FILED DECEMBER 26, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **ELIZABETH ANN GUITTARD, AKA ELIZABETH ANN BARRANCO** **Member No. 115421,** **A Member of the State Bar.**	**Case No. 05-O-03826-RAP** **06-O-11537 (Cons.)** **DECISION INCLUDING DISBARMENT RECOMMENDATION AND INVOLUNTARY INACTIVE ENROLLMENT ORDER**

I. INTRODUCTION

In this disciplinary matter, Diane J. Meyers appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Elizabeth Ann Guittard, AKA Elizabeth Ann Barranco, did not appear in person or by counsel.

After considering the evidence and the law, the court recommends that respondent be disbarred.

II. SIGNIFICANT PROCEDURAL HISTORY

A. Case no. 05-O-03826

The Notice of Disciplinary Charges (NDC) was filed on March 13, 2006, and was properly served on respondent on that same date at her official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section[1] 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) A courtesy copy was also sent to an alternate address.

On March 20, 2006, respondent was properly served at her official and alternate

[1]Future references to section are to the Business and Professions Code.

addresses with a notice advising her, among other things, that a status conference would be held on April 19, 2006.

Respondent filed a response to the NDC on April 5, 2006, in which she requested that documents be served at the alternate address.

On May 3, 2006, an order memorializing a status conference held the previous day was properly served on respondent at the alternate address. The notice advised respondent that a status conference and trial were scheduled on June 26 and September 7, 2006, respectively.

On May 3, 2006, respondent also was properly served at her official and alternate addresses with notice of a settlement conference to be conducted on June 1, 2006. She did not appear at the settlement conference. On June 5, 2006, she was properly served at her official and alternate addresses with an order memorializing the settlement conference.

Respondent did not appear at the June 26 conference. The next day, she was properly served at her alternate address with an order memorializing the conference and noting that a pretrial conference would be held on August 30, 2006, and trial on September 7, 2006. A corrected order reiterating these dates was filed and properly served on respondent at her alternate address on July 17, 2006.

On August 16, 2006, the State Bar filed a request for judicial notice, which was properly served on respondent at her official and alternate addresses.[2]

On August 28, 2006, the State Bar filed a pretrial statement, which was properly served on respondent at her official and alternate addresses.

On September 1, 2006, an order memorializing the August 30, 2006, pretrial conference was filed and properly served on respondent at her official and alternate addresses. Respondent did not appear at the pretrial conference. The order advised respondent that she was precluded from introducing evidence or calling witnesses at trial. It also advised her that, if she did not appear at trial, her response would be stricken and her default would be entered.

Respondent did not appear for trial on September 7, 2006. On that same date, the court

[2]The request for judicial notice was granted by order filed September 1, 2006.

entered respondent's default and enrolled her inactive effective three days after service of the order. The order also noted that the response to the NDC was stricken. The order was filed and properly served on her at her official and alternate addresses as well as a second alternate address (Spring Valley address) on that same date by certified mail, return receipt requested. The return receipt shows that the order was received on September 9, 2006, by "Alex Guittard" at respondent's official address. The copy sent to the alternate address was returned unclaimed and bore a sticker advising of the new address in Spring Valley.

On September 7, 2006, the State Bar filed a brief seeking respondent's disbarment. It was served at her official and alternate addresses as well as at Spring Valley.

The matter was submitted for decision without hearing on September 27, 2006.

B. Case no. 06-O-11537

The NDC was filed on July 6, 2006, and was properly served on respondent on that same date at her official address, by certified mail, return receipt requested. The return receipt indicated delivery on July 7, 2006, and was signed "Alex Guittard." A courtesy copy of the NDC was also sent to the alternate address.

On July 13, 2006, respondent was properly served at her official and alternate addresses with a notice advising her, among other things, that a status conference would be held on August 30, 2006.

