

PUBLIC MATTER

FILED

JUL 23 2003

STATE BAR COURT CLERK'S OFFICE
SAN FRANCISCO

STATE BAR COURT
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of

RICHARD RALPH MURPHY
No. 28734,

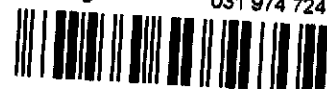
A Member of the State Bar.

Case Nos. 00-O-12629-PEM and
02-O-13664-PEM

DECISION AND ORDER OF
INVOLUNTARY INACTIVE
ENROLLMENT

I. INTRODUCTION

In separate thirty-one count and two count Notices of Disciplinary Charges ("NDC"), Respondent **RICHARD RALPH MURPHY** is charged with multiple acts of misconduct in thirteen client matters. In addition, during the trial of this matter, the Court permitted the Office of the Chief Trial Counsel of the State Bar of California ("State Bar") to amend the thirty-one count NDC to include two additional charges. The charged misconduct includes allegations that Respondent: (1) was held in contempt of court on numerous occasions for violating court orders; (2) was found to have provided ineffective assistance of counsel in two criminal matters, resulting in the vacating of jury findings of guilt against his clients; (3) provided ineffective assistance of counsel to a client in a suppression hearing; (4) was sanctioned for filing a frivolous action; (5) was sanctioned for failing to comply with court orders; (6) failed to return unearned fees; (7) violated a client's confidences; (8) engaged in an improper business transaction with a client; (9) failed to communicate with a client; (10) threatened a client with criminal charges in order to gain an advantage in a civil action;



1 (11) failed to pay a \$25,000 debt to a client; (12) maintained an unjust action for a client; (13)
2 failed, on multiple occasions, to report the imposition of judicial sanctions against him to the State
3 Bar; (14) committed multiple acts of moral turpitude; and (15) represented clients with conflicting
4 interests.

5 For the reasons stated below, this Court finds Respondent culpable, by clear and convincing
6 evidence, of most of the charged violations. As a result of Respondent's extensive misconduct in
7 this proceeding, the existence of significant aggravating circumstances and his multiple instances
8 of prior discipline, this Court recommends that Respondent be disbarred and that his name be
9 stricken from the roll of attorneys in this State.

10 **II. PROCEDURAL HISTORY**

11 On July 26, 2002, the State Bar filed and properly served the NDC in State Bar Case. No.
12 00-O-12629. Thereafter, on August 9, 2002, the State Bar filed with this Court an application to
13 have Respondent involuntarily enrolled as an inactive member of the State Bar pursuant to Business
14 and Professions Code section 6007, subdivision (c)(2).

15 Respondent was served with the verified petition on August 13, 2002, by certified mail,
16 return receipt requested, addressed to him at his official membership address. (Rule 461(d), Rules
17 Proc. of State Bar.) On August 16, 2002, the State Bar filed supplemental exhibits in support of its
18 application to have Respondent involuntarily enrolled as an inactive member of the State Bar. These
19 supplemental State Bar exhibits were served upon Respondent by first-class mail on the same date.

20 Pursuant to the State Bar's request, a hearing on the State Bar's application for involuntary
21 inactive enrollment was held by the Court on September 5, 2002, and taken under submission on
22 September 6, 2002. On September 22, 2002, Respondent was involuntarily enrolled as an inactive
23 member of the State Bar.

24 On November 1, 2002, after the hearing on the State Bar's application for involuntary
25 inactive enrollment, the State Bar filed and properly served another NDC upon Respondent in State
26 Bar Court Case No. 02-O-13664. On November 13, 2002, Respondent filed responses to the NDCs
27
28

1 in both Case No. 00-O-12629 and Case No. 02-O-13664. On December 17, 2002, this Court
2 consolidated the two cases for trial.

3 At the pretrial conference on February 11, 2003, the parties stipulated to many of the facts
4 underlying the State Bar's charges. The Court memorialized these agreed-upon facts in a document
5 entitled "Stipulated Facts for Trial" which was filed with the Court on the first day of trial.

6 A three-day trial was held on February 19, 20 and 21, 2003. The State Bar was represented
7 throughout this proceeding, including at trial, by Deputy Trial Counsel Alan Konig. Respondent
8 represented himself *in propria persona* throughout this proceeding. Following receipt of closing
9 briefs from the parties, the Court took this proceeding under submission on April 24, 2003.

10 **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

11 **Jurisdiction**

12 Respondent was admitted to the practice of law in California on June 11, 1958, and at all
13 times mentioned herein, has been a member of the State Bar of California.

14 **Case No. 00-O-12629 PEM**

15 **A. Count One (The Keisler Matter)**

16 Respondent represented Dave Ralph Keisler in a criminal proceeding entitled *People v. Dave*
17 *Ralph Keisler*, Lassen County Superior Court Case No. CR014931 (hereinafter "Keisler matter").
18 During a trial setting hearing that Respondent personally attended on October 21, 1999, the
19 Honorable Stephen D. Bradbury ordered Respondent to file and serve his written list of trial
20 witnesses by December 22, 1999. Notwithstanding the court's order, Respondent submitted his
21 witness list for the first time at the trial readiness conference on January 3, 2000. Pursuant to the
22 prosecution's request, the court cited Respondent for contempt on January 10, 2000, for his failure
23 to comply with the court's order to disclose witnesses by December 29, 1999. On April 28, 2000,
24 the court held the contempt hearing and found that Respondent had violated Code of Civil Procedure

1 section 1209(a).¹

2 Respondent is charged in Count One of the NDC in Case No. 00-O-12629 with a violation
3 of Business and Professions Code section 6103, which provides that an attorney must obey court
4 orders requiring him to do or to forebear an act connected with or in the course of his profession,
5 which he ought in good faith do or forebear. This Court finds Respondent culpable, by clear and
6 convincing evidence, of a violation of section 6103. At trial on this matter, Respondent stipulated
7 that he was held in contempt of the court for his failure to file and serve a written witness list as
8 ordered by the court and that the court's order of contempt was made under the standard of proof
9 beyond a reasonable doubt.

10 **B. Count Two (The Ehleringer Matter)**

11 Respondent represented Leon Ehleringer in a criminal proceeding entitled *People v. Leon*
12 *Ehleringer*, Lassen County Superior Court Case No. CRO14968 (hereinafter "Ehleringer matter").
13 During a trial setting conference in the *Ehleringer* matter on October 21, 1999, at which Respondent
14 personally appeared, the Honorable Stephen D. Bradbury ordered Respondent to file and serve his
15 written list of trial witnesses by December 22, 1999. Notwithstanding the court's order, Respondent
16 submitted his witness list for the first time at the trial readiness conference on January 10, 2000.
17 Pursuant to the prosecution's request, the court cited Respondent for contempt on January 24, 2000,
18 as a result of his failure to comply with the court's order to disclose witnesses by December 22,
19 1999. On April 28, 2000, the court held the contempt hearing and found that Respondent had
20 violated Code of Civil Procedure section 1209(a).²

21 Respondent is charged in Count Two of the NDC in Case No. 00-O-12629 with a second
22 violation of Business and Professions Code section 6103. The Court finds Respondent culpable, by
23 clear and convincing evidence of the charged violation of section 6103. At trial in this matter,
24

25 ¹ Respondent did not object to any of the State Bar's exhibits being admitted into evidence. See
26 State Bar Exhibit 2,3, and 6.

27 ² See State Bar Exhibit 5 & 6.

1 Respondent stipulated that he was held in contempt of the court for his failure to file and serve a
2 written witness list as ordered by the court and that the order of contempt was made under the
3 standard of proof beyond a reasonable doubt.

4 **C. Counts Three through Five (The Maggin Matter)**

5 Eduardo Maggin was arrested and charged with multiple felony and misdemeanor offenses,
6 including (a) possession of a dangerous weapon [Pen. Code, § 12020, subd. (a)]; (b) carrying a
7 concealed weapon [Pen. Code, § 12025, subd. (a)(2)]; (c) carrying a loaded firearm in a public place
8 [Pen. Code, § 12031, subd. (a)(1)]; (d) battery upon a peace officer [Pen. Code, § 243, subd. (b)];
9 (e) resisting, delaying, or obstructing a peace officer [Pen. Code, § 148, subd. (a)(1)]; (f) driving
10 under the influence [Veh. Code, § 23152, subd. (a)]; and (g) driving under the influence with a blood
11 alcohol level of .08% or greater [Veh. Code, § 23152, subd. (b)].

12 On October 24, 1999, Maggin retained Respondent to represent him in the subsequent
13 criminal proceeding entitled *People v. Eduardo Maggin*, Lassen Superior Court Case No.
14 CR015454, and paid him a flat fee of \$7,500 for all the work to be done in the matter through trial.

15 Between October 1999 and March 2000, Maggin telephoned Respondent's office on
16 numerous occasions requesting information on how the criminal matter was to proceed. Respondent
17 never replied to any of Maggin's telephone calls. On November 1, 1999, Maggin sent a letter to
18 Respondent requesting that Respondent inform him about various issues related to his case. The
19 Court finds that Respondent received Maggin's letter since it was placed in a sealed envelope,
20 correctly addressed to Respondent's office address, was deposited for collection by the U.S. Postal
21 Service, postage prepaid, and was not subsequently returned to Maggin as undeliverable for any
22 reason. Respondent did not respond to Maggin's letter.

23 On April 24, 2000, the jury trial in the *People v. Maggin* action commenced. Respondent
24 represented Maggin at trial. At the conclusion of the trial on April 26, 2000, the jury convicted
25 Maggin of all counts, except for the charge of battery upon a peace officer, which was dismissed.

