

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case Nos.: 11-O-14350 (11-O-14358)-PEM
)	
TIMOTHY MICHAEL DARDEN,)	DECISION ON MOTIONS AND
)	PETITIONS FOR DISBARMENT;
Member No. 147576,)	ORDER OF INVOLUNTARY INACTIVE
)	ENROLLMENT
A Member of the State Bar.)	
_____)	

INTRODUCTION

Respondent Timothy Michael Darden (respondent) was charged with two counts of committing an act of moral turpitude, dishonesty or corruption by misappropriating client funds. His default was entered for failing to appear at trial.

Rule 5.85 of the Rules of Procedure of the State Bar¹ provides the procedure to follow when an attorney fails to appear at trial after receiving adequate notice and opportunity. As relevant here, the rule provides that if an attorney's default is entered for failing to appear at trial and the attorney fails to have the default set aside or vacated within 90 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).)

Respondent filed a motion to vacate the entry of his default and to set aside his default which was denied by order of the court. He thereafter sought reconsideration of this order, which the court also denied. The Office of the Chief Trial Counsel (State Bar) subsequently filed a petition for disbarment under rule 5.85.

In response to the disbarment petition, respondent filed a second motion to vacate entry of default and an opposition to the State Bar's petition for disbarment. The State Bar filed a response to the motion, contending that the motion to vacate the default has no merit and should be denied, but acknowledging that the disbarment petition was not properly served on respondent in compliance with rule 5.25, and that it would re-serve the disbarment petition. On March 5, 2013, the State Bar filed a second petition for disbarment which was nearly identical to the January 31, 2013 disbarment petition. Thereafter, respondent filed a reply to the State Bar's response to the motion and a reply declaration in support of his motion, and the court submitted this matter for a ruling on the State Bar's January 31, 2013 disbarment petition.

Thereafter, on April 2, 2013, respondent filed a motion to strike and dismiss the State Bar's March 5, 2013 petition for disbarment and opposition to the March 5, 2013 petition for disbarment with a supporting declaration. The motion also seeks to vacate respondent's default and dismiss the NDC and the cases on which the NDC is based. The State Bar filed an opposition to respondent's motion. Respondent filed a reply and declaration in support of his motion.

Respondent has failed to show good cause to vacate the entry of default, to dismiss the NDC and the cases on which the NDC is based, or to deny the disbarment petition. The court therefore denies respondent's motions. The court also concludes that the requirements of rule 5.85 have been satisfied and grants the petition for disbarment. Disbarment is warranted under

rule 5.85 and the applicable discipline standards³ and case law. Accordingly, the court recommends that respondent be disbarred from the practice of law.

FINDINGS AND CONCLUSIONS

Respondent was admitted to the practice of law in California on July 16, 1990, and has been a member of the State Bar since then. On February 10, 2012, the State Bar filed and properly served the notice of disciplinary charges (NDC) on respondent by certified mail, return receipt requested, and by regular mail to his membership records address. The NDC notified respondent that his failure to appear at trial would result in a disbarment recommendation. (Rule 5.41.) On March 21, 2012, respondent filed his response to the NDC.

Respondent appeared in person at a status conference on March 26, 2012, at which trial dates were discussed. There is no evidence that respondent ever advised the State Bar or the court that he was in a great deal of pain at the time of this conference; that he was on heavy medication; or that he was having difficulty following the court's discussion with the State Bar regarding trial dates. The order setting the commencement of trial for June 5, 2012, at 10:00 a.m., was served on respondent at his membership records address by first-class mail, postage paid, on March 28, 2012.⁴

Respondent filed a motion to continue the trial on May 29, 2012. The State Bar filed its opposition to respondent's motion on May 31, 2012. That same date, the court filed an order denying respondent's motion to continue the trial. The order denying respondent's motion to

³ All references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

⁴ Respondent also appeared at a pretrial conference on May 24, 2012, at which time it was confirmed that trial would commence on June 5, 2012 at 10:00 a.m., but other later trial dates were rescheduled. The order setting forth these trial dates was served on respondent at his membership records address by first-class mail, postage paid, on May 24, 2012.

continue the trial was properly served on respondent on May 31, 2012, by first-class mail, postage paid, to his membership records address.

