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STATE BAR COURT
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LOS ANGELES



THE STATE BAR COURT
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No. 00-O-13391-RAH
RANDY E. BENDEL,)	DECISION
Member No. 130569,)	
<u>A Member of the State Bar.</u>)	

1. INTRODUCTION

In this disciplinary proceeding, Respondent Randy E. Bendel is charged in the Notice of Disciplinary Charges ("NDC") with eight counts: employing means inconsistent with truth and seeking to mislead a judge, failure to maintain respect to the court, failure to obey a court order, failure to comply with laws, maintaining an unjust action (two counts), malicious prosecution, and moral turpitude. The Office of the Chief Trial Counsel was represented by Deputy Trial Counsel Kim G. Anderson and Charles T. Calix ("DTC Anderson and Calix".) Respondent represented himself at trial *in propria persona*.

The modest origins of this case involved a marital dissolution action brought by Mark Horwitz against Respondent's client, Maria Horwitz. However, as will be discussed in detail below, this simple dissolution case rather quickly was transformed into many cases. Like the Hydra of Greek mythology that grew new heads when its old ones were cut off, Respondent's attempts to resolve one problem only resulted in others arising in its place. In this case's various incarnations, it touched many courts and judges, including Commissioners Fried, Reichman, and

1 Weiss, and Judges Bascue, Black, Bobb, Chavez, Crispo, Cox, Denner, Farrell, Gutman, Harwin,
2 Johnson, Kaplan, Krieger, Kolostian, Marlar, Mohr, Morrow, Mund, Murphy, O'Donnell, Riblet,
3 Spear, Thrasher, Wallace, and Yaffe, in addition to various appellate justices of the California
4 Second Appellate District and judges of the Ninth Circuit. As one could imagine, an enormous
5 amount of judicial time and effort went into processing this litigation.¹

6 In large part, Respondent was responsible for transforming this case into the monster it
7 became, and therefore, this Court finds Respondent culpable by clear and convincing evidence of
8 misconduct as set forth below. As a result of this finding, the Court recommends that
9 Respondent be actually suspended for a period of six months, among other things, as set forth
10 more fully below.

11 **2. SIGNIFICANT PROCEDURAL HISTORY**

12 On October 27 and 31 and November 4 and 12, 2003, various motions and requests were
13 considered and ruled upon by the Court. The following represents a list of the significant
14 matters:

15 **A. Requests for Judicial Notice.**

16 1. Two requests to take judicial notice of certain documents contained in
17 *Canatella v. Stovitz, et. al*, U.S. District Court (N.D. Cal.) case no. C00-1105 MJJ. Granted.

18 2. Transcripts of court proceedings on August 5, 1999 and September 3, 1999 in
19 *Horwitz v. Horwitz*, Los Angeles Superior Court ("LASC"), case no. LD 017 906. Granted.

20 3. The judgment entered on January 18, 2002 in *Dem v. Bendel & Horwitz*, LASC
21 case no. LC 052 851. Granted.

22 4. Maria Horwitz' ex parte application for a temporary restraining order and order
23 to show cause why a preliminary injunction should not be issued in *Horwitz v. Horwitz*, LASC
24 case no. BC 219 052. Granted.

25 5. Notice of Related Cases in *Horwitz v. Horwitz*, LASC case no. BC 219 052.
26 Granted.

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¹The trial of this case in this Court lasted 14 days.

1 6. Notice of Motion and Declaration of Joinder in *Horwitz v. Horwitz*, LASC
2 case no. BC 219 052. Granted.

3 7. Ex parte application in LASC case no. PC 021 242. Denied.

4 8. Petition for Dissolution. Denied.

5 9. Motion to Quash in LASC case no. PC 021 242. Denied.

6 10. Response and Request for Dissolution. Denied.

7 11. Minute Order in LASC case no. LD 017 906. Denied.

8 12. Minute Order in LASC case no. LC 046 713. Denied.

9 **B. Motions.**

10 1. Motion to Dismiss Count Four of the Notice of Disciplinary Charges (“NDC”).
11 Denied.

12 2. Motion to Strike paragraphs eight and nine of the NDC. Denied.

13 3. Motion to Strike paragraph six and the first clause of paragraph 23. Denied.

14 4. Motion to Dismiss Count Five of the NDC. Denied.

15 5. Motion in Limine to exclude all documentary evidence not identified in
16 Respondent’s exhibit list and produced and delivered to the State Bar as required by the Court’s
17 pretrial order. Granted.

18 6. Motion for Recusal and/or Abatement. Heard and denied by the Hon. Alban
19 Niles, Judge, State Bar Court.

20 7. Motion by Respondent for certain procedural orders regarding the conduct of
21 trial. Denied.

22 8. Motion for Mistrial made on November 4, 2003. Ruling reserved at trial.
23 Motion hereby DENIED.

24 9. Motion to Amend NDC, Counts Two and Nine. Denied.

25 10. Motion to Amend to add another count to NDC. (Business and Professions
26 Code section 6068(e) violation.) Denied.

27 11. Motion to amend to add another count to NDC. (Rules of Professional
28 Conduct, Rule 3-110 violation.) Ruling reserved at trial. Motion hereby DENIED.

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12. Motion to Dismiss counts 5, 7, and 8 of the NDC. Denied.

13. Motion to Dismiss count 4 of the NDC. Ruling reserved at trial. Motion hereby DENIED.

C. Order Sealing Exhibits.

Exhibits 1246 through 1256, consisting of tax returns for Tri Star Window Coverings, Inc. Mark Designs, Inc., MDI Enterprises, Inc. and Mark and Maria Horwitz, are ordered sealed.

3. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 14, 1987, and since that time has been an attorney at law and a member of the State Bar of California.

B. Background

Given the extensive documentary evidence of court filings in this matter, the Court feels it would be helpful to categorize the documents filed by each party. No attempt is made to fully describe every document in this extensive record. Rather, to help provide a clearer understanding of this Decision, the Court seeks only to group the most relevant documents and briefly analyze their contents.

i. Financial Disparities.

As noted above, the case began as a marital dissolution matter (“the Dissolution Case”) in which Respondent represented Maria Horwitz (“Maria”). The case was filed as Los Angeles Superior Court (“LASC”) case number LD 017 906 on January 10, 1996. (Exhibit 1001, 1002.) The petitioner in the dissolution case was Maria’s ex-husband, Mark Horwitz (“Mark”). Maria and Mark had been married for 22 years – from 1975 to 1997 – and had one child. Maria met Mark when she was employed by him as a maid and was relatively unsophisticated in financial matters throughout their marriage.²

²In a declaration filed in court, Respondent indicated that his client had a fourth grade education. (Exhibit 1140.)

1 The income shared by Mark and Maria came, in part, from companies engaged in the
2 home improvement business. Mark Designs, Inc. ("Mark Designs") was a company owned in
3 equal shares by Mark and his father Leo Horwitz ("Leo"). Tri Star Window Coverings, Inc. ("Tri
4 Star") was a company owned in equal shares by Mark and Bernard Warshauer ("Bernard").

