

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 11-O-11375-LMA
)	
DAVID FRANKLIN BROWN,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 172130,)	ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

Respondent David Franklin Brown (respondent) was charged with four counts of violations of the Rules of Professional Conduct and the Business and Professions Code.¹ He failed to participate either in person or through counsel, and his default was entered. The Office of the Chief Trial Counsel (State Bar) filed a petition for disbarment under rule 5.85 of the Rules of Procedure of the State Bar.²

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),

¹ Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

² Unless otherwise indicated, all references to rules are to this source.

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.³

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 2, 1994, and has been a member since then.

Procedural Requirements Have Been Satisfied

On October 4, 2011, the State Bar filed and properly served the NDC on respondent by certified mail, return receipt requested, at his membership records address.⁴ The NDC notified respondent that his failure to participate in the proceeding would result in a disbarment recommendation. (Rule 5.41.) A signed return receipt card was received by the State Bar, but the signature was illegible. However, the NDC was later returned to the State Bar marked "forwarding address on file!"⁵

Thereafter, the State Bar left a message for respondent at his membership records telephone number, sent an email, attaching the NDC, to two email addresses for respondent,⁶ and sent a letter and the NDC to respondent by facsimile to two numbers, including respondent's membership records facsimile number. In addition, a letter and the NDC were also sent to

³ 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).)

⁴ Prior to this date, the State Bar called respondent at his membership records telephone number and left a voicemail message for respondent.

⁵ See State Bar's petition for disbarment filed June 5, 2012, page 2, lines 6-7.

⁶ 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 by first-class mail to nine additional addresses obtained through an internet search. The State Bar also attempted to reach respondent at four additional telephone numbers obtained through an internet search and at a telephone number obtained from the Daily Journal's Directory of Attorneys.

Respondent failed to file a response to the NDC. On November 4, 2011, the State Bar filed and properly served a motion for entry of respondent's default.⁷ The motion complied with all 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 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 on November 22, 2011. The order entering the default was served on respondent at his membership records address by certified mail, return receipt requested.⁸ The court also ordered respondent's involuntary inactive enrollment as a member of the State Bar under 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 June 5, 2012, the State Bar filed the petition for disbarment.⁹ As required by rule 5.85(A), the State Bar reported in the petition that: (1) the State Bar has not had any contact with respondent since his default was entered; (2) there is one other non-public disciplinary matter pending against respondent; (3) respondent has a prior record of discipline; and (4) the Client Security Fund (CSF) has not yet paid out claims

⁷ The motion was returned to the State Bar.

⁸ The order was returned to the State Bar Court by the USPS.

⁹ The petition was served that date by both certified mail, return receipt requested, and by regular mail on respondent at his membership records address.

resulting from respondent's conduct.¹⁰ 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 July 3, 2012.

Respondent has a prior record of discipline.¹¹ Pursuant to a Supreme Court order filed on July 27, 2011, respondent was suspended for two years, the execution of which was stayed, subject to respondent being suspended for a minimum of 90 days and he will remain suspended until he makes and provides proof of specified restitution and the court grants a motion to terminate his suspension. The misconduct involved two client matters. Respondent was found culpable of failing to perform legal services with competence; failing to respond promptly to reasonable client status inquiries and failing to keep a client reasonable informed of significant developments in a matter in which respondent had agreed to provide legal services; failing to refund unearned fees; failing to render appropriate accounts to a client; failing to update his membership records address; committing an act involving moral turpitude, dishonesty and corruption by making a false representation to his client; failing to cooperate and participate in a disciplinary investigation; failing to obtain permission of a tribunal before withdrawing from employment; and failing to take reasonable steps to avoid reasonably foreseeable prejudice to his client. Respondent did not participate in this matter, and his default was entered.

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

¹⁰ The deputy trial counsel's declaration attached to the petition is dated June 5, 2012. The court therefore takes judicial notice that as of July 20, 2012, records show that the CSF has paid claim(s) against respondent.

¹¹ The court takes judicial notice of the pertinent State Bar Court records regarding this prior discipline, admits them into evidence and directs the Clerk to include copies in the record of this case.

respondent is culpable as charged, except as otherwise noted and, therefore, violated a statute, rule or court order that would warrant the imposition of discipline. (Rule 5.85(E)(1)(d).)

Case Number 11-O-11375 (Avila Matter)

Count One – respondent willfully violated rule 3-110(A) of the Rules of Professional Conduct (failing to perform legal services with competence) by failing to perform any work on behalf of his client, aside from sending one demand letter.

Count Two – respondent willfully violated section 6068, subdivision (m) (duty to communicate) by failing to respond to his client’s telephone calls and by refusing to meet with his client when his client came to his office.

Count Three – respondent willfully violated rule 3-700(D)(2) of the Rules of Professional Conduct (failing to promptly refund unearned fees) by failing to refund \$5,000 in unearned fees to his client.

Count Four – the court will not find respondent culpable of willfully violating section 6068, subdivision (i) (failing to cooperate/participate in a disciplinary investigation) as the letters from the State Bar investigator were returned by the post office, and there is no evidence that the State Bar’s emails or voicemail message was received by respondent.

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 his default, as the State Bar: (1) filed and properly served the NDC on respondent;
- (2) left telephone messages for respondent at his membership records telephone number and five additional telephone numbers; (3) sent an email attaching the NDC to two email addresses;

(4) sent a letter and the NDC to respondent by facsimile to two numbers; and (5) sent a letter and the NDC to respondent at nine additional addresses;

(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 his disbarment.

RECOMMENDATION

Disbarment

The court recommends that respondent David Franklin Brown be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys.

Restitution

The court also recommends that respondent be ordered to make restitution to Miguel Avila in the amount of \$5,000 plus 10 percent interest per year from November 10, 2007. 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 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, 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 David Franklin Brown, State Bar number 172130, 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: October _____, 2012

LUCY ARMENDARIZ
Judge of the State Bar Court