PUBLIC MATTER

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THE STATE BAR COURT

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **ANTONIA G. SMITH,** **Member No. 97304,** A Member of the State Bar.	**Case No. 03-O-00299-PEM** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. INTRODUCTION

In this disciplinary matter, Larry DeSha appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Antonia G. Smith (Respondent) did not appear in person or by counsel.

In this default proceeding, Respondent is charged with seven counts of professional misconduct, including improperly acquiring interests adverse to a client, committing acts of moral turpitude, and failing to cooperate with the State Bar. After considering the evidence and the law, the court finds by clear and convincing evidence that Respondent is culpable of all but one of the charged counts of misconduct. For the reasons set forth below, the court recommends that Respondent be disbarred from the practice of law in California.

II. SIGNIFICANT PROCEDURAL HISTORY

On September 10, 2003, the State Bar filed a Notice of Disciplinary Charges (NDC) in case number 03-O-00299. On that same date the State Bar properly served the NDC on Respondent at her official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section 6002.1 (c). On October 2, 2003, the U.S. Postal Service

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returned the NDC to the State Bar stamped "Returned to Sender" and "Attempted, Not Known."[1]

On September 15, 2003, Respondent was properly served at her official membership records address with a notice advising her, among other things, that an initial status conference would be held on October 27, 2003. Respondent did not appear at the October 27, 2003, status conference.

Respondent did not file a responsive pleading to the NDC. On February 23, 2004, the State Bar filed a motion for entry of default and on that same day properly served the motion on Respondent at her official membership records address.[2] The motion advised Respondent that minimum discipline of disbarment would be sought if she was found culpable. Respondent did not respond to the motion.

On March 10, 2004, the court entered Respondent's default and enrolled her inactive effective three days after service of the order. The order was properly served on Respondent at her official membership records address on that same date by certified mail, return receipt requested.

On March 19, 2004, the State Bar filed a request for waiver of default hearing and a brief on culpability and discipline. The matter was submitted for decision on March 30, 2004.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (Bus. & Prof. Code section 6088; Rules Proc. of State Bar, rule 200(d)(1)(A).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on May 7, 1981, was a member at all times pertinent to the allegations and is currently a member of the State Bar of California.

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[1] On October 3, 2003, the State Bar received the return receipt for the NDC signed by an unknown person and dated October 2, 2003, despite the fact that the NDC was returned.

[2] On November 24, 2003, the Membership Records office of the State Bar was notified of a change in Respondent's official membership records address. On January 13, 2004, the State Bar sent a copy of the NDC to Respondent at her new membership records address with a cover letter asking her to respond to the NDC. Neither the NDC nor the cover letter was returned by the U.S. Postal Service as undeliverable or for any other reason.

B. Case No. 03-O-00299 (The Paul Matter [Counts 1-7])

Facts

During early 1991 Respondent represented Meyer and Elsie Paul in estate planning services, including creation of a revocable trust on April 11, 1991. After Meyer Paul died, Respondent continued to provide legal services to Elsie Paul, including preparing her income tax returns for calendar years 1999 and 2000, and preparing an amendment to the Meyer and Elsie Paul trust on September 11, 2000.

During calendar year 1998, Respondent began paying Elsie Paul's bills. Respondent prepared payment checks drawn against Elsie Paul's bank account and had Elsie Paul sign the checks before mailing them to Elsie Paul's creditors. Respondent kept all records for Elsie Paul's bank account and would reconcile the monthly bank statements.

By the end of 1998, Elsie Paul, who was then 91 years old, had placed great trust and confidence in Respondent to manage her financial affairs such that she would sign checks without questioning their purpose and would even sign blank checks. Respondent acted in the capacity of a fiduciary in her assistance of Elsie Paul.

On or about February 22, 1999, Respondent had Elsie Paul sign an application for an asset management account with the brokerage house of TD Waterhouse Investor Services, Inc. (TDW). Under terms of the application, Respondent and Elsie Paul were to be joint tenants with rights of survivorship, giving Respondent ownership to assets in the account as well as exclusive ownership to any assets in the account upon Elsie Paul's death.

