FILED SEPTEMBER 28, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **BESSIE MAE CARR,** **Member No. 121368,** A Member of the State Bar.	)	Case No.: **05-O-03047-RAH** **AMENDED DECISION & ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, Deputy Trial Counsel Shari Sveningson appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Respondent Bessie Mae Carr did not appear in person or by counsel.

In the notice of disciplinary charges (hereafter NDC), the State Bar charges respondent with five counts of misconduct. In the first four counts, the State Bar charges respondent with misconduct involving a single client matter, including the misappropriation of $83,634.20 in trust funds in willful violation of Business and Professions Code section 6106.[1] In the fifth

[1] Section 6106 provides: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." Unless otherwise noted, all further statutory references are to the Business and Professions Code.

count, the State Bar charges respondent with failing to cooperate in the State Bar's disciplinary investigation into her misconduct.

The court finds respondent culpable on each of the five charged counts of misconduct and agrees with the State Bar that disbarment is the appropriate level of discipline to recommend to the Supreme Court. In addition, the court concludes that respondent should be involuntarily enrolled as an inactive member of the State Bar under section 6007, subdivision (c)(4).

II. PROCEDURAL HISTORY

On May 8, 2006, the State Bar filed the NDC and properly served a copy of it on respondent at her latest address shown on the official membership records of the State Bar (hereafter official address) by certified mail, return receipt requested in accordance with section 6002.1, subdivision (c). That service was deemed complete when mailed even if respondent did not receive it. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108.)

On May 12, 2006, the State Bar received, from the United States Postal Service (hereafter Postal Service), a return receipt (i.e., green card) for the copy of the NDC that was served on respondent at her official address. That receipt establishes that the copy of the NDC was actually delivered to respondent's official address, where it was accepted and signed for by "Lou Khoury."

Respondent's response to the NDC was due no later than May 29, 2006. (Rules Proc. of State Bar, rule 103(a).) Respondent, however, failed to timely file a response.

On June 2, 2006, the State Bar filed a motion for entry of respondent's default and properly served a copy of it on respondent at her official address by certified mail, return receipt requested.[2] Respondent failed to respond to the State Bar motion or to file a response to the

[2] The declaration of Deputy Trial Counsel Sveningson, which is attached to the State Bar's June 2, 2006, motion, establishes the following. That, on May 22, 2006, and again on June 1, 2006, Sveningson telephoned respondent at the telephone number listed for respondent on the

NDC. Because all of the statutory and rule prerequisites were met, the court filed an order on May 23, 2006, entering respondent's default and, as mandated in section 6007, subdivision (e)(1), placing her on involuntary inactive enrollment.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on: (1) the well-pleaded factual allegations (not the legal contentions or charges) contained in the NDC, which allegations are deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)); and (2) the facts in this court's official file in this matter.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 10, 1985, and has been a member of the State Bar since that time.

B. Misconduct

In March 2004, Mr. Mauricio Sousa employed respondent to represent him in a marital dissolution matter in the San Diego Superior Court. Thereafter, on June 18, 2004, the superior court ordered (1) that the house Sousa owned with his wife (hereafter collectively the Sousas) be sold; (2) that the sales proceeds be deposited into respondent's client trust account; and (3) that none of the sales proceeds be withdrawn from respondent's trust account without either the written agreement of the Sousas or a court order.

After the Sousas' home was sold, the net sales proceeds payable to the Sousas was $96,634.20. In July 2004, the escrow company gave respondent a check for $88,634.20, which was all but $8,000 of the sales proceeds ($96,634.20 less $88,634.20 equals $8,000).

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official membership records of the State Bar. That, on each of those two occasions, Sveningson received a recorded message notifying her that the telephone number belonged to respondent after which Sveningson left a voicemail message asking respondent to call her about complaints that had been filed against respondent with the State Bar. That respondent never responded to Sveningson's two voicemail messages.

Respondent deposited that $88,634.20 check into her client trust account on July 8, 2004. Then, in August 2004, the escrow company gave respondent a check for the remaining $8,000 balance, and respondent deposited that check into her client trust account on August 20, 2004. Accordingly, as of August 20, 2004, respondent held all of the $96,634.20 in sales proceeds in her client trust account for the Sousas.