Respondent failed to appear for trial on June 5, 2012, and the court entered respondent's default by order filed that same date. The order notified respondent that if he did not timely move to set aside his default, the court would recommend his disbarment.⁵ The order also placed respondent on involuntary inactive status under Business and Professions Code section 6007, subdivision (e), effective three days after service of the order, and he has remained inactively enrolled since that time.

On August 31, 2012, respondent filed a motion to vacate the entry of his default and to set aside his default. The State Bar filed an opposition to respondent's motion on September 17, 2012. Respondent filed a reply to the State Bar's opposition on September 27, 2012. On October 3, 2012, the court filed an order denying respondent's motion to vacate the entry of his default and his alternative motion to set aside his default, and noting that the State Bar could file a disbarment petition upon the finality of this order in this court.

On October 23, 2012, respondent filed a motion for reconsideration of the court's order denying his motion to vacate default and alternative motion to set aside his default. The State Bar filed its response to respondent's motion for reconsideration on November 2, 2012. By order filed on December 4, 2012, the court denied respondent's motion for reconsideration.

On January 31, 2013, the State Bar filed its petition for disbarment. As required by rule 5.85(A), the State Bar reported in the petition that: (1) respondent has not contacted the State Bar since June 5, 2012, the day his default was entered/served;⁶ (2) there are no other

⁵ The order was properly served on respondent on June 5, 2012, by certified mail, return receipt requested, to respondent's membership records address.

⁶ However, respondent did file several motions and other pleadings after his default was entered.

disciplinary matters pending against respondent; (3) respondent has no record of prior discipline; and (4) the Client Security Fund has not made any payments resulting from respondent's conduct.

Thereafter, on February 25, 2013, respondent filed a second motion to vacate entry of default and an opposition to the State Bar's petition for disbarment.⁷ On March 5, 2013, the State Bar filed its response to respondent's motion. In its response, the State Bar acknowledged that the petition was not properly served on respondent in compliance with rule 5.25, and that it would re-serve the petition. Accordingly, that same date, the State Bar filed and properly served on respondent by certified mail, return receipt requested, another petition for disbarment.⁸

On March 11, 2013, respondent filed a reply to the State Bar's response to the motion and his reply declaration in support of his motion. This matter was submitted for a ruling on the State Bar's January 31, 2013 disbarment petition as of March 11, 2013.

However, on April 2, 2013, respondent filed a motion to strike and dismiss the State Bar's March 5, 2013 petition for disbarment and opposition to the March 5, 2013 petition for disbarment with a supporting declaration. The motion also seeks to vacate respondent's default and dismiss the NDC and the cases on which the NDC is based. The State Bar filed an opposition to respondent's motion on April 16, 2013. Respondent filed a reply and declaration in support of his motion on April 22, 2013.⁹

⁷ Respondent also filed his declaration in support of his motion and opposition.

⁸ Although the State Bar filed another disbarment petition, rather than just a proof of service showing that the original petition was re-served by certified mail, return receipt requested, the March 5, 2013 petition for disbarment is nearly identical to the State Bar's January 31, 2013 disbarment petition. As such, the court will consider the March 5, 2013 disbarment petition as merely re-service of the January 31, 2013 disbarment petition, rather than as a new petition.

⁹ As noted earlier, the court will consider the March 5, 2013 disbarment petition as merely re-service of the January 31, 2013 disbarment petition. Accordingly, the court finds moot respondent's contentions in his April 2, 2013 motion to strike and dismiss the second petition for

Respondent's February 25, 2012 Motion to Vacate Entry of Default and Opposition to the State Bar's January 31, 2012 Disbarment Petition

In his motion, respondent seeks an order denying the State Bar's petition for disbarment and vacating entry of his default on the grounds that his default was improperly entered and the petition fails to meet the minimum requirements of the law. Specifically, respondent contends:

(1) that the disbarment petition was not properly served on respondent as it was not served by certified mail, return receipt requested;¹⁰

(2) as the default order was not served at the proper address, the disbarment petition was filed prematurely, as it was filed prior to 91 days after proper service of the default order;

(3) as the status conference order setting forth the trial dates did not have a check in the box before the language which set forth that the case was set for trial on certain dates, a proper notice of trial was not served on respondent at least 30 days before trial, and the court did not properly serve the notice of trial on respondent;

