Prior to 2011, the rules permitted imposition of a discipline less than disbarment even if the defaulting attorney did not seek relief. (See former rule 200 et seq. of the Rules of Procedure of the State Bar.) These rules frequently resulted in multiple proceedings against members who had essentially abandoned their law licenses and never sought to participate in the proceedings.

In order to obviate these multiple proceedings by non-responding members, the new rules require that when a member's default has been entered *and* the member fails to have it set aside or vacated, OCTC *must* file a petition seeking the member's disbarment under rule 5.85(A). In turn, a hearing judge *must* grant the petition and recommend disbarment *provided* (1) the member has failed to file a response to the petition for disbarment *or* (2) the court has denied a motion to set aside or vacate the default. (Rule 5.85(E)(1).)[7]

What should not be overlooked, however, is that the new rules also provide a defaulted member with various opportunities to seek relief both before and after OCTC has filed a petition

[7] We wish to make clear that any interpretation of our December 19, 2012 interlocutory order to the contrary would be incorrect.

for disbarment.[8] Moreover, the hearing judge retains wide discretion to fashion appropriate relief under the new rules, as the judge *may*: (1) vacate the default subject to appropriate conditions; (2) set aside the default for limited purposes only; or (3) deny the motion if the judge decides the member has not made the required showing. (Rule 5.83(H).) Because the effects of a default may deny a disposition of the case on the merits irrespective of the charges or potential mitigation, we closely scrutinize orders denying relief from default and "any doubts . . . must be resolved in favor of [the member seeking relief]." (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233; *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 215.) The hearing judge may require "very slight" evidence to justify it, as long as the granting of such relief will not cause prejudice. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 ["when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default"].)

Carver contends the hearing judge erred on remand by again refusing to set aside his default in its entirety. He is mistaken — the hearing judge acted according to the new default rules and well within his discretion when he, in essence, set aside the default for the limited purpose of conducting a hearing on culpability, aggravation, and level of discipline. To the extent Carver seeks to have his entire default set aside, we decline to do so. We have twice considered whether the judge abused his discretion in refusing to set aside the default in its entirety and we twice refused to set it aside. We see no basis for considering the issue again.

[8] The opportunities for relief include: (1) a stipulation to vacate default that must be approved by the hearing judge (rule 5.83(A)); (2) a timely motion to set aside default (rule 5.83(C)); (3) a late-filed motion to set aside default (rule 5.83(D)); and (4) a motion to set aside default filed in response to petition for disbarment (rule 5.85(D)). Also, an improperly entered default may be vacated by motion of a party or on the Court's own motion at any time while the State Bar Court has jurisdiction over the matter. (Rule 5.83(C).)

B. Culpability for Violation of Rule 1-110 of the Rules of Professional Conduct

The hearing judge properly deemed as admitted the factual allegations in the NDC in accordance with rule 5.82(2).[9] The admitted allegations show Carver received the reproval order in his prior case, which contained certain conditions, and he then violated those conditions. First, Carver failed to timely contact his probation officer by meeting with the officer approximately two months after the deadline. Second, Carver failed to file the required quarterly reports. Third, Carver failed to report his compliance with the probation conditions in his underlying criminal matter. We affirm the hearing judge's finding that OCTC established by clear and convincing evidence[10] that Carver failed to comply with conditions attached to a public reproval in violation of rule 1-110 of the Rules of Professional Conduct.

C. Significant Aggravation and No Mitigation

The appropriate discipline is determined in light of the relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Although Carver was properly precluded from offering evidence in mitigation in accordance with rule 5.82(3),[11] OCTC has the burden of proving aggravation by clear and convincing evidence under standard 1.5.

We affirm the hearing judge's finding that Carver's 2011 public reproval constitutes an aggravating circumstance under standard 1.5(a). His prior misconduct was recent and his

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[9] Rule 5.82(2) provides that when the court enters a default, the facts alleged in the NDC will be deemed admitted.

[10] Clear and convincing evidence must leave no substantial doubt and be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

[11] Rule 5.82(3) provides: "except as allowed by these rules or ordered by the Court, the member will not be permitted to participate further in the proceeding and will not receive any further notices or pleadings unless the default is set aside on timely motion or by stipulation. . . ."

defiance of a police order demonstrates a lack of respect for the rule of law, which reflects negatively on the legal profession.