26 ///

1 On June 9, 2000, Maggin's new counsel, Rex Gay, filed a motion for a new trial based upon
2 Respondent's failure to competently represent Maggin. On July 25, 2000, the court granted the
3 motion for a new trial and vacated the jury's guilty verdicts due to Respondent's incompetent
4 representation of Maggin.³ The trial court's finding with respect to Respondent's ineffective
5 assistance was based upon the following facts, among others: (1) Respondent failed to convey a
6 misdemeanor offer to Maggin; (2) Respondent failed to meet with Maggin between the time he was
7 retained in October 1999 and the dispositional conference in March 2000; (3) Respondent failed to
8 meet with Maggin at any time between the dispositional conference in March 2000 and the
9 commencement of trial on April 24, 2000, except for a 15-minute meeting at Denny's Restaurant at
10 10:00 p.m. on the night before trial; (4) Respondent failed to prepare Maggin for trial; (5)
11 Respondent failed to contact any of the character witnesses whose names had been provided to him
12 by Maggin; (6) Respondent failed to explain the preliminary hearing and trial process to Maggin; (7)
13 Respondent did not know that venue was improper for the charged violation of Penal Code section
14 243(d) and that Respondent's waiver of the preliminary hearing resulted in Maggin being held to
15 answer and ultimately convicted on a violation for which there was improper venue; (8) Respondent
16 conducted no investigation prior to trial; (9) Respondent did not know what a *Wheeler* motion was
17 and, therefore, did not attempt to have the prosecutor justify his exclusion of all Hispanics from the
18 jury; (10) Respondent did not know what a Penal Code section 17(b)(5) motion was; (11)
19 Respondent did not know of CALJIC 12.42 as a possible defense to the nunchukas charge; and (12)
20 Respondent introduced Maggin's inadmissible prior conviction into evidence and then did nothing
21 to limit the prosecution's use of that prior conviction.⁴

22 ///

23
24 ³ Respondent did not object to the admission of the transcript of the hearing for a new trial in
25 evidence in this hearing. During a two-hour recess, the Court gave Respondent an opportunity to review
26 the transcript in order to determine if he had any objections to the evidence at that hearing. Respondent
reviewed the transcript and reported that it was accurate.

27 ⁴ See State Bar Exhibit 8- Transcript of Motion for New Trial Hearing.

1. Count Three (Rule 3-110(A), Rules of Professional Conduct)

Respondent is charged in Count Three of the NDC in Case No. 00-O-12629 with a wilful violation of rule 3-110(A) of the Rules of Professional Conduct, which provides that a member of the State Bar shall not intentionally, recklessly or repeatedly fail to perform legal services in a competent manner.

The Court concludes that Respondent either intentionally or recklessly failed to represent Maggin in a competent manner with respect to Maggin's criminal matter. The Court's conclusion is based upon the transcript of the hearing for a new trial and upon Respondent's stipulation to the fact that he was found by the trial court to have provided ineffective assistance of counsel resulting in the court vacating the jury's findings of guilt against Maggin. The Court's conclusion is also based upon Respondent's testimony at the hearing in this proceeding. Respondent testified that he still does not have any idea of what a *Wheeler* motion is and that it was not until the day before this hearing that he learned of the purpose of a Penal Code section 17(b) motion. Respondent admitted that he did not contact any of Maggin's witnesses because he believed they could not attend the trial. Respondent further admitted that he waived Maggin's right to a preliminary hearing because he believed, based on prior experience, that preliminary hearings are "a joke."

By failing to adequately prepare for and conduct Mr. Maggin's criminal matter and by failing to be aware of relevant landmark cases and the prevailing criminal law, Respondent intentionally, recklessly and repeatedly failed to perform the legal services for which he was retained by Maggin in wilful violation of rule 3-110(A) of the Rules of Professional Conduct.

2. Count Four (Business and Professions Code Section 6068, Subdivision (m))

Respondent is charged in Count Four of the NDC in Case No. 00-O-12629 with a violation of Business and Professions Code section 6068, subdivision (m), which provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in the matters with regard to which the attorney has agreed to provide legal services.

1 The Court finds, by clear and convincing evidence, that Respondent is culpable of the
2 charged violation of section 6068, subdivision (m). Maggin testified at the hearing on the motion
3 for a new trial that he called Respondent and left messages for him on many occasions. Maggin
4 kept missing Respondent, but Respondent never got back to him.⁵ At the hearing on the motion for
5 a new trial, Respondent acknowledged that he received Maggin's November 1, 1999 letter.⁶
6 However, Respondent asserted that he talked on the telephone with Maggin probably within a day
7 or two of receiving the November 1 letter, and that he had numerous conversations with Maggin
8 regarding his case. Yet Respondent admitted that he could not produce a single document or
9 notation from Maggin's client file to corroborate his testimony. The Court resolves this dispute in
10 the testimony in favor of Maggin and finds that Respondent's failure to return Maggin's telephone
11 calls or to respond to Maggin's letter constitutes a violation of Business and Professions Code
12 section 6068, subdivision (m).

13 **3. Count Five (Rule 3-700(D)(2), Rules of Professional Conduct)**

14 Respondent is charged in Count Five of the NDC in Case No. 00-O-12629 with a wilful
15 violation of rule 3-700(D)(2), which provides that an attorney must promptly refund any part of a
16 fee paid in advance that has not been earned. The Court does not find Respondent culpable of the
17 charged violation of rule 3-700(D)(2). The burden of proof on the issue of culpability rests with the
18 State Bar. (Rules Proc. of State Bar, rule 213.) While Respondent was found to have rendered
19 ineffectiveness assistance of counsel in his representation of Maggin, that does not mean that he
20 shouldn't be compensated for the competent services that he did render. Respondent represented
21 Maggin at trial and in numerous hearings. He was not incompetent in all those court appearances.
22 The evidence adduced at trial demonstrated that Maggin filed a small claims action alleging that
23 Respondent owed him a refund of \$5,000 of the \$7,500. The small claims matter was consolidated
24 with a cross-complaint matter filed by Respondent and the matter was subsequently settled for
25

26 ⁵ See State Bar Exhibit 8—page 100 of the transcript of a motion for new trial.

27 ⁶ See State Bar Exhibit 9—page 14 of the transcript of a motion for new trial.

1 \$3,000. In short, Maggin received \$3,000 pursuant to a settlement obtained as a result of a civil
2 action.⁷

3 **D. Count Six (The Garcia Matter)**

4 Respondent represented Manuel Reynoso Garcia in a criminal proceeding entitled *People v.*
5 *Manuel Garcia*, Lassen County Superior Court Case No. CR012582 (hereinafter "*Garcia matter*").
6 On June 21, 1999, Respondent was ordered by the Honorable Ridgely Lazard to appear at 1:00 p.m.
7 on August 16, 1999, for a probation revocation hearing setting conference in the *Garcia matter*.
8 Judge Lazard specifically informed Respondent that his failure to appear at the August 16 conference
9 would be considered a contempt of court.

10 Respondent failed to appear at the conference on August 16, 1999, and the matter was
11 continued to August 23, 1999. On August 24, 1999, the court held a contempt hearing and found
12 that, by failing to appear at the hearing on August 16, 1999, Respondent had violated Code of Civil
13 Procedure section 1209(a)(5).⁸

14 Respondent is charged in Count Six of the NDC in Case No. 00-O-12629 with a violation
15 of Business and Professions Code section 6103. The Court finds Respondent culpable, by clear and
16 convincing evidence, of the charged violation of section 6103. At trial in this matter, Respondent
17 stipulated that he was held in contempt of the court for his failure to appear as ordered by the court
18 and that the court's order of contempt was made under the standard of proof beyond a reasonable
19 doubt.

20 **E. Count Seven (The Holland Matter)**

21 Respondent represented Clayton Holland in a criminal proceeding entitled *People v. Clayton*
22 *Holland*, Lassen County Superior Court Case No. CR015001 (hereinafter "*Holland matter*"). In the
23 *Holland matter*, on August 17, 1999, Respondent was ordered by the Honorable Ridgely Lazard to
24 appear at 9:00 a.m. on September 3, 1999, for a court trial. Judge Lazard specifically informed

25
26 ⁷ See State Bar Exhibit 40 & 41.

27 ⁸ See State Bar Exhibit 9.

1 Respondent that his failure to appear at the September 3 court trial would be considered a contempt
2 of court.

3 Respondent failed to appear for the court trial on September 3, 1999.⁹ On September 9, 1999,
4 the court held a contempt hearing and found that, by failing to appear for trial on September 3, 1999,
5 in the *Holland* matter, Respondent violated Code of Civil Procedure sections 1209(a)(5) and
6 1209(a)(8). Judge Lazard imposed sanctions of \$750 against Respondent.¹⁰

7 Respondent is charged in Count Seven of the NDC in Case No. 00-O-12629 with a violation
8 of Business and Professions Code section 6103. The Court finds Respondent culpable, by clear and
9 convincing evidence, of the charged violation of section 6103. At trial in this matter, Respondent
10 stipulated that he was held in contempt of court for his failure to appear as ordered by the court and
11 that the court's order of contempt was made under the standard of proof beyond a reasonable doubt.

12 **F. Counts Eight and Nine (The Noel Matter)**

13 Respondent represented Stephen Noel in a criminal proceeding entitled *People v. Stephen*
14 *Noel*, Lassen County Superior Court Case No. CR015024 (hereinafter "*Noel* matter"). At the
15 readiness conference in the *Noel* matter on November 23, 1999, which Respondent personally
16 attended, the Honorable Ridgely Lazard ordered Respondent to disclose all witnesses he intended
17 to call at trial to the prosecution at least thirty days prior to the scheduled January 6, 2000 trial, as
18 required by Penal Code section 1054. At the same time, Respondent was also ordered to disclose
19 to the prosecution all real evidence and written statements of witnesses in compliance with Penal
20 Code section 1054. Judge Lazard specifically informed Respondent that his failure to comply with
21 the court's order would be considered a contempt of court.

22
23 ⁹ Respondent had appeared in court for the *Holland* matter at 8:30 a.m. on September 3, 1999,
24 and had remained in the courtroom until about 9:00 a.m., at which time he went to another court in which
25 a second court trial had been scheduled for the same time. Respondent had only been retained in the
26 second matter on September 2, 1999. Although Respondent requested a continuance of the second trial
(a probation revocation proceeding), the judge denied the continuance. As a result, Respondent
represented the defendant at trial in the second case and was not available for the scheduled trial before
Judge Lazard in the *Holland* matter.

27 ¹⁰ See State Bar Exhibits 10 & 11.

1 On January 3, 2000, three days before trial, Respondent disclosed to the prosecution the name
2 of a witness that he intended to call at trial. Respondent also disclosed that he possessed a written
3 statement from the victim that had been in his possession for more than thirty days. At a January 5,
4 2000, hearing on Respondent's motion to continue trial due to the illness of a witness, Respondent
5 was ordered by Judge Lazard to immediately provide a copy of the victim's statement to the
6 prosecution. Respondent did not immediately provide the statement to the prosecution. On January
7 6, 2000, the court granted the continuance and set a hearing on the sanction for non-compliance with
8 Penal Code section 1054 and an Order to Show Cause re Contempt.

