

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case Nos.: <b>13-O-13723-LMA</b>
	)	
<b>KENNETH JAY SCHWARTZ,</b>	)	
	)	<b>DECISION AND ORDER OF</b>
<b>Member No. 99548,</b>	)	<b>INVOLUNTARY INACTIVE</b>
	)	<b>ENROLLMENT</b>
<u>A Member of the State Bar.</u>	)	

Respondent Kenneth Jay Schwartz 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 cooperate in a State Bar investigation. He did not 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.<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 NDC and the attorney fails to have

---

<sup>1</sup> 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.<sup>2</sup>

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 1, 1981 and has been a member of the State Bar of California since.

#### **Significant Procedural History**

On January 21, 2014, the State Bar filed and properly served the NDC on respondent by certified mail, return receipt requested to 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 indicating that the correspondence was received on January 23, 2014 by Robert Lampl.

Respondent did not file a response to the NDC by February 17, 2014. However, he had actual notice of this proceeding while it was being investigated as he had email and telephone communication with the State Bar investigator in October 2013, including obtaining an extension of time to October 30, 2013 to respond to the investigator's letters regarding alleged misconduct. Moreover, the deputy trial counsel and investigator had made efforts to contact respondent by voicemail left at his official and alternate telephone numbers and by leaving a message for respondent with Matt Schwartz in November 2013, none of which were returned. Matt Schwartz, the branch manager of Gold Financial Services in Texas, said he checked respondent's

---

<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).)

office and that respondent was not there but would tell respondent the investigator had called. In addition, in November 2013, the investigator visited respondent's official address and discovered that respondent was not there and that mail was piled up on his chair. Attorney Robert Lampl at that location indicated that respondent had moved to Texas about two months before. When mail was received for respondent, it was placed in his office. Further, respondent had not requested that Lampl's office take over his cases or forward mail to him. Finally, a November 2013 Lexis search did not produce any additional addresses or telephone numbers for respondent.

On March 6 and 7, 2014, the State Bar properly served and filed, respectively, on respondent a motion for entry of his default by certified mail, return receipt requested to respondent's membership records address. The motion included a supporting declaration reflecting that respondent had actual notice of the proceeding being investigated and that efforts had been made to locate and contact respondent. 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 April 2, 2014. 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), effective three days after service of the order. The return receipt indicates delivery of the order on April 4, 2014 to someone whose signature is illegible.

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 November 14, 2014, the State Bar filed and properly served a petition for disbarment on respondent by certified mail, return receipt requested. As required by rule 5.85(A), the State Bar reported in the petition that: (1) the State Bar has not had contact with respondent since the default was entered; (2) there are four other

disciplinary matters pending against respondent; (3) respondent has one prior record of discipline<sup>3</sup>; and (4) the Client Security Fund (CSF) has not made any payments resulting from respondent's conduct as set forth in the NDC. 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 December 10, 2014.

Respondent has two prior records of discipline.<sup>4</sup>

Pursuant to an order of the State Bar Court, a public reproof was imposed on respondent effective October 24, 1990. In this matter, respondent stipulated that that he willfully violated former rules 6-101(A)(2) (failure to perform competently), 2-111(A)(2) (abandonment) and 2-111(A)(3) (not returning unearned fees) of the State Bar Rules of Professional Conduct<sup>5</sup> and Business and Professions Code section 6068, subdivision (m) (not communicating).<sup>6</sup>

Pursuant to a Supreme Court order filed on June 10, 1998, respondent was suspended for two years and until respondent made restitution and return client files, the execution of which was stayed, and he was placed on probation for two years, on conditions. Respondent stipulated that he willfully violated rules 3-110(A) (failure to perform competently), 3-700(A)(2) (abandonment), 3-700(D)(2) (not returning unearned fees) and 3-700(D)(1) (not returning client files) sections 6103 (not complying with a court order) and 6068, subdivisions (i) and (m) (not cooperating in a disciplinary investigation and not communicating, respectively).

---

<sup>3</sup> The court judicially notices its records which indicate that respondent has two prior disciplinary records.

<sup>4</sup> The court takes judicial notice of the relevant State Bar court records regarding the two prior discipline records, admits them into evidence and directs the clerk to include copies in the record of this case.

<sup>5</sup> References to the former Rules of Professional Conduct are to those in effect at the time of the stipulation.

<sup>6</sup> Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

## **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 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 13-O-13723 (Martin Matter)**

Count One - respondent willfully violated rule 3-110(A) of the State Bar Rules of Professional Conduct (failing to perform legal services with competence) by not filing a bankruptcy petition on behalf of Charles Martin as he was retained to do.

Count Two alleges respondent's willful violation of rule 3-700(D)(2) of the State Bar Rules of Professional Conduct by failing to refund \$1,806 in unearned fees to a client, averring that respondent "performed no services of value" on the client's behalf "and therefore earned none of the fees paid." The NDC's statements that that respondent's services were of no value and, therefore, the fees were unearned, are assertions of opinion, not factual allegations that can be deemed admitted. Moreover, lack of value is irrelevant in determining whether an advanced fee was unearned for purposes of this rule. Accordingly, since no violation was shown, this count is DISMISSED with prejudice.

Count Three – respondent willfully violated section 6068, subdivision (m) (failing to respond to client inquiries) by not responding promptly to six emails and one certified letter, reasonable inquiries made by his client between March 5, 2013 and May 8, 2013, which respondent received regarding a matter in which he had agreed to provide legal services.

Count Four – respondent willfully violated section 6068, subdivision (i) (failing to cooperate/participate in a disciplinary investigation) by failing to respond to a State Bar

investigator's two letters that respondent received and that requested his response to allegations of misconduct being investigated in the Martin 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 the investigation of this matter and reasonable diligence was used to notify him of the matter prior to the entry of his default, as set forth above;
- (3) the court finds that 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.

Respondent failed to participate in this disciplinary proceeding. The court recommends disbarment.

## **RECOMMENDATION**

### **Disbarment**

The court recommends that respondent Kenneth Jay Schwartz 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 Kenneth Jay Schwartz, State Bar number 99548, 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: February \_\_\_\_, 2015

---

LUCY M. ARMENDARIZ  
Judge of the State Bar Court