On March 10, 1999, Respondent presented the account application to TDW with an initial deposit check from Elsie Paul in the amount of $30,000.00. TDW opened the account assigning it account number 886-13248-1-5. Respondent subsequently deposited two more checks from Elsie Paul into the account on March 17, 1999, for $28,000.00 and on March 25, 1999, for $15,000.00, raising the balance in the TDW account to $73,000.00.

The establishment of the joint account was not fair and reasonable to Elsie Paul for the following reasons:

1. It unnecessarily and gratuitously gave ownership and survival rights to Respondent;

2. TDW offered a more suitable trust account which could have been used to the same benefit of Elsie Paul without conferring any property interests to Respondent as the individual account did;

3. Respondent opened the account for the purpose of engaging in highly speculative stock trading, an inappropriate management of Elsie Paul's assets.

At no time did Respondent disclose to Elsie Paul that the account had been opened, that it would be used for speculative stock trading, or that Respondent had the right to spend the entire amount on deposit and to receive any balance upon Elsie Paul's death.

At no time did Respondent advise Elsie Paul in writing that she could seek the advice of an independent lawyer of her choice, nor did Respondent give her any reasonable opportunity to seek that advice.

After opening the TDW account, Respondent treated the account as if she were its sole owner. On March 19, 1999, Respondent made the first of 119 stock trade transactions. On May 11, 1999, Respondent made the first of 23 cash withdrawals from the TDW account for her own personal use.

TDW paid $301.44 in interest on the TDW account. Of the $73,301.44, Respondent paid herself $59,401.50 and lost the remaining $13,821.65 in stock trade transactions, leaving a balance of only $78.29 by July 28, 2000.

Respondent did not obtain Elsie Paul's approval before paying herself $59,401.50 from the TDW account.

In October 2000, Respondent had Elsie Paul sign three additional checks for deposit in the TDW account, totaling $58,778.00. These checks were in the amounts of $11,000.00, $17,778.00, and $30,000.00 which Respondent respectively deposited into the TDW account on October 13, 24, and 26, 2000, bringing the balance in the account to $58,871.90.[3]

After depositing the $58,778.00, Respondent continued to treat the account as if she were its

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[3]These deposits plus the $78.29 remaining in the TDW account in July equals $58,856.29. The NDC fails to state the source of the additional $15.61 which brought the TDW account balance to $58,871.90 by October 26, 2000.

sole owner. On October 19, 2000, Respondent made the first of 73 stock trade transactions with the $58,871.90. On November 24, 2000, Respondent made the first of 32 cash withdrawals from the TDW account for her own personal use.

TDW paid an additional $81.18 in interest on the TDW account. Of the $58,953.08, Respondent paid herself $24,426.39 and lost the remaining $34,519.91 in stock trade transactions, leaving a balance of only $8.78 by September 10, 2001.

Respondent did not obtain Elsie Paul's approval before paying herself $24,426.39 from the TDW account.

On October 2, 2001, Respondent deposited a check for $35,000.00 from Elsie Paul into the TDW account, increasing the balance to $35,009.04.

As before, Respondent treated the account solely as her own and made stock trades between October 10-16, 2001. The trades were profitable and raised the TDW account balance to $36,165.64.

On October 18, 2001, Respondent paid herself $12,000.00 by check from the TDW account. On October 22, 2001, she paid herself another $12,000.00 by check from the TDW account. On October 23, 2001, Respondent paid herself $12,155.00 by check from the TDW account, leaving a balance of $10.64.

On or about January 23, 2003, the State Bar opened an investigation, case no. 03-O-00299, pursuant to a complaint filed by Linda Lieberman.

On January 27, February 20, July 8, and July 22, 2003, a State Bar investigator mailed letters to Respondent requesting her to respond in writing to the allegations of misconduct being investigated. The State Bar investigator mailed the letters to Respondent at her official membership records address. The United States Postal Service did not return any of the letters as undeliverable or for any other reason. Respondent did not respond to any of the letters or otherwise communicate with the State Bar.