Respondent did not file a responsive pleading to the NDC. On August 18, 2006, a motion for entry of default was filed and properly served on respondent at her official address by certified mail, return receipt requested. A courtesy copy was sent to her alternate address. The motion advised her that minimum discipline of unspecified actual suspension to continue until she complied with rule 205 of the Rules of Procedure and returned her client's files would be sought if she was found culpable. A supplemental declaration in support of this motion was filed and properly served on August 23, 2006, on respondent at her official address by certified mail, return receipt requested. A courtesy copy was sent to the alternate address. Respondent did not respond to the motion.

Respondent did not appear at the August 30 status conference. On September 1, 2006,

she was properly served with a status conference order at her official and alternate addresses by first-class mail, postage prepaid. The order noted that he default would be entered if she did not file an answer.

On September 6, 2006, the court entered respondent's default and enrolled her inactive effective three days after service of the order. The order was filed and properly served on her at her official and alternate addresses on that same date by certified mail, return receipt requested. The signed return receipts indicate that the correspondence was received at each address.

The matter was submitted for decision without hearing on September 21, 2006.

As to both matters, the State Bar's and the court's efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (April 26, 2006, No. 04-1477) 547 U.S. ___, 126 S.Ct. 1708, 164 L.Ed.2d 415, <http://www.supremecourtus.gov/opinions/05slipopinion.html>.)

By order filed December 13, 2006, these matters were consolidated on the court's own motion and the submission date of case no. 06-O-11537 was vacated and deemed to be September 27, 2006, the same as case no. 05-O-03826.

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. (§6088; Rules of Proc. of State Bar[3], rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 3, 1984, and

[3]Future references to the Rules of Procedure are to this source.

has been a member of the State Bar at all times since.

B. Case no. 05-O-03826 (The Alvarez Matter)

1. Facts

Respondent and Kim Alvarez were close friends since 1994. Kim and her husband, Joe, owned J. Alvarez Construction, Inc. (JAC) as community property. Kim often sought and received legal advice from respondent regarding business-related problems on her community property interest, including the impact of an audit of JAC by the State Compensation Insurance Fund (Fund).

From July 2002 through March 2004, respondent represented Joe in a criminal case. He was charged with insurance fraud and conspiracy regarding payments allegedly not made by JAC to the Fund and to the Employment Development Department (EDD). (*People v. Alvararez*, San Diego County Superior Court case no. SCD160771.) Kim was also named as a defendant but was represented by other counsel.

From April 2005, respondent represented Kim in a family law matter which revolved around the payment of the EDD and Fund debt from Kim's community property interest in the family home. (*In the Matter of Joe Alvarez and Kim Alvarez*, San Diego County Superior Court case no. ED60257.) The family law and criminal cases were substantially related because they both involved restitution payments to the Fund and EDD from the Alvarez's community property assets.

When respondent represented Joe in the criminal case, she obtained confidential information material to her employment by Kim in the family law case. Respondent agreed to represent Kim without Joe's informed written consent.

On June 10, 2005, Joe filed a motion to disqualify respondent as Kim's attorney in the family law case because she and he had had confidential communications during the criminal case that were relevant in the family law case. In an order filed August 5, 2005, the superior court granted the motion on those grounds. It also found that, in paragraphs 17, 19, 29, 31, 32, 33 and 36 of her declaration opposing the motion, respondent had revealed confidential

communications between her and Joe as follows:

- Between February 14 and 19, 2003, Joe began calling respondent.[4] She would return the call to Kim and Joe became angry with her. His demands that respondent meet with him became rude. She agreed to meet with him, believing that he wanted to discuss the merits of the criminal case and/or obtain her reassurance that his recent separation from Kim would not affect the outcome of the case. Joe quickly acknowledged that it was "all about the money" and that it was not going to be necessary to go to trial. He expected the district attorney to make him an offer to settle for a sum of money that he did not really owe but that he would be obligated to pay in order to remain in business with a valid license. Kim was at all times cognizant of their mutual interest in successfully defending the criminal case and respondent assured Joe that their separation would not adversely affect it.
- Respondent began to have second thoughts about that advice after she learned the real reason Joe had asked to meet her on February 20, 2003. Joe wanted to have respondent tell Kim that, if she did not let him return home, he was going to divorce her and take from her everything that she had ever gained by marrying him, including their children. Respondent got the impression that Joe had recently consulted with a divorce lawyer who had described for him in detail the amount of pain and suffering that he would be able to inflict on her through family law proceedings. After that meeting, Joe called respondent numerous times to ask whether she had conveyed his message and what the response had been. When it was apparent that the only reason he was calling respondent was so that he could harass her into harassing his wife, respondent stopped returning Joe's calls. She did try to persuade Kim to disregard the advice of Dr. Levak, their marriage counselor, and let Joe return home.

[4]Respondent claims that she generally dealt with Kim regarding Joe's case.

- Respondent's knowledge of Joe's surveillance activities, coupled with the threats he had asked her to convey to Kim a month earlier, placed respondent in a difficult position as to her continued representation of Joe in the criminal case. She decided that she could no longer represent him at trial but at the same time felt constrained to make sure that he was not prejudiced by her removing herself from the case. She did not want to bring a motion to be relieved out of concern that the judge who heard it might require her to state the basis for her conflict. It was still in both parties' interests to have Joe receive probation and respondent did not want anything I did or said to negatively influence the court in that regard.
- Respondent was called upon only to perform one remaining task, that is, convincing Kim to plead guilty. Given the lack of evidence against her and her knowledge that Joe had retained S. Michael Love, a well-known divorce lawyer, she was hesitant to admit her guilt. It was a "package deal" however. If she did not plead, Joe would have to pay considerably more money to the Fund and to EDD. Since it was in both their interests that he pay as little as possible, respondent advised her to plead. Without some assurance that her community interest in the family home would not be used to pay those debts, she was unwilling to do so.
- On December 8, 2003, the parties appeared for trial and were sent to Department 31 for a plea. As we walked to the department, respondent told Joe about Kim's concerns, explaining that if she could be given some assurance that her portion of the home equity would not be spent to pay the Fund or EDD, she would plead. Joe called Love and gave respondent the phone so she could explain the situation to him. She inquired of him what language she could include on Kim's change of plea form that would give her the assurances she was seeking in family court. Love told her to write the sentence: "Defendant understands that Joe Alvarez's payments will be taken into account in Family Court proceedings for purposes of valuation of community property. However, the People will have no recourse

against defendant's community assets in payment of the fines and restitution owed."

- Respondent then spoke with Deputy District Attorney Ernest Marugg who was required to sign the form. She pointed out the language that she had added at Love's suggestion and asked for his confirmation that he would not seek Kim's portion of the equity to pay Joe's debt. His exact words to respondent were: "I'm not interested in taking Kim's community property." The only reason he was insisting that Kim plead guilty was his concern that, if she did not, Joe could transfer his assets to her and avoid having them attached by the Fund or EDD. He had no intention of attaching any of Kim's assets and, if the parties divorced, he told respondent that he would not seek Kim's community property.
- Respondent said that she was completely loyal to Kim and that there were no confidential communications from Joe that she would need to keep from her. She had reviewed Kim's file and it was apparent to her that what Joe really wants is for the court to exclude as privileged respondent's information about the devious, manipulative and fraudulent way he and his lawyer induced Kim to plead guilty to a crime that she did not commit. After falsely promising her that her equity would be protected, they actively took steps to convince the court that as part of her sentence, Kim had been ordered to liquidate her interest in that asset to pay EDD a sum of money that it would not otherwise be entitled to collect absent years of civil litigation. The money Joe agreed to pay EDD and the Fund in exchange for his noncustodial sentence was never meant to be taken out of Kim's community property. Otherwise, the district attorney would have demanded payment of the entire amount due at the close of escrow. The district attorney assured Kim and respondent and has since assured them that it was never his intention that her community property be used for that payment.

