

**STATE BAR COURT  
REVIEW DEPARTMENT**

In the Matter of

**JOSEPH ANTHONY MESCE**

A Member of the State Bar

No. 93-TE-16421

Filed November 9, 1993; as modified, January 12, 1994

**SUMMARY**

The State Bar sought respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6007 (c) based on his guilty plea to misdemeanor contempt arising out of a missed court appearance; two Vehicle Code violations; the evidence produced at his preliminary hearing on felony charges of possession, possession for sale, and transportation of methamphetamine, as well as a misdemeanor charge for being under the influence of a controlled substance; and the pendency of criminal charges against him for attempted bribery of a witness and soliciting perjury. Focusing exclusively on the issue of threat of harm to clients, the hearing judge found insufficient evidence of potential harm to justify inactive enrollment. (Hon. Jennifer Gee, Hearing Judge.)

The State Bar moved for relief from the hearing judge's decision. The review department found that the evidence from the preliminary hearing on the drug charges demonstrated a reasonable probability that the State Bar would prevail in a disciplinary matter based on those charges, and that respondent's misconduct demonstrated a clear likelihood of harm both to his clients and to the public. Concluding that the hearing judge erred in failing to consider the substantial threat of harm to the public and in finding inadequate evidence of client harm, the review department ordered respondent enrolled inactive.

**COUNSEL FOR PARTIES**

For Office of Trials: Julie W. Stainfield

For Respondent: No appearance

**HEADNOTES**

**[1 a, b] 130 Procedure—Procedure on Review**

**139 Procedure—Miscellaneous**

Review department's general practice is not to publish opinions in matters where oral argument has not been heard. However, where the only party which had appeared in a proceeding requested publication of an order issued without oral argument, and the order dealt with a situation which had

not been addressed in review department's prior published opinions, the request for publication was granted. The effective date of the order was not affected by its modification due to the request for publication.

**[2] 2210.90 Section 6007(c)(2) Proceedings—Other Procedural Issues**

In order to impose involuntary inactive enrollment on an attorney pursuant to Business and Professions Code section 6007 (c), the court must find that the attorney poses a substantial threat of harm to the attorney's clients or the public. The following elements must be shown by clear and convincing evidence: that the attorney has caused or is causing substantial harm to clients or the public; that clients or the public are likely to suffer greater injury from denial of inactive enrollment than the attorney is likely to suffer if it is granted or there is a reasonable likelihood that the harm will reoccur and continue; and that there is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter.

**[3 a, b] 159 Evidence—Miscellaneous**

**191 Effect/Relationship of Other Proceedings**

**2210.90 Section 6007(c)(2) Proceedings—Other Procedural Issues**

It would have been inappropriate in involuntary inactive enrollment proceeding for judge to draw any inference from pending criminal charges in and of themselves. However, testimony offered under oath and subject to cross-examination in preliminary hearings on such criminal charges supported judge's findings regarding facts of respondent's criminal conduct. This evidence was sufficient to demonstrate a reasonable probability that State Bar would prevail on merits of disciplinary charges brought thereon.

**[4] 142 Evidence—Hearsay**

**2210.30 Section 6007(c)(2) Proceedings—Declarations as Evidence**

Declarations offered in support of application for involuntary inactive enrollment did not provide an evidentiary basis to find clear and convincing evidence of respondent's likelihood of causing substantial harm, where declarants simply identified themselves as authors of unverified reports without vouching for the truth of the reports or establishing a business records exception to the hearsay rule.

**[5 a, b] 165 Adequacy of Hearing Decision**

**167 Abuse of Discretion**

**2221 Section 6007(c)(2) Proceedings—Inactive Enrollment Ordered**

Where respondent had missed a court appearance on behalf of a client shortly after stipulating to discipline based in part on similar past conduct; had brought an illegal drug to court, attempted to visit an incarcerated client with the drug in his possession, and thrown the drug on the floor after refusing to be searched; had been stopped on another occasion with the drug in his car; and had been observed to be under the influence of a controlled substance while with a client, there was a clear likelihood of harm to both respondent's clients and the public if respondent were allowed to practice law pending adjudication of criminal and State Bar proceedings, and hearing judge erred in focusing exclusively on threat of harm to clients and finding insufficient evidence thereof to justify inactive enrollment.