5 Respondent entered the case as attorney for Maria on August 21, 1997. As it appeared to
6 Respondent, Mark and Maria lived a rather luxurious lifestyle while married. After their
7 dissolution³, the income reported by Mark on family law income and expense declaration forms
8 dropped dramatically from that which Respondent had observed from before the dissolution.⁴
9 Specifically, Mark reported that his annual gross income was \$48,000 during 1997 (Exhibits
10 1023, 1024), down from \$284,000 in 1994 (Exhibit 1016). He reported that this drop was a
11 result of "business reversals." (Exhibit 1023.) In addition, Mark stated that he had over
12 \$300,000 in unsecured debt as a result of his failed business. (Exhibit 1024.) After reviewing
13 the documents in the case, Respondent learned that in September 1996, Mark Designs went out
14 of business and transferred all of its assets to Tri Star. Further, Respondent understood that in
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16 ³In the Dissolution Case and the lawsuits that followed, Respondent claimed Mark
17 Designs and Tri Star were community property assets of Mark and Maria. The family law court
18 bifurcated the marital dissolution matter, granting judgment on dissolution status only and
19 reserving judgment on property distribution issues. Judgment was entered on dissolution status
only on October 22, 1997. (Exhibits 1035, 1036.)

20 ⁴While little independent evidence was produced at trial other than Respondent's
21 statements as to the actual financial status of Mark and Maria, it is clear that Respondent had a
22 good faith belief that their lifestyle was luxurious. Among the attributes of wealth that
23 Respondent observed or was aware of were the following: income shown on tax returns of in
24 excess of \$250,000 per year in the two years preceding dissolution; a BMW 740i; a Lexus LS
25 400; a Corvette; an expensive home valued at \$500,000 with a housekeeper; a business grossing
26 over \$6 million per year; a membership in the North Ranch Country Club; and vacations to
27 Hawaii taken by Mark and Maria. (Exhibits 24, 1016.) As will be seen, it was, in part, this
28 belief that Mark was wealthy that motivated Respondent to pursue through litigation the assets
Respondent felt were being secreted. As such, given the relevance of Respondent's state of mind
to some of the charges in this case, the failure of Respondent to produce further admissible
evidence of these indices of wealth does not preclude Respondent from offering evidence of the
basis for his good faith belief that such indices existed. Such evidence is either not hearsay
(since it is not being offered to prove the truth of the matter asserted) or is covered by an
exception to the hearsay rule (statements of mental state). (Evid. C. sections 1200, 1250.)

1 April 1997, Mark liquidated his \$100,000 retirement account and transferred the proceeds to Tri
2 Star. Respondent also felt that Mark did not adequately account for over \$300,000 in zero
3 coupon bonds (Exhibit 24.)

4 “Smelling a rat,” Respondent sought to uncover the assets and income which he felt Mark
5 was hiding to avoid his spousal support obligations. Further, Respondent attempted to unwind
6 “fraudulent” transactions involving community property assets. With perhaps the best of
7 motives, thus began a long road of litigation by Respondent and others, culminating in this
8 disciplinary proceeding.⁵

9 **ii. The Underlying Related Cases**

10 Various cases were filed, some by Respondent and others by different parties, as set forth
11 in more detail below. All were in some way connected to the Dissolution Case and each was
12 heavily litigated by all parties. On December 13, 1999, the Dissolution Case, the Dem Case, the
13 Bank Indemnity Case, and the Fraudulent Transfer Case were deemed related and assigned to the
14 Northwest District. (Exhibit 17.) Thereafter, the cases were to bear the case number of the
15 Dissolution Case as the “lead case” along with all of the other case numbers. However, they
16 were not consolidated, so to some extent, each retained its own identity. After the related cases
17 were assigned to the Northwest District, Judge Farrell, the supervising judge of that district,
18 assigned them to Judge Kolostian in Department NW “I” on February 9, 2000.

19 Other cases were filed that were not a part of the order relating the cases. These included
20 the Abuse of Process Case (LASC BC 233 852) and the Bankruptcy Case (SV-99-12829 and SV-
21 01-01167.)

22 **a. The Dem Case.**

23 Neal and Karen Dem (“the Dems”) were the landlords of the property where Mark
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25 ⁵Respondent was not the only one who suspected fraudulent behavior by Mark and his
26 friends and relatives. David Gill of Danning, Gill, Diamond & Kollitz, LLP was appointed the
27 Chapter 7 Trustee in the bankruptcy (discussed in more detail below.) On March 8, 2001, Mr.
28 Gill filed an adversary proceeding in Mark Designs’ bankruptcy (Case No. SV99-12829),
alleging, *inter alia*, fraudulent transfer of assets, conversion, and breach of fiduciary duty.
(Exhibit 1226.)

1 Designs did business. Mark was a guarantor of the lease. Mark Designs defaulted on the lease,
2 and in March 1998, the Dems filed suit. ("the Dem Case," LASC case no. PC 021 242.) Their
3 attorney was Steven Dem. Mark Designs and Mark failed to oppose the lawsuit, and the case
4 ended by default trial on January 26, 1999, with the Dems receiving a judgment against Mark
5 Designs and Mark in the amount of \$103,769. In June 1999, the Dems levied on shares of stock
6 that Mark owned in Tri Star and a promissory note in favor of Mark executed by Tri Star with a
7 face value of \$180,000.

8 Respondent felt that Mark Designs and Mark should not have simply acquiesced in the
9 lawsuit, but should have defended to preserve community assets. As such, Respondent filed a
10 third party claim of ownership in the case on June 11, 1999 and sought to conduct discovery.⁶
11 The Dems filed an ex parte application to prevent the discovery, which was denied. (Exhibit 5.)
12 The hearing on the third party claim was continued to allow discovery to take place. Respondent
13 filed an ex parte application to amend the third party claim to allege fraud, which was denied.
14 (Exhibits 3, 6.) Respondent filed a writ challenging this decision. (Exhibit 5.) A hearing on the
15 third party claim was held on October 4, 1999, but Respondent failed to appear. The third party
16 claim was denied. (Exhibits 7, 8.) The court ordered the property levied upon and sold.
17 Respondent filed an ex parte application for relief from default and requesting an opportunity to
18 dismiss the case, apparently in light of the fact that his writ was unsuccessful. (Exhibit 9.) The
19 application was denied. (Exhibit 12, 13) On December 9, 1999, Respondent filed a Notice of
20 Appeal of the judgment denying his client's third party claim. (Exhibit 15) The Dems requested
21 (Exhibit 16.) and received a judgment of costs in the amount of \$25,709 for enforcing the
22 judgment in this case.

23 On December 13, 1999, the Dem Case was ordered related to the Dissolution Case
24 (Exhibit 17.) and later assigned to the Northwest District, Judge Kolostian. (Exhibit 21.) On
25 July 28, 2000, Judge Kolostian dismissed the Dem Case. (Exhibit 46.)

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27 ⁶Respondent filed this third party claim after the judgment was entered. (Response to
28 request number 12 of the Requests for Admission from the Office of the Chief Trial Counsel.
(Hereafter, "RFA.")

1 **b. Fraudulent Transfer Case.**

2 Having unsuccessfully prevented the transfer in the Dem Case, on October 26, 1999,
3 Respondent filed an action for breach of fiduciary duty, fraudulent transfer, civil conspiracy,
4 abuse of process and various related theories. (LASC case no. BC 219 052, Exhibit 10). This
5 action was filed against Mark, Leo, Bernard and their significant others or spouses; Robert Kahn,
6 an attorney for Mark, Tri Star and Bernard; Tri Star; the Dems; Steven Hoffer (an accountant);
7 and David Hagen and his law firm (the attorney that filed the bankruptcy petition for Mark
8 Designs.) Because of an apparent conflict of interest resulting from being named as a party in the
9 case, Mr. Kahn substituted out and was replaced by a new attorney, James Steele.

10 Discovery was conducted in the Fraudulent Transfer Case, including Requests for
11 Admissions propounded by Bernard and Tri Star. (Exhibit 40, pp. 98-110.) Respondent failed to
12 respond to the Requests for Admissions. Upon a motion filed by Bernard and Tri Star, the
13 Requests for Admissions were ordered admitted. (Exhibit 26.) The court then asked for briefs as
14 to whether the deemed admissions left any matters for trial. Finding none, Judge Kolostian
15 ordered the case dismissed with prejudice, and ordered sanctions paid by both Respondent and
16 his client in the total amount of \$8,238. (Exhibit 38.) This was reduced to a judgment on June
17 28, 2000. (Exhibit 39.)