(4) the undersigned judge was disqualified from presiding over the trial as the undersigned was assigned as a settlement judge and the parties did not stipulate to allow the undersigned to preside over the trial; and

(5) the requirements of rule 5.85 have not been met and the requisite factors have not been established by the State Bar because:

A. the State Bar has failed to establish that the NDC was properly served on respondent;

disbarment and opposition to the second petition for disbarment as to why the March 5, 2013 disbarment petition should be stricken and dismissed. However, regarding respondent's other contentions in his April 2, 2013 motion which are similar to those already set forth in respondent's February 25, 2013 motion to vacate default and opposition to the State Bar's January 31, 2013 disbarment petition, the court will address these arguments in connection with the discussion of respondent's February 25, 2013 motion.

¹⁰ This contention is now moot as the State Bar re-served the disbarment petition.

B. the State Bar has failed to establish that respondent had actual notice or that reasonable diligence was used to notify respondent of the proceedings prior to the entry of his default;

C. the State Bar has failed to establish that the default was properly entered; and

D. the State Bar has failed to establish that the factual allegations deemed admitted in the NDC support a finding that respondent violated a statute, rule or court order that would warrant the imposition of discipline. Respondent also contends that the court must dismiss the NDC, as the NDC is insufficient and defective, and must also dismiss the cases on which the NDC is based.¹¹

The court finds, however, that respondent was not deprived of adequate due process in this matter. Respondent was properly served with the NDC.¹² In addition, it is clear that respondent had notice that disciplinary charges had been filed against him, as he filed a response to the NDC.

¹¹ Respondent also cites to his health issues in this motion. However, respondent cited to his health issues in his motion to continue the trial, his August 31, 2012 motion to vacate and set aside his default, and his motion for reconsideration of the court's order denying his motion to vacate default and alternative motion to set aside default, which were all denied by the court. Accordingly, the court will not again consider these contentions. Respondent's contention in his reply declaration in support of his February 25, 2013 motion that "unlawfully (contrary to the Americans with Disabilities Act and other applicable law), the Court apparently refused to accommodate me regarding my illness, my disability, or my special needs, despite my repeated requests that it do so (including in writing on May 29, 2012)" is without merit, as respondent never filed any request for accommodations under the Americans with Disabilities Act.

¹² Although respondent claims that in July 2011, he requested in writing that the State Bar serve all future documents on his counsel's address, respondent did not have counsel and was, in fact, appearing in propria persona in this matter. Respondent never filed and served a signed, written notice to serve counsel as required by rule 5.25(D). The only evidence that respondent provided that he made a request that future documents be served at an address other than his membership records address is an email dated February 21, 2012, after the NDC was filed and served in this matter. Furthermore, there is no evidence that respondent ever expressly requested to the court that service be made to an address other than his membership records address or asked for service to his counsel as required by rule 5.26.

Respondent also had actual notice of the trial dates in this matter as he (1) appeared in person at the status conference at which trial dates were discussed; (2) respondent appeared at the pretrial conference at which the trial commencement date was confirmed; (3) he filed a motion to continue the trial, and in his declaration in support of that motion, he specifically noted that the trial was set to begin on June 5, 2012; (4) respondent allegedly sent an email to his office in the early morning on June 5, 2012, seeking to have his office notify the court that he was ill and unable to appear at trial; (5) respondent alleges that on June 5, 2012, he and his office attempted to notify the court by telephone that respondent was too ill to participate in the court proceedings; and (6) respondent has never claimed that he did not receive the NDC, the status conference order setting forth the trial dates, the pretrial conference order which confirmed the trial was to commence on June 5, 2012, or the order denying his motion for a continuance. In addition, the court finds that (1) the status conference order setting forth that the matter was set for trial beginning on June 5, 2012, at 10:00 a.m., was served on respondent at his membership records address;¹³ (2) he was properly served with the pretrial conference order which set forth that trial would commence on June 5, 2012; and (3) he was properly served with the order denying his motion for a continuance.