9 On May 17, 2000, the court held a contempt hearing and found that Respondent violated
10 Code of Civil Procedure section 1209, subdivision (a)(5) by failing to disclose that he possessed a
11 written statement of the victim and by failing to provide the prosecution with a witness list at least
12 30 days prior to trial. The court ordered Respondent to pay sanctions of \$1,250. Respondent was
13 present when the court sanctioned him. In addition, the court served a copy of the contempt order
14 and judgment of contempt upon Respondent at his office address on June 21, 2000, in compliance
15 with Code of Civil Procedure sections 1013a and 2015.5. Respondent did not report those sanctions
16 to the State Bar.

17 **1. Count Eight (Business and Professions Code Section 6103)**

18 Respondent is charged in Count Eight of the NDC in Case No. 00-O-12629 with a violation
19 of Business and Professions Code section 6103. The Court finds Respondent culpable, by clear and
20 convincing evidence, of the charged violation of section 6103. At trial in this matter, Respondent
21 stipulated that he was held in contempt of the court for his failure to disclose a witness and to reveal
22 all real evidence as ordered by the court and that the court's order of contempt was made under the
23 standard of proof beyond a reasonable doubt.¹¹

24 ///

25 ///

26
27 ¹¹ See State Bar Exhibits 12 and 13.

2. Count Nine (Business and Professions Code Section 6068, Subdivision (o)(3))

Respondent is charged in Count Nine of the NDC in Case No. 00-O-12629 with a violation of Business and Professions Code section 6068, subdivision (o)(3), which provides that it is the duty of a member of the State Bar to report to the agency charged with attorney discipline (i.e., the State Bar) in writing, within 30 days of the time the attorney has knowledge of the entry against him, of the imposition of any judicial sanctions, except for a judicial sanction of less than \$1,000 for failure to make discovery.

The Court finds Respondent culpable, by clear and convincing evidence, of the charged violation of section 6068, subdivision(o)(2). At the hearing on this matter Respondent admitted that he did not report the imposition of the judicial sanction against him on the belief that the court imposing the sanctions would report it. A belief that the court imposing the sanctions will report the sanction to the State Bar is not a defense to a charge of violating section 6068, subdivision (o)(3). (*In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar. Ct. Rptr. 179, 188.)

G. Count Ten (The Knight Matter)

Gregory Knight was arrested and charged with felony counts of possession and sale of a controlled substance and being under the influence of a controlled substance. Two sentencing enhancements were also alleged pursuant to Penal Code section 667.5(b). Knight retained Respondent to represent him in the subsequent criminal proceeding entitled *People v. Gregory Knight*, Lassen County Superior Court Case No. CR015881.

On August 14, 2000, Respondent was present when the court set a dispositional conference for September 21, 2000, at 9:00 a.m. Respondent subsequently failed to appear at 9:00 a.m. for the dispositional conference. Respondent finally appeared at 10:30 a.m., at which time he informed the court that the matter had “slipped through the cracks” and that he was not prepared to proceed. The court granted Respondent’s request for a continuance to October 10, 2000, at 9:00 a.m. Respondent also failed to appear for the dispositional conference on October 10, 2000, and the matter was continued to October 24, 2000, at 9:00 a.m.

Thereafter, on December 19, 2000, a hearing on Respondent's motion to suppress evidence was held in the *Knight* matter. At that hearing, the court noted that Respondent had a threshold responsibility of establishing standing to bring the motion. However, Respondent was unfamiliar with the concept of standing and was wholly unfamiliar with the case law cited by the prosecution relating to the reasonableness of the police search. After being informed by the court regarding the nature of the standing issue and of his burden to show standing, Respondent successfully established his client's standing to raise the search and seizure issue. However, the court subsequently denied Respondent's suppression motion on the merits, finding that the police search was reasonable.

Respondent is charged in Count Ten of the NDC in Case No. 00-O-12629 with a wilful violation of rule 3-110(A) of the Rules of Professional Conduct. The Court does not find Respondent culpable of the charged violation of rule 3-110(A) with respect to the *Knight* matter. The burden of proof is on the State Bar to prove that Respondent intentionally, recklessly or repeatedly failed to perform competent legal services on behalf of Knight. The fact that Respondent was late and failed to appear at some hearings in the case does not necessarily mean that Respondent failed to competently perform legal services. Further, while Respondent was clearly unfamiliar with the concept of standing and of the case law regarding search and seizure, based upon the evidence before it, the Court concludes that Respondent's lack of familiarity with the case law did not materially affect the trial court's ruling on the motion to suppress evidence.¹²

H. Counts Eleven and Twelve (The Tanton Matter)

Respondent represented Ruth Tanton in two matters entitled *Geibel v. Tanton*, Lassen County Superior Court Case No. 33846 and *Tanton v. Tanton*, Lassen County Superior Court Case No. FS32883 (hereinafter “the *Tanton* matters”). The *Tanton* matters related to civil harassment and dissolution of marriage. On August 28, 2000, Respondent was present in court for the *Tanton* matters, at which time the court set a further evidentiary hearing on the restraining orders for October 13, 2000. Respondent failed to appear at the subsequent hearing on October 13, 2000. Present for

¹² See State Bar Exhibits 14, 15 and 16.

1 the October 13 hearing were Ms. Tanton, two attorneys representing opposing parties and several
2 witnesses who had been subpoenaed to testify at the evidentiary hearing. The court continued the
3 hearing and issued an order to show cause directing Respondent to appear on December 18, 2000,
4 and to show cause why he should not be held in contempt of court. The OSC was personally served
5 upon Respondent on October 17, 2000.

6 On December 18, 2000, the court held the order to show cause hearing. Respondent was
7 present at the hearing. The court dismissed the contempt citation but imposed sanctions upon
8 Respondent pursuant to Code of Civil Procedure sections 177.5 and 128.5. In the *Geibel v. Tanton*
9 action, the court sanctioned Respondent in the amount of \$1,000, of which \$750 was for the
10 opposing party's costs and \$250 for the court's costs. In the *Tanton v. Tanton* action, the court
11 sanctioned Respondent in the amount of \$1,503, of which \$1,253 was for the opposing party's costs
12 and \$250 for the court's costs.¹³

13 Both sanction orders were served upon Respondent on December 21, 2000. Respondent
14 ultimately paid the sanctions to the court on January 16, 2002. Respondent did not report these
15 sanctions to the State Bar.

16 **1. Count Eleven (Rule 3-110(A), Rules of Professional Conduct)**

17 Respondent is charged in Count Eleven of the NDC in Case No. 00-O-12629 with a wilful
18 violation of rule 3-110(A) of the Rules of Professional Conduct. The Court does not find
19 Respondent culpable of the charged violation of rule 3-110(A) with respect to the Tanton matter.
20 The burden of proof is on the State Bar to prove that Respondent intentionally, recklessly or
21 repeatedly failed to competently perform legal services on behalf of Tanton. The fact that
22 Respondent was late and failed to appear at one hearing does not mean that he failed to competently
23 perform the legal services for which he was retained. At the contempt hearing, Respondent admitted
24 that he failed to properly note the date of the hearing when his client met with him a few days prior
25 to the hearing due to several other pending matters. From the foregoing facts, the Court cannot

26
27 ¹³ See State Bar Exhibits 17 through 19.

1 determine (1) whether this was the only time that Respondent missed a hearing in the case; (2)
2 whether he performed adequately at the continued hearing; or (3) whether, in the final analysis, Ms.
3 Tanton was satisfied with Respondent's services.

4 **2. Count Twelve (Business and Professions Code Section 6068, Subdivision (o)(3))**

5 Respondent is charged in Count Twelve of the NDC in Case No. 00-O-12629 with a violation
6 of Business and Professions Code section 6068, subdivision (o)(3), which provides that it is the duty
7 of a member of the State Bar to report to the agency charged with attorney discipline (i.e., the State
8 Bar) in writing, within 30 days of the time the attorney has knowledge, of the imposition against the
9 attorney of any judicial sanction, except for a sanction of less than \$1,000 for the failure to make
10 discovery.

11 The Court finds Respondent culpable, by clear and convincing evidence, of the charged
12 violation of section 6068, subdivision(o)(3). At the hearing in this matter, Respondent admitted that
13 he did not report the imposition of the judicial sanction against him to the State Bar. Additionally,
14 one of the sanctions exceeded \$1,000, and neither sanction was the result of Respondent's failure
15 to make discovery.

16 **I. Counts Thirteen and Fourteen (The Sanchez Matter)**

17 On November 15, 2000, Respondent filed a civil complaint for damages for malicious
18 prosecution on behalf of Juan and Terra Sanchez (hereinafter "*Sanchez matter*") entitled *Sanchez v.*
19 *Lord, et al.*, Lassen County Superior Court Case No. 34012. Wal-Mart Stores and Wal-Mart
20 employees were included in this action as defendants. The civil action filed by Respondent arose
21 out of an altercation between Juan and Terra Sanchez and two individuals at a Wal-Mart store
22 located in Susanville, California. Terra Sanchez was subsequently arrested and prosecuted. In the
23 civil complaint in the *Sanchez matter*, Respondent alleged causes of action for malicious prosecution
24 against Wal-Mart and its employees with respect to Terra Sanchez's arrest and prosecution.¹⁴ In
25 order for Respondent to prevail on his claim of malicious prosecution, the plaintiffs would have had

26
27 ¹⁴ See State Bar Exhibit 30 page 87-Respondent's complaint for damages.

1 to prove that Wal-Mart was "actively instrumental" in bringing about the prosecution. Both
2 plaintiffs testified in their respective depositions that they had absolutely no reason to believe that
3 Wal-Mart employees knowingly gave false information to the police.

4 After the civil complaint in the *Sanchez* matter had been filed and depositions taken, counsel
5 for Wal-Mart made numerous attempts to have Respondent dismiss Wal-Mart and its employees
6 from the action on the grounds that there was no basis in law for their inclusion in the action.
7 Respondent refused every attempt made by Wal-Mart's counsel.¹⁵

8 In August 2001, Wal-Mart filed a motion for summary judgment and motion for sanctions
9 pursuant to Code of Civil Procedure section 128.7. Respondent filed oppositions to both motions.

