FILED AUGUST 29, 2008

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **CAROLYN SUE JANZEN,** **Member No. 102998,** A Member of the State Bar.	)	Case No.: **03-O-04514-RAH** **DECISION AND ORDER**

I. INTRODUCTION

In this original disciplinary proceeding, respondent Carolyn Sue Janzen is charged with three counts of professional misconduct. The court finds, by clear and convincing evidence, that respondent is culpable on two of the three counts, one count of Business and Professions Code, section 6106 (committing an act involving moral turpitude) [1] and one count of Rules of Professional Conduct, rule 4-100(A) (failing to deposit and maintain client funds in a trust account).[2]

For the reasons stated below, the court recommends that respondent be disbarred.

II. PERTINENT PROCEDURAL HISTORY

On February 9, 2007, a 10-day letter was mailed to respondent at her official membership records address (official address)[3] at the time. Respondent replied to the letter with two

[1]Unless otherwise noted, all further statutory references are to the Business and Professions Code.

[2]Unless otherwise noted, all further references to rules are to these Rules of Professional Conduct of the State Bar of California.

[3]Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of all respondent's official membership records addresses to the date of the filing of this decision

facsimile transmissions, dated February 1, 2007, and February 22, 2007, both of which listed the same address.

On March 23, 2007, the Office of Chief Trial Counsel of the State Bar of California (State Bar) filed a notice of disciplinary charges (NDC). The NDC had been served on respondent on March 22, 2007, by certified mail, return receipt requested, at each of the last three of respondent's official addresses, the oldest of which was effective in March 2003, and the most recent of which was effective in March 2007. On April 3, 2008, the return cards from the copies sent to respondent's last two official addresses were received by the State Bar signed with the name Carolyn Janzen.

On March 26, 2007, the court filed and served a Notice of Assignment and Notice of Initial Status Conference,[4] setting an initial conference for May 2, 2007. At some point, this case was consolidated with another case in the alternative discipline program (ADP). Respondent participated in status conferences until January 2008. This case was then severed and removed from the ADP, and the court filed an order reassigning the proceedings on February 13, 2008.

On February 27, 2008, the court filed and served a Notice of In-Person Status Conference, setting a status conference for March 13, 2008. Respondent did not appear at that status conference, and the matter was continued for a further in-person status conference to April 1, 2008. The court filed and served an Order Pursuant to In Person Status Conference containing

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and admits into evidence exhibit one attached to the State Bar's motion for entry of respondent's default (a certified copy of respondent's address history on file in the State Bar's Membership Records Department as of April 23, 2008).

[4]Copies of this notice and all other documents sent to respondent by the court, except for the order entering respondent's default, were sent to respondent at her official address by first-class mail, postage fully prepaid. A copy of the order entering default was sent to respondent at her official address by certified mail, return receipt requested. Copies of the order entering default were also sent to respondent at her two most recent prior official addresses by first-class mail. Of these documents, the only ones returned to the court were the copy of the order entering default sent to respondent's official address by certified mail and one of the copies of that document sent to one of respondent's prior official addresses by first-class mail.

the continued date and time of the hearing. However, respondent again failed to appear on April 1.

During April 2008, a State Bar investigator and paralegal performed numerous online searches for respondent, and the investigator made numerous telephone calls to various numbers uncovered in the online searches, without being able to reach respondent. Deputy Trial Counsel Suzan J. Anderson (DTC Anderson) also attempted to reach respondent by telephone at her official membership records telephone number but was unsuccessful. Also during that month, the State Bar sent six letters to respondent at various addresses detailing her failure to participate in the State Bar Court proceedings and informing her that the State Bar would file a motion to have her default entered. Only one of these letters was not returned to the State Bar; the others were all returned as undeliverable.[5]

On April 30, 2008, the State Bar filed a motion for the entry of respondent's default. A copy of this motion was served on respondent at her official address by certified mail, return receipt requested, but the record does not reflect whether or not this copy was returned to the State Bar.

No response to the State Bar's motion having been filed, the court entered respondent's default on May 28, 2008.[6] On June 9, 2008, the State Bar filed its brief on culpability and discipline.[7] The matter was submitted for decision on that date.

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[5]The court admits into evidence all of the exhibits accompanying the declarations of DTC Anderson, the State Bar investigator, and the State Bar paralegal, all attached to the State Bar's motion for entry of respondent's default.

