

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case Nos.: 13-O-11287-LMA (13-O-11621)
)	
KEVIN MOORE O’CASEY,)	DECISION AND ORDER OF INVOLUNTARY
)	INACTIVE ENROLLMENT
Member No. 159858,)	
)	
<u>A Member of the State Bar.</u>)	

Respondent Kevin Moore O’Casey (respondent) is charged with six counts of misconduct. 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

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¹ Unless otherwise indicated, all references to rules are to the Rules of Procedure of the State Bar which were in effect from January 1, 2011, through June 30, 2014. Among other amendments, the default rules were amended effective July 1, 2014. However, as respondent’s default was entered before July 1, 2014, the rules which were in effect before July 1, 2014, are the operative rules in this matter.

² If the court determines that any due process requirements is 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 the practice law in this state on October 2, 1992, and has been a member of the State Bar of California since that time.

Procedural Requirements Have Been Satisfied

The State Bar filed the NDC in this proceeding on October 17, 2013. On October 17, 2013, the State Bar also served the NDC on respondent by certified mail, return receipt requested, at respondent's official-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 NDC has not been returned to the State Bar by the Postal Service.

Thereafter, on November 18, 2013, the State Bar attempted to reach respondent by (1) calling at his membership-records-telephone number and (2) calling Attorney Paul S. Hokokian, who represented respondent in one of his prior disciplinary proceedings.

Respondent failed to file a response to the NDC. On November 19, 2013, the State Bar filed and properly served a motion for entry of default on respondent by certified mail, return receipt requested, to his membership-records address. The motion complied with all the requirements for a default, including a supporting declaration of reasonable diligence by the State Bar senior 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 6, 2013. The order entering the default was properly 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),³ effective three days after service of the order. He has remained on inactive enrollment since that time.

Respondent also did not seek to have his default set aside or vacated. (Rule 5.83(C)(1) [attorney had 180 days to file motion to set aside default].) On July 3, 2014, the State Bar filed and properly served a petition for disbarment on respondent by certified mail, return receipt requested, to his membership-records address. As required by rule 5.85(A), the State Bar reported in the petition that (1) respondent has not had any contact with the State Bar after his default was entered on December 6, 2013; (2) there are 10 other disciplinary matters pending against respondent; (3) respondent has three prior records of discipline;⁴ and (4) there are eight pending claims with the Client Security Fund due to 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 29, 2014.

Pursuant to a pre-NDC stipulation that respondent entered into with the State Bar and a State Bar Court order filed April 28, 2005, respondent was privately reprovved. Discipline was imposed in that matter for respondent's failure to communicate and client abandonment.

Pursuant to a stipulation that respondent entered into with the State Bar and a State Bar Court order filed May 9, 2011, respondent was publicly reprovved. Discipline was imposed in

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³ All further statutory references are to the Business and Professions Code.

⁴ The State Bar failed to introduce copies of respondent's three prior records of discipline into evidence. Thus, the court takes judicial notice of the pertinent State Bar Court records regarding respondent's three prior records of discipline, admits them into evidence, and directs the Clerk to include copies in the record of this case.

that matter for respondent's failure to perform with competence, failure to refund unearned fees, and failure to communicate.

Pursuant to a Supreme Court order filed on October 29, 2013, respondent was suspended for three years, the execution of which was stayed, and he was placed on probation for three years subject to conditions including that he be suspended from the practice of law for a minimum of the first two years of probation and until he provides proof of his rehabilitation, fitness to practice, and learning and ability in the general law. Discipline was imposed in that matter for respondent's failure to communicate, failure to cooperate with State Bar disciplinary investigations, and failure to comply with reprobation conditions. Respondent appeared and participated in that matter.

The Admitted Factual Allegations Warrant the Imposition of Discipline

Upon entry of a respondent's default, the factual allegations (but not the charges or conclusions) in the NDC were deemed admitted and no further proof was or 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 on three of the six counts and, therefore, violated a statute, rule or court order that would warrant the imposition of discipline. (Rule 5.85(E)(1)(d).)

Case Number 13-O-11287 (Clark 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 serve, on the respondent-spouse, the petition for legal separation that respondent filed for his client Deborah Clark and by taking no further action on behalf of Clark other than filing the petition for separation.

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Count Two – respondent willfully violated section 6068, subdivision (m) (failing to communicate) by failing to respond to 12 telephonic reasonable status inquiries made by his client Clark.

Count Three – State Bar Rules of Professional Conduct, rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund any part of a fee paid in advance that has not been earned. In count three, the State Bar charges that respondent willfully violated State Bar Rules of Professional Conduct, rule 3-700(D)(2) because, upon the termination of his employment, respondent did not refund the advanced fee he collected from his client Clark. However, the factual allegations in the NDC that are deemed admitted by the entry of respondent’s default do not establish that the advanced fee was unearned. First, the statements in the NDC to the effect that the legal services respondent performed for Clark were of no value and that respondent did not, therefore, earn any portion of the advanced fee are conclusion and assertions of opinion, not factual allegations that can be deemed admitted. Second, lack of value (either objectively or subjectively) is irrelevant in determining whether an advanced fee was unearned for purposes of rule 3-700. No rule 3-700(D)(2) violation is shown.

Count three is DISMISSED with prejudice for want of proof.

Case Number 13-O-11621 (Kalender Matter)

Count Four – State Bar Rules of Professional Conduct, rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. In count four, the State Bar charges that respondent willfully violated rule 3-110(A) “by performing no legal services of value on behalf of the client” Nick Kalender. However, rule 3-110(A) does not refer to, much less require, that an attorney provide legal services of value. Neither value nor lack of value is relevant with respect to determining whether

an attorney has intentionally, recklessly, or repeatedly failed to perform legal services competently in willful violation of rule 3-110(A). No violation of rule 3-110(A) is shown.

Count four is DISMISSED with prejudice for want of proof.

Count Five – in count five, the State Bar charges that respondent willfully violated State Bar Rules of Professional Conduct, rule 3-700(D)(2) because, upon the termination of his employment, respondent did not refund the advanced fee he collected from his client Kalender. However, the factual allegations in the NDC that are deemed admitted by the entry of respondent's default do not establish that the advanced fee was unearned. First, the statements in the NDC to the effect that the legal services respondent performed for Kalender were of no value and that respondent did not, therefore, earn any portion of the advanced fee are conclusion and assertions of opinion, not factual allegations that can be deemed admitted. Second, lack of value (either objectively or subjectively) is irrelevant in determining whether an advanced fee was unearned for purposes of rule 3-700. No rule 3-700(D)(2) violation is shown.

Count five is DISMISSED with prejudice for want of proof.

Count Six – 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 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) reasonable diligence was used to notify respondent of the proceedings prior to the entry of his default, as the State Bar (a) filed and properly served the NDC on respondent by

certified mail, return receipt requested, at his membership records address; (b) attempted to reach respondent by calling his membership-records telephone number; and (c) attempted to reach respondent by calling an attorney who previously represented respondent in another disciplinary proceeding.

(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 reasonable 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.

RECOMMENDATIONS

Disbarment

The court recommends that respondent Kevin Moore O'Casey 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 Kevin Moore O’Casey, State Bar number 159858, 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. (Rules Proc. of State Bar, rule 5.111(D).)

Dated: October ____, 2014.

LUCY ARMENDARIZ
Judge of the State Bar Court