18 **c. Bank Indemnity Case.**

19 On October 21, 1998, Mark's father, Leo, filed an action against Maria, LASC case no.
20 LC 046 713. It sought indemnification for an obligation of \$370,000 arising out of a bank loan
21 from Sanwa Bank to Mark Designs which Leo paid after Mark Designs went out of business.
22 Leo only sued Maria, not his son Mark, who, along with Leo, were the principal officers of Mark
23 Designs.

24 When faced with this lawsuit, Respondent, on behalf of Maria, filed a cross-complaint
25 against Tri Star, Mark Designs, Mark and Bernard. Respondent began discovery, and was forced
26 to file six motions to compel responses, all of which were granted. When the cross-defendants
27 finally complied with discovery requests, Respondent learned much of the financial information
28 set forth above about the income and assets of Mark and Mark Designs.

1 The Bank Indemnity Case was ordered related to the Dissolution Case on December 13,
2 1999 (Exhibit 17.) and was later assigned to Judge Kolostian. (Exhibit 21.) On July 28, after
3 Respondent failed to appear at a hearing, Judge Kolostian dismissed the cross-complaint filed by
4 Respondent on behalf of Maria, struck the answer of Maria to the complaint, and entered a
5 default against Maria on the complaint. These terminating sanctions were a result of the failure
6 to cooperate in discovery. Judge Kolostian also issued monetary sanctions of \$6,397 against
7 Respondent and his client.

8 **d. Abuse of Process Case.**

9 On July 24, 2000, Respondent and his client filed a complaint for Abuse of Process and
10 Interference with Prospective Economic Advantage, naming both Respondent and his client as
11 plaintiffs. (Exhibit 72, pp. 38-50) Significantly, in addition to Bernard and Tri Star, Respondent
12 named James A. Steele, their attorney. This complaint was filed in the Central District of Los
13 Angeles Superior Court, and in the first paragraph, plaintiffs objected to venue in the Northwest
14 District, where the other related cases were being handled.

15 On July 28, 2000, Respondent filed a motion for preliminary injunction seeking to
16 prevent attorney James A. Steele, Bernard and Tri Star from participating in the Dissolution
17 Case. The motion for preliminary injunction was assigned to Judge Spear, (Exhibit 44.) but
18 apparently, an application for an ex parte order was brought the day before, July 27, 2000, in
19 front of Judge Yaffe in the Writs and Receivers department of the central district of the Los
20 Angeles Superior Court. A hearing on the ex parte application was held on July 27, 2000, and
21 Judge Yaffe denied the application. (See transcript, exhibit 42.) During the hearing, Judge Yaffe
22 stated that he refused to allow Respondent to use his court to effectively overturn the decision of
23 another court within the Los Angeles Superior Court. Judge Yaffe stated that he felt Respondent
24 was "shopping around" the Los Angeles Superior Court for a favorable ruling that he was unable
25 to get from Judge Kolostian. When Respondent later appeared before Judge Spear on the motion
26 for preliminary injunction, he failed to tell her that Judge Yaffe had denied the ex parte
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1 application and the grounds therefor. (RFA 111.)⁷

2 On August 9 2000, Judge Bascue ordered the Abuse of Process Case related to the other
3 cases in his earlier order, and suspended the Abuse of Process Case pending resolution of the
4 Dissolution Case. (Exhibits 48, 49.) On August 15, 2000, Respondent again filed a peremptory
5 challenge against Judge Kolostian. (Exhibit 72, pp. 910-912.)

6 A demurrer to the complaint was filed and was sustained by Judge Kolostian on
7 September 8, 2000. (Exhibit 51.) In his order, Judge Kolostian stated that it was “impossible to
8 file this action” and that it “was a totally frivolous lawsuit and [the demurrer] must be sustained
9 without leave to amend.” (Exhibit 51, p. 11.)

10 **e. The Bankruptcy Case.**

11 On July 28, 2000, in the Mark Designs bankruptcy action, Respondent filed a motion for
12 examination under Rule 2004 of the Federal Rules of Bankruptcy Procedure, naming 39
13 individuals, including: Mark Horwitz; the U.S. Trustee; the Chapter 7 Trustee and his counsel;
14 Bernard; the Dems and their attorney; various other attorneys including James Steele and Robert
15 Kahn; Commissioner Weiss; and Judges Kolostian, Yaffe, Chavez, Bobb, Kreiger, and Mohr. In
16 addition, Respondent requested permission to examine the Commission on Judicial Performance.
17 Bankruptcy Judge Riblet denied the motion.

18 **iii. Judicial Challenges.**

19 Throughout the related cases, Respondent felt that he and his client were not receiving
20 fair hearings. On several occasions, he filed peremptory challenges as to judges he felt were
21 biased against his client or him. On occasion, he filed multiple challenges against the same
22 judicial officer in related cases and multiple challenges against different judicial officers in the
23 same case.⁸

24 The occasions in which Respondent sought to remove judicial officers are set forth

26 ⁷In light of the order relating the cases, the motion was later taken off calendar by Judge
27 Spear. (Exhibit 50.)

28 ⁸California Code of Civil Procedure section 170.6 provides that a party may make only
one such peremptory challenge under that section in any one action.

1 below, in date order:

2	<u>Date</u>	<u>Target</u>	<u>Reference</u>
3	1. September 3, 1999	Commissioner Weiss in the Dissolution Case under CCP 170.6. Denied by Judge Thrasher.	Exhibits 1140, 14
4			
5	2. December 22, 1999	Commissioner Weiss in the remaining related cases under CCP 170.6: Bank Indemnity Case, the Dem Case, and Fraudulent Transfer Case.	Exhibits 18, 19, 20
6			
7	3. April 13, 2000	Judge Kolostian in the four related cases, under CCP section 170.3(c)(1). Denied by Judge Wallace.	Exhibit 27
8			
9	4. May 18, 2000	Judge Kolostian in the four related cases, under CCP sections 170.1 and 170.3	Exhibit 31
10			
11	5. August 9, 2000	Judge Kolostian by filing the Abuse of Process Case in LASC Central District and objecting to venue in Judge Kolostian's district.	Exhibits 40, 42
12			
13			
14	6. August 15, 2000	Judge Kolostian in the Abuse of Process Case, under CCP section 170.6, despite an August 9, 2000 order by Judge Bascue relating the case to the other related cases and then suspending the case.	Exhibits 48, 49 50, 72 at pages 910-912,
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18 As can be readily seen from the above chronology, Respondent made several formal
19 challenges to judicial officers who ruled against him, including Judge Kolostian and
20 Commissioner Weiss. In addition, as the cases were deemed related, Respondent made multiple
21 challenges in the same case. Further, Respondent also attempted to use court processes to effect
22 an informal challenge to Judge Kolostian. (See Exhibits 40 and 42 regarding the Abuse of
23 Process Case.) Finally, he named attorneys for opposing parties as defendants in litigation with
24 the purpose of achieving a tactical advantage in the litigation. In one instance, the attorney he
25 sued, Mr. Kahn, recused himself because he felt the lawsuit placed him in a conflict of interest
26 with his client.