[6]Respondent's involuntary inactive enrollment pursuant to section 6007, subdivision (e) was effective three days after the service of this order by mail.

[7]Exhibits 1 and 2 (certified copies of documents from respondent's prior disciplinary cases) attached to the State Bar's brief on the issues of culpability and discipline are admitted into evidence. Although the State Bar did not explicitly waive the hearing in this matter, no request for a hearing was submitted after the court notified the State Bar, in its order entering respondent's default, that no default hearing would be held unless the State Bar requested one.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).) These findings of fact are based on these deemed admissions and the exhibits admitted into evidence as stated in this decision.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California in June 1982, and has been a member of the State Bar of California since that time.

B. Findings of fact

In the fall of 1998, Ms. Edna F. Martin retained respondent as her attorney. Respondent represented Martin in three matters. In a matter unrelated to the charges here, in August or September 1998, Martin asked respondent to help her rescind a lease agreement with an option to purchase for a mobile home park she owned in San Diego County. In approximately December 1998, Martin sold the mobile home park to the former lessees. Part of the purchase price consisted of a promissory note payable to Martin in the amount of $810,392.99. The note was to be paid in 15 years. In or after January 1999, Martin asked respondent to assist her in the renegotiation and modification of the loan agreement/contract and schedule of payments based upon the sale of the mobile home park. Sometime after that, Martin asked respondent to represent her in another unrelated matter, the sale of real property located in Palm Desert, California. Martin was nearly 94 years old at the time of respondent's retention. Respondent's representation of Martin lasted until about the fall of 1999. Martin paid respondent approximately six times for her services, including a retainer of approximately $2,500 in the fall of 1998 and a check for $8,000 in December 1998.

With regard to the loan modification matter, on April 19, 1999, Martin executed a Loan Modification Agreement of the Note (modification). On May 4, 1999, respondent executed a Legal Certification of the modification in her capacity as Martin's attorney. On the same date, respondent signed the Acknowledgment of Receipt of Funds as part of the modification, acknowledging the receipt of $125,000 for Martin's benefit.

Besides funds referred to above received from Martin in payment for respondent's services and the $125,000 received for Martin on May 4, 1999, respondent received numerous payments on Martin's behalf related to the note and/or the modification (Martin funds), commencing at least in December 1998, as set forth below.

On December 17, 1998, respondent received $11,325.40 of Martin funds that were deposited on the same date into respondent's general business account.

On March 9, 1999, respondent received $9,106.16 of Martin funds that were deposited on the same date into respondent's general business account.

On April 9, 1999, respondent received $7,138.08 of Martin funds, of which amount $7,000 was deposited on the same date into respondent's general business account.

On April 12, 1999, respondent received $11,785.95 of Martin funds that were deposited on the same date into respondent's general business account.

On May 6, 1999, respondent received $11,069.98 of Martin funds that were deposited on the same date into respondent's general business account.

On May 10, 1999, respondent received $25,000 of Martin funds that were deposited on the same date into respondent's general business account.

On May 11, 1999, respondent received $100,000 of Martin funds that were deposited on the same date into respondent's client trust account (CTA).

On May 28, 1999, respondent received $75,000 of Martin funds that were deposited on the same date into respondent's CTA.

On June 14, 1999, respondent received $11,034.52 of Martin funds that were deposited on the same date into respondent's general business account.

On July 9, 1999, respondent received $11,849.90 of Martin funds that were deposited on the same date into respondent's general business account.

On August 13, 1999, respondent received $11,076.90 of Martin funds, of which $10,090.90 was deposited on the same date into respondent's general business account.

On September 7, 1999, respondent received $11,025.30 of Martin funds, of which $10,025.30 was deposited on the same date into respondent's general business account. The rest of the funds that respondent received on this date, on April 9, 1999, and on August 13, 1999, were at some other point before the end of September 1999 deposited into respondent's general business account.[8]

As relevant to the charges in count three, from December 1998 through September 1999, respondent received at least $295,412.19 of Martin funds. Of that amount, $120,412.19 was deposited into respondent's general business account. The remaining $175,000 was deposited into respondent's CTA. These amounts do not include the $8,000 check that Martin wrote to respondent in December 1998, nor any other payments Martin made to respondent.