10 On September 28, 2001, following a hearing conducted on September 17, 2001, the court
11 granted Wal-Mart's motion for summary judgment and its motion for sanctions in the amount of
12 \$8,550, representing a portion of the attorney fees incurred by Wal-Mart.¹⁶ On December 10, 2001,
13 the court approved additional sanctions of \$1,528.82 against Respondent, representing the amount
14 of the costs incurred by Wal-Mart.

15 The September 28, 2001, sanction order was served upon Respondent on October 25, 2001.
16 The subsequent order imposing costs was served upon Respondent on December 10, 2001. On
17 February 1, 2002, Respondent partially paid the sanctions to Wal-Mart. Respondent did not report
18 the sanctions to the State Bar.

19 ///

20 ///

21
22 ¹⁵ On March 12, 2001, and June 7, 2001, defendants' attorney wrote to Respondent warning
23 Respondent of his intent to file a motion for summary judgment and to request an award of attorneys fees
24 pursuant to Code of Civil Procedure section 128.5. Respondent did not respond to these letters.

25 ¹⁶ At the hearing on the Motion for Summary Judgment, the court found that the moving
26 defendant had shown in the pleadings supporting its motion that plaintiffs have no evidence that the
27 moving defendant was actively instrumental in bringing about the prosecution. In addition, the court
28 found that plaintiffs' responsive contentions were either unintelligible or not supported by the
evidentiary pleading.

1. Count Thirteen (Business and Professions Code Section 6068, Subdivision (c))

Respondent is charged in Count Thirteen of the NDC in Case No. 00-O-12629 with a violation of Business and Professions Code section 6068, subdivision (c), which provides that it is the duty an attorney to counsel or maintain only those actions, proceedings, or defenses as appear to him to be legal or just, except the defense of a person charged with a public offense.

The Court finds, by clear and convincing evidence, that Respondent is culpable of the charged violation of section 6068, subdivision (c). When Respondent filed the complaint for damages under a malicious prosecution theory, he knew or should have known that the action against the defendants for malicious prosecution of the plaintiffs for alleged crimes requires proof that (a) the defendant was “actively instrumental” in the prosecution; (b) the criminal action terminated in the plaintiffs’ favor; (c) the defendant acted without probable cause in initiating the prosecution; and (d) the defendant acted with malice. Shortly after Respondent filed the complaint and depositions were taken, it was clear there was probable cause for a call to the police, that no employee of the defendant took any action other than responding to police questioning, and that the plaintiffs admitted that they had no evidence that any wilfully false statement was made.

By filing and maintaining the *Sanchez* action against Wal-Mart and Wal-Mart employees when there was no legal or just basis for it, Respondent wilfully maintained an unjust action in violation of Business and Professions Code section 6068, subdivision (c).

2. Count Fourteen (Business and Professions Code Section 6068, Subdivision (o)(3))

Respondent is charged in Count Fourteen of the NDC in Case No. 00-O-12629 with a violation of Business and Professions Code section 6068, subdivision (o)(3). The Court finds Respondent culpable, by clear and convincing evidence, of the charged violation of section 6068, subdivision(o)(3). At the hearing in this matter, Respondent admitted that he did not report the imposition of the judicial sanctions against him to the State Bar. Moreover, it is uncontroverted that the amount of the sanctions exceeded \$1,000, and were not imposed as a result of Respondent's failure to make discovery.

1 **J. Counts Fifteen and Sixteen (The Larson Matter)**

2 Respondent represented Lescon Larson in a criminal proceeding entitled *People v. Lescon*
3 *Larson*, Lassen County Superior Court Case No. CR017059 (hereinafter "*Larson matter*"). While
4 personally appearing in court on the *Larson matter* on October 1, 2001, Respondent was ordered by
5 the Honorable Ridgely Lazard to appear at a trial readiness conference on October 16, 2001. Judge
6 Lazard specifically informed Respondent that his failure to appear at the scheduled October 16
7 conference would be considered a contempt of court.

8 Respondent did not appear at the trial readiness conference on October 16, 2001, but instead
9 sent another attorney who was not the trial attorney and was unfamiliar with the matters to be
10 discussed at the conference. Respondent did not notify the prosecutor that he would not be present
11 at the readiness conference. Because Judge Lazard uses the trial readiness conference to resolve
12 pretrial matters, such as *in limine* motions, jury instructions and witness scheduling, the court was
13 compelled to reschedule both the readiness conference and the trial.¹⁷

14 On November 27, 2001, the court held a contempt hearing at which Respondent personally
15 appeared and participated. The court found Respondent guilty of contempt in violation of Code of
16 Civil Procedure sections 1209(a)(5) and (a)(8). The court imposed sanctions against Respondent
17 in the amount of \$1,250. On December 12, 2001, the court served a copy of the order and judgment
18 of contempt upon Respondent at his office address in full compliance with Code of Civil Procedure
19 sections 1013 and 2015.5. Respondent did not report the imposition of this sanction to the State Bar.

20 **1. Count Fifteen (Business and Professions Code Section 6103)**

21 Respondent is charged in Count Fifteen of the NDC in Case No. 00-O-12629 with a violation
22 of Business and Professions Code section 6103. The Court finds Respondent culpable, by clear and
23 convincing evidence, of the charged violation of section 6103. At trial in this matter, Respondent
24 stipulated that he was held in contempt of the court for his failure to appear at the October 16, 2001,

25 _____
26 ¹⁷ At the contempt hearing, Respondent acknowledged that he was to be personally present at the
27 October 16, 2001, trial readiness conference but that he chose, instead, to appear at an important
deposition in Orange County in an unrelated case.

1 readiness conference as ordered by the court and that the court's order of contempt was made under
2 the standard of proof beyond a reasonable doubt.¹⁸

3 **2. Count Sixteen (Business and Professions Code Section 6068, Subdivision (o)(3))**

4 Respondent is charged in Count Sixteen of the NDC in Case No. 00-O-12629 with a
5 violation of Business and Professions Code section 6068, subdivision (o)(3). The Court finds
6 Respondent culpable, by clear and convincing evidence, of the charged violation of section 6068,
7 subdivision (o)(3). At the hearing in this matter, Respondent admitted that he did not report the
8 imposition of the judicial sanction against him to the State Bar. Additionally, it is uncontroverted
9 that the sanction exceeded \$1,000, and that it was not imposed as a result of Respondent's failure
10 to make discovery.

11 **K. Count Seventeen (Failure to Maintain Respect for the Court)**

12 On eight separate occasions set forth above, Respondent disregarded court orders of the
13 Honorable Lazar Ridgely and the Honorable Stephen D. Bradbury. Respondent testified that, as to
14 the *Keisler* matter, it occurred during the holidays and at a time when he was running for office. As
15 a result, Respondent asserted that he was too busy and neglected getting the witness list for the court.
16 Respondent expressed remorse for not supplying the court with the witness list in a timely manner.
17 As to the *Ehleringer* and *Garcia* matters, Respondent admits that those matters "slipped through the
18 cracks." As to the *Holland* matter, Respondent admits that it was his failure to submit a witness list
19 was due to sloppiness. Finally, Respondent asserted that he didn't appear for the hearing in the
20 Tanton matter because he wasn't aware of the hearing.

21 Respondent is charged in Count Seventeen of the NDC in Case No. 00-O-12629 with a
22 violation of Business and Professions Code section 6068, subdivision (b), which requires an attorney
23 to maintain the respect due to courts of justice and to judicial officers. Notwithstanding the fact that
24 Respondent has been held in contempt of eight separate occasions, the Court does not find
25 Respondent culpable of the charged violations of section 6068, subdivision (b). While Respondent

26
27 ¹⁸ See State Bar Exhibit 21 and 22.

1 was clearly disorganized, over-extended and negligent, the Court does not find that he intentionally
2 violated the orders of the court.

3 **L. Count Eighteen (Commission of Acts of Moral Turpitude)**

4 Respondent is charged in Count Eighteen of the NDC in Case No. 00-O-12629 with a
5 violation of Business and Professions Code section 6106, which provides that the member's
6 commission of an act involving moral turpitude, dishonesty or corruption constitutes grounds for
7 suspension or disbarment. The State Bar charges that, by repeatedly disregarding court orders,
8 habitually abusing the judicial system, failing to pay court sanctions and filing unjust actions,
9 Respondent committed acts of moral turpitude, dishonesty or corruption.

10 For the reasons stated with respect to Count Seventeen, the Court does not find Respondent
11 culpable of the charged violation of section 6106. Respondent was habitually disorganized,
12 negligent, over-extended and not well-prepared. However, the Court does not find clear and
13 convincing evidence that Respondent acted with any intent to abuse the judicial system, to flout the
14 judges' orders or harm the administration of justice.

15 **M. Counts Nineteen through Twenty-Five (The Foley Matter)**

16 Sometime prior to December 12, 2001, Michael Foley was arrested and charged with various
17 drug offenses. Foley retained Respondent to represent him in the subsequent criminal proceeding
18 entitled *People v. Michael Foley*, Lassen Superior Court Case No. CR017256, and paid him a flat
19 fee of \$5,000, for all of the work to be done in the matter through trial. Respondent represented
20 Foley at a jury trial that concluded on December 12, 2001. The jury found Foley guilty of the
21 charged drug offenses.

22 During the course of Respondent's representation of Foley in the criminal matter, he entered
23 into a separate agreement to represent Foley in a civil action related to his arrest. Respondent told
24 Foley that one of the reasons the civil action should be filed was to permit Respondent to take
25 depositions of witnesses who were involved in Foley's arrest. Respondent accepted an additional
26 \$5,000 from Foley for the civil action, but that action was never filed. Respondent never provided
27
28

1 Foley with a written fee agreement relating to the civil action. Moreover, Respondent admitted that
2 he has never refunded any monies to Foley in either the civil or the criminal matter. Respondent
3 testified at trial in this proceeding that his agreement with Foley was a flat fee arrangement and that
4 he sent Foley a billing statement on April 1, 2002, and on May 15, 2002, only after Foley demanded
5 it. However, Foley testified that the only billing he ever received from Respondent was dated April
6 1, 2002. In that billing statement, Respondent claimed to have incurred expenses of \$3,376 and
7 attorney fees of \$6,450, for a total of \$9,826. However, Respondent did not provide any
8 documentation to support either his claimed expenses or his claimed attorney fees. The Court finds
9 Foley to be more credible on this issue and finds that the only billing statement provided by
10 Respondent with respect to the proposed civil action was Respondent's April 1, 2002, statement.

