

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of) Case Nos.: **10-O-01018 (10-O-03798)-PEM**
)
CHERYL JANE ERBER,) **DECISION AND ORDER OF**
) **INVOLUNTARY INACTIVE**
) **ENROLLMENT**
)
Member No. **151382,**)
)
A Member of the State Bar.)

Respondent Cheryl Jane Erber (respondent) was charged with failing to perform legal services with competence and/or failing to promptly refund an unearned fee in two client matters. She failed to participate either in person or through counsel, and her default was entered. The Office of the Chief Trial Counsel (State Bar) filed a petition for disbarment under the Rules of Procedure of the State Bar, rule 5.85.¹

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 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

¹ Unless otherwise indicated, all references to rules are to this source.

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).)

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 4, 1990, and has been a member since then.

Procedural Requirements Have Been Satisfied

A 20-day letter was mailed to respondent at respondent's official membership records address on January 12, 2011. Thereafter, the State Bar had contact with respondent at the telephonic 20-day meeting on February 2, 2011.

On February 28, 2011, the State Bar filed and properly served the NDC on respondent by certified mail, return receipt requested, at her membership records address. The NDC notified respondent that her failure to participate in the proceeding would result in a disbarment recommendation. (Rule 5.41.) The NDC was returned unclaimed by the U.S. Postal Service.

Thereafter, the State Bar attempted to reach respondent by telephone twice at her official membership records telephone number but each time a busy signal was received. The State Bar also attempted to reach respondent at another telephone number obtained by internet research, but an automated message advised the caller that the telephone number was no longer in service or was disconnected. The State Bar also sent respondent an email to an email address contained in respondent's case file.³

Respondent failed to file a response to the NDC. On April 19, 2011, the State Bar filed and properly served a motion for entry of respondent's default. The motion complied with all

³ Effective February 1, 2010, all attorneys are required to maintain a current email address to facilitate communications with the State Bar. (Cal. Rules of Court, rule 9.7(a)(2).) Respondent, however, does not have an email address maintained on the State Bar's official membership records.

the requirements for a default, including a supporting declaration of reasonable diligence by the State Bar deputy trial counsel declaring the additional steps taken to provide notice to respondent. (Rule 5.80.) The motion also notified respondent that if she did not timely move to set aside her default, the court would recommend her disbarment. Respondent did not file a response to the motion, and her default was entered on May 9, 2011. The order entering the default was served on respondent at her membership records address by certified mail, return receipt requested. The court also 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 she has remained inactively enrolled since that time.

Respondent also did not seek to have her default set aside or vacated. (Rule 5.83(C)(1) [attorney has 180 days to file motion to set aside default].) On January 18, 2012, the State Bar filed the 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) respondent has other disciplinary investigations pending; (3) respondent has no record of prior discipline; and (4) the Client Security Fund has not made payments resulting from respondent's conduct. 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 February 14, 2012.

The Admitted Factual Allegations Warrant the Imposition of Discipline

Upon entry of respondent's default, the factual allegations in the NDC are deemed admitted and no further proof is required to establish the truth of such facts. (Rule 5.82.) As set forth below in greater detail, the factual allegations in the NDC support the conclusion that respondent is culpable as charged and, therefore, violated a statute, rule or court order that would warrant the imposition of discipline. (Rule 5.85, subd. (E)(1)(d).)

1. Case Number 10-O-01018 (The Frager Matter)

Count One - respondent willfully violated rule 3-110(A) of the Rules of Professional Conduct (RPC) (failing to perform legal services with competence) by failing to timely file a complete temporary protective order or temporary restraining order on behalf of her client.

Count Two – respondent willfully violated rule 3-700(D)(2) of the RPC (failing to promptly refund unearned fees) by failing to refund promptly any part of a \$1,500 fee paid in advance that has not been earned.

2. Case Number 10-O-03798 (The Mattauch Matter)

Count Three – respondent willfully violated rule 3-700(D)(2) of the RPC by failing to refund promptly any part of a \$2,000 fee paid in advance that has not been earned.

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 NDC was properly served on respondent under rule 5.25;

(2) reasonable diligence was used to notify respondent of the proceedings prior to the entry of her default, as the State Bar had contact with respondent at the telephonic 20-day meeting; the NDC was served on respondent at her membership records address by certified mail; the State Bar attempted to reach respondent by telephone twice at her official membership records telephone number and at another telephone number obtained by internet research; and the State Bar sent respondent an email to an email address contained in respondent’s case file.

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

(4) the factual allegations 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 disciplinary proceeding. As set forth in the Rules of Procedure of the State Bar, the court must recommend her disbarment.

RECOMMENDATION

Disbarment

The court recommends that respondent Cheryl Jane Erber be disbarred from the practice of law in the State of California and that her name be stricken from the roll of attorneys.

Restitution

The court also recommends that respondent be ordered to make restitution to the following payees:

- (1) Bruce Frager in the amount of \$1,500 plus 10 percent interest per year from November 18, 2010; and
- (2) Michael Mattauch in the amount of \$3,650⁴ plus 10 percent interest per year from March 26, 2010.

Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

Rule 9.20

The court also recommends that respondent 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 within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

⁴ This figure represents the small claims judgment Mattauch obtained against respondent.

Costs

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being 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 Cheryl Jane Erber, State Bar number 151382, 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. (Rules Proc. of State Bar, rule 5.111(D).)

Dated: April _____, 2012

PAT McELROY
Judge of the State Bar Court