[8]The NDC does not specifically make this allegation; however, it does allege, and respondent has admitted, that respondent deposited into her general business account a total amount, $120,412.19, that necessarily includes the full amount of funds respondent received on these three dates. If the rest of the funds that respondent received on these three dates were not deposited into respondent's business account, the total amount deposited into that account would be $118,288.11. The NDC also appears to allege that the total deposit of Martin funds into her general business account took place between December 1998 and September 1999. The court concludes, however, that even if the lesser amount were deposited into respondent's general business account, the discipline recommended here would remain the same.

As relevant to the charges in counts one and two, from April 12, 1999, to November 1999, respondent received at least $267,842.55 of Martin funds, of which amount $92,842.55 was deposited into respondent's general business account and the remaining $175,000 was deposited into respondent's CTA. During this same time frame, respondent incurred and paid $188,944.32 in expenses for Martin's benefit. Of these expenses, $135,001.73 was paid from respondent's CTA, $51,442.59 was paid from her general business account, and the remaining $2,500 was paid in cash. Subtracting the $188,944.32 from the $267,842.55 in total payments received, the remainder is $78,898.24. This represents an amount distributed to no one, kept by respondent, and not accounted for in any way.

In addition, during the period from October 1998 through November 1999, respondent received payments totaling $23,385 from Imperial County for work on juvenile cases. In 1999, this work represented 75 percent of respondent's caseload, and the total payment to respondent from these cases is significantly less than the amount of respondent's expenses during the April 12, 1999, to November 1999 time period.

Less than two years later, on July 19, 2001, Martin died. The probate of her estate commenced on October 3, 2001.[9] On January 21, 2005, the estate's personal representative, Arthur D. Lohr, filed a civil complaint against respondent alleging various causes of action. Lohr filed a motion for summary judgment in the civil action on June 30, 2006, on the ground that undisputed facts established respondent's misappropriation of $78,898.24 from Martin. On September 26, 2006, the Imperial County Superior Court signed and filed a Notice of Entry of Order that concluded that respondent had misappropriated funds from Martin.

[9]The probate matter was entitled *Estate of Edna Martin a.k.a. Edna Martin Alves, deceased*.

C. Count One – Section 6106

Section 6106 provides that an attorney's commission of an act involving moral turpitude, dishonesty, or corruption constitutes a cause for disbarment or suspension. The State Bar proved by clear and convincing evidence that respondent violated this section by misappropriating Martin's funds, i.e., by keeping $78,898.24 of Martin's funds for a use other than for Martin's benefit. (See *Baca v. State Bar* (1990) 52 Cal.3d 294, 304.)

D. Count Two – Section 6106

The NDC charges that respondent additionally violated section 6106 by breaching her fiduciary duty to Martin as Martin's attorney due to respondent's misappropriation of the $78,898.24 of Martin's funds. Because this violation is based on the same acts of misappropriation as the violation set forth in count one, the court declines to find additional culpability in count two and dismisses this count with prejudice. (See *In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786-787.)

E. Count Three – Rule 4-100(A)

Rule 4-100(A) provides as relevant here that State Bar members must deposit into a client trust account all funds received or held for the benefit of clients. The State Bar has proved by clear and convincing evidence that respondent violated this rule by depositing Martin funds into her general business account. In so doing, respondent failed to maintain client funds in trust, willfully violating rule 4-100(A).

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

Because respondent's default was entered, no evidence in mitigation was offered in this proceeding, and none can be gleaned from this record. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[10]

B. Aggravation

Respondent was admitted to practice in California in 1982. She has two prior records of discipline. (Std. 1.2(b)(i).)

On March 12, 2004, the Supreme Court filed an order imposing a one-year stayed suspension and a two-year probation on various conditions. In that case, respondent stipulated to culpability of two counts of violating rule 4-100(A) for commingling personal and business funds with trust funds in her client trust account during 2002 and 2003. There were no factors in aggravation, and in mitigation, respondent had no prior record of discipline; and her misconduct resulted in no harm to clients.

On July 31, 2008, the Supreme Court filed an order imposing a two-year stayed suspension, a five-year probation, and a nine-month actual suspension that was to continue until respondent made specified restitution. That discipline was based on respondent's misconduct in one client matter lasting from 1996 until 2002. In that case, respondent failed to perform legal services competently, made misrepresentations to her client, withdrew from employment without taking reasonable steps to avoid reasonably foreseeable prejudice to her client, failed to refund unearned fees, and failed to provide an accounting to her clients. In aggravation, respondent had one prior record of discipline, her misconduct caused significant harm, and she committed

[10]This and all further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

multiple acts of misconduct. In mitigation, respondent displayed spontaneous candor and cooperation to the State Bar during disciplinary proceedings.

