

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 06-O-10752-RAH
)	
ANN LONERGAN SMITH,)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND
Member No. 94331,)	INVOLUNTARY INACTIVE
)	ENROLLMENT ORDER
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this disciplinary matter, Anthony J. Garcia appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Ann Lonergan Smith represented herself.

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

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on March 20, 2006. Respondent filed a response on April 18, 2006.

By order filed on October 13, 2006, pages two and three of respondent's Exhibit C were stricken.

The matter was submitted for decision on October 13, 2006

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 16, 1980, and has been a member of the State Bar at all times since.

B. Facts

The State Bar and respondent stipulated to the ultimate facts of culpability alleged in the complaint. In summary, those facts are repeated in this decision. On February 8, 2002, respondent entered into a Stipulation Re Facts and Law and Disposition (“Stipulation”) with the State Bar in case numbers 99-O-12613, 00-O-10252, and 01-J-00182. That Stipulation was approved by the court and filed on February 14, 2002. (Exhibit 1.) The Stipulation required respondent to submit quarterly reports to the Office of Probation of the State Bar of California on each January 10, April 10, July 10, and October 10 of the period of probation, to provide proof to the Office of Probation of payment of restitution to the U.S. Bankruptcy Court Clerk in the amount of \$3,000 plus 10% annual interest accruing from October 26, 1999, and to provide proof to the Office of Probation of payment of restitution to the U.S. Trustee in the amount of \$1,000 plus 10% annual interest accruing from October 26, 1999. These payments were to be made no later than the end of respondent’s probation period. On June 20, 2002, the Supreme Court filed order S106466 approving the stipulation, ordering stayed suspension of one year, and ordering that respondent comply with the terms of probation, including those set forth above. (Exhibit 2.) The Supreme Court’s order became effective on July 20, 2002.

On July 19, 2005, respondent filed a motion for extension of time to pay restitution. This motion was granted on July 29, 2005 by the Hearing Department of the State Bar Court. (Exhibit 5.) The order granting the motion required that respondent complete the restitution no later than December 31, 2005, and by amended order filed August 1, 2005 (Exhibit 6), the court extended probation to January 31, 2006. To date, respondent has failed to make either of the restitution payments set forth in the Stipulation.

During the pretrial period and trial, respondent was late with her filings, and when filings were made, they were sometimes improperly titled or filed on the wrong dates.¹

¹For example, respondent’s pretrial statement was not timely filed, even after extra time was given to respondent. Respondent’s exhibit list was also not timely filed, and in fact, was not formally filed until after the trial had concluded. Also, apparently respondent appeared for a settlement conference on the day before trial when none was scheduled. Finally, respondent has misnamed her pleadings, referring to her settlement conference brief as “Pretrial Statement” and

C. Legal Conclusion

Respondent is charged with a wilful violation of Business and Professions Code section 6103, by wilfully disobeying or violating an order of the court requiring her to do or forbear an act connected with or in the course of respondent's profession which she ought in good faith do or forbear from doing. There is clear and convincing evidence that, by not complying with disciplinary conditions of probation as ordered by the Supreme Court within the period of probation, as extended, respondent wilfully disobeyed a court order in violation of section 6103.

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. Misconduct², std. 1.2(b).)

Respondent has three prior instances of discipline. (Std. 1.2(b)(i).) In Supreme Court case no. S106466 (State Bar Court case no. 99-O-12613; 00-O-10252; 01-O-00062; 01-J-00183 (Cons.)), discipline was imposed consisting of one year's stayed suspension and three years' probation on conditions including restitution. Respondent stipulated to culpability of violating rule 3-110(A) and sections 6103 and 6068, subdivision (o)(3). Respondent, who had no prior knowledge or experience in bankruptcy law, was paid by a lawyer to work on hundreds of bankruptcy cases without giving her sufficient supervision. Respondent did not meet directly with the clients. The other attorney abandoned the law practice within three months of respondent's being hired, leaving her in charge of hundreds of files. She did not perform competently for her clients, violated bankruptcy court orders and did not report sanctions. She was disbarred from practicing before the bankruptcy court for incompetence. In aggravation, she was found to have committed multiple acts of misconduct. The misconduct occurred between January 1999 and May 2000. In mitigation, she had no prior discipline.

her pretrial statement as "Pretrial Statement/Settlement Conference Statement."

²Future references to standard or std. are to this source.