11 In May 2002, Robert K. Hill, subsequent counsel for Foley in the criminal proceeding, filed
12 a motion for a new trial based upon Respondent's failure to competently represent Foley. On May
13 7, 2002, the trial court granted the motion for a new trial and vacated the jury's guilty verdict due
14 to Respondent's incompetent representation of Foley. Foley was subsequently allowed to enter a
15 plea and to receive diversion pursuant to Penal Code section 1000. The plea will ultimately result
16 in the dismissal of the charges upon Foley's successful completion of diversion.

17 The trial court's finding of Respondent's incompetent representation was based upon the
18 following factors: (1) prior to trial, Foley provided Respondent with audio-recordings of prior
19 testimony of prosecution witnesses at an administrative hearing on the same issues, but Respondent
20 failed to listen to those recordings and subsequently lost the recordings; (2) Respondent took less
21 than one minute to explain to Foley the prosecution's offer of diversion which was made prior to the
22 preliminary hearing; (3) Respondent failed to file any pretrial motions to preclude the introduction
23 of non-*Mirandized* statements by Foley; (4) Respondent expressed his belief that the *Miranda* ruling
24 has no application in Lassen County; (5) Respondent could not respond to an "evidentiary
25 foundation" objection during Foley's trial; (6) Respondent failed to interview many of the witnesses
26 he used at trial; (7) Respondent failed to adequately cross-examine prosecution witnesses; (8)

1 Respondent failed to properly prepare Foley's expert witness for testimony, resulting in the expert's
2 inability to answer key questions; and (9) Respondent failed to explain Proposition 36 drug probation
3 to Foley.¹⁹

4 The trial court vacated the jury's finding of guilt due to Respondent's incompetence and
5 served a copy of its decision upon Respondent at his office address in compliance with Code of Civil
6 Procedure sections 1013a and 2015.5. Respondent did not report the court's decision to vacate the
7 jury's verdict to the State Bar in writing as required by Business and Professions Code section 6068,
8 subdivision (o)(7).

9 **1. Count Nineteen (Rule 3-110(A), Rules of Professional Conduct)**

10 Respondent is charged in Count Nineteen of the NDC in Case No. 00-O-12629 with a wilful
11 violation of rule 3-110(A) of the Rules of Professional Conduct as a result of Respondent's
12 incompetent representation of Foley in his criminal matter. The Court finds Respondent culpable
13 of the charged violation of rule 3-110(A) and concludes that Respondent either intentionally or
14 recklessly failed to represent Foley in a competent manner with respect to Foley's criminal matter.
15 The Court's conclusion is based upon the transcript of the hearing for a new trial²⁰ and upon
16 Respondent's stipulation to the fact that he was found by the trial court to have provided ineffective
17 assistance of counsel resulting in the court vacating the jury's findings of guilt against Foley. The
18 Court's conclusion is also based upon Foley's testimony at the trial in this matter. Foley testified
19 that Respondent did not interview any of his witnesses for trial, did not explain drug diversion to him
20 and lost the tapes from the administrative proceedings dealing with the matter.

21 **2. Count Twenty (Rule 3-700(D)(2), Rules of Professional Conduct)**

22 Respondent is charged in Count Twenty of the NDC in Case No. 00-O-12629 with a wilful
23 violation of rule 3-700(D)(2) with respect to Respondent's representation of Foley in his criminal
24 proceeding. Rule 3-700(D)(2) provides that an attorney must promptly refund any portion of a fee

25
26 ¹⁹ See State Bar Exhibit 23.

27 ²⁰ See State Bar Exhibit 24.

1 paid in advance that has not been earned. The Court does not find Respondent culpable of the
2 charged violation of rule 3-700(D)(2). The burden of proof on the issue of culpability rests with the
3 State Bar. (Rules Proc. of State Bar, rule 213.) Notwithstanding the fact that a court vacated the
4 jury's finding of guilt due to Respondent's incompetence, Respondent did present Foley's case to
5 a jury and the jury did acquit Foley of two charges. From the foregoing facts, the Court concludes
6 that Respondent earned at least a portion of the fee in the criminal matter. However, there is no
7 evidence from which the Court can determine the portion of the fee, if any, that Respondent did not
8 earn.

9 **3. Count Twenty-One (Business and Professions Code Section 6068, Subdivision (o)(7))**

10 Respondent is charged in Count Twenty-One of the NDC in Case No. 00-O-12629 with a
11 violation of Business and Professions Code section 6068, subdivision (o)(7), which provides that a
12 member shall notify the State Bar in writing within 30 days of the reversal of a judgment in a
13 proceeding based in whole or in part upon misconduct, grossly incompetent representation or wilful
14 misrepresentation by the attorney.

15 The Court finds Respondent culpable, by clear and convincing evidence, of the charged
16 violation of section 6068, subdivision (o)(7). At the hearing in this matter, Respondent admitted that
17 he did not notify the State Bar in writing of the reversal of the judgment in the *Foley* matter, which
18 was based upon his grossly incompetent representation of Foley. By failing to notify the State Bar
19 in writing of the court's decision to vacate the guilty verdicts in the *Foley* matter, Respondent
20 willfully failed to report reversal of a judgment based upon his incompetent representation.

21 **4. Count Twenty-Two (Rule 3-200(A), Rules of Professional Conduct)**

22 Respondent is charged in Count Twenty-Two of the NDC in Case No. 00-O-12629 with a
23 wilful violation of rule 3-200(A) of the Rules of Professional Conduct, which provides that a
24 member of the State Bar shall not seek, accept, or continue employment if the member knows that
25 the objective of such employment is to bring an action, conduct a defense, assert a position in
26 litigation or take an appeal, without probable cause and for the purpose of harassing or maliciously
27

1 injuring any person. The Court does not find Respondent culpable of the charged violation rule 3-
2 200(A). The burden of proof on the issue of culpability rests with the State Bar. (Rules Proc. of
3 State Bar, rule 213.) Foley testified that Respondent told him that he had a credible defense and that
4 depositions might help in his criminal defense. Respondent testified that he performed legal
5 research on whether Foley could sue on a negligence theory and found that there was a viable cause
6 of action. There was no testimony or other evidence that the reason Respondent entertained the civil
7 lawsuit was to harass or maliciously injure any person.

8 **5. Count Twenty-Three (Rule 3-200(B), Rules of Professional Conduct)**

9 Respondent is charged in Count Twenty-Three of the NDC in Case No. 00-O-12629 with a
10 wilful violation of rule 3-200(B) of the Rules of Professional Conduct, which provides that an
11 attorney shall not seek, accept or continue employment when the he knows or should know that the
12 objective of such employment is to present a claim or defense that is not warranted by existing law.

13 The Court finds Respondent culpable, by clear and convincing evidence, of the charged
14 violation of rule 3-200(B). At the hearing in this matter, Respondent testified that the theory for his
15 civil action on behalf of Foley was *res ipsa loquitur*. This theory advanced by Respondent was based
16 on the fact that, since Foley was found passed out in the middle of the street late at night, the
17 bartender must have slipped something in Foley's drink. Clearly, the doctrine of *res ipsa loquitur*
18 did not apply to the facts as testified to by Respondent and Respondent should have known it. The
19 Court concludes that, by seeking, accepting and continuing employment when Respondent knew or
20 should have known that the objective of which was to present a claim in litigation not warranted
21 under existing law, he willfully engaged in a prohibited objective of employment in wilful violation
22 of rule 3-200(B).

23 **6. Count Twenty-Four (Rule 3-700(D)(2), Rules of Professional Conduct)**

24 Respondent is charged in Count Twenty-Four of the NDC in Case No. 00-O-12629 with a
25 wilful violation of rule 3-700(D)(2), relating to the proposed civil action for which Respondent was
26 retained by Foley. The Court finds Respondent culpable, by clear and convincing evidence, of the
27
28

1 charged violation of rule 3-700(D)(2). Respondent received a fee of \$5,000 from Foley to bring a
2 civil action relating to his arrest. Business and Professions Code section 6148 requires an attorney
3 and client to enter into a written contract for legal services in any case in which the total expense to
4 the client, including attorney fees, will exceed \$1,000. The bills rendered by the attorney must
5 clearly state the basis for the charges. Failure to comply with these provisions renders the agreement
6 voidable at the option of the client and the attorney is entitled to collect only a reasonable fee. At
7 the trial in this proceeding, Respondent admitted there was no written fee agreement with Foley
8 relating to the proposed civil action. Since there was no written fee agreement, Respondent is
9 entitled to recover to attorney fees on a *quantum meruit* basis. However, in light of Respondent's
10 failure to file the civil action, to take the depositions of any of the purported witnesses or to take any
11 other action on Foley's behalf in the proposed civil action, the Court finds that Respondent did not
12 earn any of the advanced fees paid by Foley. As a consequence, Respondent failure to refund the
13 \$5,000 advance fee to Foley constitutes a wilful violation of rule 3-700(D)(2).

14 **7. Count Twenty-Five (Business and Professions Section 6106)**

15 Respondent is charged in Count Twenty-Five of the NDC in Case No. 00-O-12629 with
16 violation of Business and Professions Code section 6106, which provides that an attorney's
17 commission of an act involving moral turpitude, dishonesty or corruption constitutes grounds for
18 suspension or disbarment. The State Bar charges that Respondent committed an act of moral
19 turpitude, dishonesty or corruption in violation of Business and Professions Code section 6106 by
20 suggesting to Foley that he file a civil action which Respondent knew or should have known had no
21 basis other than to harass the arresting officers and to gain an advantage in litigation that was not
22 permitted by law.

23 The Court does not find Respondent culpable, by clear and convincing evidence, of the
24 charged violation of section 6106. Although he should have known, the Court finds that Respondent
25 did not know that the proposed civil action was not warranted under the current law. Therefore, the
26 Court does not find Respondent of an act of moral turpitude with respect to the issue of suggesting
27
28

1 to Foley that he file the civil action.

2 However, the NDC also charges that Respondent violated section 6106 by failing to return
3 any of Foley's \$5,000 advanced fee after he had failed to file the civil action on Foley's behalf.
4 Respondent's primary justification to Foley for the civil action was to provide a basis for taking
5 depositions that would assist Foley in his criminal proceeding. However, Respondent neither filed
6 the civil action nor took the depositions. Thus, Foley obtained no benefit whatsoever from the
7 \$5,000 in advanced fees that he paid to Respondent and the Court finds that Respondent did not earn
8 any portion of those fees. Moreover, in light of Respondent's complete lack of any colorable claim
9 to the \$5,000 in advanced fees, as a result of his continuing failure to refund those fees, Respondent
10 committed an act of moral turpitude.