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C. Legal Conclusions

Counts One, Three and Five: Rule 3-300 (Acquiring Interest Adverse to Client)

Rule 3-300 of the Rules of Professional Conduct[4] prohibits an attorney from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to a client without first ensuring that 1) the terms of the transaction or acquisition are fully disclosed and transmitted in writing to the client and are fair and reasonable to the client; 2) the client is advised in writing of the right to seek the advice of an independent lawyer and is afforded a reasonable opportunity to seek that advice; and 3) the client consents in writing to the terms of the transaction or acquisition.

By not ensuring that the establishment of the TDW account was fair and reasonable, by not fully disclosing in writing to Elsie Paul the fact that the account would be used for speculative stock trading, and by not advising Elsie Paul in writing of her right to seek the advice of an independent lawyer, Respondent wilfully violated rule 3-110(A) on three discrete occasions when she made the aggregate deposits of $73,000.00 in March 1999, $58,778.00 in October 2000, and $35,000.00 in October 2001.

Count Two: Section 6106 (Moral Turpitude)

Section 6106 of the Business and Professions Code[5] prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

Because Respondent did not obtain Elsie Paul's approval before paying herself $59,401.50 from the TDW account, Respondent dishonestly or with gross negligence misappropriated $59,401.50 of Elsie Paul's funds in July 2000.

By misappropriating Elsie Paul's funds in the amount of $59,401.50 in July 2000, Respondent committed an act involving moral turpitude, dishonesty or corruption in wilful violation of section 6106.

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[4]Unless otherwise noted, all further references to "rule(s)" refer to the Rules of Professional Conduct.

[5]Unless otherwise noted, all further references to "section" refer to the Business and Professions Code.

Count Four: Section 6106 (Moral Turpitude)

Because Respondent did not obtain Elsie Paul's approval before paying herself $24,426.39 from the TDW account, Respondent dishonestly or with gross negligence misappropriated $24,426.39 of Elsie Paul's funds in October 2000.

By misappropriating Elsie Paul's funds in the amount of $24,426.39 in October 2000, Respondent committed an act involving moral turpitude, dishonesty or corruption in wilful violation of section 6106.

Count Six: Section 6106 (Moral Turpitude)

Unlike the earlier disbursements Respondent made to herself in July and October 2000, the NDC fails to specifically allege that Elsie Paul did not authorize the payments Respondent made to herself in October 2001. The absence of any factual allegations to support the conclusion that Respondent dishonestly or with gross negligence misappropriated $36,155.00 of Elsie Paul's funds in October 2001, precludes a finding of a violation of section 6106 in this instance. Therefore, the court finds there is a lack of clear and convincing evidence that Respondent committed an act involving moral turpitude, dishonesty or corruption in wilful violation of section 6106.

Count Seven: Section 6068(i) (Failure to Cooperate in State Bar Investigation)

Section 6068(i) requires an attorney to cooperate and participate in any disciplinary investigation or proceeding pending against her.

By not responding to the State Bar investigator's letters regarding the allegations under investigation, Respondent did not cooperate in a disciplinary investigation, in wilful violation of section 6068(i).

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

Respondent's multiple acts of misconduct are an aggravating factor. (Standard 1.2(b)(ii), Rules Proc. Of State Bar, tit. IV, Stds. For Atty. Sanctions for Prof. Misconduct (Standards).)

Respondent's conduct significantly harmed her client. (Standard 1.2(b)(iv).)

Respondent made no attempt to rectify or atone for the consequences of her misconduct. (Standard 1.2(b)(v).)

Respondent's lack of candor and cooperation with the State Bar during a disciplinary proceeding, evidenced by her failure to participate prior to entry of default, is an aggravating circumstance. (Standard 1.2(b)(vi).) The court notes that the conduct relied on for this finding closely equals the misconduct giving rise to the finding of culpability under 6068(i) and correspondingly assigns little weight to this factor in aggravation. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225 [Respondent's failure to participate in disciplinary proceeding before entry of default found to be aggravating factor warranting little weight since conduct relied upon for the finding in aggravation so closely resembled the conduct relied upon for culpability finding under section 6068(i)].)