As of February 7, 2005, respondent had properly paid out a total of $13,000 of the sales proceeds to the Sousas. Other than this $13,000, respondent has not properly paid out any of the sales proceeds. Moreover, as set forth below, between August 20, 2004, and September 30, 2005, respondent misappropriated a total of $83,544.85 of the sales proceeds.

Between August 20, 2004, and October 21, 2004, inclusive, respondent held all of the $96,634.20 in sales proceeds in trust for the Sousas and should have had at least that much in her client trust account. However, during that time period, the balance in respondent's client trust account dropped below $96,634.20 on four days. Specifically, on August 20, 2004, the balance fell below that amount by $244.85; on August 31, 2004, by $357.78; on September 30, 2004, by $260.83; and on October 21, 2004, by $1,444.85.

Between October 22, 2004, and February 1, 2005, inclusive, respondent held $88,634.20 of the sales proceeds in trust for the Sousas and should have had at least that much in her client trust account. However, during that time period, the balance in respondent's client trust account dropped below $88,634.20 on four days. Specifically, on October 25, 2004, the balance fell below that amount by $1,944.85; on November 30, 2004, by $7,045.07; on December 31, 2004, by $12,944.85; and on February 1, 2005, by $14,944.85.

On and after February 2, 2005, respondent held $83,634.20 of the sales proceeds in trust for the Sousas and should have had at least that much in her client trust account. However, between February 2, 2005, and September 30, 2005, the balance in respondent's client trust

account dropped below $83,634.20 on seven days. Specifically, on February 7, 2005, the balance fell below that amount by $17,944.85; on March 31, 2005, by $25,944.85; on April 25, 2005, by $30,944.85; on June 30, 2005, by $52,044.85; on July 29, 2005, by $65,044.85; on August 31, 2005, by $78,044.85; and on September 30, 2005, by $83,544.85.

Between February 10, 2005, and May 1, 2005, Mr. Sousa left about 15 voicemail messages for respondent in which he requested an update on his divorce proceeding. Even though respondent actually received each of those messages, respondent did not respond to any of them.

On May 4, 2005, Mr. Sousa terminated respondent's services and retained Attorney Julie Mele to represent him in the divorce proceeding. That same day, Attorney Mele filed an ex parte substitution of attorney in the divorce proceeding. The next day (i.e., May 5, 2005), the superior court ordered that Attorney Mele be Mr. Sousa's attorney of record in the divorce proceeding and that respondent release, to Mele, all the funds she was then holding in trust for Mr. Sousa.[3] Respondent, however, did not release any funds to Mele.

On August 31, 2005, and then again on September 15, 2005, a State Bar investigator mailed, to respondent at her official address, a letter regarding the State Bar investigation into the complaints that Mr. Sousa filed against her. In those two letters, the investigator asked respondent to provide the State Bar with a written response to specific allegations of misconduct no later than September 15, 2005, and September 29, 2005, respectively. Even though respondent actually received those two letters, she failed to respond to either of them. In addition, respondent failed to otherwise participate in the State Bar's disciplinary investigation into Mr. Sousa's complaints.

[3] It is unclear how respondent could have determined what portion of the sales proceeds she held in trust for only Mr. Sousa as opposed to the portion she held in trust for both Mr. Sousa and Mr. Sousa's wife.

Counts 1 & 2: Failure to Comply with Trust Account Rule (Rule 4-100(A)) & Moral Turpitude (§ 6106)

In counts 1 and 2, the State Bar charges that respondent willfully violated rule 4-100(A) of the State Bar Rules of Professional Conduct (hereafter rule 4-100) and section 6106, respectively. Rule 4-100(A) (as did its virtually identical predecessor -- former rule 8-101 of the Rules of Professional Conduct [effective from January 1, 1975, to May 26, 1989] [hereafter former rule 8-101]) requires, inter alia, that all funds received or held for the benefit of a client by an attorney must be deposited into one or more identifiable bank accounts labeled " 'Trust Account,' 'Client's Funds Account' or words of similar import."

