

JUL 03 2018

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

Case No. 16-O-18035-YDR

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

A Member of the State Bar, No. 208813.

In this original disciplinary proceeding, respondent Keith Alan Kelly (Respondent) is charged with five counts of misconduct. Even though Respondent had adequate notice of the March 15, 2018, trial setting in this proceeding, Respondent failed to appear at the trial, and his default was entered under rule 5.81 of the Rules of Procedure of the State Bar.¹ Thereafter, the State Bar's Office of Chief Trial Counsel (OCTC) filed a petition for disbarment under rule 5.85.

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 if the attorney fails to have the default set aside or vacated within 45 days, OCTC will file a petition requesting the State Bar Court to recommend the attorney's disbarment to the Supreme Court.²

¹ Except where otherwise indicated, all further references to rules are to the Rules of Procedure of the State Bar of California.

² If the court determines that any due process requirement is 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 all of 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 the practice of law in California on November 27, 2000, and has been a member of the State Bar of California since that time.

Procedural Requirements Have Been Satisfied

On July 6, 2017, OCTC filed the NDC in this proceeding with the court and properly served it on Respondent at his membership-records address by certified mail, return receipt requested. The NDC notified Respondent that his failure to appear at the State Bar Court trial would result in a disbarment recommendation. (Rule 5.41.) Respondent filed a response to that NDC on January 11, 2018.

On January 22, 2018, at an in-person status conference at which Respondent was present, the court set the trial in this matter to begin on March 15, 2018. Thereafter, on January 25, 2018, the court filed and served on Respondent at the address he provided in his response to the NDC (which address is also Respondent's membership-records address) by first class mail, postage paid, an order following status conference in which the court, among other things, set the case for trial beginning on March 15, 2018. (Rule 5.81(A)(2)(b).)

On March 15, 2018, OCTC appeared for trial, but Respondent did not. On that same day, after finding that all of the requirements of rule 5.81(A) were satisfied, the court filed an order entering Respondent's default and properly served that order on Respondent at his membership-records address³ by certified mail, return receipt requested. (Rules 5.25(B), 5.81(B).) The order

³ Respondent's membership-records address is the same address that Respondent provided in his response to the NDC.

notified Respondent that, if he did not timely move to set aside or vacate his default, the court would recommend his disbarment.

In its March 15, 2018, order entering Respondent's default, the court also ordered that Respondent be involuntarily enrolled as an inactive member of the State Bar of California under Business and Professions Code section 6007, subdivision (e),⁴ effective three days after service of that order by mail. Accordingly, Respondent was involuntarily enrolled inactive on March 18, 2018, and Respondent has continuously been enrolled inactive under section 6007, subdivision (e) since that time.

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 May 8, 2018, OCTC filed a petition for disbarment after default. On May 8, 2018, OCTC also properly served the petition for disbarment on Respondent at his membership-records address⁵ by certified mail, return receipt requested. (Rules 5.25, 5.85(D).) As required by rule 5.85(A), OCTC reported in the petition that: (1) since the entry of default, OCTC has received no contact from Respondent; (2) there are two disciplinary investigations pending against Respondent; (3) Respondent does not have a prior record of discipline; and (4) the Client Security Fund has not paid out any claims as a result of Respondent's misconduct.

Respondent did not respond to the petition for disbarment or move to set aside or vacate the default. The court took the petition for disbarment under submission for decision on June 6, 2018.

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⁴ All further statutory references are to the Business and Professions Code.

⁵ Again, Respondent's membership-records address is the same address that Respondent provided in his response to the NDC.

The Admitted Factual Allegations Warrant the Imposition of Discipline

Upon entry of a Respondent's default, the factual allegations, but not the conclusions or the charges, 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 deemed admitted in the NDC support findings that Respondent is culpable on three of the five counts of misconduct in the NDC and that Respondent, therefore, violated a statute, rule, or court order that would warrant the imposition of discipline. (Rule 5.85(F)(1)(d).)