11 **N. Counts Twenty-Six through Thirty-One (The Clark Matter)**

12 Commencing in 1993, James Russell Clark and others were under investigation in Maricopa
13 County, Arizona for purported securities violations. In December 1994, a 99-count indictment was
14 filed against Clark in a criminal proceeding entitled *State of Arizona v. James Russell Clark*, Case
15 No. CR94-10904. Clark paid Respondent a flat fee of \$25,000 in cash to represent him in the
16 criminal proceedings arising out of Case No. CR94-10904. Respondent never provided Clark with
17 a written fee agreement with respect to Case No. CR94-10904.

18 Clark testified that, after the payment of the \$25,000 flat fee, Respondent approached him
19 in March 1995 and requested a loan in the amount of \$25,000 to pay Respondent's costs and
20 expenses in a legal matter unrelated to his representation of Clark. As repayment of the loan,
21 Respondent promised to pay Clark ten percent (10%) of his share of the proceeds of a lawsuit that
22 he expected to settle in the near future. Clark further testified that Respondent has never repaid any
23 portion of the \$25,000 loan. Respondent, on the other hand, denied that he obtained a loan from
24 Clark and asserts that the \$25,000 he received from Clark in March 1995 was additional
25 compensation for the representation that he was providing to Clark in the pending criminal
26 proceeding. In a May 5, 2001, letter to the Arizona State Bar, Respondent maintained that he was
27
28

1 also representing Clark in a bankruptcy proceeding. According to Respondent, Clark's criminal
2 matter was expected to take two to three months to try because it involved 99 counts of alleged
3 securities violations. Respondent asserted that, at the time he received the additional \$25,000 from
4 Clark, he had already earned more than \$150,000 for his representation of Clark. However, there
5 is no written fee agreement and Respondent has no documentation to support his claimed legal
6 expenses and attorney's fees. This Court resolves the conflict in the testimony in favor of Clark and
7 finds that the second payment of \$25,000 to Respondent was a loan that Respondent has never
8 repaid.

9 In November 1995, Clark entered a guilty plea to two counts of the indictment in the *State*
10 *of Arizona v. Clark* action and was sentenced to three years imprisonment. Clark was incarcerated
11 for about seven months and, thereafter, was released on parole and, subsequently, on probation.

12 There is a conflict in the evidence as to the duration of Respondent's representation of Clark.
13 At trial in this matter, Clark testified that Respondent continued to represent him in the criminal
14 proceeding until January 2001, including during his incarceration and his subsequent parole and
15 probation. Respondent, on the other hand, stated in his May 5, 2001 letter to the Arizona State Bar,
16 that he had represented Clark from 1994 through 1996 and that Clark had been released from prison
17 through the representation of other counsel.²¹ Respondent and Clark both agree that Clark pled
18 guilty to two counts of the indictment in Case No. CR94-10904 in November 1995 and that he was
19 sentenced to state prison in February 1996. It is clear that, as late as July 13, 1998, Respondent was
20 listed as Clark's attorney at a restitution hearing in Case No. CR94-10904.²² Furthermore, Mr.
21 Jakubczyk, Clark's lawyer in a civil action against Respondent, testified that he believed Respondent
22 was Clark's lawyer until Respondent filed a motion to withdraw as counsel. Finally, it is undisputed
23 that Respondent filed a motion to withdraw as counsel of record in Case No. CR94-10904 on
24 January 20, 2001. In light of the fact that Respondent clearly represented Clark in July 1998 at a

25
26 ²¹ See State Bar Exhibit 27, page 12.

27 ²² See State Bar Exhibit 25, page 8.

1 restitution hearing, that Clark testified he considered Respondent to be his attorney until his motion
2 to withdraw and the fact that Respondent filed his motion to withdraw as counsel for Clark in
3 January of 2001, this Court resolves the conflict in the evidence in Clark's favor on this issue and
4 concludes that there is sufficient evidence to conclude that Respondent represented Clark in Case
5 No. CR94-10904 until his January 20, 2001, motion to withdraw as counsel for Clark was granted.²³

6 After his release from incarceration, Clark began a business in which he purchased, placed
7 and serviced vending machines. Respondent became interested in Clark's business in 1998. In
8 February 1998, Respondent and Clark agreed that Respondent would send money which Clark would
9 use to purchase candy vending machines on Respondent's behalf. Pursuant to their agreement,
10 Respondent would receive one-third of the revenue from the vending machines that Clark purchased
11 on his behalf. Clark would receive the remaining two-thirds of the revenue, with half of that amount
12 allocated to the servicing of Respondent's machines. Respondent and Clark also agreed that Clark
13 would use Respondent's share of the revenues to buy additional vending machines for Respondent.
14 Clark and Respondent never executed a written contract documenting their agreement concerning
15 the purchase and service of vending machines on Respondent's behalf.

16 Between February 1998 and August 2000, Respondent sent money orders to Clark totaling
17 \$127,000 for the purchase of the vending machines on his behalf. Clark deposited these money
18 orders into the bank account he maintained for Clark & Sons Vending, Inc.

19 In approximately December 2000, a dispute developed between Respondent and Clark
20 regarding the vending machine business. Respondent demanded that Clark provide an accounting
21 of all funds that he had paid to Clark and with respect to the vending machines that had been
22 purchased and allocated to Respondent both from the \$127,000 in funds he had provided and from
23

24
25 ²³ Even if Respondent did not represent Clark until January 2001, it is clear that ,when he entered
26 into the business vending machine transaction with Clark, he was Clark's attorney because he
27 represented Clark in July 1998 in a court hearing and, by Respondent's own admission in a May 5, 2001
28 letter (State Bar Exhibit 27-011), Respondent invested \$127,000 with Clark between February 12, 1998
and September, 2000.

1 Respondent's share of the revenues from those vending machines.²⁴

2 In January 2001, Respondent filed a written complaint regarding Clark with the Securities
3 Division of the Arizona Corporations Commission. In his complaint, Respondent stated that he had
4 invested \$127,000 of his funds and an additional \$33,000 in earnings in Clark's company over the
5 preceding three years but that Clark had not made his books and records regarding those investments
6 available for inspection by Respondent. Respondent also asserted in his complaint that he believed
7 Clark had stolen his monies.²⁵

8 At some point, probably in early 2001, an individual named Vern Auten telephoned Clark
9 about Clark's dispute with Respondent. Auten is a friend and former client of Respondent, who
10 accompanied Clark and Respondent to a two-day vending machine conference in Las Vegas in mid-
11 2000. According to Clark, Auten told him that he was calling on behalf of Respondent. Auten told
12 Clark that unless he gave Respondent what he wanted, Respondent would have Clark's probation
13 violated and he would call the United States Attorney to have Clark criminally prosecuted.
14 Respondent, on the other hand, stated in his May 5, 2001, letter to the Arizona State Bar that Auten
15 had called Clark of his own volition because he was concerned that Clark's failure to provide the
16 accounting that Respondent had requested would adversely affect a joint venture for the manufacture
17 and nationwide placement of candy vending machines that Auten had been discussing with both
18 Clark and Respondent. According to Respondent, Auten did not threaten Clark with criminal
19 charges. The Court resolves this conflict in the testimony in favor of Clark because Respondent
20 consistently and candidly testified that his major concern was exerting enough pressure on Clark
21 to get the monies he felt Clark owed him and that he put his own interest in retrieving what he
22 believed was money owed him above any interest of Clark.

23
24 ²⁴ In his May 5, 2001, letter to the Arizona State Bar, Respondent stated that he had been asking
25 for an accounting regarding the use of his funds for the purchase of the vending machines since May
26 1998. According to Respondent, although Clark promised to produce an accounting, he failed to do so
and continually offered excuses for his inability to prepare and present the accounting.

27 ²⁵ See State Bar Exhibit 27, at pp. 25-28.

1 At some point, apparently in early 2001, Respondent spoke with Clark's probation officer
2 and informed her of his belief that Clark may have converted the \$127,000 he had given to Clark for
3 the purchase of candy vending machines on his behalf. In his conversations with Clark's probation
4 officer, Respondent disclosed confidential information about Clark that Respondent had obtained
5 during the course of his representation of Clark. Furthermore, Respondent admitted at trial that he
6 called Assistant Attorney General Jim Nielson, who was the prosecutor in Case No. CR94-10904,
7 and told him that Clark was stealing from him.

8 Although Clark ultimately provided an accounting on February 9, 2001, Respondent
9 immediately disputed the accounting and, on February 23, 2001, filed a complaint for damages for
10 fraud and conversion against Clark in Maricopa County (Arizona) Superior Court entitled *Murphy*
11 *v. James Russell Clark, et al.*, Maricopa County Superior Court Case No. CV2001-003077. This
12 action was subsequently settled in June 2001 and a general mutual release was signed by the parties
13 in July 2001.

14 **1. Count Twenty-Six (Rule 3-300, Rules of Professional Conduct)**

15 Respondent is charged in Count Twenty-Six of the NDC in Case No. 00-O-12629 with a
16 wilful violation of rule 3-300 of the Rules of Professional Conduct, which provides that a member
17 of the State Bar shall not enter into a business transaction with a client or knowingly acquire an
18 ownership, possessory, security or other pecuniary interest adverse to a client unless (a) the
19 transaction and its terms are fair and reasonable to the client and are fully disclosed in writing in a
20 manner that should be reasonably be understood by the client; (b) the client is advised in writing that
21 he or she may seek the advice of an independent attorney of the client's choice and is given a
22 reasonable opportunity to do so; and (c) the client thereafter agrees in writing to the transaction.

23 The State Bar that charges that Respondent violated rule 3-300 by entering into a business
24 transaction with Clark (i.e., the purchase of candy vending machines) in which (a) the transaction
25 and its terms were not fully disclosed to Clark in writing; (b) Clark was not advised in writing that
26 he could seek the advice of an independent lawyer of his choice; (c) Clark was not given a reasonable
27

1 opportunity to seek that advice; and (d) Clark did not thereafter consent in writing to the terms of
2 the transaction.

