

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 11-O-17164-RAP
)	
GUSTAVO DIAZ,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 225402,)	ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

Respondent Gustavo Diaz (respondent) was charged with (1) failing to obey a court order; (2) failing to perform with competence; and (3) failing to cooperate/participate in a State Bar investigation. 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.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 June 3, 2003, and has been a member since then.

Procedural Requirements Have Been Satisfied

On June 7, 2012, the State Bar filed and properly served the NDC on respondent by certified mail, return receipt requested, at his membership records address. As of July 23, 2012, the return receipt had not been returned to the State Bar; however, the NDC also had not been returned as undeliverable or otherwise by the United States Postal Service. The NDC notified respondent that his failure to participate in the proceeding would result in a disbarment recommendation. (Rule 5.41.)

Reasonable diligence was used to notify respondent of this proceeding, and respondent had actual notice of this disciplinary proceeding. The State Bar attempted to reach respondent by telephone at respondent's membership records telephone number, but the number was disconnected. A message was also sent to respondent at the email address then noted on his membership records.³ The message informed respondent that (1) the deputy trial counsel assigned to this matter was unable to reach him by telephone; (2) the State Bar had not received his reply to the NDC that was filed on June 7, 2012; (3) there is a status conference with the State Bar Court on July 11, 2012; and (4) if the deputy trial counsel did not hear back from respondent by 5:00 p.m. the next day, the State Bar would proceed to file a motion for entry of default. The deputy trial counsel asked respondent to respond to the email and to let her know

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).)

whether he intends to participate in this matter. Later that day, the deputy trial counsel received a reply email from respondent in which he stated that he had not received the NDC, but he did intend to fully participate in the proceedings. Respondent requested that the deputy trial counsel email him a copy of all relevant documents or mail the documents to P.O. Box 1751, Lancaster, CA 93536.⁴ The next day, the deputy trial counsel sent the NDC, the Notice of Assignment, and the Notice of Initial Status Conference to respondent by email to his then-email address as respondent had requested.⁵

Although respondent had actual notice of this proceeding, respondent failed to file a response to the NDC. On July 23, 2012, the State Bar filed and properly served on respondent by certified mail, return receipt requested, a motion for entry of respondent's default. 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) and reflecting that respondent had actual notice of this proceeding. 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 August 9, 2012. 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

⁴ In her declaration attached to the motion for entry of respondent's default, the deputy trial counsel sets forth that the post office box address given by respondent in his email response is the same address to which the NDC was mailed on June 7, 2012. However, that statement is incorrect, as the zip code respondent stated in his email is different than the zip code listed on respondent's membership records address which was the address to which the NDC was sent.

⁵ After respondent failed to appear at the July 11, 2012 status conference, the deputy trial counsel called directory assistance for the area which includes respondent's membership records address and asked for all telephone listings for respondent, but directory assistance did not have a listing for respondent in that area.

the State Bar 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.

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 February 25, 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) respondent has not contacted the State Bar since his default was entered; (2) there are other investigations pending against respondent;⁶ (3) respondent has no prior record of discipline; and (4) the Client Security Fund has not made any 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 March 25, 2013.

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(E)(1)(d).)

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Count One – respondent willfully violated section 6103 (violation of court order) by not appearing in court for the reading of the verdict in his client's criminal matter, after he had been repeatedly admonished by the court for excessive tardiness and after the court issued explicit

⁶ Although the deputy trial counsel's declaration attached to the petition for disbarment also reflects that there are other disciplinary matters pending against respondent, pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice that there are presently no other filed disciplinary matters pending against respondent.

orders that respondent appear for the verdict reading or arrange for another attorney to make the appearance.⁷

Count Two – respondent willfully violated rule 3-110(A) of the Rules of Professional Conduct (failing to perform legal services with competence) by not appearing for the reading of the verdict in his client’s criminal matter or making arrangements for another attorney to make the appearance, after respondent had received notice of the hearing at which the verdict in his client’s criminal case was to be read.

Count Three – respondent willfully violated section 6068, subdivision (i) (failing to cooperate/participate in a disciplinary investigation), by not responding to the State Bar’s letter requesting that respondent participate and cooperate in this disciplinary investigation by providing a written response to the allegations under investigation in this matter.

Disbarment is Recommended

Based on the above, the court concludes that the requirements of rule 5.85(E) have been satisfied, and respondent’s disbarment is recommended. In particular:

(1) the NDC was properly served on respondent under rule 5.25;

(2) respondent had actual notice of this disciplinary proceeding, as he responded to an email message from the State Bar which informed respondent, in pertinent part, that the State Bar had not received his reply to the NDC that was filed on June 7, 2012, and that if the deputy trial counsel did not hear back from him by 5:00 p.m. the next day, the State Bar would proceed to file a motion for entry of default;

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

⁷ The court notes that the NDC alleges that the court ordered respondent or his “stand-in” to be present in court on May 25, 2011, at **9:45 p.m.** However, the court finds that this is clearly a typographical error. Based on other facts alleged in the NDC, it is clear that the time was 9:45 a.m., not 9:45 p.m.

(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 actual 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 recommends disbarment.

RECOMMENDATION

Disbarment

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

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 Gustavo Diaz, State Bar number 225402, be involuntarily enrolled as an

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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 13, 2013

RICHARD A. PLATEL
Judge of the State Bar Court