- [6]     **141     Evidence—Relevance**  
          **513.90   Aggravation—Prior Record—Found but Discounted**  
          **2290     Section 6007(c)(2) Proceedings—Miscellaneous**  
Respondent's record of prior discipline did not warrant great weight in involuntary inactive enrollment proceeding, where respondent's first prior disciplinary matter was unrelated to present conduct, and State Bar had stipulated in second prior matter that respondent's misconduct was only worthy of a short suspension not requiring client notification.
- [7]     **141     Evidence—Relevance**  
          **2290     Section 6007(c)(2) Proceedings—Miscellaneous**  
In involuntary inactive enrollment proceeding, evidence showing very substantial likelihood that respondent had substance abuse problem could be considered as risk to the public of future professional misconduct even absent evidence of current client harm.
- [8]     **165     Adequacy of Hearing Decision**  
          **167     Abuse of Discretion**  
          **2221     Section 6007(c)(2) Proceedings—Inactive Enrollment Ordered**  
Where there was uncontroverted evidence of repeated client harm and other violations of law by respondent, and no evidence of recognition by respondent of substance abuse problem, hearing judge erred in denying involuntary inactive enrollment of respondent without considering substantial harm which public was likely to suffer from such denial.

**ADDITIONAL ANALYSIS**

[None.]

## ORDER GRANTING INACTIVE ENROLLMENT

PEARLMAN, P.J.:

This is a motion under rule 1400(c)(iii), Provisional Rules of Practice, seeking relief from a decision denying the Office of the Chief Trial Counsel's ("OCTC") application for inactive enrollment of respondent Joseph Anthony Mesce ("Mesce") pursuant to Business and Professions Code section 6007 (c). It was referred by the Presiding Judge for consideration by the review department in bank by order filed October 21, 1993, and considered by the review department on the moving papers.<sup>1</sup> [1a - see fn. 1] Respondent did not participate in the proceedings below or file any opposition papers on review.

We have been asked to overrule the decision below as contrary to law and an abuse of discretion and immediately to enroll respondent inactive.

[2] In order to impose involuntary inactive enrollment upon a member of the State Bar of California pursuant to Business and Professions Code section 6007 (c), the court must find that the member "poses a substantial threat of harm to the interests of the attorney's clients or to the public." The burden of proof is by clear and convincing evidence. (*Conway v. State Bar* (1989) 47 Cal.3d 1107, 1126.) The elements necessary for a successful application were correctly stated by the hearing judge: clear and convincing evidence that respondent has caused or is causing substantial harm to his clients or the public; that his clients or the public are likely to suffer greater injury from the denial of the application than respondent is likely to suffer if it is granted or there is a reasonable likelihood that the harm will reoccur and continue; and that there is a reasonable probabil-

ity that the State Bar will prevail on the merits of the underlying disciplinary matter. (Bus. & Prof. Code, § 6007 (c)(2).)

Respondent has a prior record of two disciplinary suspensions, the first of which was stayed and the second of which included 60 days of actual suspension and until restitution is made to a former client. Respondent was placed on the latter suspension by the Supreme Court on August 19, 1993, pursuant to a stipulation entered into between respondent and the State Bar in January of 1993 resolving two pending State Bar proceedings. Respondent is currently not entitled to practice law both pursuant to that suspension order and for failure to pay State Bar fees. His more recent misconduct includes his guilty plea on July 27, 1993, to violating Penal Code section 166, subdivision 1 (misdemeanor contempt) for failure to appear on behalf of a client for sentencing in a criminal matter on March 15, 1993, and his failure to contact the court regarding his nonappearance. It also includes two violations of Vehicle Code section 12500, subdivision (a) (driving without a valid driver's license).

In addition, as a result of two separate incidents, respondent is awaiting trial on charges of felony possession of methamphetamine (Health and Safety Code section 11377, subdivision (a)), felony possession of methamphetamine for sale (Health and Safety Code section 11378), felony transportation of methamphetamine (Health and Safety Code section 11379, subdivision (a)), and the misdemeanor of being under the influence of a controlled substance (Health and Safety Code section 11550). He is also awaiting trial on charges of violating Penal Code section 137, subdivision (a) for allegedly attempting to bribe a client who was a witness and two charges of soliciting perjury from the same witness in violation of Penal Code section 653f, subdivision (a).

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1. When it was originally filed on November 9, 1993, this order was not designated for publication. [1a] This court's general practice has been to refrain from publishing opinions in matters in which oral argument has not been heard. However, in this matter, by timely motion filed November 29, 1993, OCTC—the only party which has appeared in this proceeding—requested that the court reconsider its decision not to publish this order. The motion requested publication by analogy to rule 976(b) of the California Rules of Court,

noting, inter alia, that the order granted section 6007 (c) inactive enrollment based on facts and testimony relating to pending criminal proceedings, a situation which has not been addressed in this court's prior published opinions. Good cause appearing, we hereby grant the motion for reconsideration and have accordingly modified the order filed November 9, 1993, by adding two footnotes and designating the order for publication.

[3a] It would have been inappropriate for the hearing judge to draw any inference from the pending criminal charges in and of themselves. However, OCTC obtained and offered in support of its application, among other things, several declarations and certified copies of the transcript of two preliminary hearings conducted in April of 1993 on the pending criminal charges.