3 By its terms, rule 3-300 applies only to business transactions between an attorney and a
4 current client. As indicated above, the Court finds clear and convincing evidence that Respondent's
5 representation of Clark continued until Respondent made a motion to withdraw as counsel of record
6 in January 2001. Respondent acknowledged that his business transaction with Clark was not in
7 writing and that he did not advise Clark in writing that he had the right to seek the advice of an
8 independent attorney. Thus, the Court finds Respondent culpable, by clear and convincing evidence,
9 of the charged violation of rule 3-300 of the Rules of Professional Conduct.

10 **2. Count Twenty-Seven (Business and Professions Code Section 6068, Subdivision (e))**

11 Respondent is charged in Count Twenty-Seven of the NDC in Case No. 00-O-12629 with
12 a violation of Business and Professions Code section 6068, subdivision (e), which provides that is
13 the duty of a member of the State Bar to maintain inviolate the confidences of his client. The State
14 Bar charges that Respondent violated section 6068, subdivision (e) by disclosing to numerous
15 individuals and agencies confidential information about Clark that Respondent received during his
16 representation of him.

17 The Court finds Respondent culpable, by clear and convincing evidence, of the charged
18 violation of section 6068, subdivision (e). As indicated above, Respondent admitted that he
19 complained about Clark's conduct relating to the vending machine business to the Securities
20 Division of the Arizona Corporations Commission, to Clark's probation officer and to the
21 prosecuting attorney in Clark's criminal securities matter. Respondent told Clark's probation officer
22 that Clark had entered into a business transaction with him. At the time he told the probation officer
23 of this transaction, Respondent knew that he was jeopardizing Clark's freedom.²⁶ Moreover,
24 Respondent admits that he told Clark's probation officer that Clark was "hanging" out with a known

25
26 ²⁶ Respondent knew that Clark was supposed to report all business transactions to his probation
27 officer and that Clark had not reported Respondent's business transaction with him to his probation
28 officer.

1 felon and even told the probation officer the felon's name. Respondent also told the probation
2 officer that Clark was stealing from him. As to his communications with the criminal prosecutor
3 regarding Clark, Respondent admits that he called the prosecuting attorney to report that Clark was
4 stealing from him. The Court concludes that, by meeting with Clark's probation officer and the
5 prosecutor on Clark's case to essentially discuss potential grounds for revoking Clark's probation,
6 Respondent failed to maintain inviolate Clark's confidences at every peril to himself and to preserve
7 Clark's secrets in violation of Business and Professions Code section 6068, subdivision (e).

8 **3. Count Twenty-Eight (Rule 5-100(A), Rules of Professional Conduct)**

9 Respondent is charged in Count Twenty-Eight of the NDC in Case No. 00-O-12629 with a
10 wilful violation of rule 5-100(A) of the Rules of Professional Conduct, which provides that a
11 member shall not threaten to present criminal, administrative or disciplinary charges in order to
12 obtain an advantage in a civil dispute.

13 The Court finds Respondent culpable, by clear and convincing evidence, of the charged
14 violation of rule 5-100(A). It is clear that Respondent was willing, and believed it was right, to take
15 whatever actions were necessary to get Clark to pay him \$127,000 for his business investment in
16 Clark's vending machines. Respondent testified that his purpose in calling Clark's probation officer
17 and the prosecuting attorney was to put pressure on Clark so that he would pay him. Respondent
18 believed that the probation officer and prosecuting attorney would make Clark live up to his
19 obligation to Respondent. This Court concludes that Respondent threatened Clark with criminal,
20 administrative or disciplinary action in an effort to obtain an advantage over Clark in their business
21 dispute in wilful violation of rule 5-100(A) of the Rules of Professional Conduct.

22 **4. Count Twenty-Nine (Business and Professions Code Section 6068, Subdivision (c))**

23 Respondent is charged in Count Twenty-Nine of the NDC in Case No. 00-O-12629 with the
24 commission of acts of moral turpitude, dishonesty or corruption in violation of Business and
25 Professions Code section 6106 by (a) entering into an improper business transaction with a client;
26 (b) threatening the client with unlawful action; (c) improperly contacting state agencies to gain an
27

1 advantage over the client; and (d) disclosing confidential information about the client.

2 The Court does not find that Respondent committed an act of moral turpitude by entering into
3 an improper business transaction with Clark. There is no evidence that the improper business
4 transaction was unfair to Clark or that Respondent misappropriated any money from the business
5 transaction.

6 However, the Court finds that Respondent committed acts of moral turpitude in violation of
7 Business and Professions Code section 6106 when he improperly disclosed confidential information
8 about Clark in an effort to gain an advantage over the Clark in civil dispute.

9 **5. Count Thirty (Rule 3-300, Rules of Professional Conduct)**

10 Count Thirty of the NDC in Case No. 00-O-12629 alleges that Respondent violated rule 3-
11 300 in 1995 by entering into an improper loan transaction with Clark. The Court finds Respondent
12 culpable, by clear and convincing evidence, of the charged violation of rule 3-300. Clark testified
13 that, in 1995, shortly after he paid Respondent \$25,000 for his representation of Clark in his criminal
14 proceedings, Respondent requested another \$25,000 in the form of a loan so that Respondent could
15 fund another civil case. Respondent told Clark that he would split the proceeds of the other client's
16 case with Clark as repayment of the loan. Clark then gave Respondent \$25,000 in cash. Respondent
17 won an award of three million dollars, but the client fired Respondent before he could collect
18 attorney's fees and the case was appealed. Consequently, Respondent never repaid Clark. As
19 previously indicated, this Court finds, by clear and convincing evidence, that the additional \$25,000
20 that Respondent received from Clark in March 1995 was a loan as opposed to the payment of
21 additional fees for the ongoing representation of Clark in his pending criminal proceeding.

22 The Court finds Respondent culpable, by clear and convincing evidence, of a wilful violation
23 of rule 3-300 of the Rules of Professional Conduct. It is uncontroverted that Clark was a client of
24 Respondent at the time he received the \$25,000 loan from Clark. As Respondent acknowledges,
25 there was no written loan agreement. The terms of the loan transaction were neither fair nor
26 reasonable to Clark because the loan was unsecured. Moreover, Clark was not advised in writing
27
28

1 that he could seek the advice of an independent attorney of his choice.

2 **6. Count Thirty-One (Business and Professions Code Section 6106)**

3 Respondent is charged in Count Thirty-One of the NDC in Case No. 00-O-12926 with a
4 violation of Business and Professions Code section 6106. The State Bar charges that Respondent
5 committed acts involving moral turpitude, dishonesty or corruption by breaching entering into an
6 improper loan with Clark and then refusing to repay the loan.

7 The Court finds Respondent culpable of the charged violation of section 6106. The Supreme
8 Court stated in *Hunnicut v. State Bar* (1988) 44 Cal.3d 362, 372, quoting *Clancy v. State Bar*
9 (1969) 71 Cal.2d 140, 146, "[t]he relationship between an attorney and client is a fiduciary
10 relationship of the highest character. All dealings between an attorney and his client that are
11 beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness."

12 As indicated with respect to the Court's conclusion that Respondent willfully violated rule
13 3-300 of the Rules of Professional Conduct, the Court concludes that the terms of the loan
14 transaction were neither fair nor reasonable to Clark and that loan transaction significantly benefitted
15 Respondent at Clark's expense. As a result, Respondent breached his fiduciary duty to Clark, an act
16 of moral turpitude in violation of section 6106.

17 **O. Count Thirty-Two (The Foley Matter)**

18 At trial in this matter, the Court permitted the State Bar to amend the NDC to charge that
19 Respondent did not perform with competence with respect to the Foley civil matter. However, in its
20 brief on culpability and discipline filed May 14, 2003, the State Bar moved to dismiss this count. The
21 Court grants the State Bar's motion to dismiss Count Thirty-Two with prejudice.

22 **P. Count Thirty-Three (The Maggin Matter)**

23 At trial in this matter, the Court also permitted the State Bar to amend the NDC in Case No.
24 00-O-12629 to charge that Respondent maintained an illegal and unjust action in violation of
25 Business and Professions Code section 6068, subdivision (c) with respect to the Maggin matter. After
26 Maggin won his motion for a new trial based upon Respondent's incompetence, Maggin sued
27
28

1 Respondent in small claims court for a refund of his attorney's fees. Respondent filed a cross-
2 complaint against Maggin and requested that the case be transferred because his cross-claims
3 exceeded the jurisdictional limit of small claims court.²⁷ In his cross-complaint, Respondent asked
4 for minimum damages of \$75,000 for slander and intentional interference with a business advantage.
5 The basis for Respondent's slander claim was Maggin's testimony at the hearing on the motion for
6 new trial.

7 The Court finds Respondent culpable, by clear and convincing evidence, of the charged
8 violation of section 6068, subdivision (c). When Respondent filed the cross-complaint for slander,
9 he knew or should have known that Maggin's testimony during the hearing on the motion for a new
10 trial was privileged and could not form that basis of a civil action for slander, since slander is a false
11 and unprivileged publication.²⁸ (Civ. Code, § 47, subd. (b); *In the Matter of Varakin* (Review Dept.
12 1994) 3 Cal. State Bar Ct. Rptr. 179, 184.) By basing his cross-complaint on Maggin's testimony,
13 Respondent maintained an illegal and unjust action in violation of 6068, subdivision (c).

14 **Case No. 02-O-13664 PEM**

15 **A. Count One (The Larson Matter)**

16 Respondent represented Lescon Larson in a criminal proceeding entitled *People v. Lescon*
17 *Larson*, Lassen County Superior Court, Case No. CR017059. On April 4, 2002, during a trial setting
18 conference in the *Larson* matter, which Respondent personally attended, the Honorable Ridgely L.
19 Lazard ordered Respondent to appear at a trial readiness conference on April 8, 2002, at 12:30 p.m.
20 Respondent did not appear for the conference on April 8, 2002, until 12:45 p.m.

21 At a subsequent hearing on April 15, 2002, on an order to show cause re contempt,²⁹
22 Respondent acknowledged that he was aware of the court's order setting the trial readiness conference
23 in the *People v. Larson* action for April 8, 2002, at 12:30 p.m. Respondent also acknowledged that

24
25 ²⁷ See State Bar Exhibit 40 pgs 1-16.

26 ²⁸ See Civil Code Sections 46 and 47.

27 ²⁹ See State Bar Exhibit 46.