Respondent's default was properly entered, as the NDC was properly served on respondent; notice of trial was served on respondent at his membership records address; and respondent had actual notice of the trial date but failed to appear at trial.¹⁴

¹³ Respondent's contention that he was not served with proper notice of trial at least 30 days before trial, because the status conference order setting forth the trial dates did not have a check in the box before the language which set forth that the case was set for trial on certain dates is nonsensical.

¹⁴ Although notice of the trial dates was served on respondent at his membership records address, rather than at the address in his response to the NDC (see rule 5.81(A)(2)), the court finds that respondent's default was properly entered, as respondent had actual notice of the trial dates. In addition, respondent has never claimed that his membership records address was a wrong address.

Although the undersigned judge was originally assigned to handle an early neutral evaluation conference (ENEC) in this matter, the undersigned never did so, as the ENEC was continued and was later held before another judge. The court did not review any substantive material from either party in this matter prior to the continuance of the ENEC. Accordingly, the undersigned was not disqualified from presiding over the trial in this matter, and the court's entry of respondent's default was proper.

Furthermore, the order entering respondent's default was properly served on respondent, and the court therefore finds that the disbarment petition was timely filed more than 95 days after service of the order entering respondent's default, and as authorized by the court in its order denying respondent's motion to vacate the entry of his default and his alternative motion to set aside his default.

Accordingly, for the reasons set forth above, respondent's motion to vacate the entry of his default is denied.

Petition for Disbarment

To grant a petition for disbarment, the evidence must show that (1) the NDC was properly served on respondent under rule 5.25; (2) respondent had actual notice of the proceeding or due diligence was used to notify him prior to the entry of default; (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. (Rule 5.85(E).)

The evidence demonstrates that the first three factors set forth in rule 5.85 required to recommend a member's disbarment have been met as (1) the NDC was properly served on respondent for the reasons set forth in footnote 11; (2) respondent had actual notice of this disciplinary proceeding prior to the entry of his default, as he filed a response to the NDC; and,

for the reasons set forth above, the court finds that respondent had actual notice of the trial in this matter prior to the entry of his default; and (3) respondent's default was properly entered, as the NDC was properly served on respondent; notice of trial was served on respondent at his membership records address; and respondent had actual notice of the trial date but failed to appear at trial.

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.) Respondent contends that the State Bar has failed to establish that the factual allegations deemed admitted in the NDC support a finding that respondent violated a statute, rule or court order that would warrant the imposition of discipline. Respondent also contends that the court must dismiss the NDC and the cases which form the basis for the NDC, because the NDC is insufficient and defective.

The factual allegations in the NDC show that Richard Stickney (Stickney), a friend of Janet Stites (Stites), recommended respondent to Stites as an attorney who could both handle a probate estate and draft a special needs trust.¹⁵ Stites's mother had died and named Stites as beneficiary on her bank accounts, life insurance and annuities. Respondent contacted Stites and advised her that he could handle the probate of her mother's estate and create a special needs trust for her.

Thereafter, Stites had her signatures notarized on a living trust and a special needs trust which had been drafted by respondent, and Stickney delivered the trust documents to respondent. Respondent instructed Stites that in order to fund her special needs trust, she should run the funds received as a result of her mother's death, which totaled \$438,301.48, through the bank account of Stites's aunt. Pursuant to respondent's instructions, between February 2009 and May

¹⁵ Stites is blind and receives Social Security income.

2009, Stites had her aunt purchase four money orders totaling \$438,301.48 made payable to Stickney. Stickney deposited each of the four cashier's checks or money orders in his bank account and then issued checks payable to the Law Offices of America, Inc. which is currently a suspended corporation of which respondent is president. Stickney ultimately issued checks to the Law Offices of America, Inc., totaling \$438,301.48, which were deposited into a business checking account belonging to the Law Offices of America, Inc. Respondent told Stickney that by running Stites's funds through her aunt's and Stickney's accounts, Stites's special needs trust would be funded in such a way that Stites could receive periodic payments from the special needs trust without jeopardizing any public benefit payments. Respondent thereafter coerced Stickney into signing an agreement which provided in part that "any funds received" from Stickney was a loan from Stickney to respondent and back-dating to the agreement "1/19/09."

Stites and Stickney thereafter hired attorney Ronald K. Mullin (Mullin) to represent them. In three separate letters each received by respondent, Mullin requested, among other things, that respondent provide accountings for all funds turned over to respondent by Stites and/or Stickney. Mullin also requested, on behalf of Stites, the return of the entrusted \$438,301.48.

