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JUL 18 2018 *AK*

STATE BAR COURT  
CLERK'S OFFICE  
LOS ANGELES

# PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case Nos. 17-J-04657;
	)	17-J-04658 (Cons.)-YDR
NICOLE ELLAN FOSTER,	)	
	)	DECISION AND ORDER OF
A Member of the State Bar, No. 275845.	)	INVOLUNTARY INACTIVE
_____	)	ENROLLMENT

Respondent Nicole Ellan Foster (Respondent) was ordered disbarred by the Supreme Court of the State of North Dakota upon facts that established her culpability for acts of professional misconduct in two separate discipline matters within that jurisdiction. As a result, the Office of Chief Trial Counsel of the State Bar of California (OCTC) initiated this proceeding against Respondent by filing two notices of disciplinary charges on October 30, 2017. (Bus. & Prof. Code, § 6049.1;<sup>1</sup> Rules Proc. of State Bar, rules 5.350-5.354.)

The issues in this proceeding are limited to: (1) the degree of discipline to be imposed upon Respondent in California; (2) whether, as a matter of law, Respondent's culpability in the North Dakota proceeding would not warrant the imposition of discipline in California under the laws or rules applicable in California at the time of Respondent's misconduct in North Dakota; and (3) whether the North Dakota proceeding lacked fundamental constitutional protection. (Section 6049.1, subdivision (b).)




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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Business and Professions Code.

Respondent bears the burden of establishing that the conduct for which she was disciplined in North Dakota would not warrant the imposition of discipline in California and/or that the North Dakota proceedings lacked fundamental constitutional protection. Unless Respondent establishes one or both of these, the record of discipline in the North Dakota proceedings is conclusive evidence of Respondent's culpability of misconduct in California. (Section 6049.1, subdivisions (a) and (b).)

Respondent failed to participate in the California State Bar Court proceeding, either in person or through counsel, and her default was entered. The OCTC 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 State Bar Court 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 and the attorney fails to have the default set aside or vacated within 90 days, the OCTC 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

### **Jurisdiction**

Respondent was admitted to practice law in this state on May 9, 2011, and has been a member since then.

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<sup>2</sup> Unless otherwise indicated, all references to rules in this Decision and Order are to the Rules of Procedure of the State Bar of California.

<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).)

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

On October 30, 2017, the OCTC properly filed and served a Notice of Disciplinary Charges in case No. 17-J-04658 (NDC #1) on Respondent by certified mail, return receipt requested, at her membership records address. That same day, the OCTC also properly filed and served a second Notice of Disciplinary Charges in case No. 17-J-04657 (NDC #2) on Respondent by certified mail, return receipt requested, at her membership records address.<sup>4</sup> Both NDC #1 and NDC #2 notified Respondent that her failure to participate in the proceedings would result in a disbarment recommendation. (Rule 5.41.) Neither NDC #1 nor NDC #2 was returned to the OCTC by the U.S. Postal Service as undeliverable.

In addition, Respondent had actual notice of this proceeding. On December 6, 2017, a Deputy Trial Counsel for the OCTC spoke with Respondent by telephone and notified her of the present proceedings. Respondent provided the OCTC with her current email address, and the OCTC emailed Respondent copies of the court's Notice of Assignment and Notice of Initial Status Conference, as well as copies of NDC #1 and NDC #2. Thereafter, on December 11, 2017, Respondent appeared and participated telephonically at the initial status conference.

Respondent, however, did not subsequently file a response to NDC #1 or NDC #2. On December 8, 2017, the OCTC 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 Deputy Trial Counsel David Aigboboh 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 January 8, 2018. The court also ordered Respondent's involuntary inactive enrollment as a

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<sup>4</sup> NDC #1 and NDC #2 were subsequently consolidated.

member of the State Bar under section 6007, subdivision (e), effective three days after service of the order. Respondent has remained inactively enrolled since that time. The order entering default and enrolling Respondent inactive was properly served on Respondent at her membership records address by certified mail, return receipt requested.

Respondent 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 May 2, 2018, the OCTC filed the petition for disbarment. As required by rule 5.85(A), the OCTC reported in the petition that: (1) it has had no contact with Respondent since the default was entered; (2) Respondent has other disciplinary matters pending; (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 June 6, 2018.

