

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 13-O-17575-LMA
)	
NANCY KAY McDONALD,)	
)	DECISION AND ORDER OF
Member No. 146168,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

In this matter, respondent Nancy Kay McDonald was charged with four counts of misconduct stemming from one client matter. Respondent failed to participate either in person or through counsel, and her default was entered. The Office of the Chief Trial Counsel of the State Bar of California (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 90 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(F)(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 12, 1990, and has been a member since then.

Procedural Requirements Have Been Satisfied

On July 8, 2014, the State Bar properly filed and served an NDC on respondent by certified mail, return receipt requested, at her membership records address. The NDC notified respondent that her failure to participate in the proceeding would result in a disbarment recommendation. (Rule 5.41.) The State Bar has not received a return receipt card from the U.S. Postal Service.

In addition, reasonable diligence was used to notify respondent of this proceeding. The State Bar made attempts to contact respondent without success. These efforts included mailing a courtesy copy of the NDC to respondent on July 8, 2014, by regular first class mail at her membership records address. The NDC was not returned by the U.S. Postal Service. Thereafter, on August 18, 2014, the deputy trial counsel (DTC) assigned to this matter attempted to reach respondent at her membership records telephone number and left a voicemail message informing respondent of the State Bar's intent to file a motion for entry of default. In her voicemail, the assigned DTC further advised respondent that once the default motion was filed, respondent must file a motion to set aside the default with the State Bar Court. Additionally, the DTC asked respondent to contact trial counsel at her direct phone number with any questions.

Respondent failed to file a response to the NDC. On August 19, 2014, the State Bar filed and properly served 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 deputy trial counsel declaring the additional steps taken to provide notice to respondent. (Rule 5.80.) The motion also notified respondent that if she did not timely move to set aside her default, the court would recommend her disbarment. Respondent did not file a response to the motion, and her default was entered on September 4, 2014. The order entering the default was served on respondent at her 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, and she has remained inactively enrolled since that time.

Respondent also did not seek to have her default set aside or vacated. (Rule 5.83(C)(1) [attorney has 90 days to file motion to set aside default].) On December 9, 2014, the State Bar filed and properly served the petition for disbarment. As required by rule 5.85(A), the State Bar reported in the petition that: (1) it has had no contact with respondent since the default was entered; (2) there is one other disciplinary matters pending against respondent; (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 January 6, 2015.

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

Case No. 13-O-17575 – The Goodbody Matter

Count One – the court does not find respondent culpable of willfully violating Rules of Professional Conduct, rule 3.110(A) (failure to perform) as there is no clear and convincing evidence that respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence.³ Accordingly, Count One is dismissed with prejudice.

Count Two – respondent willfully violated Rules of Professional Conduct, rule 3-700(D)(2) (failure to refund unearned fees) by performing no legal services of value and failing to refund unearned advanced fees upon termination of employment.

Count Three – respondent willfully violated rule 4-100(B)(3) of the Rules of Professional Conduct (failure to account) by failing to provide her client with an accounting of the fees, which the client had advanced to her.

Count Four – Respondent willfully violated Business and Professions Code section 6068, subdivision (i) (failing to cooperate in a State Bar investigation), by failing to respond to the State Bar’s letters, which she received, requesting a response to the allegations of misconduct being investigated in case No. 13-O-17575.

Disbarment is Recommended

Based on the above, the court concludes that the requirements of rule 5.85(F) 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 her default, as the State Bar properly served her with the NDC and made various efforts

³ The State Bar merely alleged that respondent failed to perform the legal services for which she was employed “by performing no legal services of value on behalf of the client.” This allegation is vague and arbitrary and does not establish, by clear and convincing evidence, that respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence.

to locate respondent, including mailing a courtesy copy of the NDC to respondent at her membership records address and, thereafter, calling her and leaving a message at respondent's membership records telephone number, informing her of the State Bar's intent to file a motion for entry of default and advising that once the default motion was filed respondent must move to set aside the default;

(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.

RECOMMENDATIONS

Disbarment

The court recommends that respondent Nancy Kay McDonald be disbarred from the practice of law in the State of California and that her name be stricken from the roll of attorneys.

Restitution

The court, additionally, recommends that respondent be ordered to make restitution to Gerald Goodbody in the amount of \$1,600 plus 10 percent interest per year from August 22, 2013. 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 Nancy Kay McDonald, State Bar number 146168, 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: April _____, 2015

LUCY ARMENDARIZ
Judge of the State Bar Court