As of the date the NDC was filed, respondent had not (1) notified Stites or Mullin of any bank account set up to hold Stites's entrusted funds; (2) made any periodic payment to Stites directly or indirectly or for her benefit from the \$438,301.48 or any interest thereon; (3) provided any form of accounting to Mullin or Stites; and (4) returned any part of the entrusted \$438,301.49 transmitted to respondent via Stites's aunt and Stickney on behalf of Stites. These admitted facts show that respondent misappropriated client funds, an act involving moral turpitude, dishonesty or corruption, by depositing the entrusted \$438,301.48 in a business checking account rather than a trust account, and thereafter refusing to account to Stites for the

entrusted funds and refusing to refund the entrusted funds to Stites, in willful violation of Business and Professions Code section 6106.

The factual allegations in the NDC also show that Stickney hired respondent to prepare a living trust for him sometime prior to October 30, 2008. Respondent prepared a living trust for Stickney, and Stickney signed the trust before a notary. Between January 29, 2009, and January 20, 2011, at respondent's direction, Stickney entrusted a total of \$32,500 to respondent to fund the living trust respondent had prepared for him. At respondent's request, Stickney returned the notarized trust to respondent. On January 31, 2011, respondent coerced Stickney into signing an agreement which provided that "any funds received" from Stickney was a loan from Stickney to respondent and back-dating to the agreement "1/19/09." Respondent told Stickney that he would give Stickney copies of quarterly statements showing where Stickney's entrusted funds were kept; however, he never did so. As of the filing of the NDC, respondent had not returned any part of the \$32,500 entrusted to him by Stickney in order to fund the trust. These admitted facts show that respondent misappropriated entrusted client funds, an act involving moral turpitude, dishonesty or corruption, by accepting \$32,500 from Stickney to fund the trust respondent prepared for him, and thereafter coercing Stickney into signing a false statement that the entrusted funds was a loan, in willful violation of Business and Professions Code section 6106. A member's willful violation of Business and Professions Code section 6016 is cause for the imposition of discipline. (Bus. & Prof. Code, § 6100.) The factual allegations in the NDC therefore support the finding that respondent violated a statute that would warrant the imposition of discipline.

The evidence therefore shows that the requirements of rule 5.85(E)(1) are met. The petition for disbarment is therefore granted.

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Disbarment is Also Warranted under the Standards and Case Law

Standard 2.2(a) provides that the willful misappropriation of entrusted funds or property must result in disbarment, unless the amount of property or funds misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate. As the Supreme Court noted in *Grim v. State Bar* (1991) 53 Cal.3d 21, 29, “Misappropriation is more than a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession. (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [citations omitted]; *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656 [citations omitted].) In all but the most exceptional of cases, it requires the imposition of the harshest discipline. (*Chang v. State Bar, supra*, at p. 128; *Gordon v. State Bar* (1982) 31 Cal.3d 748, 757 [citations omitted].) The seriousness of the offense and the propriety of disbarment as the appropriate discipline have long been recognized by [the] court (*In re Ford* (1988) 44 Cal.3d 810, 816 [citations omitted], and cases cited) and are reflected in the standards.” While the fact that respondent has no prior record of discipline in over 20 years of practice is entitled to great weight in mitigation, the amount of money misappropriated is quite significant. Thus, the court does not find that compelling mitigating circumstances clearly predominate, and there is no compelling reason to depart from standard 2.2(a) in this case.

RECOMMENDATION

Disbarment

The court recommends that respondent Timothy Michael Darden 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 the following payees:

(1) Janet Stites in the amount of \$438,301.48¹⁶ plus 10 percent interest per year from May 26, 2009; and

(2) Richard Stickney in the amount of \$32,500 plus 10 percent interest per year from January 20, 2011.

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 Timothy Michael Darden, State Bar Number 147576, be involuntarily enrolled

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¹⁶ The court will not recommend restitution of the funds totaling \$15,000 which Stites apparently paid to respondent as advanced fees, as there is no clear and convincing evidence that this money was not earned.

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: June _____, 2013

PAT McELROY
Judge of the State Bar Court