2. Conclusions of Law

a. Count 1: Rule of Professional Conduct[5] 3-310(E) (Representation Adverse to Former Client)

Rule 3-310(E) prohibits an attorney from accepting employment adverse to a client or former client without his or her informed written consent where, by reason of such representation, the attorney has obtained confidential information material to the employment.

There is clear and convincing evidence that respondent wilfully violated rule 3-310(E). By representing Kim against Joe in the family law matter, respondent accepted employment adverse to Joe, her former client, without his informed written consent although she had obtained confidential information while representing him that was material to the family law matter.

B. Case no. 06-O-11537 (The Brown Matter)

1. Facts

On October 18, 1999, Velma Brown retained respondent to evaluate the merits of a habeas corpus petition on behalf of her son, Theodis Brown.

Respondent sent Velma a letter dated April 14, 2002, advising that there was no merit to filing a federal habeas petition for Theodis and that she was working on a state habeas petition for him.

Respondent stopped working on Theodis' case in April 2002. She effectively terminated her employment in his case.

On May 12, 2005, Theodis mailed a letter to respondent at the last address he knew for her. It was her official address from September 1989 to February 2004. In his letter, Theodis stated that he had written to respondent and that he and his family had made numerous telephone requests for the return of his files in his criminal case. He asked that she return all paperwork, transcripts, letters and briefs as soon as possible.

On December 7, 2005, Theodis and Velma asked the State Bar to ask respondent to release the transcripts of his case. On that same date, the State Bar sent that request to

[5]Future references to rules are to this source.

respondent by email.

On December 19, 2005, respondent sent an email to the State Bar indicating that she was going to send Theodis' file to subsequent counsel or to the Innocence Project. She did not want to give the file directly to Theodis or Velma because it was voluminous and she wanted to maintain its integrity. She said was going to contact Velma to find out whether there was a new lawyer and, if not, she would prepare the file for transmittal to the Innocence Project.

On February 9, 2006, Theodis and Velma told the State Bar that respondent had not released the transcript or file and that they had tried to reach respondent at her home telephone number but it had been disconnected. On that same date, the State Bar sent respondent an email and a letter to her home address informing her that the Browns had tried to call her but that her telephone had been disconnected; that Brown was requesting that she release his transcripts because he could not proceed with his case without them; and that respondent contact Theodis and Velma to arrange for delivery of the transcripts to them. Respondent received the email and letter.

On February 15, 2006, the State Bar received a letter from Theodis stating that he had not received the transcripts or file from respondent. On that same date, the State Bar sent respondent another email and letter to her home and official addresses informing her that Theodis was still seeking the return of his transcripts and asking her to release them to him immediately. Respondent received the letter and email.

On March 20, 2006, the State Bar received a letter from Theodis stating that he had not received his file or transcripts from respondent.

On April 11, 2006, the State Bar sent respondent a letter at her official address informing her that an investigation had been opened regarding Theodis' complaint that she had not released the transcripts or file to him. Respondent received the letter.

On April 28, 2006, respondent informed the State Bar that Theodis' file was in storage and that she would not be able to retrieve it for two weeks. She said that she would send the file directly to Velma.

On May 22, 2006, respondent told the State Bar that the transcripts and file were still in

storage and that she would not be able to retrieve them unless she paid her storage bill. She did not indicate when she would be able to pay the storage bill. She said that she would send the transcripts directly to Theodis as requested.

As of July 6, 2006, respondent had not returned the file and transcripts to Theodis.

2. Conclusions of Law

a. Count 1: Rule of Professional Conduct 3-700(D)(1) (Not Returning Client Papers or Property)

Rule 3-700(D)(1) requires an attorney whose employment has been terminated to promptly release to the client, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. This includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

By not returning the file and transcripts to her client as requested after she terminated her services, respondent wilfully violated rule 3-700(D)(1).

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct[6], std. 1.2(b).)

