

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 07-O-12076-RAP
)	
MARY KATHLEEN HARTLEY,)	DECISION & ORDER OF
)	INACTIVE ENROLLMENT
Member No. 89090,)	
)	
A Member of the State Bar.)	
_____)	

I. INTRODUCTION

In this original disciplinary proceeding, which proceeded by default, the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar) charges that respondent **MARY KATHLEEN HARTLEY**¹ repeatedly engaged in acts involving moral turpitude and dishonesty while she was the executor of an estate and that she failed to cooperate with a State Bar disciplinary investigation. Deputy Trial Counsel Melanie J. Lawrence (hereafter DTC Lawrence) appeared for the State Bar. Respondent failed to appear either in person or by counsel.

The State Bar recommends that respondent be disbarred. For the reasons set forth *post*, the court finds that respondent is culpable of the charged misconduct and agrees with the State

¹ Respondent was admitted to the practice of law in the State of California on November 29, 1979, and has been a member of the State Bar of California since that time.

Bar that disbarment is the appropriate level of discipline for the found misconduct. In addition, as discussed *post*, the court independently concludes that respondent should be required to pay \$32,971.85 (plus interest) in restitution to the estate.

II. KEY PROCEDURAL HISTORY

On July 15, 2008, the State Bar filed the notice of disciplinary charges (hereafter NDC) in this proceeding and inadvertently served a copy of it on respondent at an incorrect address. Therefore, on August 12, 2008, the State Bar re-served respondent by mailing a copy of the NDC to her at her latest address shown on the official membership records of the State Bar (hereafter official address) by certified mail, return receipt requested. (Bus. & Prof. Code, § 6002.1, subd. (c);² Rules Proc. of State Bar, rule 60(b).)

On August 25, 2008, the State Bar received, from the United States Postal Service (hereafter Postal Service), a return receipt (i.e., a green card) for the copy of NDC that was properly served on respondent. That return receipt establishes that the copy of the NDC that was mailed to respondent at her official address was actually delivered there and that it was “signed for” by a Patrick (Patrick’s last name is undecipherable).

Respondent’s response to the NDC was due no later than September 8, 2008. (Rules Proc. of State Bar, rule 103(a); see also Rules Proc. of State Bar, rule 63 [computation of time].) Respondent failed to file a response. Accordingly, on September 18, 2008, the State Bar filed a motion for the entry of respondent's default and properly served a copy of that motion on respondent at her official address by certified mail, return receipt requested. Respondent, however, never filed a response to that motion or to the NDC.

The declaration of DTC Lawrence, which is an exhibit to the State Bar's September 18, 2008, motion for entry of default, establishes that, in addition to performing its statutory duty to

² Unless otherwise noted, all further statutory references are to this code.

serve a copy of the NDC on respondent at her official address by certified mail, the State Bar made an effort to locate respondent and insure that she had actual notice of this proceeding.³ That effort was unsuccessful. Nevertheless, it is clear that respondent was given adequate notice of this proceeding. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108; see also *Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.)

Because all of the statutory and rule prerequisites were met and because respondent was given adequate notice of this proceeding, this court filed an order on October 6, 2008, in which it entered respondent's default and, as mandated by section 6007, subdivision (e)(1), ordered that she be involuntary enrolled as an inactive member of the State Bar of California effective October 9, 2008.⁴

On October 21, 2008, the State Bar filed a waiver of hearing and brief on culpability and discipline. Thereafter, on October 24, 2008, the court took the matter under submission for decision without a hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

In February 2006, respondent was appointed executor of the Estate of Irvin C. Sittler. On January 26, 2007, the superior court removed respondent as the executor and appointed William Price as the special administrator of the Sittler estate (hereafter Special Administrator Price).

³ That effort included DTC Lawrence repeatedly telephoning respondent's office and leaving voicemail messages for respondent asking that respondent call her back immediately.

⁴ Of course, an attorney on inactive enrollment cannot lawfully practice law in California. (§ 6126, subd. (b).)

While she was the executor of the Sittler estate, respondent withdrew a total of \$23,306.88 in estate funds from various bank accounts at Bank of America. Respondent used and spent that \$23,306.88 for her own benefit without notifying or seeking the superior court's permission.

Also, while she was the executor of the Sittler estate, respondent collected \$7,865 in rent from K. Wagner, who was then a tenant in an apartment building owned by the estate. Respondent used and spent that \$7,865 for her own benefit without notifying or seeking the superior court's permission.

On about February 28, 2007, the superior court issued an order directing respondent to “immediately convey and transfer,” to Special Administrator Price, the total sum of \$32,971.85, calculated as follows:

\$22,307.00	Cash Withdrawn from Bank of America Accounts
7,865.00	Rent Collected from K. Wagner
2,556.00	Rent Collected from J. Whitcomb
<u>243.85</u>	Licensing Penalties
<u>\$32,971.85</u>	

Respondent actually received the superior court’s February 28, 2007, order, but did not comply with it.

On July 11, 2007, and again on August 9, 2007, a State Bar investigator sent respondent correspondence asking her to provide a response to various allegations of misconduct that Special Administrator Price made against her and to provide various documents with that response. Even though respondent actually received both of those letters, she did not respond to either of them.

Count 1 – Moral Turpitude and Dishonesty (§ 6106)

In count 1, the State Bar charges that respondent willfully violated section 6106, which proscribes acts involving moral turpitude, dishonesty, or corruption. The record clearly

establishes that respondent willfully violated section 6106's proscriptions of acts involving moral turpitude and dishonesty (1) when, without the superior court's knowledge or permission, she used and spent, for her own benefit, the \$23,306.88 in Sittler estate funds she withdrew from Bank of America and the \$7,865 in rent she collected from K. Wagner and (2) when she disobeyed the superior court's February 28, 2007, order directing her to immediately convey and transfer \$32,971.85 to Special Administrator Price.