1 he did not arrive at the courthouse until approximately 12:45 p.m., following his receipt of a
2 telephone call from his client. Respondent explained to the court that he had worked all weekend and
3 had fallen asleep in his chair while he was waiting to come to court. He was awakened by a telephone
4 call from his client and ran over to the court. Respondent stated that he intended no disrespect to the
5 court by being late for the readiness conference. The court found Respondent in contempt of court
6 in violation of Code of Civil Procedure section 1209, subdivisions (a)(5) and (a)(8) and imposed
7 sanctions pursuant to Code of Civil Procedure section 177.5 in the amount of \$750.

8 Respondent is charged in Count One of the NDC in Case No. 02-O-13664 with a violation
9 of Business and Professions Code section 6103. The Court finds Respondent culpable, by clear and
10 convincing evidence, of this charge. At trial in this matter, Respondent stipulated that he was held
11 in contempt of the court for his failure to appear at the readiness conference and that the court's order
12 of contempt was made under the standard of proof beyond a reasonable doubt.

13 **B. Count Two (The "K" Matter)**

14 On November 11, 2001, K was arrested by Lassen County authorities and charged with
15 violations of Penal Code sections 288 [commission of a lewd act] and 288a, subdivision (c)(2)
16 [participation in an act of oral copulation] on his two daughters. At the same time, the federal
17 government was conducting an investigation into the defendant's conduct. The federal government
18 had issued grand jury subpoenas for K, whom they considered the target of the investigation, as well
19 as both K's wife, whom they intended to call as a witness, and K's daughter.

20 In March 2002, K's wife spoke with Respondent. Shortly after Respondent spoke with K's
21 wife, K called Respondent and retained him to represent K in the criminal matter. On March 29,
22 2002, an Assistant United States Attorney (AUSA) working on the criminal matter wrote to
23 Respondent and urged him to cease his representation of all three individuals because of the conflicts
24 in their joint representation. The AUSA warned Respondent that if he did not receive written
25 confirmation of Respondent's withdrawal from representation, he would initiate proceedings
26
27
28

1 requesting the federal court to disqualify Respondent.³⁰ On the same date, the AUSA reiterated his
2 position in another letter. On April 1, 2002, Respondent wrote the AUSA a letter denying any
3 conflict between K and his wife and acknowledging the broadening conflict between the daughter and
4 her family. Respondent also accepted the subpoenas for the entire family. On April 11, 2002, the
5 AUSA wrote a letter to Respondent in which he acknowledged that Respondent did not oppose the
6 motion to disqualify him from representing all three parties.

7 The State alleges that Respondent agreed to represent the accused, the witness and the victim
8 in the criminal matter for a period of time by entering into retainer agreements with each of the them.
9 On the other hand, Respondent testified that the only person who had a retainer agreement with was
10 the accused (i.e. K), and that he briefly represented the wife and children only to protect them from
11 the burdensome demands made upon them by the AUSA. The Court resolves this conflict in
12 testimony in favor of the Respondent.

13 Respondent is charged in Count Two of the NDC in Case No. 02-O-12664 with a wilful
14 violation of rule 3-310(C)(2), which provides that a member shall not without the written consent of
15 each client represent accept or continue to represent more than one client in a matter in which the
16 interest of the clients actually conflict.

17 The Court does not find the Respondent culpable of the charged violation of rule 3-310(C)
18 (2). The burden of proof is on the issue of culpability rests with the State Bar. (Rules Proc. of State
19 Bar, rule 213.) The State Bar did not meet is burden of proving that Respondent represented more
20 than one client in which the interest of the clients actually conflict.

21 **IV. LEVEL OF DISCIPLINE**

22 **Factors in Mitigation**

23 There are no mitigating factors presented by the record in this proceeding.

24 ///

25 ///

26
27 ³⁰ See State Bar Exhibit 29, pg. 23.

1 **Factors in Aggravation**

2 Respondent has been disciplined on three previous occasions, a serious aggravating factor
3 pursuant to Standard 1.2(b)(i) of the Standards for Attorney Sanctions for Professional Misconduct.

4 By opinion filed November 18, 1975 in *In re Murphy* (1975) 15 Cal.3d 533, the California
5 Supreme Court suspended Respondent from the practice of law for a period of three years, stayed
6 execution of the order of suspension and placed him on probation for three years on conditions that
7 included his actual suspension for a period of one year. Respondent's culpability in that proceeding
8 resulted from his criminal conviction on five counts of offering and selling securities in violation of
9 the conditions of a permit issued by the Commissioner of Corporations in violation of Corporations
10 Code section 25540. The Supreme Court found that Respondent's conduct involved fraud and deceit
11 and that he repeatedly disregarded court orders and statutes. (*In re Murphy, supra*, 15 Cal.3d at p.
12 539.)

13 Thereafter, effective May 19, 1978, the Supreme Court extended Respondent's suspension
14 for a period of one year, but stayed execution of the order of suspension and placed him on probation
15 for a period of an additional one year. Respondent's culpability in that proceeding was based upon
16 his admission that he engaged in the unauthorized practice of law during the period of the actual
17 suspension imposed in *In re Murphy, supra*.

18 Finally, effective October 26, 1993, Respondent received a private reproof as a result of his
19 failure to competently perform the legal services for which he was retained in one client matter.
20 Respondent's misconduct occurred in 1988.

21 The current misconduct found by the Court in this proceeding evidences multiple acts of
22 wrongdoing by Respondent. (Standard 1.2(b)(ii).)

23 Respondent's misconduct in providing ineffective assistance of counsel in two criminal
24 matters and in repeatedly violating court orders and failing to appear at scheduled hearings
25 significantly harmed the administration of justice. Additionally, Respondent's failure to refund any
26 portion of the \$5,000 fee paid by Foley or to repay the \$25,000 loan that he received from Clark
27

1 significantly harmed those clients. (Standard 1.2(b)(iv).)

2 **Discussion**

3 Respondent has clearly caused substantial harm to his clients and to the public. In two cases
4 (the Maggin and Foley matters), the trial court concluded that Respondent had rendered ineffective
5 assistance of counsel to his clients and, as a result, was compelled to set aside their convictions.
6 Respondent also failed to competently perform the legal services for which he was retained in at least
7 two other matters (the Knight and Tanton matters). Respondent's clients in these matters clearly
8 suffered harm as a result of Respondent's inadequate performance of his legal obligations. In
9 addition, Respondent has evidenced a pattern of failing to appear at hearings, conferences and even
10 trials on a timely basis. The evidence in this proceeding establishes at least seven instances in which
11 Respondent failed to appear on a timely basis (the Keisler, Ehleringer, Garcia, Holland, Noel and
12 Larson matters). In a number of these cases, Respondent was found in contempt of court and
13 sanctions were imposed. In addition, the evidence establishes that Respondent maintained an unjust
14 action against Wal-Mart Stores and Wal-Mart employees in one case (the Sanchez matter). On at
15 least four occasions (the Noel, Tanton, Sanchez and Larson matters), Respondent failed to report the
16 imposition of sanctions to the State Bar. On another occasion (the Foley matter), he failed to report
17 the reversal of a judgment based upon ineffective assistance of counsel to the State Bar. These
18 various violations evidence substantial harm to the interests of the public and the administration of
19 justice.

20 The Court finds that there is evidence that Respondent continues to be a serious threat to his
21 clients and the public. Respondent has blamed virtually all of his problems upon the individual
22 reaction of two local judges. He appears to take no responsibility for taking criminal cases where he
23 does not possess the minimum expected degree of learning and competence in that field of law.
24 Significantly, Respondent's incompetent performance are not events that occurred in the distant past.
25 In the Foley matter, the Court granted the motion for a new trial and vacated the jury's verdict due
26 to Respondent's incompetence in May, 2002.

1 In light of the serious and extensive nature of Respondent's misconduct in the current
2 proceeding, his lack of insight or appreciation of that wrongdoing and his history of prior discipline,
3 this Court concludes that Respondent's disbarment is necessary for the protection of the public, the
4 courts and the legal profession.

5
6 **V. RECOMMENDED DISCIPLINE**

7 This Court recommends that Respondent **RICHARD RALPH MURPHY** be disbarred from
8 the practice of law in the State of California and that his name be stricken from the roll of attorneys
9 in this State.

10 Although Respondent was required to comply with the requirements of rule 955 of the
11 California Rules of Court in the involuntary inactive enrollment order filed by the State Bar Court on
12 September 19, 2002, in Case No. 02-TE-13762, it is recommended that the Supreme Court also order
13 Respondent to comply with rule 955(a) of the California Rules of Court within 30 calendar days of
14 the effective date of the Supreme Court order in this matter and to file the compliance affidavit
15 required by rule 955(c) within 40 days of the effective date of the Supreme Court's order.

16
17 **VI. COSTS**

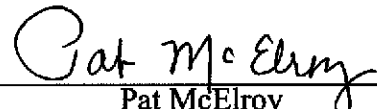
18 It is further ordered that costs be awarded to the State Bar pursuant to Business and
19 Professions Code section 6086.10 and that such costs be made payable in accordance with Business
20 and Professions Code section 6140.7.

21
22 **VII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

23 Respondent has been continuously enrolled as an inactive member of the State Bar since
24 September 22, 2002, as a result of this Court's decision in Case No. 02-TE-13762. Nevertheless, in
25 light of this Court's recommendation that Respondent be disbarred from the practice of law, pursuant
26 to the provisions of Business and Professions Code section 6007, subdivision (c)(4) and rule 220(b)

1 of the Rules of Procedure, it is hereby ordered that Respondent **RICHARD RALPH MURPHY** be
2 involuntarily enrolled as an inactive member of the State Bar. The order of involuntary inactive
3 enrollment shall be effective three days after the date upon which this Decision is served.

4
5
6
7 Dated: July 23, 2003


Pat McElroy
Judge of the State Bar Court

CERTIFICATE OF SERVICE
[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. 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 San Francisco, on July 23, 2003, 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:

- [X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

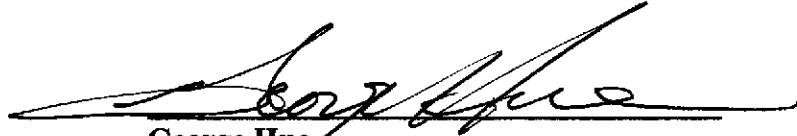
RICHARD R MURPHY
44 S GAY ST
SUSANVILLE CA 96130

RICHARD R MURPHY
928 MERIDIAN PLAZA
ANDERSON IN 46016

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

ALAN KONIG, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **July 23, 2003**.



George Hue
Case Administrator
State Bar Court