

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case No.: <b>12-H-11848</b>
	)	
<b>MARK HAYWOOD GALYEAN,</b>	)	<b>DECISION ON MOTION TO SET ASIDE</b>
	)	<b>DEFAULT AND PETITION FOR</b>
<b>Member No. 220617,</b>	)	<b>DISBARMENT; ORDER OF</b>
	)	<b>INVOLUNTARY INACTIVE</b>
<u>A Member of the State Bar.</u>	)	<b>ENROLLMENT</b>

**INTRODUCTION**

Respondent Mark Haywood Galyean (Respondent) was charged with failing to comply with several conditions attached to his prior public reproof in violation of rule 1-110 of the Rules of Professional Conduct.<sup>1</sup> His default was entered for failing to file a response to Notice of Disciplinary Charges (NDC). The 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.<sup>2</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. As relevant here, the rule provides that if an attorney's default is entered for failing to file a response to the NDC 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.<sup>3</sup>

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<sup>1</sup> This rule provides that members must comply with conditions attached to reprovals.

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

<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(E)(2).)

Respondent did not have his default set aside within the required time period and the State Bar filed a petition for disbarment. In response to the petition, Respondent then filed a motion to set aside the default. (Rule 5.85(D).) The State Bar requests that the motion to set aside the default be denied and that the petition for disbarment be granted.

The court concludes that Respondent has failed to show good cause to set aside his default. It therefore denies that motion. The court also concludes that the requirements of rule 5.85 have been satisfied and that disbarment is warranted under both rule 5.85 and the applicable discipline standards.<sup>4</sup> Accordingly, the court recommends that Respondent be disbarred from the practice of law.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Respondent was admitted to practice law in this state on September 22, 2002, and has been a member since then. On May 7, 2012, the NDC was filed and properly served on Respondent by certified mail, return receipt requested, at his then current membership records address. (Rule 5.25.) The NDC warned Respondent that, if he did not file a timely response to the NDC, his default would be entered and his disbarment could result. (Rule 5.41.)

An initial status conference was held on June 11, 2012. Respondent appeared in person. The State Bar was represented by Deputy Trial Counsel Lara Bairamian. Various matters were discussed at the conference, and a trial date was set for September 5, 2012. Respondent made no claim at that time that he was suffering from either depression or financial problems. Instead, he represented that he had faxed a copy of his response to the NDC to the court. Respondent, when later informed by Ms. Bairamian that no response had been filed, then told her that he had sent a messenger to the court to file his response. He did not do so. Ms. Bairamian then warned Respondent several times that a motion for default would be filed if a response were not filed.

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<sup>4</sup> All references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Despite all of these warning, Respondent failed to file a response. And a motion for entry of Respondent's default resulted.

The motion for entry of default was filed on July 16, 2012, and was properly served on Respondent by certified mail, return receipt requested, at his then current membership records address. The motion complied with all requirements for a default motion under Rule 5.80, and again warned Respondent that the default could result in his disbarment. When Respondent still did not file a response to the motion, his default was entered on August 2, 2012. The order entering the default was properly served on Respondent by certified mail, return receipt requested, at his membership records address. The order also enrolled Respondent as an inactive member of the State Bar under Business and Professions Code section 6007, subdivision (e). Respondent has remained inactively enrolled since then.

When Respondent did not move to set aside his default for more than 180 days after his default had been entered, the State Bar filed, and properly served, a petition for disbarment on February 13, 2013, pursuant to rule 5.85. In response to the petition, Respondent then filed his motion for relief from default on March 5, 2013.<sup>5</sup> Significantly, Respondent does not assert that he did not receive the motion for entry of default or the order entering default.

### **Motion for Relief from Default**

Respondent argues that his failure to act timely should be excused because he suffered from major depression, which resulted in financial problems, and because he had difficulties with his attorney. As Respondent did not file his motion to set aside the default within 180 days of the service of the order entering his default, he must show by clear and convincing evidence that (1) he did not learn of the NDC until after the 180-day period expired; (2) he filed his motion promptly after learning of the NDC; and (3) his failure to file a timely response to the

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<sup>5</sup> Respondent's assertion in his motion that the petition was never served on him is unavailing as his response was timely under rule 5.85(D).

NDC and a timely motion are excused by compelling circumstances beyond his control. (Rule 5.83(D).)

Respondent's late-filed motions falls far short of meeting the above requirements of rule 5.83. Respondent informed the court at the June 11, 2012, status conference that he would be submitting his response to the NDC. Consequently, he was aware of the NDC by at least that date. Hence, it cannot be concluded that he did not become aware of the NDC until after the 180-day period set forth in rule 5.83 had run. In addition, he did not file his motion to set aside the default until March 5, 2013. Hence, it cannot be concluded that he filed his motion for relief promptly after learning of the NDC.

Nor did Respondent present convincing evidence that his failures to file a timely response to the NDC and a timely motion for relief from default are excused by compelling circumstances beyond his control. He did not present any expert testimony showing he suffered from "major depression." Absent some sort of reliable extrinsic evidence, the court has no facts with which to assess the extent and nature of any alleged mental condition and its effect on Respondent's ability to respond timely in this discipline case. Respondent related a series of financial circumstances that befell him as a result of his claimed depression. But, as unfortunate as those claimed circumstances were, Respondent did not show or explain the effect they had on his ability to participate in this case. In fact, it is apparent that, despite his problems, Respondent was able to attend to the circumstances of his life, including appearing at the initial status conference in this case. At best, Respondent has shown that the problems distracted him from his discipline matter.