The superior court's February 28, 2007, order was not issued in connection with or in the course of respondent's employment as an attorney. Instead, the order was directed at respondent as the "removed" executor of the Sittler estate. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 950.) Ordinarily, an attorney's willful violation of such an order that is directed at the attorney in a nonprofessional or personal capacity is not a disciplinable offense. (*Id.* at pp. 950-951, 953 ["The mere fact of a contempt citation is no grounds for discipline of an attorney."]; *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 496, 499.) However, the superior court's February 28, 2007, order was not an ordinary order. The order directed respondent to return, inter alia, the \$31,171.88 (\$23,306.88 plus \$7,865) that she deliberately misappropriated from that estate. Thus, respondent's failure to obey the superior court's order without any explanation or purported justification involved moral turpitude. (Cf. *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868 & fn. 4.)

Count 2 – Failing to Cooperate with Disciplinary Investigation (§ 6068, subd. (i))

In count 2, 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) when she failed to respond to the State Bar investigator's July 11, 2007, and August 9, 2007, letters.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Factors in Mitigation

Notwithstanding the State Bar's representation to this court that there are no mitigating circumstances, respondent is entitled to substantial mitigating credit for not having a prior record of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std 1.2(e)(i).)⁵

First, the State Bar has not proffered any evidence indicating that respondent has a prior record of discipline, which would be an aggravating circumstance that the State Bar would have a duty to, at least, attempt to prove in this proceeding. Second, and more notably, the State Bar's official membership records show that respondent has no prior record of discipline.⁶ Third, the State Bar's official membership records show that respondent was continuously an active member of the State Bar from her admission date of November 29, 1979, through at least February 2006 when the misconduct found in this proceeding began. Thus, respondent has practiced law discipline-free for about 27 years (from November 1979 through February 2006). Again, respondent's lack of a prior record of discipline is a very substantial mitigating circumstance. (Std. 1.2(e)(i).)

⁵ All further references to standards are to this source.

⁶ Because of the importance that our Supreme Court places on the issue of whether or not an attorney has a prior record of discipline (e.g., *In re Mostman* (1989) 47 Cal.3d 725, 741), the State Bar Court has long judicially noticed the State Bar's official records in determining the presence or lack of a prior record of discipline.

B. Factors in Aggravation

Respondent's misconduct in this proceeding involves multiple acts of misconduct. (Std. 1.2(b)(ii).)

Respondent's failure to file a response to the NDC in this proceeding, which allowed her default to be entered, is an aggravating circumstance. (Std. 1.2(b)(vi).) However, because "the conduct relied on for this finding so closely equals the misconduct giving rise to the finding of culpability under section 6068, subdivision (i) and the entry of respondent's default that it warrants little weight." (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

Respondent's misconduct caused significant harm to the Sittler estate because she failed to transfer \$32,971.85 to Special Administrator Price in accordance with the superior court's February 28, 2007, order. (Std. 1.2(b)(iv).)

V. DISCUSSION ON DISCIPLINE

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (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 Taylor* (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 the present proceeding, the most severe sanction for respondent's misconduct is found in standard 2.2(a), which applies to

respondent's deliberate misappropriation of \$31,171.88 in Sittler estate funds, which she used and spent for her own benefit, in willful violation of section 6106.⁷ 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 Supreme Court has repeatedly held that the willful misappropriation of entrusted funds is a grievous violation. Moreover, the Supreme Court has made clear that even an isolated instance of misappropriation by an attorney who has no prior record of discipline may result in disbarment in the absence of compelling mitigation. (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129; *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1071-1073.) Even though respondent is entitled to substantial mitigation for her 27 years of discipline-free practice, that mitigation simply does not rise to the level of compelling mitigation for purposes of applying standard 2.2(a). What is more, even at this late date, there is no evidence that respondent has paid a single dollar of restitution to the Sittler estate.

In sum, both the standards and case law support a disbarment recommendation in this proceeding. Moreover, as discussed in footnote 7 *post*, the court independently concludes that respondent should be ordered to make restitution to the Sittler estate in the amount of \$32,971.85 plus interest thereon from March 30, 2007.⁸

⁷ Even though the record establishes that respondent misappropriated only \$31,171.88 of the \$32,971.85 that she owes the Sittler estate, this court concludes that respondent should be required to make restitution of the full \$32,971.85 as ordered by the superior court in its February 28, 2007, order.

⁸ March 30, 2007, is 30 days after respondent was directed to immediately pay \$32,971.85 to the Sittler estate in the superior court's February 28, 2007, order.

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent **MARY KATHLEEN HARTLEY** 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. The court further recommends that **MARY KATHLEEN HARTLEY** be ordered to make restitution to the duly appointed representative of the Estate of Irvin C. Sittler (or his, her, or its successor in interest) in the amount of \$32,971.85 plus 10 percent interest per annum from March 30, 2007, (or to the Client Security Fund to the extent of any payment from the fund to the Sittler estate or to its appointed representative plus interest and costs, in accordance with Business and Professions Code section 6140.5) and to furnish satisfactory proof thereof to the State Bar's Office of Probation. The court further recommends that any restitution to the Client Security Fund be enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

VII. RULE 9.20 & COSTS

The court further recommends that **MARY KATHLEEN HARTLEY** be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, 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 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), the court orders that **MARY KATHLEEN HARTLEY** be involuntary 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: January 8, 2009.

RICHARD A. PLATEL
Judge of the State Bar Court