

# PUBLIC MATTER

FILED

JUL 20 2017

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

STATE BAR COURT  
CLERK'S OFFICE  
LOS ANGELES

In the Matter of )

Case Nos. 16-O-15074 (16-O-16310)-CV

GAIL JUDITH HIGGINS, )

DECISION AND ORDER OF  
INVOLUNTARY INACTIVE  
ENROLLMENT

A Member of the State Bar, No. 164989. )



Respondent Gail Judith Higgins is charged with a total of nine counts of misconduct involving two separate client matters. Respondent failed to participate in this proceeding either in person or through counsel, and her default was entered. Thereafter, the Office of Chief Trial Counsel of the State Bar of California (OCTC) filed a petition for disbarment under rule 5.85 of the Rules of Procedure of the State Bar.<sup>1</sup>

Rule 5.85 provides the procedure to follow when an attorney fails to participate in a disciplinary proceeding after receiving adequate notice and opportunity. The rule provides that, if an attorney's default is entered for failing to respond to the notice of disciplinary charges (NDC) and if the attorney fails to have the default set aside or vacated within 90 days, OCTC will file a petition requesting that the State Bar Court recommend the attorney's disbarment.<sup>2</sup>

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<sup>1</sup> Except where otherwise indicated, all further references to rules are to the Rules of Procedure of the State Bar.

<sup>2</sup> If the court determines that any due process requirement is not satisfied, including adequate notice to the attorney, the court will deny the petition for disbarment and take appropriate action to ensure that the matter is promptly resolved. (Rule 5.85(F)(2).)

In the instant case, the court concludes that the requirements of rule 5.85 have been satisfied and, therefore, grants the petition and recommends that respondent be disbarred from the practice of law.

### **FINDINGS AND CONCLUSIONS**

Respondent was admitted to the practice of law in this state on June 15, 1993, and has been a member of the State Bar of California since that time.

#### **Procedural Requirements Have Been Satisfied**

On December 13, 2016, OCTC filed and properly served the NDC on respondent by certified mail, return receipt requested, at respondent's membership-records address. The NDC notified respondent that her failure to participate in the proceeding would result in a disbarment recommendation. (Rule 5.41(B)(3).) OCTC received a signed return receipt for the NDC from the United States Postal Service (Postal Service) on December 27, 2016, but the printed name of the individual who signed the receipt and his or her signature are illegible.

The assigned Deputy Trial Counsel (DTC) attempted to contact respondent by telephone at her membership-records telephone number and left a voicemail message for respondent in which he identified himself as an OCTC Attorney and stated that he intended to file a motion for entry of default against her if she did not promptly file a response to the NDC. OCTC believes that respondent may have moved to Florida. A LexisNexis search for respondent revealed that respondent has an address in Melbourne, Florida. That search further revealed that, in October 2016, respondent obtained a Florida driver's license and registered a motor vehicle in Florida.

On January 10, 2017, the DTC mailed letters with copies of the NDC enclosed to respondent at both her membership-records address and at her address in Melbourne, Florida. That same day, the DTC emailed a copy of his letter to respondent at her membership-records email address. None of those three letters was returned to the DTC undelivered. In addition, on

January 17, 2017, the DTC received a voicemail message from respondent stating that she had received the January 10, 2017, letter that he had mailed to her Melbourne, Florida address and that she would review the NDC and call him later. On January 18, 2017, the DTC attempted to telephone respondent at the phone number from which she had called him on the previous day, and received a voicemail greeting, which identified the phone number as belonging to respondent. Thus, the DTC left a voicemail message for respondent stating that he was returning her telephone call from the day before. Respondent, however, never called the DTC back.

Thereafter, respondent failed to file a response to the NDC. And, on January 20, 2017, OCTC filed and served a motion for entry of default on respondent at her membership-records address by certified mail, return receipt requested. Even though the certificate of service for the motion for entry of default does not show that a courtesy copy of the motion for entry of default was sent to respondent at her Florida address, the DTC's declaration, which is attached to OCTC's petition for disbarment, *post*, establishes that a courtesy copy of the motion was, in fact, mailed to respondent at her Florida address and that the courtesy copy was not returned to OCTC undelivered. OCTC's motion for entry of default complied with the requirements for a default, including a supporting declaration from the DTC. (Rule 5.80.) The motion notified respondent that, if she did not timely move to set aside her default, the court would recommend her disbarment.

Respondent did not file a response to the motion for entry of default or to the NDC, and the court entered her default on February 13, 2017. The court properly served the default order on respondent at her membership-records address by certified mail, return receipt requested. In the default order, respondent was again advised that, if she did not timely move to set aside her default, the court would recommend her disbarment.

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In the default order, the court also ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of California in accordance with Business and Professions Code section 6007, subdivision (e). Thereafter, on February 16, 2017, respondent was involuntarily enrolled inactive, and she has been involuntarily enrolled inactive under the court's February 13, 2017, order since that time.