Moreover, the term "client" in rule 4-100 (and its predecessor -- former rule 8-101) often includes nonclients with whom an attorney has, either voluntarily or by operation of law, entered into a fiduciary relationship. (E.g., *Guzzetta v. State* Bar (1987) 43 Cal.3d 962; *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632-633.) Having assumed the responsibility, under the superior court's June 18, 2004, order, to hold and to disburse the sales proceeds only upon the written agreement of the Sousas or upon an order of the superior court, respondent owed Mr. Sousa's wife the obligations of a "client" under rule 4-100. (Cf. *Guzzetta v. State Bar, supra,* 43 Cal.3d at 979.) Thus, respondent owed a duty both to Mr. Sousa (a client) and to Mr. Sousa's wife (a nonclient) to comply with rule 4-100.

It has long been established that an attorney has a "personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds." (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 795.) In fact, an attorney's duty to comply with rule 4-100 is nondelegable. (Cf. *Coppock v. State Bar* (1988) 44 Cal.3d 665, 680 [applying former rule 8-101].) Thus, it is clear (1) that respondent owed an independent, nondelegable duty to comply with rule 4-100 to Mr. Sousa and (2) that respondent owed an independent, nondelegable duty to comply with rule 4-100 to Mr. Sousa's wife.

"An attorney violates [rule 4-100] when he or she fails to deposit and manage funds in the manner delineated by the rule, even if this failure does not harm the client. [Citation.]" (*Murray v. State Bar* (1985) 40 Cal.3d 575, 584.) Moreover, a violation of rule 4-100 may involve conversion of client or other trust funds. Of course, not every conversion of such funds involves moral turpitude, dishonesty, corruption. (*In the Matter of Hagan* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 167-168, and cases there cited.) However, when the conversion involves moral turpitude, dishonesty, or corruption in willful violation of section 6106, it is appropriately denominated as a "misappropriation" or a "willful misappropriation."[4] (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26.)

A rule 4-100(A) violation involving the conversion of client funds is established whenever the actual balance of the bank account in which the client funds were deposited drops below the amount credited to the client. (*Edwards v. State* Bar (1990) 52 Cal.3d 28, 37; *Palomo v. State Bar, supra*, 36 Cal.3d at p. 795; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 123.) Once such a violation is established, the burden then shifts to the attorney to show (1) that he or she did not act in bad faith or engage in an act involving moral turpitude, dishonesty, or corruption and (2) that the conversion occurred as a result of only ordinary negligence and not gross carelessness and reckless. (Cf. *Giovanazzi v. State* Bar (1980) 28 Cal.3d 465, 585-586; *In the Matter of Respondent F, supra*, 2 Cal. State Bar Ct. Rptr. at p. 26). Otherwise, the attorney will be found culpable of misappropriating client or other trust funds, which merits severe discipline.

[4] The terms "misappropriation" and "willful misappropriation" are often used interchangeably, but neither of them appear in the Rules of Professional Conduct or the State Bar Act. Even though the courts have held that those terms cover a wide range of conduct varying significantly in the degree of culpability (*Edwards v. State Bar, supra*, 52 Cal.3d at p. 38; see also *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367), serious opprobrium commonly attaches to them (*In the Matter of Respondent F, supra*, 2 Cal. State Bar Ct. Rptr. at p. 26). Accordingly, this court attempts to use the terms to describe a conversion of client or other trust funds *only* when the conversion involves moral turpitude, dishonesty, or corruption. (*In the Matter of Respondent F, supra*, 2 Cal. State Bar Ct. Rptr. at p. 26.)

The record clearly establishes that respondent willfully violated rule 4-100(A) and converted clients funds on each of the 15 days between August 20, 2004, and September 30, 2005, when the balance in her client trust account fell below the amount of sales proceeds she held in trust for the Sousas. Moreover, respondent failed to establish that she did not act in bad faith or that she did not engage in an act involving moral turpitude, dishonesty, or corruption. Respondent also failed to establish that her rule 4-100(A) violations were the result of mere negligence. Accordingly, the record clearly establishes that, between August 20, 2004, and September 30, 2005, respondent willfully misappropriated a total of $83,544.85 in sales proceeds from the Sousas and that respondent's misappropriations involved, at least, moral turpitude in willful violation of section 6106.[5] (Cf. *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020 1021.)