Respondent's misconduct involves multiple acts of wrongdoing. (Std. 1.2(b)(ii).

The State Bar urges in its brief on culpability and discipline that respondent's misconduct was surrounded by bad faith, dishonesty, concealment, and overreaching in the misappropriation of funds and refusal to account for such funds. (Std. 1.2(b)(iii).) However, the court concludes that the State Bar has not established bad faith, dishonesty, concealment, or overreaching other than that inherent in misappropriation.

The court agrees with the State Bar that respondent's misconduct significantly harmed his client and the administration of justice in that Martin's estate was forced to sue respondent in civil court to attempt to recover the funds. (Std. 1.2(b)(iv).)

The State Bar also asserts that respondent has shown indifference toward rectification of or atonement for the consequences of her misconduct. (Std. 1.2(b)(v).) The State Bar bases this assertion on respondent's failure to refund the funds to Martin or her estate, forcing the estate to sue respondent to try to recover the funds; on respondent's supposed failure to return unearned fees in her most recent prior disciplinary case; and on respondent's failure to participate in these proceedings. However, the court has already found aggravation based on Martin's estate having to sue respondent; the court has no evidence before it that respondent has not yet made restitution in her prior disciplinary case; and rather than indifference, the court finds aggravation based on respondent's failure to cooperate in this disciplinary proceeding after termination from the ADP and prior to the entry of default. (Std. 1.2(b)(vi).) The court also finds that, as alleged by the NDC and admitted due to default, respondent failed to cooperate with her client by failing to account for the funds.

V. DISCUSSION

The purpose of California State Bar 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. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the 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.) While the standards are not binding, they are entitled to significant weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310 1311.)

Respondent has been found culpable in one client matter of misappropriating over $75,000 of client funds and of failing to maintain client funds in a trust account. In aggravation, respondent has two prior records of discipline, her misconduct involved multiple acts of wrongdoing, her misconduct resulted in significant harm, and she failed to cooperate with her client and with the State Bar in this disciplinary proceeding after the case was removed from the ADP and prior to the entry of her default. There is no evidence in mitigation.

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the more or most severe of the different sanctions. In the present proceeding, the more severe sanction for respondent 's misconduct is found in standard 2.2(a), which provides for disbarment as the appropriate discipline for willful misappropriation of entrusted funds or property unless the amount of funds misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate. Neither of these two exceptions applies to the facts here.

The court has considered *Kaplan v. State Bar* (1991) 53 Cal.3d 1067, which additionally supports disbarment. Kaplan misappropriated approximately $29,000 of funds belonging to his law firm and failed to maintain client funds in trust. Although he had no prior misconduct in just over 11 years of practice and presented 16 witnesses who testified to his good character, he also initially lied about the cause of his misconduct to his law partners and to the State Bar. Notwithstanding the mitigating evidence presented coupled with the lack of a prior record, the Supreme Court determined that disbarment was warranted. The court concludes that the present case demonstrates more serious misconduct than that involved in *Kaplan*.

In view of respondent's misappropriation of a large amount of her client's funds, her failure to place client funds in trust, her lack of participation in this case, and her prior discipline, the court determines that disbarment is warranted here to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys.

Finally, the court notes that restitution is warranted in this case due to respondent's misappropriation of her client's funds.

VI. RECOMMENDED DISCIPLINE

Accordingly, the court hereby recommends that respondent Carolyn Sue Janzen be disbarred from the practice of law in the State of California and that her name be stricken from the roll of attorneys in this state.

It is also recommended that the Supreme Court order Janzen to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, after the effective date of its order imposing discipline in this matter.[11]

[11]Respondent is required to file a rule 9.20(c) affidavit even if she has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

It is further recommended that the Supreme Court order Janzen to make restitution to the Estate of Edna Martin a.k.a. Edna Martin Alves, deceased, (Estate of Edna Martin) in the amount of $78,898.24 plus 10 percent interest per annum from September 30, 1999 (or to the Client Security Fund to the extent of any payment from the fund to the Estate of Edna Martin, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnish satisfactory proof thereof to the State Bar's Office of Probation. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d).

VII. Costs

The court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in section 6140.7 and as a money judgment.

VIII. Order of Involuntary Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: August ___, 2008.

RICHARD A. HONN
Judge of the State Bar Court