Respondent has two prior instances of discipline. (Std. 1.2(b)(i).) In State Bar Court case no. 01-O-1353, a private reproval was ordered, effective August 22, 2001, which included conditions of probation for 18 months, for violating rule 4-100(A) in one client matter. The parties stipulated that there were no aggravating factors. Mitigating factors were no prior discipline, candor and cooperation and severe financial difficulties.

In Supreme Court case no. S142774 (State Bar Court case nos. 02-O-13363, 03-H-05010, 04-O-11767, 04-O-14837, 04-O-15116 (Cons.)), effective July 27, 2006, discipline was imposed

[6]Future references to standard or std. are to this source.

consisting of stayed suspension for two years and until respondent complied with standard 1.4(c)(ii); and four years' probation on conditions including actual suspension for one year and restitution. The parties stipulated that, in 11 matters, respondent violated rules 1-110, 3-110(A) (six counts), 3-700(A)(2) (seven counts), 3-700(D)(1) and (2), and 4-100(A) as well as sections 6068, subdivisions (i) and (m) and 6106. Severe financial and emotional problems were mitigating factors. Aggravating circumstances were one prior instance of discipline, multiple acts of misconduct and similar misconduct to that in the prior disciplinary case (rule 4-100(A) violation). The court notes that there is similar misconduct to that in the present case (violation of rule 3-700(D)(1)) and that the Browns were the subject of misconduct in the prior disciplinary matter as well, although for different violations (rules 3-110(A) and 3-700(D)(2)). The court further notes that some of the misconduct in the present case occurred while this prior matter was being resolved. Considering the present and prior disciplinary matters, she has been engaged in a nearly continuous course of misconduct since December 2000.

Respondent's misconduct significantly harmed clients. (Std. 1.2(b)(iv).) Theodis and Velma had to repeatedly pursue respondent between May 2005 and July 2006 to try to obtain his transcripts and file.

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) She has demonstrated her contemptuous attitude toward disciplinary proceedings as well as her failure to comprehend the duty of an officer of the court to participate therein, a serious aggravating factor. (Std. 1.2(b)(vi); *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 104, 109.)

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors.

C. Discussion

The purpose of 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. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 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. (Std. 1.6(a).)

Standard 2.10 applies in this matter. It provides for reproval or suspension according to the gravity of the offense or harm, if any, to the victim, with due regard to the purposes of imposing discipline for violations of the State Bar Act or of the Rules of Professional Conduct not otherwise specified in the standards.

Standard 1.7(b) also applies. It provides that, if an attorney has two prior records of discipline, the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Respondent has been found culpable of violating rules 3-700(D)(1) and 3-310(E). In aggravation, she has two prior instances of discipline, including for misconduct similar to that in the present case (not turning over client files and papers) and involving the Browns, who were subject to misconduct by respondent which was addressed in S142774. Other aggravating factors include client harm and not participating in the disciplinary proceedings. There are no mitigating circumstances since respondent did not participate in these proceedings.

The State Bar recommends disbarment if culpability was found in both matters. The court agrees.

Lesser discipline than disbarment is not warranted because there are no extenuating circumstances that clearly predominate in this case. (Std. 1.7(b).) The serious and unexplained nature of the misconduct and the lack of participation in these proceedings suggest that respondent is capable of future wrongdoing and raise concerns about her ability or willingness to comply with her ethical responsibilities to the public and to the State Bar. Moreover, it is evident that the prior instances of discipline have not served to rehabilitate respondent or to deter her from further misconduct. Having considered the evidence, the standards and other relevant law, the court believes that disbarment is the only adequate means of protecting the public from further wrongdoing by respondent. Accordingly, the court so recommends.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent Elizabeth Ann Guittard, AKA Elizabeth Ann Barranco, 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, paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing her compliance with said order.

VI. COSTS

It is recommended 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.

VII. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007(c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the Supreme

Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: December 26, 2006

RICHARD A. PLATEL
Judge of the State Bar Court