### **The Admitted Factual Allegations Warrant the Imposition of Discipline**

The court finds that Respondent's culpability in the North Dakota proceedings would warrant the imposition of discipline in California under the laws or rules applicable in this state at the time of Respondent's misconduct in the North Dakota proceedings, as follows:

#### **Case No. 17-J-04658 – The May 1, 2017 North Dakota Disciplinary Order**

On May 1, 2017, the Supreme Court of the State of North Dakota ordered that Respondent be disbarred upon finding that she had committed professional misconduct in that jurisdiction as set forth in the Stipulation for Discipline entered into by Respondent and the Disciplinary Board of the Supreme Court of the State of North Dakota on December 12, 2016. In this stipulation, Respondent agreed that her conduct relating to 32 matters violated numerous North Dakota Rules of Professional Conduct (NDRPC) and warranted her disbarment. Said misconduct included, among other things, failing to perform services on her clients' behalf, in

violation of NDRPC rule 1.3 [Diligence]; failing to communicate with her clients, in violation of NDRPC rule 1.4 [Communication]; improperly withdrawing from representation and effectively abandoning her legal practice, in violation of NDRPC rule 1.16 [Declining or Terminating Representation]; making inaccurate representations to courts, in violation of NDRPC rule 3.3 [Candor Toward the Tribunal]; and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflected adversely on her fitness as a lawyer, in violation of NDRPC rule 8.4 [Misconduct].

NDC #1 alleges that Respondent's misconduct in North Dakota reflects violations of sections 6068, subdivision (d); 6068, subdivision (m); and 6106, as well as Rules of Professional Conduct, rules 3-110(A) and 3-700(D)(1). This court agrees. The allegations from NDC #1 are deemed admitted upon the entry of Respondent's default in this proceeding and are supported by the stipulated facts giving rise to Respondent's discipline in North Dakota. Those facts show that Respondent made misleading statements to various courts, failed to promptly respond to reasonable client inquiries, committed misconduct constituting moral turpitude, failed to perform legal services with competence, and improperly withdrew from representation.

**Case No. 17-J-04657 – The June 29, 2017 North Dakota Disciplinary Order**

On June 29, 2017, the Supreme Court of the State of North Dakota again ordered that Respondent be disbarred upon finding that she had committed additional professional misconduct in that jurisdiction as set forth in the decision issued by the Hearing Panel of the Supreme Court of North Dakota on April 17, 2017. In this default decision, Respondent was found culpable of misconduct involving two client matters. Said misconduct included, among other things, failing to perform services on her clients' behalf, in violation of NDRPC rule 1.3 [Diligence]; failing to communicate with her clients, in violation of NDRPC rule 1.4 [Communication]; collecting unreasonable fees by failing to refund unearned fees, in violation of

NDRPC rule 1.5 [Fees]; and improperly withdrawing from representation, in violation of NDRPC rule 1.16 [Declining or Terminating Representation].

NDC #2 alleges that Respondent's misconduct in North Dakota reflects violations of section 6068, subdivision (m), as well as Rules of Professional Conduct, rules 3-110(A), 3-700(D)(1), and 3-700(D)(2). This court agrees. The allegations from NDC #2 are deemed admitted upon the entry of Respondent's default in this proceeding and are supported by the stipulated facts giving rise to Respondent's discipline in North Dakota. Those facts show that Respondent failed to promptly respond to client inquiries; failed to perform legal services with competence; improperly withdrew from representation, and failed to promptly refund unearned fees.

**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 her 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 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 Nicole Ellan Foster, State Bar number 275845, be disbarred from the practice of law in the State of California and that her 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.

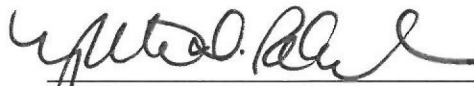
### Costs

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 Nicole Ellan Foster, State Bar number 275845, 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 18, 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 18, 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:

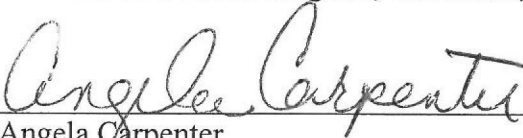
NICOLE E. FOSTER  
1343 OHIO ST TRLR 6  
BANGOR, ME 04401 - 2718

NICOLE ELLAN FOSTER  
27 JAMES STREET  
ROCKLAND, ME 04841

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

David E. Aigboboh, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on July 18, 2018.

  
\_\_\_\_\_  
Angela Carpenter  
Court Specialist  
State Bar Court