In Supreme Court case no. S111040 (State Bar Court case no. 01-O-3056), discipline was imposed consisting of one year's stayed suspension and two years' probation on conditions including 30 days' actual suspension. Respondent was found culpable of violating rule 4-100(A) by not maintaining two personal injury clients' funds in her client trust account and by commingling her personal funds in that account. The misconduct occurred between February and September 2001. In mitigation, the parties stipulated that respondent did not have prior experience maintaining client funds and that she did not have the intent to misappropriate client funds. Her recently-deceased husband, also a lawyer, had maintained the firm's business records. There was no client harm as respondent honored the checks prior to State Bar involvement. Respondent began listening to continuing education classes and enrolled in the State Bar's Client Trust Account Record-Keeping School. Other mitigating factors were candor and remorse. One prior record of discipline was found as an aggravating factor. Respondent and the State Bar entered into a stipulation to resolve this matter.

In Supreme Court case no. S131367 (State Bar Court case no. 03-O-2256), effective May 28, 2005, respondent was placed on stayed suspension for one year and six months' probation on conditions including actual suspension for 45 days, among other things. The probationary period was to be consecutive to that imposed in Supreme Court case no. S111040. She was found culpable of violating rule 4-100(A) and sections 6068, subdivisions (i) and (k). The misconduct occurred in April 2003 and October 2004. In mitigation, the parties stipulated, among other things, that, with her CPA, she had developed a system to manage her trust account and that, although she had misused the trust account, she did not misuse clients' money. She also was candid and cooperative. Moreover, respondent had had shoulder surgery and physical therapy thereafter. During that time, her brother, who had come to live with her after her husband's death, died. Two prior instances of discipline were aggravating factors.

Respondent's failure to comply with the court's order of sanctions payable to the Bankruptcy Court and the U.S. Trustee has significantly harmed the administration of justice. (Std. 1.2(b)(iv).) However, given the substantial overlap between this aggravation and the underlying charge, the court has given little weight to this standard in assessing respondent's

ultimate discipline.

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).)

During the period of the misconduct, respondent suffered from serious medical problems with her eyes. Specifically, she was required to undergo surgeries and eventually, a retina transplant. The trauma of this condition caused her serious emotional strain. Unauthenticated medical records were offered, but denied admission into evidence (Exhibit G), and no expert medical testimony was offered or received. As such, while respondent may indeed have been subject to extreme emotional difficulties or physical disabilities at the time of the misconduct and the difficulties or disabilities were not the product of any illegal conduct by the attorney, respondent did not offer competent expert testimony to establish that her condition was directly responsible for the misconduct and did not establish through clear and convincing evidence that she no longer suffers from such difficulties or disabilities. As a result, the court finds that standard 1.2(e)(iv) does not apply.

The candor and cooperation of the respondent is a mitigating factor. (Std. 1.2(e)(v). During the trial, the State Bar acknowledged respondent's candor and cooperation. Therefore, the court finds that respondent has proven by clear and convincing evidence that she was candid and cooperative.³

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.)

³While respondent often became confused as to her responsibilities to the court during the pretrial period and the trial, the court finds that this was not due to her lack of cooperation. Rather, her tardiness with filings and other missteps were a result of her honest confusion as to the unique procedures employed in this court.

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 2.6(b) applies in this matter. It recommends suspension or disbarment for violations of sections 6103, depending on the gravity of the offense or harm, if any to the victim, with due regard to the purposes of imposing discipline.

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 not obeying the Supreme Court’s disciplinary order by not complying with probation conditions. Her three prior disciplinary records for misconduct occurring between 1999 and 2004 are a grave aggravating factor.

The State Bar recommends disbarment. Respondent seeks 90 days of actual suspension.

While the court has found some mitigation in respondent’s candor and cooperation, this mitigation clearly does not constitute “the most compelling mitigation” within the meaning of standard 1.7(b). Lesser discipline than disbarment is also not warranted because there are insufficient extenuating circumstances that clearly predominate in this case. (Std. 1.7(b).) Respondent’s four cases of misconduct in approximately five years, suggest that she 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 **ANN LONERGAN SMITH** be **DISBARRED** from the practice of law in the State of California and that her name be stricken from the rolls of attorneys in this state.

It is also recommended that the Supreme Court order respondent to comply with rule 955, 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 that they be 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, subdivision (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: November ____, 2006

RICHARD A. HONN
Judge of the State Bar Court