27 **iv. Disrespect for the Courts.**

28 The record reveals that Respondent was profoundly frustrated by what he felt was unfair

1 treatment by several of the judicial officers with whom he came into contact. In particular, he
2 felt that Judge Kolostian and Commissioner Weiss were biased against him. As a result of this
3 frustration, he lashed out against those judicial officers in various ways, some of which are set
4 forth below. Other of Respondent's statements complained of by the Office of the Chief Trial
5 Counsel were not sufficiently disrespectful to warrant analysis by this Court, and therefore, are
6 not discussed.

7 a. Commissioner Weiss.

8 In support of a motion to disqualify Commissioner Weiss after he had made rulings
9 unfavorable to Respondent, Respondent filed a declaration itemizing the allegations of bias.
10 (Exhibit 1140.) One of the examples given of bias and his improper judicial conduct in the
11 declaration and further clarified in the trial in this matter was that he allegedly conducted an ex
12 parte hearing on Respondent's matter with opposing counsel. In fact, his opposing counsel
13 happened to be at court on another matter that was unopposed and that matter was conducted in
14 chambers. Further, Commissioner Weiss disclosed to Respondent that he had an ex parte hearing
15 with Respondent's opposing counsel, and Respondent consented to the court continuing with that
16 hearing. When asked at the trial whether he had any other evidence of improper judicial conduct
17 by Commissioner Weiss arising out of this ex parte hearing, Respondent replied that he did not.⁹

18 In the same declaration, Respondent referred to a hearing that had occurred before
19 Commissioner Weiss where a discussion was held as to the sale of community property.
20 Commissioner Weiss apparently stated that Respondent's client could go to a public sale and, on
21 her own, bid on an undervalued asset. Respondent stated the following:

22 "Perhaps the most telling comments made by Commissioner Weiss during the hearing on
23 Respondent's motion to enjoin the Dem Proceeding was in response to the following
24 question which I posed to the (sic) Commissioner Weiss during the hearing:

25 _____
26 ⁹This Court is not the only court that has reviewed whether Respondent's complaints
27 about the ex parte hearing by his opposing counsel was proper. Judge Thrasher, in an order dated
28 November 16, 1999, concluded the following in denying Respondent's motion to disqualify
Commissioner Weiss:

"This Court finds that no reasonable person aware of the facts in this case would entertain
a doubt as to Commissioner Weiss' ability to be impartial." (Exhibit 14, p. 4.)

1 ““If the stock is sold, let’s say, sold for \$50,000 and at trial the evidence would establish
2 my client’s contention that it is worth \$400,000 to \$500,000 is correct, what is my client
to do?”

3 “Commissioner Weiss responded as follows:

4 ““If the stock is sold for \$50,000, why doesn’t your client overbid slightly and end up
5 stealing a \$400,000 or \$500,000 asset for slightly over \$50,000?””

6 Based on that interchange, Respondent stated in his declaration the following:

7 “Commissioner Weiss’ use of the term ‘steal’ is particularly problematic. No judicial
8 officer should countenance ‘stealing’ the assets between spouses. For Commissioner
Weiss to suggest stealing is further evidence of bias.”

9 At the conclusion of his declaration, Respondent stated the following:

10 ““The only thing Commissioner Weiss wants to maintain jurisdiction over is the parties so
that he can assist one party and destroy the other.”

11 On September 15, 1999, Respondent filed objections to and a request to strike the answer
12 by Commissioner Weiss to Respondent’s motion to disqualify him.¹⁰ Commissioner Weiss’
13 answer was in the form of a declaration under penalty of perjury. In it, he responded to the
14 allegations made against him, by declaring, *inter alia*, that he did not act out of bias or prejudice,
15 was truthful, that his use of the term “steal” was done so metaphorically, and that the *ex parte*
16 hearing with Respondent’s opposing counsel did not concern Respondent’s case and was done
17 only after Respondent consented.

18 Respondent objected to many of the assertions made in Commissioner Weiss’
19 declaration. Respondent stated the following:

20 “Whether Commissioner Weiss enjoys the reputation of being a truth teller is not
21 established. Similarly, whether Commissioner Weiss misrepresents facts is also not
22 established. (Frankly, Commissioner Weiss has asserted that he was speaking
metaphorically about “stealing” and still asserts that he does not misrepresent facts. This
23 does not make sense. This also impeaches Commissioner Weiss’ improper testimony.)

24 ...

25 “Commissioner Weiss failed to testify truthfully in opposition to the present motion in
26 spite of his self serving proclamation of ‘always’ telling the truth. Commissioner [Weiss]
could not even make it through a 3 page declaration without making an untrue statement
(lying).

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28 ¹⁰The Answer of Commissioner Weiss is Exhibit 1141, and the objections and request to
strike is Exhibit 1145.

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“Whether Commissioner Weiss has integrity or a reputation has not been established. Based on the improper and false testimony made by Commissioner Weiss, there is no reason to accept such self serving testimony from Commissioner Weiss.”

In the bankruptcy court Rule 2004 motion referred to above, Respondent referred to Commissioner Weiss as “Mr. Weiss.” (Exhibit 47, p. 5.)¹¹ Further, in the context of his request for examination of the Commission on Judicial Performance, Respondent stated at page 6 that the Commission is “...investigating fraud with respect to ... the conduct of certain state court judicial officers presiding over the state court proceedings. Records from these agencies will help Maria establish that the state court proceedings involve serious misconduct of state court judicial officers.” (Exhibit 47, p. 6.) No evidence was offered by Respondent to substantiate the claim that such an investigation against any judicial officer was pending.

The NDC alleges that Respondent accused Commissioner Weiss of committing “perjury” arising out of his filing of documents in the bankruptcy matter that contained that accusation. Respondent admitted making this statement in his response to Request for Admission 145.

b. Judge Kolostian.

Respondent also openly complained of Judge Kolostian after the matter was assigned to his court.¹²

In his motion to disqualify Judge Kolostian, Respondent stated in a declaration that “...Judge Kolostian has made a mockery of the Family Code and has been derelict in his duties as a family law judicial officer.” (Exhibit 27, p. 7.)

In a second motion to disqualify Judge Kolostian, Respondent stated in a declaration under penalty of perjury that “Judge Kolostian also had ex parte communications with counsel for both Mr. Warshauer, Petitioner and Tri Star.” No explanation was given as to the context of this remark.

¹¹Similarly, in this same document, Respondent referred to Judge Kolostian as “Mr. Kolostian.” See footnote below.

¹²Respondent also referred to Judge Kolostian as “Mr. Kolostian” in papers filed with the Bankruptcy Court. (Exhibit 47, p. 5.)

1 In a writ of mandate addressed to the District Court of Appeal for the Second Appellate
2 District, Respondent sought the appellate court's assistance in overturning many decisions made
3 by Judge Kolostian. (Exhibit 32.) At page 83 of Exhibit 32, Respondent stated the following:

4 "Maria's problem is that the family law court is trying to kill her. Maria's exclusive
5 remedy at law is her worst enemy. For that matter, respondent court is the worst
6 nightmare of any family law litigant. If the family court is Maria's exclusive remedy,
7 Maria has no remedy at law. Maria's remedy at law keeps sending her away to face
8 annihilation. If Maria survives to return, Maria is again sent away to face destruction.
9 Not only is respondent court reluctant, respondent court is arguably committing a felony."

10 At page 109 of Exhibit 32, Respondent stated the following:

11 "Respondent court could care less about finding out what Mark has done with the
12 community property. Respondent court is a derelict court. Respondent court is arguably
13 the most reluctant family law court of all time. Three of the four pending lawsuits were
14 cause (sic) by the reluctant family law court. Respondent court is a problem. Maria
15 contends that the 'problem' has to do with the fact that Mark's attorney sits as a judicial
16 officer of the department of respondent court in question. The solution for the 'problem'
17 was to kill Maria and her attorney so that the 'problem' would go away. This 'final
18 solution' was no less evil than other historical 'final solutions'."