Respondent also asserts that he hired an attorney to represent him in October 2012 and that the attorney did not inform him of the deadlines for seeking relief from default. That assertion was unsupported by any corroborating testimony from the attorney. It also appears that

the attorney was hired to represent Respondent in his probation case, not this discipline case. In any event, this does not explain Respondent's failure to file a response to the NDC or to the motion to enter his default. Nor does it explain his failure to move promptly to set aside the default before October 2012 or after January 2013, when he asserts the attorney withdrew from representing him.

In order to have the default set aside, rule 5.83(D) requires that Respondent show all three of the requirements of the rule. Respondent failed to do so. In addition, rule 5.83(E) requires that a motion to set aside the default be accompanied by a verified proposed response to the NDC. Respondent also failed to satisfy this requirement, as the proposed response submitted by him was unverified.

This court recognizes that, whenever possible, cases should be resolved on the merits. (*In the Matter of Navarro* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 192, 198.) Nevertheless, other policies favor getting cases to trial on time, avoiding unnecessary delay, and preventing litigants from playing fast and loose with the pertinent legal rules and procedures. (*Gardner v. Superior Court* (1986) 182 Cal. App. 3d 335, 339.) Respondent appeared at the status conference in this proceeding and was aware of the case at least as early as June 2012. Despite numerous warnings and opportunities, he failed to seek relief from the default until well after his default had been entered and well after the scheduled trial date. He has failed to present persuasive evidence showing that his failure to act should be excused. Accordingly, the motion to set aside the default is denied.

### **Petition for Disbarment**

To grant a petition for disbarment, the evidence must show that (1) the NDC was properly served on Respondent under rule 5.25; (2) Respondent had actual notice of the proceeding or due diligence was used to notify him prior to the entry of 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 warranting the imposition of discipline. (Rule 5.85(E).)

The requirements for a disbarment recommendation under rule 5.85 have been met. As shown above, the NDC was properly served on Respondent, he had actual notice of the proceeding before his default was entered, and the default was properly entered. Further, the factual allegations of the NDC show that Respondent violated a rule that would warrant the imposition of discipline. In January 2011, Respondent was publically reprovved. Several conditions were attached to the reprovval, including that Respondent submit quarterly reports to the Office of Probation, take and pass the State Bar's Ethics School, and take and pass the Multistate Responsibility Examination (MPRE). Respondent failed to submit two quarterly reports and failed to complete timely the Ethics School and MCLE requirements. These admitted facts show that Respondent willfully failed to comply with the conditions attached to his reprovval in violation of rule 1-110 of the Rules of Professional Conduct. A member's failure to comply with conditions attached to a reprovval is cause for the imposition of discipline. (Cal. Rules of Court, rule 9.19(b).)

### **Disbarment is Also Warranted under the Standards**

Standard 1.7(b) provides that if a member has a record of two prior impositions of discipline, the degree of discipline in the current case must be disbarment unless the most compelling mitigating circumstances clearly predominate.

Respondent has a record of two prior disciplines, both recent and involving troubling factors similar to those present here. The first discipline was the public reprovval in January 2011, discussed above. The misconduct in that case involved a single client matter. Respondent failed to return unearned fees and failed to return timely the client's file upon his termination

from employment. Like here, Respondent's default was entered in the case for failing to file a response to the NDC. The parties stipulated to setting the default aside. Several conditions were attached to the reproof.

In June 2012, the Supreme Court suspended Respondent for one year, stayed execution of that suspension, and placed him on probation for two years on conditions, including 30 days of actual suspension. This second discipline resulted from Respondent's misconduct in another single client matter and, like here, his failure to comply with several conditions attached to his January 2011 reproof. In the client matter, Respondent failed to account timely to his client regarding client funds that came into his possession and failed to release the client's file timely upon his termination. In the reproof matter, Respondent failed to schedule an appointment timely with the Office of Probation, failed to submit two quarterly reports timely, and failed to pay restitution in the amount of \$2,500 plus interest to his former client.<sup>6</sup>

No mitigating circumstances are present. Despite adequate notice and opportunity, Respondent failed to participate properly in this case. He has not shown that his default resulted from compelling circumstances beyond his control. This case will be the second time that Respondent has failed to comply with discipline conditions and the second time he has allowed his default to be entered.

## **DISCUSSION**

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

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<sup>6</sup> The court takes judicial notice of the prior discipline and directs the clerk to include in the record of this case a copy of the stipulations and Supreme Court orders.

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The court then looks to the decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As the Review Department noted more than 21 years ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Both the guidelines of rule 5.85 and standard 1.7(b) suggest that Respondent's continued misconduct and his indifference to the disciplinary process make his disbarment both necessary and appropriate. This record of misconduct and indifference by Respondent does not engender any confidence that he will comply with either his probation conditions or his other professional obligations in the future. The court therefore concludes that removing him from the practice of law is required to protect the public, the profession and the courts.

## **RECOMMENDATION**

### **Disbarment**

For the forgoing reasons, the court recommends that Respondent **Mark Haywood Galyean** 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 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 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 **Mark Haywood Galyean**, State Bar number 220617, be 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: May \_\_\_\_\_, 2013

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DONALD F. MILES  
Judge of the State Bar Court