[4] The declarations unfortunately do not provide an evidentiary basis under Transitional Rules of Procedure, rule 793.1(c) for finding clear and convincing evidence of respondent's likelihood of causing substantial harm to the public because the declarants simply identify themselves as authors of unverified reports without vouching for the truth of the reports or establishing a business records exception to the hearsay rule. (Cf. *Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 150 ["It is the clear policy of the law that the drastic remedy of an injunction pendente lite may not be permitted except upon a sufficient factual showing, by someone having knowledge thereof, made under oath or by declaration under penalty of perjury."].)

[3b] Nonetheless, the testimony of various officials under oath and subject to cross-examination in the two preliminary hearings does support the hearing judge's findings as to evidence of respondent's possession of methamphetamine on two occasions; the circumstances under which the methamphetamine was discovered on both occasions; the fact that a briefcase identified as respondent's contained a large quantity of methamphetamine (13.305 grams net weight); and his being under the influence of a controlled substance on the second occasion. This evidence was sufficient to demonstrate a reasonable probability that the State Bar will prevail on the merits of disciplinary charges brought thereon.

There was, however, insufficient evidence presented in this record that respondent attempted to bribe a witness or sought to suborn perjury. Although this conduct was allegedly tape recorded by the victim client, the alleged victim did not testify and no transcript of the tape recording was produced at the preliminary hearing or before this court.

[5a] The hearing judge focused exclusively on the issue of threat of harm to clients without discussing the threat of harm to the public and found insufficient evidence of potential harm to the former to justify inactive enrollment of respondent. We cannot uphold this determination on the facts as found by the hearing judge. [6] We understand her reluctance to place too great a weight on either record of prior discipline. The first was unrelated and in the second the State Bar stipulated that it involved misconduct only worthy of a short suspension not requiring client notification.

[5b] Nonetheless, there is clearly a likelihood of harm to both respondent's clients and the public if respondent is allowed to resume practicing law while awaiting final adjudication of the pending State Bar and criminal proceedings. Respondent admittedly missed yet another court appearance on behalf of a client in March of this year just two months after stipulating to discipline based in part on several incidents of similar conduct in the past. Far more disturbing is the evidence that on another date in March of 1993, after stipulating to discipline for prior misconduct, he brought a concealed canister of methamphetamine to court and was attempting to visit an incarcerated client with the methamphetamine in his possession. After refusing to be searched, he disbursed the methamphetamine on the courthouse floor in an apparent attempt to destroy evidence of his crime. This incident at the courthouse, standing alone, presents very troubling evidence of substantial risk to the public in respondent's continued ability to practice law. A few weeks thereafter he was in a car stopped for a traffic violation with an even larger quantity of methamphetamine found by the arresting police officer in a briefcase with respondent's flyers in it where respondent had been sitting. An arrest warrant had already been issued against him for the earlier incident. On the latter occasion he was traveling with another client and was observed by the police officer to be under the influence of a controlled substance. The foregoing facts were established by clear and convincing evidence.

Respondent has not participated in this proceeding to contradict any of the evidence offered by

OCTC against him. Although respondent is currently on suspension, it is within his power to terminate it upon proof of payment of restitution and payment of his bar fees. [7] There is a very substantial likelihood based on the evidence that was introduced below that respondent has a substance abuse problem which the court would have been entitled to consider as a risk to the public of future professional misconduct even if there were no evidence of current client harm. (See *In re Kelley* (1990) 52 Cal.3d 487, 498.)

[8] Here there is evidence of repeated client harm and other violations of law and no evidence of recognition by respondent of a substance abuse problem. In *Conway v. State Bar, supra*, Conway's offer of evidence of rehabilitation, including that he no longer suffered from cocaine addiction, was rejected as "insufficient to overcome the strong showing that [he] posed a substantial threat of harm to his clients and the public" in light of "past lapses and history of recurring wrongs." (*Conway v. State Bar, supra*, 47

Cal.3d at p. 1126.) Given the uncontroverted record in this proceeding of past lapses and recurring wrongs, we must find that the hearing judge erred in denying inactive enrollment of respondent without considering the substantial threat of harm the public is likely to suffer from the denial.

IT IS HEREBY ORDERED that JOSEPH ANTHONY MESCE be enrolled inactive pursuant to Business and Professions Code section 6007 (c) effective five days after the service of this order<sup>2</sup> [1b - see fn. 2] and that appropriate notice be given respondent and the Supreme Court pursuant to Business and Professions Code section 6081. IT IS FURTHER ORDERED that respondent shall comply with the provisions of rule 795.5, Transitional Rules of Procedure.

We concur:

NORIAN, J.  
STOVITZ, J.

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2. This order was originally filed and served on November 9, 1993, and became effective five days from such service. [1b] The effective date of respondent's inactive enrollment is not

affected by the present modification of this order due to OCTC's request that it be designated for publication.