19 **v. Other Conduct Alleged to Show Disregard for the Administration of**
20 **Justice.**

21 In addition to the conduct described above concerning judicial officers, Respondent is
22 also alleged to have misused judicial proceedings in order to advance his litigation goals.

23 a. Seeking to Disqualify Other Counsel.

24 On at least six occasions, Respondent attempted to remove opposing counsel by filing
25 actions or motions. On October 26, 1999, Respondent filed the Fraudulent Transfer Case,
26 naming an opposing counsel, Robert Kahn, as a party defendant. (Exhibit 10.) As a result of this
27 filing, Mr. Kahn recused himself.

28 In his place, James A. Steel was retained. On May 24, 2000, Respondent filed a motion
to disqualify Mr. Steele. (Exhibit 72, p. 89-97.) This motion was opposed by Mr. Steele, and
denied by Judge Kolostian on July 28, 2000. (Exhibit 46.)

In the Fraudulent Transfer Case, Respondent also named David Hagen (the bankruptcy
attorney for Mark and Mark Designs) and Steven Dem (the attorney for the Dems.) (Exhibit 10,
RFA 28.) Like Mr. Kahn, Mr. Hagen and Mr. Dem were named in the abuse of process count of
the Fraudulent Transfer Case.

1 In July 2000 in the Related Cases, Respondent sought to disqualify Albert & Barr and
2 Gary L. Barr, (attorneys for Leo, Mark, and Beth Willer (“Beth”), Mark’s current wife). This
3 motion was opposed by Leo, Mark and Beth. (Exhibit 72, pp. 298-320.) This motion was denied
4 on July 28, 2000 by Judge Kolostian. (Exhibit 46.)

5 On July 24, 2000, Respondent filed the Abuse of Process Case, naming Mr. Steele as a
6 party defendant. (Exhibit 40.) Unlike Mr. Kahn, Mr. Steele did not recuse himself. Since he did
7 not do so voluntarily, in February, 2002, Respondent brought another motion to disqualify Mr.
8 Steele. This matter was heard on March 11, 2002¹³, by Judge Black, and also denied. (Exhibit
9 61) Judge Black commented on the propriety of the motion as follows:

10 “It’s basically a motion to reconsider a prior order which was clearly denied. You cited
11 Woods [v. Superior Court (1983) 149 Cal.App.3d 931] then. You’re citing Woods now.
12 Woods didn’t apply then. Woods doesn’t apply now for the reason set forth in [opposing
counsel’s] papers. ... This motion was really (sic) [already?] brought before the court.
Judge Klustian (sic) basically denied it.”

13 (Exhibit 61 at pp. 2-3.)

14 b. Violating Order Relating Cases.

15 Despite an order relating the cases and assigning them for all purposes to Judge
16 Kolostian, Respondent sought and received two Orders to Show Cause and Affidavits for
17 Contempt from Commissioner Fried in the Dissolution Case. (Exhibit 36.) When this filing was
18 brought to the attention of Judge Kolostian by ex parte hearing, he not only ordered that the
19 matter be heard before him, he also ordered the clerk’s office in his court not to accept any
20 documents in the Horwitz matters except those set in his court.

21 As noted above in the general discussion of the Abuse of Process Case, Respondent filed
22 an application for an ex parte order on July 27, 2000 before Judge Yaffe, which was denied.¹⁴

24 ¹³The NDC in this proceeding was filed and served by mail on April 8, 2002. It may be
25 presumed that Respondent was aware of the State Bar’s investigation for some time before the
26 filing of the NDC.

27 ¹⁴As was discussed earlier in this Decision, this action was filed in the Central District on
28 July 24, 2000, over seven months after Judge Bascue’s order relating all the cases. Also as noted
earlier, Judge Yaffe stated that he felt Respondent was “shopping around” the Los Angeles
Superior Court for a favorable ruling that he was unable to get from Judge Kolostian.

1 The next day, July 28, 2000¹⁵, he filed a Motion for Preliminary Injunction against Bernard, Tri
 2 Star and James A. Steele. This was filed in the LASC Central District before Judge Spear.
 3 (Exhibit 44.) The motion for preliminary injunction sought to prevent Mr. Steele and his clients
 4 from filing any documents or otherwise seeking any relief in the Dissolution Case.

5 **vi. Sanctions Imposed on Respondent and his Client.**

6 Respondent and/or his client were sanctioned repeatedly throughout the litigation
 7 described above. The following represents a summary of the sanctions imposed against them:

8 Date	9 Case	Sanctioning Judge	Payor	Payee	Amount	Reference
10 4/7/00	Related Cases	Kolostian	Maria and Respondent ("Jointly")	Bernard	\$1,348.00	RFA 46
11 4/7/00	Related Cases	Kolostian	Jointly	Tri Star	2,429.00	RFA 47
12 4/7/00	Related Cases	Kolostian	Jointly	Bernard	1,348.00	RFA 49
13 4/7/00	Related Cases	Kolostian	Jointly	Bernard	1,273.00	RFA 51
14 4/7/00	Related Cases	Kolostian	Jointly	Tri Star/Steele	1,273.00	RFA 53
15 7/28/00	Bank Indemnity Case	Kolostian	Jointly	Bernard/Steele	323.00	RFA 121
16						
17 7/28/00	Bank Indemnity Case	Kolostian	Jointly	Bernard/Steele	198.00	RFA 123
18						
19 7/28/00	Bank Indemnity Case	Kolostian	Jointly	Bernard/Steele	298.00	RFA 125
20						
21 7/28/00	Bank Indemnity Case	Kolostian	Jointly	Bernard/Steele	448.00	RFA 127
22						
23 7/28/00	Bank Indemnity Case	Kolostian	Jointly	Bernard/Steele	2,048.00	RFA 131
24						
25						
26						

27 ¹⁵This was the same day that Judge Kolostian conducted a hearing on many of the
 28 motions referred to above, and ordered Respondent and/or his client to pay over \$11,000 in
 sanctions. (See Exhibit 46.)

1	7/28/00	Bank Indemnity Case	Kolostian	Jointly	Leo and Mark	4,349.00	RFA 134
2							
3	7/28/00	Dissolution Case	Kolostian	Jointly	Steven Dem	3,417.00	RFA 140
4							
5	3/11/02	Dissolution Case	Black	Maria	Steele	2,900.00	RFA 78
6							
	TOTAL					\$ 21,652.00	

7 **4. DISCUSSION**

8 **A. Allegations of Misconduct.**

9 The NDC alleges eight counts.

10 **i. Count One – Business and Professions Code section 6068(d) [Employing**
 11 **Means Inconsistent with Truth and Seeking to Mislead a Judge] and Count Three –**
 12 **Business and Professions Code section 6103 [Failure to Obey a Court Order]**

13 In Count One, the Office of the Chief Trial Counsel alleges that Respondent made
 14 misleading statements in pleadings, failed to disclose the court assignment of the cases to prevent
 15 the assigned judge from presiding over the case, and filed additional lawsuits and motions before
 16 different judges and in different courts, all in violation of Business and Professions Code section
 17 6068(d). (Future references to “section(s)” shall refer to the Business and Professions Code,
 18 unless otherwise noted.) For the reasons stated below, the Court does not find Respondent
 19 culpable of making misleading statements in pleadings; and does find him culpable of not
 20 disclosing the court assignment of the Horwitz cases. The charge that Respondent filed
 21 additional lawsuits and motions in courts other than the assigned court is duplicative of Count
 22 Three’s charge that Respondent violated section 6103 and is more properly addressed there.