The hearing judge also correctly found that Carver committed multiple acts of misconduct by violating three separate conditions of his public reproval, which aggravate this case. (Std. 1.5(b); *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 529 [failure to cooperate with probation monitor and failure to timely file probation reports constituted multiple acts of misconduct].) However, since these violations fall within a single reproval order, we give only modest weight to this factor. (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177.)

Of far greater significance is the hearing judge's proper finding in aggravation that Carver acted with dishonesty in his efforts to set aside his default. (Std. 1.5(d).) More than once, Carver misrepresented to OCTC the facts underlying his untimely response to the NDC and his lack of notice of these proceedings. His assertion that some misrepresentations were merely "technically inaccurate" underscores his inability to understand the high degree of honesty expected of attorneys practicing in this state. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647 ["specious and unsupported arguments in an attempt to evade culpability" reveal lack of appreciation for obligations as attorney].)

We do not adopt the hearing judge's finding that Carver's failure to file his motion to set aside his default until after the original trial date was evidence that he did not cooperate with OCTC. (Std. 1.5(f) [aggravating circumstance may include significant harm to the administration of justice].) He already has faced adverse consequences due to his failure to file his motion for relief from default, and we find it would be unjust to ascribe yet another sanction for this same conduct.

Finally, we adopt the hearing judge's finding that Carver is not entitled to mitigation.

IV. DISCIPLINE ANALYSIS

We turn now to the appropriate level of discipline. The primary purpose of attorney discipline is not to punish an erring attorney but to protect the public, the profession, and the courts. (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 626.) Standard 2.10 applies to violations of conditions attached to discipline. It provides: "Actual suspension is appropriate for failing to comply with a condition of discipline. The degree of sanction depends on the nature of the condition violated and the member's unwillingness or inability to comply with disciplinary orders."

We are concerned about Carver's prior probation violations and his disregard of his duty as an attorney to participate in these proceedings until after his default was entered. His unwillingness or inability to comply with the conditions imposed by a Supreme Court order "demonstrates a lapse of character and a disrespect for the legal system that directly relate to an attorney's fitness to practice law and serve as an officer of the court. [Citation.]" (*In re Kelley* (1990) 52 Cal.3d 487, 495.) Moreover, the aggravation in this case — particularly Carver's disingenuous and manipulative conduct in seeking to vacate his default — is significant.

Nevertheless, a two-year actual suspension is not supported by the case law, even for defaulting attorneys.[12] Carver argues that this discipline is "grossly excessive," relying on three default cases for support. (*Conroy v. State Bar* (1990) 51 Cal.3d 799 [member in default actually suspended for 60 days for violating reproval condition]; *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 [member in default actually suspended for 90 days for failing to comply with two conditions attached to private reproval]; *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813 [member in default publicly reproved for

[12] We disagree with OCTC's suggestion that disbarment is the presumptive discipline here. Carver's default was set aside for the limited purpose of conducting a discipline hearing, and neither the current default rules nor the discipline standards support presumptive disbarment under such circumstances.

failure to comply with conditions attached to private reproval].) We agree. The discipline for probation violations has ranged from 90 days to one year of actual suspension.[13] Based on the level of culpability for Carver's public reproval violations, we find that a 90-day period of actual suspension with conditions and a lengthy probation is consistent and appropriate discipline. It is worth noting that Carver could be disbarred if he violates his probation in the future. (Std. 1.8(b) [disbarment for third case unless compelling mitigation clearly predominates].)

We find the hearing judge erred in recommending that Carver receive credit toward his period of actual suspension for the time he has been on involuntary inactive enrollment. Following entry of Carver's default, the hearing judge correctly ordered his involuntary inactive enrollment effective February 18, 2012, pursuant to section 6007, subdivision (e). Neither the statute nor the case law, however, authorizes the State Bar Court to credit a member's period of involuntary inactive enrollment, under subdivision (e), toward a period of actual suspension. (Compare § 6007, subd. (e), with § 6007, subd. (d)(3), wherein the legislature expressly provides credit for involuntary inactive enrollment.) Carver is therefore not entitled to receive credit toward his period of actual suspension for the time he has been inactive.

[13] See *In the Matter of Parker* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 747 (90-day actual suspension where attorney twice failed to submit satisfactory evidence of compliance with approved substance abuse recovery program; violation breached condition directly related to attorney's one prior record of discipline resulting from his DUI conviction); *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302 (six-month suspension for violating probation condition to pay restitution directly related to attorney's underlying misconduct; aggravated by two prior records of discipline and no mitigation); *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81 (one-year suspension where attorney's prior discipline record was misconduct underlying probation revocation proceeding and violations included failure to timely file first quarterly report and make restitution).