Respondent did not seek to have her default set aside or vacated. (Rule 5.83(C)(1) [attorney has 90 days to file motion to set aside default].) Thus, on May 22, 2017, OCTC filed and properly served a petition for disbarment on respondent at her membership-records address by certified mail, return receipt requested. That same day, OCTC also mailed a courtesy copy of the petition for disbarment to respondent at her Florida address. The courtesy copy was not returned to OCTC undelivered.

As required by rule 5.85(A), OCTC reported in the petition that (1) respondent has not contacted OCTC since her default was entered on February 13, 2017; (2) there are no other disciplinary proceedings pending against respondent; (3) respondent has one prior record of discipline; and (4) the Client Security Fund has not paid out any claims resulting from respondent's conduct in this matter. Respondent did not respond to the petition for disbarment or move to set aside or vacate the default.

The court took OCTC's petition for disbarment under submission for a decision on June 21, 2017.

### **Prior Record of Discipline<sup>3</sup>**

On July 16, 2010, the Supreme Court filed an order in *In re Gail Judith Higgins on Discipline*, case number S182798 (State Bar Court case number 00-O-14412, etc.) placing

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<sup>3</sup> The court admits into evidence the certified copy of respondent's prior record of discipline, which is attached as exhibit 1 to the DTC's declaration filed on July 17, 2017.

respondent on one year's stayed suspension and two years' probation on conditions, including a 30-day suspension (*Higgins I*). The Supreme Court imposed that discipline on respondent based on the discipline recommendation in the State Bar Court's March 16, 2010, decision and order in case numbers 00-O-14412, 03-O-02970, and 05-O-03374 (consolidated) following respondent's successful completion of the State Bar Court's Alternative Discipline Program.

In case number 00-O-14412, respondent stipulated (1) that she willfully violated Business and Professions Code section 6068, subdivision (1)<sup>4</sup> by failing to file four quarterly reports in accordance with the terms of an agreement in lieu of discipline (ALD) which respondent had previously entered into with OCTC in March 2002 and (2) that she willfully violated section 6068, subdivision (m) by failing to promptly respond to her client's reasonable status inquiries.

In case number 03-O-02970, respondent stipulated that she failed to perform legal services competently in willful violation of State Bar Rules of Professional Conduct, rule 3-110(A) by failing to oppose or to appear at a bankruptcy court hearing on motion for relief from automatic stay in her clients' bankruptcy proceeding.

In case number 05-O-03374, respondent stipulated that, while she was representing a client in bankruptcy, she willfully violated: (1) State Bar Rules of Professional Conduct, rule 3-110(A) by failing to perform legal services with competence; (2) State Bar Rules of Professional Conduct, rule 3-700(D)(2) by failing to refund an unearned fee; (3) State Bar Rules of Professional Conduct, rule 4-100(B)(4) by failing to promptly refund advanced costs; (4) section 6068, subdivision (m) by failing to promptly respond to her client's reasonable status inquiries; and (5) section 6068, subdivision (i) by failing to cooperate in a disciplinary investigation.

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<sup>4</sup> All further statutory references are to the Business and Professions Code.

In mitigation, respondent had no prior record of discipline, she displayed candor and cooperated with the State Bar, and she was suffering from severe financial stress at the time of her prior misconduct. In aggravation, respondent committed multiple acts of misconduct.

**The Factual Allegations Deemed Admitted by Default Warrant the Imposition of Discipline**

Under section 6088 and rule 5.82, the factual allegations set forth in the NDC are deemed admitted by the entry of respondent's default. As set forth in greater detail *post*, the admitted factual allegations support a finding that respondent is culpable on seven of the nine counts of charged misconduct. Therefore, the factual allegations in the NDC admitted by default "support a finding that [respondent] violated a statute, rule or court order that would warrant the imposition of discipline." (Rule 5.85(F)(1)(d).)

**Case Number 16-O-15074 (Burns Matter)**

Count One – Respondent willfully violated rule 3-110(A) of the Rules of Professional Conduct (repeatedly failing to competently perform legal services) by failing to respond to case commencement deficiency notice from the bankruptcy court in which her client's bankruptcy petition was pending and thereafter failing to take any action to have her client's bankruptcy proceeding reinstated.

Count Two – Respondent willfully violated section 6068, subdivision (m) (failure to notify client of significant development) by failing to notify her clients that their bankruptcy proceeding was dismissed because of respondent's failure to respond to the bankruptcy court's case commencement deficiency notice.

