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STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of	)	Case No. 15-O-12893-PEM
	)	
<b>BRIAN GAIL KINDSVATER,</b>	)	
	)	<b>DECISION AND ORDER OF</b>
A Member of the State Bar, No. 156315.	)	<b>INVOLUNTARY INACTIVE</b>
<hr/>	)	<b>ENROLLMENT</b>

Respondent **Brian Gail Kindsvater** (respondent) was charged with five counts of violations of the Rules of Professional Conduct and the Business and Professions Code.<sup>1</sup> He failed to appear at the trial of this case and his default was entered. The Office of Chief Trial Counsel (State Bar) filed a petition for disbarment under rule 5.85 of the Rules of Procedure of the State Bar.<sup>2</sup>

Rule 5.85 provides the procedure to follow when an attorney fails to appear at trial after receiving adequate notice and opportunity. The rule provides that, if an attorney's default is entered for failing to appear at trial and the attorney fails to have the default set aside or vacated



<sup>1</sup> Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

<sup>2</sup> Unless otherwise indicated, all references to rules are to this source.

within 45 days, the State Bar will file a petition requesting the court to recommend the attorney's disbarment.<sup>3</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 California on December 17, 1991, and has been a member since then.

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

On March 21, 2016, the State Bar properly filed and served a notice of disciplinary charges (NDC) on respondent. The NDC notified respondent that his failure to appear at the State Bar Court trial would result in a disbarment recommendation. Respondent filed a response to the NDC on April 18, 2016.

At a status conference on May 2, 2016, the trial was set to start on July 5, 2016. The May 2, 2016 order setting the trial date was served on respondent at his membership records address by first-class mail, postage paid. (Rule 5.81(A).)

On July 5, 2016, the State Bar appeared for trial but respondent did not.

Finding that all of the requirements of rule 5.81(A) were satisfied, the court entered respondent's default by order filed July 5, 2016. The order notified respondent that, if he did not timely move to set aside his default, the court would recommend his disbarment. The order also placed respondent on involuntary inactive status under section 6007, subdivision (e), effective three days after service of the order, and he has remained inactively enrolled since that time.

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<sup>3</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).)

Respondent did not seek to have his default set aside or vacated. (Rule 5.83(C)(2) [attorney has 45 days after order entering default is served to file motion to set aside default].)

On August 30, 2016, the State Bar properly filed and served the petition for disbarment on respondent at his official membership records address in Miami, Florida. As required by rule 5.85(A), the State Bar reported in the petition that: (1) there has been no contact with respondent since his default was entered; (2) there is no disciplinary matter pending against respondent; (3) respondent has no record of prior discipline; and (4) the Client Security Fund (CSF) has not paid any claims as a result of respondent's misconduct.

Respondent has not responded to the petition for disbarment or moved to set aside or vacate the default. The case was submitted for decision on September 30, 2016.

**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 No. 15-O-12893 (Novello Matter)**

Count 1 – Respondent willfully violated rule 4-100(B)(1) of the Rules of Professional Conduct (failure to promptly notify a client of receipt of client funds) by failing to promptly notify his client, Ronald Novello, of receipt of settlement funds of \$20,000 on April 3, 2015.

Count 2 – Respondent willfully violated rule 4-100(A) of the Rules of Professional Conduct (failure to maintain client funds in trust account) by failing to maintain a balance of \$20,000 in a client trust account on behalf of his client.

Count 3 – Respondent willfully violated section 6106 by misappropriating \$19,812.76 between April 14, 2015, and June 24, 2015, which the client was entitled to receive.

Count 4 – Respondent willfully violated rule 4-100(B)(4) of the Rules of Professional Conduct (failure to promptly pay funds to client) by failing upon the client's request on May 12, 2015, to promptly pay the \$20,000 settlement funds to the client. He did not pay the funds until after July 15, 2015.

Count 5 – Respondent willfully violated section 6106 by misrepresenting to the client on April 15, 2015, that the settlement funds had not yet been received and that the check had to clear the client trust account, when in fact, he had already received the funds and the check had cleared.

#### **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 this proceeding and had adequate notice of the trial date prior to the entry of his default.
- (3) The default was properly entered under rule 5.81.
- (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.
- (5) Despite adequate notice and opportunity, respondent failed to appear for the trial of this disciplinary proceeding.

As set forth in the Rules of Procedure of the State Bar, the court recommends his disbarment.

## RECOMMENDATIONS

### Disbarment

The court recommends that respondent **Brian Gail Kindsvater**, State Bar number 156315, 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.

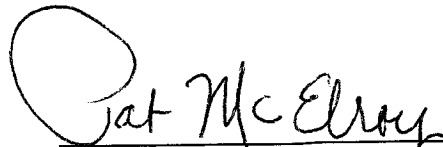
### Costs

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 **Brian Gail Kindsvater**, State Bar number 156315, 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: November 29, 2016

  
PAT McELROY  
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 November 29, 2016, I deposited a true copy of the following document(s):

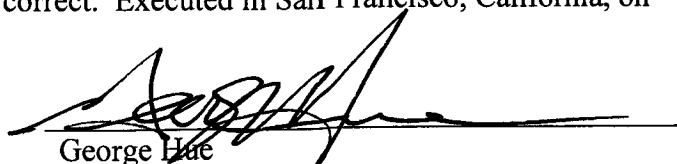
### DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

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:
- BRIAN G. KINDSVATER  
8345 NW 66TH ST # C1723  
MIAMI, FL 33195 - 2696
- by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:
- by overnight mail at , California, addressed as follows:
- by fax transmission, at fax number . No error was reported by the fax machine that I used.
- By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:
- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Susan I. Kagan, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on November 29, 2016.

  
George Hae  
Case Administrator  
State Bar Court