

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of ) Case No.: **11-O-12122-LMA**  
)  
**STEPHEN SELWYN SMITH,** ) **DECISION AND ORDER OF**  
) **INVOLUNTARY INACTIVE**  
**Member No. 108137,** ) **ENROLLMENT**  
)  
A Member of the State Bar. )

Respondent Stephen Selwyn Smith (respondent) was charged with several violations of the Business and Professions Code and the Rules of Professional Conduct in connection with a single client matter. 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.<sup>1</sup>

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.<sup>2</sup>

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<sup>1</sup> Except where otherwise indicated, all further references to rules are to the Rules of Procedure of the State Bar.

<sup>2</sup> 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 June 3, 1983, and has been a member since then.

#### **Procedural Requirements Have Been Satisfied**

On October 25, 2011, the State Bar filed and properly served the NDC on respondent by certified mail, return receipt requested, at respondent's membership-records address. The NDC notified respondent that his failure to participate in the proceeding would result in a disbarment recommendation. (Rule 5.41.) The United States Postal Service (Postal Service) did not return, to the State Bar, either the NDC or the certified mail return receipt.

On October 31, 2011, and on November 2, 3, 4, 7, 8, 9, 23, and 28, 2011, Deputy Trial Counsel William Todd (DTC Todd) telephoned respondent's membership-records telephone number and left a message for respondent. Also, on November 23 and 28, 2011, DTC Todd telephoned respondent at a telephone number the State Bar located through a search of records but, on both occasions, DTC Todd was unable to reach respondent.

On November 16, 2011, the State Bar sent courtesy copies of the NDC to respondent by regular mail to three different alternative addresses that the State Bar located for respondent via a detailed records search.

Respondent thereafter failed to file a response to the NDC. On November 30, 2011, the State Bar filed a motion for entry of respondent's default. The State Bar properly served the motion for entry of default on respondent at his membership-records address by certified mail, return receipt requested on November 28, 2011. In addition, on November 28, 2011, the State

Bar sent a courtesy copy of its motion for entry of default to respondent by regular mail to the alternative address it located for respondent in Gretna, Louisiana. 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 December 16, 2011. The order entering the default was served on respondent at his 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),<sup>3</sup> effective three days after service of the order, and he has remained inactively enrolled since that time.

Respondent 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 26, 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) the State Bar has not had any contact with respondent since the default was entered; (2) there are no disciplinary investigation matters pending against respondent; (3) respondent has no prior record of discipline; and (4) the Client Security Fund has not made any payments resulting from respondent's misconduct. 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 23, 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

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<sup>3</sup> All further statutory references are to the Business and Professions Code.

forth below in greater detail, the factual allegations in the NDC support the conclusion that respondent is culpable of the rule and statutory violations as charged 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-12122 (Xu Matter)**

Count One – respondent willfully violated rule 3-110(A) of the Rules of Professional Conduct (failing to perform legal services with competence) by not filing and pursuing his client’s case from late February 2010 through late December 2010.

Count Two – respondent willfully violated rule 3-700(D)(2) of the Rules of Professional Conduct (failing to refund unearned fees) by failing to refund \$1,750 in unearned fees to his client.

Count Three – respondent willfully violated section 6068, subdivision (m) (failing to communicate) by failing to provide a meaningful response or by failing to respond at all to his client’s email and telephone messages inquiring as to the status of the client’s matter.

Count Four – respondent willfully violated section 6068, subdivision (j) (failing to update membership address) by failing to comply with section 6002.1, which requires that attorneys maintain, on the official membership records of the State Bar, their current office address and phone number or, if no office is maintained, a current address to be used for State Bar purposes.

**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 that 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, such as leaving numerous telephone messages for respondent at his membership-records telephone number, mailing copies of the NDC to respondent at three

alternative addresses, attempting to call respondent at an alternative telephone number, and mailing a copy of the motion for entry of default to respondent at an alternative address;

(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 Stephen Selwyn Smith 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 further recommends that Stephen Selwyn Smith be ordered to make restitution to Yongsheng Xu in the amount of \$1,750 plus 10 percent interest per year from December 28, 2010 (or to the Client Security Fund to the extent of any payment from the fund to Yongsheng Xu, plus interest and costs, in accordance with Business and Professions Code section 6140.5). Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

### **California Rules of Court, 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 Stephen Selwyn Smith, State Bar Number 108137, 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: September \_\_\_\_, 2012

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**LUCY ARMENDARIZ**  
Judge of the State Bar Court