Count Three charges that respondent willfully violated section 6106 (moral turpitude) by falsely representing, to her clients, that she was a certified consumer bankruptcy specialist when respondent knew or was grossly negligent in not knowing that her specialist certification had been revoked. Even though these disjunctive, factual allegations are deemed admitted by the

entry of respondent's default (§ 6088; rule 5.82(2)), they can *establish* only the lesser allegation in light of the well-established principles that the court must resolve all reasonable doubts in a respondent attorney's favor (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1216; see also *In the Matter of Freydl* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 349, 359 [taking as established only the lesser of the charges in each count]) and that the court must accept the inference that leads to a conclusion of innocence (*In re Aquino* (1989) 49 Cal.3d 1122, 1130). In other words, the factual allegations in count three can establish only that respondent was grossly negligent in not knowing that her specialist certification had been revoked. However, count three fails to allege the factual basis of respondent's alleged gross negligence. Accordingly, the factual allegations in count three that are deemed admitted by the entry of respondent's default do not and cannot establish, by clear and convincing evidence, that respondent was grossly negligent in not knowing that her specialist certification had been revoked. Thus, count three is DISMISSED with prejudice for want of proof.

Count Four charges that respondent willfully violated section 6106 by making false statements regarding the status of her clients' bankruptcy proceeding when respondent knew or was grossly negligent in not knowing that her statements were false. The disjunctive allegations in count four, like those in count three *ante*, can establish only that respondent was grossly negligent in not knowing that her statements were false. However, count four, like count three *ante*, fails to allege the factual basis underlying the alleged gross negligence. Accordingly, count four fails to establish the alleged gross negligence by clear and convincing evidence. Thus, count four is also DISMISSED with prejudice for want of proof.

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Count Five – Respondent willfully violated State Bar Rules of Professional Conduct, rule 3-700(D)(2) (failing to refund unearned fees) by failing to refund the unearned portion of the \$2,000 advanced fee she collected from her clients.<sup>5</sup>

Count Six – Respondent willfully violated section 6068, subdivision (i) (failing to cooperate/participate in a disciplinary investigation) by failing to provide a substantive response to the State Bar’s letters.

**Case Number 16-O-16310 (Patterson Matter)**

Count Seven – Respondent willfully violated rule 3-110(A) of the Rules of Professional Conduct by repeatedly failing to competently perform legal services by failing to file a monthly operating report in her client’s first bankruptcy proceedings and, in her client’s second bankruptcy proceeding, by failing to respond to a motion to dismiss and to a motion to turnover property and documents and by failing to attend the meeting of her client’s creditors.

Count Eight – Respondent willfully violated State Bar Rules of Professional Conduct, rule 3-700(D)(2) by failing to refund \$4,700 in unearned fees that respondent collected from her client in advance.

Count Nine – Respondent willfully violated section 6068, subdivision (i) by failing to provide a substantive response to the State Bar’s letters.

**Disbarment is Recommended**

In light of the foregoing, the court finds that the requirements of rule 5.85(F) have been satisfied, and respondent’s disbarment is recommended. In particular:

- (1) the NDC was properly served on respondent under rule 5.25;

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<sup>5</sup> The factual allegations in count five that are deemed admitted by the entry of respondent’s default do not establish how much of the \$2,000 advanced fee is unearned. Accordingly, the court cannot recommend that respondent be ordered to make restitution for the unearned portion of the fee.



- (2) reasonable diligence was used to notify respondent of the proceedings prior to the entry of her default;
- (3) respondent's default was properly entered under rule 5.80; and
- (4) the factual allegations in the NDC deemed admitted by the entry of respondent's default support a finding that respondent violated a statute, rule, or court order that would warrant the imposition of discipline.

Despite adequate notice and opportunity, respondent failed to participate in this disciplinary proceeding. As set forth in the Rules of Procedure of the State Bar, the court will recommend disbarment.

### **RECOMMENDATIONS**

#### **Disbarment**

The court recommends that respondent Gail Judith Higgins be disbarred from the practice of law in the State of California and that her name be stricken from the roll of attorneys.

The court further recommends that Gail Judith Higgins be ordered to make restitution to Cherlyn Patterson in the amount of \$4,700 plus 10 percent interest per year from September 19, 2015 (or to reimburse the Client Security Fund to the extent of any payment from the fund to Cherlyn Patterson, in accordance with Business and Professions Code section 6140.5). Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

#### **California Rules of Court, Rule 9.20**

The court further recommends that respondent be ordered to comply with the requirements of 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 days, respectively, after the effective date of the Supreme Court order in this proceeding.

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**Costs**

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

**ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that Gail Judith Higgins, State Bar number 164989, 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. (Rule 5.111(D).)

Dated: July 20, 2017.

  
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**CYNTHIA VALENZUELA**  
Judge of the State Bar Court

**CERTIFICATE OF SERVICE**

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on July 20, 2017, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

GAIL J. HIGGINS  
HIGGINS LAW FIRM  
9663 SANTA MONICA BLVD STE 149  
BEVERLY HILLS, CA 90210

COURTESY COPY TO:

GAIL J. HIGGINS  
4601 COQUINA RIDGE DRIVE  
MELBOURNE, FL 32935-4808

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

ALEX J. HACKERT, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on July 20, 2017.



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Mazie Yip  
Case Administrator  
State Bar Court