

**PUBLIC MATTER**

**FILED**

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**JUL - 1 2015**

**STATE BAR COURT OF CALIFORNIA**

STATE BAR COURT CLERK'S OFFICE  
SAN FRANCISCO

**HEARING DEPARTMENT - LOS ANGELES**

In the Matter of	)	Case No.: 14-O-01542-LMA
	)	
<b>DAVID A. ELWELL,</b>	)	<b>DECISION AND ORDER OF</b>
	)	<b>INVOLUNTARY INACTIVE</b>
<b>Member No. 122091</b>	)	<b>ENROLLMENT</b>
	)	
A Member of the State Bar.	)	
_____	)	

In this matter, respondent David A. Elwell (respondent) was charged with two counts of misconduct. Respondent failed to participate either in person or through counsel, and his 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.<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 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.<sup>2</sup>

<sup>1</sup> Unless otherwise indicated, all references to rules are to this source.

<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(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 December 20, 1985, and has been a member since then.

#### **Procedural Requirements Have Been Satisfied**

On November 18, 2014, the State Bar properly filed and served an NDC, in case no. 14-O-01542, on respondent by certified mail, return receipt requested, at his membership records address. The NDC notified respondent that his failure to participate in the proceedings would result in a disbarment recommendation. (Rule 5.41.) The NDC was returned to the State Bar by the U.S. Postal Service as unclaimed and not able to be forwarded.

In addition, respondent had actual notice of this proceeding. On December 15, 2014, the deputy trial counsel (trial counsel) assigned to this matter called respondent at his membership records telephone number and left a voicemail message. On December 22, 2014, respondent called trial counsel and confirmed that his membership records address and telephone number were correct. Respondent provided a new email address and requested that trial counsel email him a courtesy copy of the NDC at that address. Respondent stated that he had been ill and requested that trial counsel hold off on filing a default motion until after the Christmas holiday. Trial counsel agreed and promptly emailed a copy of the NDC to respondent, as requested.

Respondent subsequently failed to file a response to the NDC. On January 12, 2015, the State Bar filed and properly served a motion for entry of respondent's default. Respondent did not file a response to the motion, and his default was entered on January 30, 2015. 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, 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 90 days to file motion to set aside default].) On May 20, 2015, the State Bar filed the petition for disbarment. As required by rule 5.85(A), the State Bar reported in the petition that: (1) respondent has no other disciplinary matters pending; (2) respondent has no prior record of discipline; and (3) the Client Security Fund has not made any payments resulting from respondent's conduct.<sup>3</sup> 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 June 18, 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 and, therefore, violated a statute, rule, or court order that would warrant the imposition of discipline. (Rule 5.85(F)(1)(d).)

#### **Case Number 14-O-01542 – The MCLE Compliance Matter**

Count One – respondent willfully violated Business and Professions Code section 6106 (moral turpitude – misrepresentation) by falsely reporting to the State Bar, under penalty of perjury, that he had fully complied with his minimum continuing legal education (MCLE)

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<sup>3</sup> Pursuant to rule 5.85(A), the State Bar's disbarment petition must include a declaration stating whether any contact with the member has occurred since default was entered. In an apparent oversight, the State Bar failed to adequately address this issue – instead stating that respondent has not served the State Bar with a motion to set aside or vacate the default. Based on the otherwise thorough disbarment petition and the record as a whole, there is no indication that respondent had any contact with the State Bar following the entry of his default.

requirements for the period of February 1, 2010 to January 31, 2013, when respondent knew or was grossly negligent in not knowing that he had failed to complete the MCLE requirements for that period.

Count Two – respondent willfully violated Business and Professions Code section 6068, subdivision (i) (failing to cooperate in a disciplinary investigation) by failing to provide a substantive response to the allegations in a disciplinary investigation after being contacted by the State Bar.

**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) respondent had actual notice of the proceedings prior to the entry of his default, as he communicated with the State Bar regarding the present proceedings and, upon his request, was emailed a copy of the NDC;
- (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 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.

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## RECOMMENDATIONS

### Disbarment

The court recommends that respondent David A. Elwell 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 David A. Elwell, State Bar number 122091, 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: July 1, 2015

  
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LUCY ARMENDARIZ  
Judge of the State Bar Court

## CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on July 1, 2015, I deposited a true copy of the following document(s):

### DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:


- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

DAVID A. ELWELL  
PO BOX 572556  
SALT LAKE CITY, UT 84157

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

SHERELL N. MCFARLANE, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on July 1, 2015.



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Mazie Yip  
Case Administrator  
State Bar Court