23 In Count Three, the Office of the Chief Trial Counsel alleges that Respondent wilfully
 24 disobeyed or violated the orders relating all cases and scheduling them all before Judge
 25 Kolostian. The Court finds Respondent culpable as charged.

26 The Office of the Chief Trial Counsel alleges that Respondent made misleading
 27 statements in pleadings involving his claim that parties were appearing in the Dissolution Case
 28 without standing and were seeking affirmative relief against him. In addition, the Office of the

1 Chief Trial Counsel claims that Respondent was further misleading by stating that certain
2 motions were being taken off calendar.

3 Respondent's primary theory providing the foundation for the cases he filed was that
4 several of the parties (including Bernard and Leo) should not be allowed to participate in a family
5 law matter since they were not proper parties. Obviously, it follows that Respondent contended
6 that they should not be allowed to file papers in these cases seeking affirmative relief against
7 Respondent.

8 Respondent firmly believed (and to this day, appears to believe) that it was improper to
9 allow them to participate in the way that they did. Presenting this theory of the case to the courts
10 he faced does not mean he made *misleading* statements. To the contrary, he was simply
11 advocating his position. Unless these statements were so beyond the realm of legal propriety
12 (which they are not), whether they were legally correct or not is not a concern of this Court.¹⁶ As
13 such, the statement regarding the lack of standing of certain parties does not violate Section
14 6068(d).

15 The statements made by Respondent that other parties were seeking "affirmative relief"
16 from him or were "suing" him may have been misleading, but only in the most technical sense.
17 The origin of these statements was that oppositions were filed against Respondent and in some
18 cases, requests for sanctions were made by opposing parties or attorneys. While it is true that
19 this technically would not be considered "affirmative" relief, it is perhaps, at best, a sloppy use of
20 language. It is possible that, from his view, he felt that he was being bombarded by oppositions
21 and sanctions filed by other attorneys, and he failed to focus on the reason or origin of those
22 filings. In any event, his statements certainly do not constitute an actionable ethical violation.

23 In his declaration attached to an ex parte application in the Abuse of Process Case,
24 Respondent stated that Mr. Steele had taken Respondent's joinder and contempt motions off
25 calendar by ex parte application in the Dissolution Case without Mr. Steele's clients being parties
26

27
28 ¹⁶The means by which he presented this theory (by filing actions, challenging judges, etc.)
is, however, of concern and is dealt with below in this Decision.

1 to the litigation. (Exhibit 72, p. 262.) The Office of the Chief Trial Counsel contended that this
2 was a misleading statement, since these motions had actually been heard and denied. It is true
3 that this statement may be misleading, but focusing on that aspect of the statement misses the real
4 intent of Respondent's declaration. Respondent was using that as an example to support his
5 theory of the case set forth above, *to wit*, that Mr. Steele and others should not be allowed to
6 participate at all. In that respect, Respondent's declaration accurately noted that Mr. Steele and
7 his clients were actively involving themselves in the various cases. Therefore, it is this Court's
8 view that these statements were not made to "mislead" as much as they were intended to
9 illustrate Respondent's theory of the case. Therefore, this statement is not a violation of Section
10 6068(d).

11 On at least two occasions, as noted above, Respondent sought to avoid Judge Bascue's
12 order relating the cases. Specifically, he filed the Abuse of Process Case in the Central District,
13 and in the first paragraph of the complaint, actually objected to jurisdiction in the Northwest
14 District. He also sought to have the matter heard before Judges Yaffe and Spear. Even after
15 being reprimanded by Judge Yaffe for "shopping around" for judges, the next day in a hearing on
16 a motion for preliminary injunction, Respondent failed to inform Judge Spear of Judge Yaffe's
17 comments or even that he had a hearing before him. (RFA 111.)

18 In addition, Respondent had Commissioner Fried hear and rule on two Orders to Show
19 Cause in the Dissolution Case, rather than have the matters heard by Judge Kolostian as set forth
20 in the order relating the cases. It took an *ex parte* order by Judge Kolostian to bring the matter
21 back to the proper court.

22 Given the proof as to Respondent's failure to disclose the court assignments of the
23 various cases, the Office of the Chief Trial Counsel has met its burden of proving this violation
24 of section 6068(d) by clear and convincing evidence. Similarly, there is clear and convincing
25 evidence that Respondent wilfully violated section 6103 by filing additional lawsuits and
26 motions and seeking hearings in courts other than the assigned court.

27 **ii. Count Two – Section 6068(b) [Failure to Maintain Respect to the Court]**

28 In Count Two, the Office of the Chief Trial Counsel alleges that Respondent failed to

1 maintain the respect due to the courts of justice and judicial officers by stating that: (1) “Judge
2 Kolostian made a mockery of the Family Code and has been derelict in his duties as a family law
3 judicial officer” in a motion to disqualify Judge Kolostian; and (2) Commissioner Weiss had
4 committed “perjury,” when Respondent knew that each of these statements was false.

5 As discussed below, there is not clear and convincing evidence to find a violation of
6 section 6068(b) regarding these two statements. However, there were a number of other
7 statements that were made and whose ethical propriety was litigated during these disciplinary
8 proceedings that will also be addressed in this section. As to those matters, if culpability of
9 violating section 6068(b) is found, it will be considered as uncharged misconduct, an aggravating
10 circumstance pursuant to standard 1.2(b)(iii), Standards for Attorney Sanctions for Professional
11 Misconduct, discussed below in the discipline phase of this decision. (See, i.e., *In the Matter of*
12 *Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 401; *In the Matter of Respondent K*
13 *(Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 350, 352 and 356.*)

14 In many court filings, Respondent commented on judges before whom he had appeared.
15 Often, his comments were, at the least, in poor taste and arguably poor strategy in representing
16 his client. However, for such comments to be the subject of discipline, it is necessary that they
17 be measured against Constitutional standards allowing free expression of ideas. Before
18 categorizing the comments made as either disciplinable or not, it may be helpful to briefly
19 discuss the applicable rules that frame our analysis.

20 Several courts have discussed this issue. In *Standing Committee v. Yagman* (9th Cir.
21 1995) 55 F.3d 1430, the 9th Circuit reversed the decision of a disciplinary committee of the
22 Central District that had disciplined Yagman for comments made about a federal District Court
23 judge. Among the comments Yagman made were that the judge was “anti-semitic”, “drunk on
24 the bench”, “ignorant, dishonest, ill-tempered, and a bully.” The 9th Circuit in *Yagman*
25 recognized that there are differences between conventional Constitutional analysis involved in
26 defamation cases and in those cases concerning attorneys who make comments while
27 participating in matters before a court. The court stated the following:

28 “Defamation actions seek to remedy an essentially private wrong by compensating

1 individuals for harm caused to their reputation and standing in the community. Ethical
2 rules that prohibit false statements impugning the integrity of judges, by contrast, are not
3 designed to shield judges from unpleasant or offensive criticism, but to preserve public
4 confidence in the fairness or impartiality of our system of justice. [citations]”

5 55 F.3d at 1437.

6 Therefore, the court held, the broad Constitutional protections accorded those accused of
7 traditional defamation (see *New York Times v. Sullivan* (1964) 376 U.S. 254) may not be
8 available to the same extent when the person uttering the statement is an attorney discussing a
9 judge before whom he is appearing. (See *United States District Court v. Sandlin* (9th Cir.1993)
10 12 F.3d 861.) Applying the *Sandlin* standards, the *Yagman* court used an objective malice
11 standard, rather than the subjective standard of *New York Times*. As such, the court held that
12 lawyers may freely voice criticisms supported by a reasonable factual basis, even if they turn out
13 to be mistaken.