Count 3: Failure to Communicate (§ 6068, subd. (m))

In count 3, the State Bar charges that respondent willfully violated section 6068, subdivision (m), which requires that an attorney "respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." The record clearly establishes that respondent willfully violated section 6068, subdivision (m) by failing to respond to any of the 15 status inquires that Mr. Sousa made between February 10, 2005, and May 1, 2005.

Count 4: Violation of Court Order (§ 6103)

In count 4, the State Bar charges that respondent willfully violated section 6103, which provides that an attorney's willful "disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in

[5] It is not duplicative to find that respondent willfully violated both rule 4-100(A) and section 6106. (*In the Matter of Hagen*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 169.) That is because it is not duplicative to find that an attorney's violation of a Rule of Professional Conduct is so egregious that it rises to the level of an act involving moral turpitude, dishonesty, or corruption in violation of section 6106. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520.)

good faith to do or forbear, . . . [constitutes a cause] for disbarment or suspension." To establish such a section 6103 violation, the State Bar must establish, by clear and convincing evidence, that respondent had actual knowledge of a court order and that she disobeyed it. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787-788).

The record clearly establishes (1) that respondent had actual knowledge of the superior court's June 18, 2004, order directing that the sales proceeds be deposited into her client trust account and that none of the sales proceeds be withdrawn from that account without the Sousas' written agreement or a court order and (2) that, between August 20, 2004, and September 30, 2005, respondent withdrew $83,544.85 of the sales proceeds without the Sousas' written agreement or a court order. Accordingly, respondent willfully violated section 6103 by disobeying the superior court's June 18, 2004, order.

The State Bar, however, has failed to clearly establish that respondent had actual knowledge of the superior court's May 5, 2005, order directing her to release, to Attorney Mele, all of the sales proceeds that respondent then held in trust for the Sousas. Accordingly, the portion of count 3 charging respondent with violating section 6103 by disobeying the superior court's May 5, 2005, order is dismissed with prejudice. (*In the Matter of Maloney and Virsik, supra*, 4 Cal. State Bar Ct. Rptr. at pp. 787-788).

Count 5: Failure to Cooperate with State Bar (§ 6068, subd. (i))

In count 5, the State Bar charges that respondent willfully violated section 6068, subdivision (i), which requires that an attorney "cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. . . ." The record clearly establishes that respondent willfully violated section 6068, subdivision (i) by failing to respond to the State Bar investigator's August 31, 2005, and

September 15, 2005, letters and by failing to otherwise participate in the State Bar's disciplinary investigation.

IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravating Circumstances[6]

1. Multiple Acts of Misconduct

The fact that respondent has been found culpable on five counts of misconduct is an aggravating circumstance. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (hereafter standards), std. 1.2(b)(ii).)

2. Failure to Cooperate

Respondent's failure to participate in this disciplinary proceeding before the entry of her default is an aggravating factor. (Std. 1.2(b)(vi).) However, contrary to the State Bar's contention, it warrants little weight in aggravation because the conduct relied on for this aggravating factor closely equals the misconduct relied on to find respondent culpable of violating section 6068, subdivision (i) and to enter her default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

3. Client Harm[7]

Respondent's misappropriation of $83,544.85 of the sales proceeds caused significant client harm to the Sousas. (Std. 1.2(b)(iv).)

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[6] The court declines the State Bar's request to take judicial notice of the exhibits on file in State Bar Court case number 05-O-03681-RAH. The State Bar not only failed to identify which specific exhibit or exhibits it wishes the court to consider, it also failed to state the relevancy of each such exhibit or exhibits. (See Cal. Law Revision Com. com. to Evid. Code, § 453.)

[7] The court declines to find indifference towards rectification or atonement aggravation under standard 1.2(b)(v) based on respondent's failure to make restitution because the State Bar failed to establish, by clear and convincing evidence, that respondent has not made restitution. Moreover, such aggravation is duplicative, at least in part, of the client harm aggravation already found by the court under standard 1.2(b)(iv).

