

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of) Case No.: **13-O-14148-PEM**
)
MATTHEW D. MULLER,) **DECISION AND ORDER OF**
) **INVOLUNTARY INACTIVE**
Member No. 275832,) **ENROLLMENT**
)
)
A Member of the State Bar.)

Respondent Matthew D. Muller (respondent) was charged with (1) failing to perform with competence; (2) failing to promptly refund unearned fees; (3) moral turpitude; and (4) failing to cooperate in a State Bar investigation. He failed to participate either in person or through counsel, and his default was entered. The State Bar of California, 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),

¹ Unless otherwise indicated, all references to rules are to this source. The Rules of Procedure of the State Bar regarding defaults, rules 5.80 through 5.86, were substantively revised effective July 1, 2014. However, as the default in this case was entered prior to July 1, 2014, the court, in the interest of justice, will apply in this matter former rules 5.80 through 5.86 of the Rules of Procedure of the State Bar which were in effect from January 1, 2011, through June 30, 2014.

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

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 May 7, 2011, and has been a member since then.

Procedural Requirements Have Been Satisfied

On December 23, 2013, the State Bar filed and properly served the NDC in this matter on respondent by certified mail, return receipt requested, and by regular mail 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 NDC was returned by the United States Postal Service (USPS).

Thereafter, the State Bar sent a copy of the NDC to respondent by regular first-class mail to an address in Orangevale, California which was also contained in respondent's case file. The NDC was returned to the State Bar by the USPS.

Respondent left a voicemail for the senior trial counsel assigned to this matter, Manuel Jimenez (STC Jimenez), sometime between December 24, 2013, and approximately January 3, 2014.

STC Jimenez telephoned respondent twice at a telephone number contained within the State Bar files on February 19, 2014. However, STC Jimenez did not reach respondent. STC

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).)

Jimenez also called directory assistance on that same day for the area which includes respondent's membership records address. However, directory assistance did not have any listing for respondent other than those at which STC Jimenez had already attempted to reach respondent. STC Jimenez also emailed respondent at two email addresses contained in the State Bar's files.³ With the email, STC Jimenez attached documents, including the NDC.

On February 24, 2014, STC Jimenez attempted to reach respondent by telephone at his official membership records telephone number. However, the number belongs to the Kerosky, Purves & Bogue firm. A receptionist informed STC Jimenez that respondent is no longer employed by the firm and there is no forwarding information.

Also on February 24, 2014, STC Jimenez again attempted to reach respondent at the telephone number contained within the State Bar files that he had called on February 19, 2014. However, he did not reach respondent.

STC Jimenez conducted an internet search on February 24, 2014, for respondent's name in the Orangevale, California area. STC Jimenez located a telephone number for a Matthew Muller in Orangevale, but when he telephoned the number, it was disconnected.

On February 24, 2104, after filing the motion for the entry of respondent's default, STC Jimenez received a return email from respondent. In the email, respondent (a) indicated he was ill and had not been present at the status conference due to poor health; (b) set forth that he could be reached at that email address; (c) that by the end of the day, he would have a specified number active with a voicemail box; and (d) that he is using a parent's residence in Orangevale, California for correspondence.⁴ STC Jimenez returned respondent's email on that same date.

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).)

⁴ Respondent's email is attached to the State Bar's petition for disbarment as part of Exhibit 1. The court notes that the number that was to be activated with a voicemail box and the address that respondent is using for correspondence have been redacted from this exhibit.

STC Jimenez attached, among other things, the NDC filed in this matter. STC Jimenez (a) advised respondent of the assigned judge and case administrator; (b) gave respondent the assigned case administrator's telephone number; (c) suggested that respondent call the court and ask to have the matter put back on calendar; (d) stated that the State Bar would not oppose such a request; and (e) that prior to respondent's email, he had filed a default motion that day.

Respondent failed to file a response to the NDC. On February 24, 2014, the State Bar filed and properly served a motion for entry of default on respondent by certified mail, return receipt requested, at 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 March 12, 2014. The order entering the default was served on respondent at his membership records address by certified mail, return receipt requested.⁵ 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, 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 October 3, 2014, the State Bar filed and properly served the petition for disbarment on respondent by certified mail, return receipt requested, at respondent's membership records address. As required by rule 5.85(A), the State Bar reported in the petition that: (1) the State Bar has not had any communication with respondent since his default was entered; (2) there is another matter pending against respondent

⁵ The order was returned to the State Bar Court by the USPS.

which is currently abated; (3) respondent does not have a 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 October 28, 2014.

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 as charged, except as otherwise noted, 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-14148 (Ashton 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.

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Count Two – Respondent willfully violated rule 3-700(D)(2) of the State Bar Rules of Professional Conduct (failure to return unearned fees) by failing to promptly refund, upon his constructive termination of employment, the \$1,250 fee paid by his client that was not earned.

Count Three – Respondent willfully violated Business and Professions Code section 6106 (moral turpitude) by stating in writing to his client that he had filed a notice of intent with the U.S. Citizenship and Immigration Services on behalf of the client’s minor son when he knew or was grossly negligent in not knowing the statement was false.

Count Four – Respondent willfully violated Business and Professions Code section 6068, subdivision (i) (failure to cooperate in a State Bar investigation) by failing to provide a substantive response to the State Bar’s letter which he received that requested his response to the allegations of misconduct being investigated 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) 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 at his membership records address by certified mail, return receipt requested, and by regular mail; (b) sent a copy of the NDC to respondent by regular first-class mail to another address;
- (c) telephoned respondent three times at a telephone number contained within the State Bar files, and also telephoned respondent at his official membership records telephone number;
- (d) contacted directory assistance for the area which includes respondent’s membership records address; (e) emailed respondent at two email addresses contained in the State Bar’s files, attaching documents, including the NDC; (f) conducted an internet search for respondent’s name

in the Orangevale, California area; and (g) after receiving a return email from respondent, STC Jimenez returned respondent's email and attached, in particular, the NDC, and advised him, among other things, that a default motion had been filed that day. Respondent also had actual notice of the proceeding prior to the entry of his default, as (a) respondent left a voicemail for the assigned senior trial counsel in this matter sometime between December 24, 2013, and approximately January 3, 2014; and (b) after filing the motion for the entry of respondent's default, STC Jimenez received a return email from respondent at which he notes why he was not present at the status conference;

(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 and 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 Matthew D. Muller 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 recommends that respondent be ordered to make restitution to John A. Fitzgerald Ashton in the amount of \$1,250, plus 10 percent interest per year from September 26, 2012.

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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 Matthew D. Muller, State Bar number 275832, 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: January _____, 2015

PAT McELROY
Judge of the State Bar Court