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Counts One charges Respondent with willfully violating rule 3-700(A)(2) of the Rules of Professional Conduct (improper withdrawal from employment) by constructively terminating his representation of Yvette Evans and then failing to inform Evans that he was withdrawing from employment. The skeletal factual allegations in count one, which were deemed admitted by the entry of Respondent's default, are insufficient to support a finding that Respondent willfully violated rule 3-700(A)(2). Specifically, the factual allegations are insufficient to support the conclusion that Respondent constructively terminated his representation/employment. The only factual allegation in count one to support that conclusion is the allegation that Respondent failed to take any action on Evans's behalf after March 30, 2015. Whether an attorney's ceasing to provide legal services to a client amounts to an effective withdrawal for purposes of rule 3-700(A)(2) "depends on the surrounding circumstances." (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 641.) There are, however, no factual allegations as to any such surrounding circumstance in count one.⁶ The fact that Respondent did not inform Evans

⁶ While there are, in count four, factual allegations of the circumstances surrounding Respondent's failure to take any action for Evans after March 30, 2015, those allegations are relevant only as to count four. The court cannot rely on the factual allegations in count four to

that he was withdrawing is not a factual allegation of a surrounding circumstance; it is part of the charges (i.e., stating how Respondent violated the rule). (Cf. *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 535-536 [the attorney's complete cessation of work plus the attorney's repeated and reckless, if not deliberate, failure to communicate with his client established a violation of rule 3-700(A)(2)].) In sum, count one is dismissed with prejudice.

Count Two — Respondent willfully violated rule 4-100(B)(3) of the Rules of Professional Conduct (failing to render appropriate accounts of client funds) by failing to account to Evans for the \$2,500 in advanced fees she paid him after she requested a refund of those fees on November 3, 2016.

Count Three charges Respondent with willfully violating rule 3-700(D)(2) of the Rules of Professional Conduct (failing to refund unearned fees). The deemed admitted factual allegations are insufficient to establish a rule 3-700(D)(2) violation because there is no factual allegation that Respondent failed to earn all or some specific portion of the \$2,500 in advanced fees that Evans paid him. Count three is dismissed with prejudice.

Count Four — Respondent willfully violated section 6068, subdivision (m) (failing to communicate) by failing to respond to three written and three telephonic reasonable status inquiries made by his client Evans.

Count Five — Respondent willfully violated section 6068, subdivision (i) (failing to cooperate/participate in a disciplinary investigation) by not providing substantive responses to a total of five letters and communications from OCTC requesting that Respondent respond to the allegations of misconduct being investigated with respect to his client Evans.

find that the deemed admitted factual allegations in count one establish a rule 3-700(A)(2) violation.

Disbarment is Recommended

In light of the foregoing, the court finds that the requirements of rule 5.85(F) have been satisfied and that it is appropriate to recommend Respondent's disbarment. In particular:

- (1) the NDC was properly served on Respondent under rule 5.25;
- (2) Respondent had actual knowledge of this proceeding and of the trial date before the entry of his default;
- (3) Respondent's default was properly entered under rule 5.81; and
- (4) the factual allegations in the NDC deemed admitted by the entry of Respondent's 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 will recommend disbarment.

RECOMMENDATIONS

Disbarment

The court recommends that respondent Keith Alan Kelly 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.

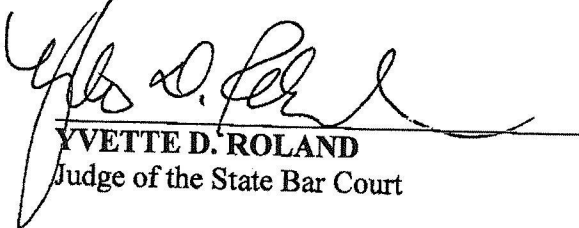
Costs

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that the costs be 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 Keith Alan Kelly, State Bar Number 208813, 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 by mail (rule 5.111(D)).

Dated: July 3, 2018.


YVETTE D. ROLAND
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 Court Specialist 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 Los Angeles, on July 3, 2018, 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:

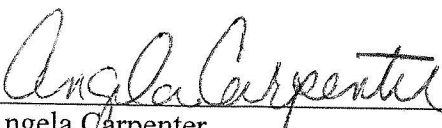
- ☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

KEITH A. KELLY
LAW OFFICES OF KEITH A KELLY
7095 INDIANA AVE STE 200
RIVERSIDE, CA 92506

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

Jaymin M. Vaghashia, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on July 3, 2018.



Angela Carpenter
Court Specialist
State Bar Court