B. Mitigating Circumstances

The State Bar has not proffered any evidence indicating that respondent has a prior record of discipline, which would be an aggravating circumstance under standard 1.2(b)(i). As noted above, respondent was admitted to practice on December 10, 1985. Furthermore, the State Bar's official membership records show that respondent has continually been an active member of the State Bar since that time. The misconduct found in this proceeding began in August 2004. Thus, the record establishes that respondent has practiced law discipline-free for almost 19 years, which is a very substantial mitigating circumstance (std. 1.2(e)(i)).

V. DISCUSSION ON DISCIPLINE

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Ba*r (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylo*r (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

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 most severe of the different sanctions. In this case, the most severe sanction for respondent's misconduct is found in standard 2.2(a), which applies to respondent's misappropriations totaling $83,544.85 and involving moral turpitude in violation of section 6106. Standard 2.2(a) provides: "Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances."

The total amount respondent misappropriated was not insignificantly small. While respondent's almost 19 years of practice without a prior record of discipline is a very substantial mitigating circumstance, it falls short of establishing that "the most compelling mitigating circumstances clearly predominate" (std. 2.2(a)).

Of course, not every misappropriation that is technically willful is equally culpable. (*Lawhorn v. State Bar, supra,* 43 Cal.3d at p. 1367.) Without question, "the distinction between misappropriation arising from gross neglect and dishonest misappropriation can be very significant in determining the appropriate level of discipline." (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.) Moreover, the Supreme Court has differentiated between willful misappropriations unaccompanied by acts of deceit or other aggravating factors and misappropriations accompanied by acts of deceit or with an intent to deprive or steal. (*Edwards v. State Bar, supra,* 52 Cal.3d at p. 38.) Specifically, the Supreme Court has held that even though disbarment is the usual form of discipline for willful misappropriation, it "would rarely, if ever, be an appropriate discipline for an attorney whose only misconduct was a single act of negligent misappropriation, unaccompanied by acts of deceit or other aggravating factors." (*Ibid*.)

Nonetheless, it remain clear that "misappropriation of client funds is a grievous breach of an attorney's ethical responsibility, and generally warrants disbarment unless the most compelling mitigating circumstances clearly predominate. [Citations.]" (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 518.) Moreover, "In misappropriation cases, discipline of less than disbarment is warranted only where extenuating circumstances show that the misappropriation of entrusted funds is an isolated event." (*In the Matter of Freydl, supra,* 4 Cal. State Bar Ct. Rptr. at p. 361.) As noted above, in the present proceeding, there are no compelling mitigating circumstances that clearly predominate. Moreover, there is no evidence of

any extenuating circumstance showing that respondent's misappropriations were "an isolated event." In fact, the record establishes the opposite. Respondent's misappropriations were not an isolated event (i.e., they occurred on 15 days over a period of more than 13 months from August 20, 2004, to September 30, 2005).

Moreover, the facts (1) that respondent failed to respond to any of Mr. Sousa's 15 status inquires made between February 10, 2005, and May 1, 2005, and (2) that respondent failed to respond to the State Bar investigator's August 31, 2005, and September 15, 2005, letters are strong circumstantial evidence that respondent's misappropriations were deliberate and involved an intent to deprive.

In sum, there is no compelling reason for this court to depart from recommending respondent's disbarment as provided for in standard 2.2(a), particularly in light of the multiple aggravating circumstances present. (*In re Silverton*, *supra*, 36 Cal.4th at p. 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) In addition, in light of the strong circumstantial evidence that respondent's misappropriations were deliberate and involved an intent to deprive, disbarment is consistent with case law. (E.g., *Grim v. State Bar* (1991) 53 Cal.3d 21; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128.)

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent Bessie Mae Carr be disbarred from the practice of law in the State of California and that her name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

VII. RULE 955 AND COSTS

The court further recommends that Carr be ordered to comply with California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30

and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[8]

The court further 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 Business and Professions Code section 6140.7 and as a money judgment.

VIII. ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that Bessie Mae Carr 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 (Rules Proc. of State Bar, rule 220(c)).

Dated: September 28, 2006.

RICHARD A. HONN
Judge of the State Bar Court

[8] Carr is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)