14 *Yagman* clarified when statements which impugn the integrity of a judge may be
15 disciplinable, even in light of the First Amendment protections. First, discipline may be imposed
16 only when the statements are false, and the burden is upon the disciplinary body to prove falsity.
17 Second, such statements must be capable of being proven true or false. As such, statements of
18 opinion may not be the subject of discipline. Third, even statements that appear factual may not
19 underlie attorney discipline if they cannot reasonably be interpreted as stating actual facts about
20 their target. Therefore, use of “rhetorical hyperbole” and use of language in the “loose, figurative
21 sense” cannot be the basis of discipline.

22 The Review Department of our Court has also defined the guiding principles this Court
23 must follow in parsing out the various comments made by Respondent in the many cases in
24 which he was involved. In *In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct.
25 Rptr. 775, respondent made 116 statements that impugned the integrity and honesty of the judges
26 sitting on the court in which respondent’s matter was pending. The hearing judge disciplined the
27 respondent for 100 of those statements. The respondent appealed that decision and the court
28 ruled that an attorney cannot be disciplined for such comments alleged to violate Section

1 6068(b), unless the statement is one of fact, is false, and the attorney knew it was false when it
2 was made, or made it with reckless disregard for its truth or falsity. Further, the court held that it
3 was the State Bar's burden to prove the falsity of such statements.

4 In *Ramirez v. State Bar* (1980) 28 Cal.3d 402, our Supreme Court ordered an attorney
5 suspended from practice for "falsely maligning" three justices of the Court of Appeal. In that
6 case, the attorney filed an appellate brief in a case where his clients had lost property at a
7 foreclosure sale, saying that the justices had acted "unlawfully" and "illegally", had become
8 "parties to the theft" of this property, and had maintained an "invidious alliance" with the
9 opposing party. The attorney also stated that the justices had falsified the record on appeal to the
10 U.S. Supreme Court and suggested that their "unblemished" records were "undeserved."

11 In imposing discipline for these comments, the *Ramirez* court was persuaded by the
12 finding of the disciplinary board that the statements were false and that the attorney had not
13 conducted an independent investigation prior to making the statements. They were made with
14 reckless disregard for the truth, and therefore, the court concluded that the First Amendment did
15 not protect such statements.¹⁷ Although reaching a different result than *Yagman* and *Anderson*,
16 the fundamental rule in *Ramirez* is consistent in all these cases: false statements of fact recklessly
17 made are not entitled to Constitutional protection.

18 Turning to the case before us, the statements Respondent made about judicial officers fall
19 into three categories: first, accusing the judicial officer of committing a crime or other improper
20 judicial conduct; second, accusing the judicial officer of bias; and third, general criticisms or
21 ridicule of the judicial officer's character or demeanor.

22 1. Accusations of crimes or other improper judicial conduct.

23 _____
24 ¹⁷The court, however, was not unanimous. In a dissenting opinion, Justice Newman (with
25 Justices Bird and Tobriner concurring) strongly objected to the restriction on freedom of speech
26 inherent in the majority's finding of culpability and discipline. Justice Bird, in a second, sole
27 authored dissent, dismissed the impact of the offensive language by the attorney. She weighed
28 the costs of imposing restrictions on speech and commented: "I find the sensitivity of the court to
the sensibilities of judges quite touching, but if taken to its logical conclusion rather dangerous.
... One would hope for a kinder and more thoughtful world. However, censorship is not the best
method by which to achieve that end."

1 Respondent accused Commissioner Weiss of conducting an ex parte meeting with
2 opposing counsel. This accusation was made with no factual basis, other than the information
3 that his opposing counsel had an in-chambers ex parte hearing with Commissioner Weiss on
4 another matter immediately before the ex parte hearing for which Respondent was appearing.¹⁸
5 In addition, Commissioner Weiss specifically asked Respondent if he objected to such an ex
6 parte meeting taking place, and Respondent said he did not object. Clearly, to later complain of
7 improper actions by Commissioner Weiss given the facts available to Respondent was totally
8 inappropriate and a violation of his duties with respect to Section 6068(b). As such, the Office of
9 the Chief Trial Counsel has sustained its burden with respect to this allegation.

10 The references Commissioner Weiss made to “stealing” were obviously metaphorical in
11 nature, as in “I went to the car dealership and got a ‘steal’ on this car.” Respondent’s literal
12 interpretation of Commissioner Weiss’ comments, to the extent it was intended to be serious,
13 was, at best, silly. No one reading his comments would ever conclude that Commissioner Weiss
14 was advocating the commission of a crime. Since no serious reader would so interpret this
15 language in a literal manner, Respondent’s interpretation of this metaphor equally does not have
16 the effect of impugning this judicial officer. As such, this does not constitute a violation of
17 Section 6068(b).

18 Similarly, in appellate briefs, Respondent stated that Judge Kolostian was “trying to kill”
19 his client. (Exhibit 32 at p. 83.) While his attempt at the dramatic was clearly “over the top,” it
20 is also clear that this represents “killing” only in the figurative sense and not an actual accusation
21 of attempted murder. (See *National Ass’n of Letter Carriers v. Austin* (1974) 418 U.S. 264, 284
22 (use of word “traitor”) and *Greenbelt Coop. Publishing Ass’n v. Bresler* (1970) 398 U.S. 6, 14
23 (use of word “blackmail”).) As such, this statement does not rise to the level of disciplinable
24 misconduct.

25 In the same appellate brief, Respondent asserts that “not only is respondent court
26

27
28 ¹⁸At trial, Respondent admitted that he had no factual reason to believe that his matter
was discussed in this ex parte hearing in chambers.

1 reluctant, respondent court is arguably committing a felony.” (Exhibit 32 at p. 83.)

2 Respondent’s use of the word “arguably” removes this statement from the realm of “fact”
3 and deposits it into the area of “opinion.” No longer was Respondent stating a factual assertion.
4 By his very language, he was making an argument. Therefore, this statement does not constitute
5 a violation of Section 6068(b).

6 The NDC alleges that Respondent accused Commissioner Weiss of committing “perjury”
7 arising out of his filing of documents in the bankruptcy matter that contained that accusation.
8 While no such documents were received into evidence,¹⁹ Respondent admitted making this
9 statement in his response to Request for Admission 145.

10 As noted above, the burden of proving the falsity of such statements is on the Office of
11 the Chief Trial Counsel. (*In the Matter of Anderson, supra*, 3 Cal. State Bar Ct. Rptr. at p. 785.)
12 While this Court harbors no suspicions that the court that Respondent referred to actually
13 committed perjury, it is the burden of the Office of the Chief Trial Counsel to prove falsity and it
14 did not offer sufficient evidence at trial that the actions of that court did not rise to the level of
15 perjury.²⁰ Therefore, the reference by Respondent does not constitute a violation of Section
16 6068(b).

17 Respondent accused Judge Kolostian of having “ex parte communications with counsel
18 for both (sic) Mr. Warshauer, Petitioner and Tri Star.” There was no explanation given for this
19 statement of fact. Arguably, such a statement might not, in and of itself, be improper. However,
20 given the context, that is, a motion to disqualify a judge, it is clear that Respondent meant that
21 Judge Kolostian had breached one of the fundamental rules that govern judicial conduct.

22 This accusation is somewhat problematic. It differs from the situation in *Yagman* where
23
24

25 ¹⁹Exhibits 92 and 93 were not received into evidence.

26 ²⁰Respondent attempts to clarify his position in his Response to the NDC. In a rather
27 convoluted (and perhaps, incomprehensible) sentence, Respondent noted that he “specifically
28 denies ‘knowing the notice of ruling did [sic] issued [by Commissioner Weiss] did not constitute
perjury.’” (Response to NDC, paragraph 22.)