B. <u>Mitigating Circumstances</u>

Respondent bears the burden of establishing mitigation by clear and convincing evidence, and since she did not participate in these proceedings, no mitigating evidence was presented. However, for the purpose of mitigation, the court takes judicial notice, pursuant to Evidence Code section 452(h), of the membership records of the State Bar and the fact that Respondent has no prior record of discipline. (Standard 1.2(e)(i).) Respondent had been in practice approximately eighteen and years prior to the start of her misconduct in March 1999. The court, therefore, considers as an appropriate factor in mitigation Respondent's absence of a prior record of discipline.

<u>Discussion</u>

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

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Standard 1.6(a).) The standards, however, are guidelines from which the court may deviate in fashioning the most appropriate discipline considering all the proven facts and circumstances of a

given matter. (*Howard v. State Bar* (1990) 51 Cal.3d 215.) They are not mandatory sentences imposed in a blind or mechanical manner." (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

Standards 2.3, 2.6(a), and 2.8 also apply in this matter. The most severe sanction is suggested by standard 2.3 which provides for actual suspension or disbarment.

Respondent has been found culpable of acquiring interests adverse to a client on three separate occasions, committing acts of moral turpitude by misappropriating client funds on two occasions totaling $83,827.89, and failing to cooperate in the State Bar's investigation of allegations of misconduct. There is mitigation for the lack of a prior record of discipline for approximately eighteen years. In aggravation, the court has found multiple acts of misconduct, client harm, indifference toward rectification or atonement, and failure to participate in the proceeding prior to the entry of default.

The court has reviewed cases involving analogous misconduct and concludes that the State Bar's recommendation of disbarment is appropriate.

In *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, an attorney was disbarred for misappropriating approximately $40,000.00 of a client's funds, misleading the client as to the status of those funds, failing to communicate, failing to maintain client funds in trust, and failing to promptly pay out client funds. In mitigation, the attorney had no prior record of discipline in approximately fifteen years of practice and displayed candor, cooperation, good character, remorse and recognition of wrongdoing. In aggravation, the court found multiple acts of wrongdoing, significant client harm, and uncharged misconduct for disobeying a court order.

In *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, an attorney was disbarred for failing to promptly pay out client funds, misappropriating $55,000 from a client, improperly limiting liability to a client, improperly acquiring interests adverse to a client, and failing to report court-ordered sanctions. In mitigation, the attorney had no prior record of discipline in approximately ten years of practice. In aggravation, the court found bad faith and indifference toward rectification.

In *Spaith* and *Blum* the misappropriations were sufficiently large enough to outweigh any showing in mitigation to justify a lesser sanction than disbarment. Respondent's misappropriations

totaling $83,827.89 are almost twice the amounts misappropriated in *Spaith* and *Blum*. Furthermore, Respondent's mitigation is not as extensive as that in *Spaith* and Respondent's factors in aggravation are more severe than either of the cited cases, particularly since the attorneys in *Spaith* and *Blum* participated in their disciplinary proceedings.

After considering Respondent's misconduct and the law and balancing the aggravating and mitigating factors, the court recommends Respondent's disbarment in order to protect the public, enforce professional standards, and maintain public confidence in the legal profession.

V. DISCIPLINE RECOMMENDATION

Accordingly, it is hereby recommended that Respondent ANTONIA G. SMITH be disbarred from the practice of law in the State of California and that her name be stricken from the rolls of attorneys in this State.

It is also recommended that the Supreme Court order Respondent to comply with rule 955, paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.

VI. COSTS

The court recommends that costs be awarded to the State Bar pursuant to section 6086.10 and that those costs be payable in accordance with section 6140.7.

VII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

It is ordered that Respondent be transferred to involuntary inactive enrollment status pursuant to section 6007(c)(4) and rule 220(c), Rules of Procedure of the State Bar of California. The inactive enrollment shall become effective three days after service of this order.

Dated: June 8, 2004

Pat McElroy

PAT MCELROY

Judge of the State Bar Court

CERTIFICATE OF SERVICE
[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. 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 June 8, 2004, 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:

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

ANTONIA G. SMITH
31855 DATE PALM DR #3-211
CATHEDRAL CITY CA 92234

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

LARRY DESHA, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **June 8, 2004**.

Lauretta Cramer
Case Administrator
State Bar Court