V. JURISDICTIONAL AND CONSTITUTIONAL CHALLENGES

Carver asserts this matter should be dismissed due to various jurisdictional and constitutional deficiencies.[14] We find that his assertions do not merit dismissal.

A. Carver's Jurisdictional Challenge Based on Improper Service Is Unavailing

Carver contends this court is without jurisdiction to hear this matter because he did not personally receive service of the NDC, the motion for entry of default, and the default order. These pleadings were sent to Carver's current address listed on his official membership records and were received by an employee of the Postal Annex.

Actual notice is not a necessary element of proper service in disciplinary proceedings, and service is deemed completed upon mailing. (Rules 5.25(B), 5.26(C) and (F); Bus. & Prof. Code, § 6002.1, subd. (c); *Middleton v. State Bar* (1990) 51 Cal.3d 548, 558-559 [under rules applicable to disciplinary proceedings, service is completed upon mailing; actual receipt not required to effect service]; *Baca v. State Bar* (1990) 52 Cal.3d 294, 303 [service of notice of entry of default complete where State Bar records showed notice mailed to member at address shown on official membership records].) Moreover, Carver admitted that he had actual notice of these proceedings on January 9, 2012 — *before* OCTC filed the motion for entry of default.

B. Carver's Due Process Challenges to the Proceedings on Remand Are Meritless

Carver claims that the hearing judge abridged his due process rights on remand by: (1) denying him the opportunity to participate in the proceedings; (2) prohibiting him from submitting evidence on issues of culpability and mitigation; and (3) improperly taking judicial notice of his own files as evidence of aggravation without giving him an opportunity to object.

As we noted *ante*, the hearing judge on remand acted within his discretion in granting only limited relief from Carver's default. As such, the judge properly deemed the allegations of

[14] Those jurisdictional and constitutional issues not specifically addressed herein have been considered and rejected as lacking in factual and/or legal support.

the NDC admitted and prohibited Carver's further participation in the proceedings, including submission of evidence regarding his culpability and factors in mitigation. (Rule. 5.82(2) and (3); *In the Matter of Morone*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 211 [the "legal effect of the entry of default was to admit the allegations" set forth in NDC and to preclude further participation].)

Carver cannot now be heard to complain about the consequences of his default since he willfully allowed it to be entered, having repeatedly failed to respond to OCTC and the court despite receiving notice of the charges against him and warnings of the adverse consequences of failing to answer. He therefore waived his right to participate in the proceedings, including the right to make evidentiary objections. (See *Bowles v. State Bar* (1984) 48 Cal.3d 100, 108-109 ["[P]etitioner's absence from the hearing was the result of his own indifference to and disregard of his statutory duties; any hearsay objection must therefore be deemed waived"].)

C. Carver Incorrectly Argues the Hearing Judge Found Uncharged Misconduct

Carver also incorrectly asserts that the hearing judge's finding of dishonesty was improper because it was tantamount to uncharged misconduct in aggravation. The hearing judge properly found that dishonesty *surrounded* Carver's misconduct due to his misleading statements in his efforts to set aside his default. Therefore, this finding does not constitute uncharged misconduct.

D. Carver's Efforts to Disqualify the Hearing Judge Are Without Merit

Carver contends that the hearing judge should have been disqualified because he failed to specifically address the allegations in Carver's two verified statements of disqualification. We disagree. The hearing judge adequately responded to the motions to disqualify him in his answers, and another hearing judge then properly considered and denied the motions. Carver failed to show that the hearing department acted arbitrarily or committed legal error, and he

further failed to make any showing of prejudice. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [absent actual prejudice, party not entitled to relief from hearing judge's procedural ruling]; *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695].)

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Michael R. Carver be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. Carver must be suspended from the practice of law for a minimum of the first 90 days of the period of his probation.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.

4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if Carver has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Carver be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VIII. CALIFORNIA RULES OF COURT, RULE 9.20

We do not recommend that Carver be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule because he has not been in practice for any period during the past two years.

IX. COSTS

We further recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

EPSTEIN, J.

WE CONCUR:

PURCELL, P. J.

McELROY, J.*

*Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F)