

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 12-O-18213; 13-N-14630 (Cons.)
)	
MARK ABRAM POSNER,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 94714,)	ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

Respondent Mark Abram Posner (respondent) was charged with (1) failing to perform legal services with competence; (2) failing to refund unearned fees; (3) failing to respond promptly to client inquiries; and (4) failing to obey California Rules of Court, rule 9.20. He failed to file a response to the notice of disciplinary charges (NDC), 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 NDC and the attorney fails to have

¹ Unless otherwise indicated, all references to rules are to the Rules of Procedure of the State Bar which were in effect prior to July 1, 2014. Among other amendments, the default rules were amended effective July 1, 2014. However, as respondent's default was entered prior to July 1, 2014, the rules which were in effect prior to July 1, 2014, are the operative rules in this matter.

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

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 16, 1980, and has been a member since then.

Procedural Requirements Have Been Satisfied

On October 9, 2013, the State Bar spoke with counsel who was representing respondent in another proceeding. In order to expedite the consolidation of all cases involving respondent, respondent's counsel agreed to waive the Early Neutral Evaluation Conference in this matter so this matter could be filed without delay.

On October 16, 2013, the State Bar filed and served the NDC in this matter on respondent's counsel by certified mail, return receipt requested. A courtesy copy was also sent to respondent at his 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 return receipt was returned to the State Bar signed by Ronda Morris.

A telephonic status conference was held on November 12, 2013, in this matter and in case No. 13-O-10006, which is another matter pending against respondent. Respondent's counsel participated in the status conference, and the court granted a motion by the State Bar to

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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).)

consolidate both matters.³

On November 26, 2013, the assigned deputy trial counsel in this matter spoke to respondent's counsel regarding respondent's overdue response in this matter. Respondent's counsel informed the deputy trial counsel that respondent was not able to assist her at this time, and that the deputy trial counsel should go ahead and file for default in these matters.

As respondent failed to file a response to the NDC, on December 2, 2013, the State Bar properly served on respondent's counsel, by certified mail, return receipt requested, a motion for entry of respondent's default. The motion was filed with the court on December 4, 2013. The motion complied with the requirements for a default, including a supporting declaration reflecting that respondent's counsel informed the deputy trial counsel that respondent was not able to assist her at this time, and that the deputy trial counsel should go ahead and file for default in these matters. 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 18, 2013. The order entering the default was served on both respondent and respondent's counsel at their respective membership records addresses 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. He has remained inactively enrolled since that time. The order served on respondent was returned by the U.S. Postal Service as not deliverable as addressed, unable to be forwarded, and with the handwritten notation "ABANDONED BOX."

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 25, 2014, the State Bar

³ However, the matters were ordered severed on December 9, 2013.

properly served a petition for disbarment on respondent's counsel by certified mail, return receipt requested. A courtesy copy was also served that date on respondent at his membership records address by regular mail. The petition was filed with the court on June 27, 2014. As required by rule 5.85(A), the State Bar reported in the petition that: (1) respondent has not contacted the State Bar since the date the order entering respondent's default was served;⁴ (2) there is another disciplinary matter pending before the court against respondent and several non-public disciplinary matters pending against him; (3) respondent has a prior record of discipline; and (4) the Client Security Fund (CSF) 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 July 22, 2014.

Respondent has a prior record of discipline. Pursuant to a Supreme Court order filed on April 24, 2013, respondent was suspended for two years, the execution of which was stayed, and he was placed on probation for two years, on condition that he be suspended for 90 days. Respondent was also required to comply with California Rules of Court, rule 9.20. Respondent stipulated that he (1) commingled personal funds in a client trust account; (2) failed to participate and cooperate in a disciplinary investigation pending against him; and (3) failed to support the Constitution and laws of this state by holding himself out as entitled to practice law to opposing counsel and the court when he was not an active State Bar member.

The Admitted Factual Allegations Warrant the Imposition of Discipline

Upon entry of a 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 of the rule and statutory violations as charged, except as otherwise noted

⁴ This is the same date that default was entered.

and, therefore, violated a statute, rule or court order that would warrant the imposition of discipline. (Rule 5.85(E)(1)(d).)

1. Case Number 12-O-18213 (Saunders Matter)

Count One – the State Bar failed to prove by clear and convincing evidence that respondent willfully violated rule 3-110(A) of the State Bar Rules of Professional Conduct (failing to perform legal services with competence). The State Bar merely alleged in the NDC that respondent violated this rule “by performing no legal services *of value* on behalf of the client.” (Italics added.) This allegation is vague, ambiguous and arbitrary and does not establish, by clear and convincing evidence, that respondent intentionally, recklessly, or repeatedly failed to perform competent legal services. Lack of value does not establish a rule 3-110(A) violation. (Cf. *Berk v. Twenty-Nine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625, 637 [A “client cannot escape full payment [in accordance with the terms of a fee agreement] merely because the attorney’s services prove to be less valuable than the parties had in mind when they entered into the [fee agreement].”].) This count is therefore dismissed with prejudice.

Count Two – respondent willfully violated rule 3-700(D)(2) of the State Bar Rules of Professional Conduct (failing to refund unearned fees) by failing to promptly refund, upon his termination of employment, any part of the \$5,000 advanced fee paid by his clients which had not been earned.

Count Three - respondent willfully violated Business and Professions Code section⁵ 6068, subdivision (m) (failure to communicate) by failing to promptly respond to several written and telephonic status inquires made by his clients.

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⁵ All further references to section(s) refer to provisions of the Business and Professions Code.

2. Case Number 13-N-14630 (Rule 9.20 Matter)

Count Four – respondent willfully violated California Rules of Court, rule 9.20, by failing to file a declaration of compliance with California Rules of Court, rule 9.20, with the clerk of the State Bar Court, as required by rule 9.20(c) by July 3, 2013, as required by Supreme Court order number S208859.

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 served on respondent and respondent's counsel;
- (2) respondent had adequate notice of the proceedings prior to the entry of his default, as
 - (a) the NDC was served on both respondent and his counsel; (b) respondent's counsel participated in a telephonic status conference in this matter; (c) the assigned deputy trial counsel in this matter spoke to respondent's counsel about respondent's overdue response; and
 - (d) respondent's counsel informed the deputy trial counsel that respondent was not able to assist counsel at this time, and that the deputy trial counsel should go ahead and file for default in these matters;
- (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 recommends disbarment.

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RECOMMENDATION

Disbarment

The court recommends that respondent Mark Abram Posner 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 Steven and Faith Saunders in the amount \$5,000, plus 10 percent interest per year from June 1, 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 Mark Abram Posner, State Bar number 94714, be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after the service of

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this decision and order. (Rule 5.111(D).)

Dated: November ____, 2014

LUCY ARMENDARIZ
Judge of the State Bar Court