1 the attorney accused the judge of being anti-Semitic after listing specific factual assertions on
2 which he based his accusation. In *Yagman*, therefore, the court considered this an opinion based
3 upon only the facts presented. In such circumstances, it can be punished only if the stated facts
4 are themselves false. (55 F.3d at 1439.)

5 Here, the assertion that the court conducted improper ex parte conferences is not
6 surrounded by any explanation of its context. It is unlike *Yagman* in that we do not have a
7 universe of facts presented upon which the accusation is based. Rather, it is a naked accusation
8 that the court has arguably committed a serious violation of its duties. As such, if this statement
9 is false, there is no protection afforded by the First Amendment.

10 As above, however, the Office of the Chief Trial Counsel had the duty to prove that it was
11 not true. It failed to sustain this burden by clear and convincing evidence at trial. Therefore, this
12 allegation must fail.

13 On April 13, 2000, Respondent filed a motion to disqualify Judge Kolostian in which he
14 stated the following under penalty of perjury: "... Judge Kolostian has made a mockery of the
15 Family Code and has been derelict in his duties as a family law judicial officer." With respect to
16 the charge that Judge Kolostian has made a "mockery of the Family Code," such an allegation is,
17 at best, an opinion and not a proper subject of discipline.

18 The dereliction of duties charge could be somewhat less of an opinion, but when taken in
19 context, fails for the same reason as the "mockery" comment. For example, one may feel that a
20 judge is "derelict" by not applying "the proper" law (i.e., not agreeing with one party over the
21 other). On the other hand, a judge may be "derelict" by not attending court sessions or otherwise
22 not meeting the requirements of his or her office. It is clear from the context of Respondent's
23 remarks that he was referring to "dereliction" of the former type, not the latter. As such, the
24 statements are opinion, and not properly the subject of discipline.

25 2. Accusations of bias.

26 Respondent clearly felt that several judicial officers were biased against either him or his
27
28

1 client, and accordingly, he sought to disqualify these judicial officers.²¹ Often, this belief
2 manifested itself in dramatic hyperbole, obviously reflecting his utter frustration. On some
3 occasions, however, his expositions left the realm of hyperbole and approached violations of
4 Section 6068(b).

5 In one case, Respondent complained that opposing counsel acted as a “judicial officer” in
6 one of the courts in which he appeared, with the implication being that the judge of that court
7 was biased in his opposing counsel’s favor. Had this been raised in an appropriate manner before
8 the court, Respondent may have been able to explore the factual basis for his fears of bias.
9 Instead, in a appellate proceeding, Respondent relied on analogies to the Holocaust and argued
10 the following:

11 “Maria contends that the ‘problem’ has to do with the fact that Mark’s attorney sits as a
12 judicial officer of the department of respondent court in question. The solution for the
13 ‘problem’ was to kill Maria and her attorney so that the ‘problem’ would go away. This
14 ‘final solution’ was no less evil than other historical ‘final solutions’.”

15 (Exhibit 32 at p. 110.)

16 In other passages of the same brief, Respondent suggests that the court he is facing is
17 sending Maria away “to face annihilation” and “destruction.” (Exhibit 32 at p. 83.) All of these
18 references are either overly dramatic exaggerations or downright distasteful analogies, but none
19 rises to a level of a violation of Section 6068(b). Respondent was arguing in a manner that he
20 apparently felt would benefit his client’s position. He used references that do not paint our
21 judiciary in a pleasant light, but these references are simply opinion. There is little chance that
22 anyone reading these passages would literally interpret the words as describing a factual assertion
23 subject to examination as to truth or falsity. As such, as to these references, the Office of the
24 Chief Trial Counsel has failed to sustain its burden of a violation of Section 6068(b).

25
26 ²¹This Court does not find that Respondent had no right to challenge the bias of judicial
27 officers before which he appears. To the contrary, the law provides extensive protections in that
28 regard. (See Code of Civil Procedure section 170, *et seq.*) Rather, the Court finds that
Respondent had a concomitant obligation to comply with his duties under the Business and
Professions Code.

1 After Commissioner Weiss had the ex parte conference with Respondent's opposing
2 counsel referred to earlier in this Decision, Respondent filed a challenge pursuant to CCP section
3 170.3(c)(1). That matter was sent to Judge Thrasher in Orange County to rule on the motion for
4 disqualification because of bias. Judge Thrasher noted that Respondent claimed two reasons for
5 the claim of bias: first, the ruling Commissioner Weiss made; and second, the ex parte meeting
6 with opposing counsel on another matter. Judge Thrasher's decision notes that "[t]his Court
7 finds that no reasonable person aware of the facts in this case would entertain a doubt as to
8 Commissioner Weiss' ability to be impartial."

9 This Court agrees with Judge Thrasher. It is true that Respondent's assertion of bias was
10 based only on facts that a judge conducted an ex parte conference in chambers with opposing
11 counsel on another matter. However, as with the "anti-Semitic" statements in *Yagman*,
12 Respondent gave the "universe" of facts upon which he based his conclusion. Others reading
13 those facts would be free to reach a different conclusion. But Respondent is, nevertheless,
14 entitled to his opinion as to the appropriate conclusion to reach based on those facts. Therefore,
15 the statement is not a violation of Section 6068(b).

16 3. Criticisms of judicial officers' honesty, character or demeanor.

17 Repeatedly, Respondent made comments that could be construed as a challenge to
18 Commissioner Weiss' honesty. Many of these comments came from Respondent's evidentiary
19 objections to Commissioner Weiss' declaration opposing the disqualification motion. (Exhibit
20 1145.) In that document, Respondent objected that it was not established that Commissioner
21 Weiss "enjoys a reputation as a truth teller" or that he has integrity or a good reputation.

22 The context of these statements is important. They were made in a pleading challenging
23 whether the declaration of Commissioner Weiss was sufficient from an evidentiary standpoint.
24 As such, it may be argued that Respondent was simply objecting to the quality of Commissioner
25 Weiss' declaration, not ridiculing or criticizing him personally.

26 Unfortunately, Respondent did not simply stop at positing objections. Instead, he
27 attacked Commissioner Weiss by noting that he "could not even make it through a three-page
28 declaration without making an untrue statement (lying)" and by commenting that "[b]ased on the

1 improper and false testimony made by Commissioner Weiss, there is no reason to accept such
2 self serving testimony from Commissioner Weiss.”

3 Despite the inappropriateness of the above comments, however, once again they fail to
4 reach the level of conduct that is proscribed by Section 6068(b). Rather, they are statements of
5 opinion based on an assumed set of facts, analogous to the “anti-Semitic” comments made in
6 *Yagman, supra*. As such, the Office of the Chief Trial Counsel has failed to sustain its burden of
7 proof with respect to these comments.

8 In a motion filed before the bankruptcy court, Respondent commented that the
9 Commission on Judicial Performance is “... investigating fraud with respect to ... the conduct of
10 certain state court judicial officers presiding over the state court proceedings. Records from
11 these agencies will help Maria establish that the state court proceedings involve serious
12 misconduct of state court judicial officers.” (Exhibit 47, p. 6.) As noted earlier in this Decision,
13 no evidence was offered by Respondent to substantiate the claim that such an investigation
14 against any judicial officer was pending. However, equally important for this analysis, no
15 evidence was offered by the Office of the Chief Trial Counsel proving the falsity of this claim, as
16 was its burden. Therefore, the claim that this statement violates Section 6068(b) must fail.

17 The Office of the Chief Trial Counsel complains of references made to Commissioner
18 Weiss and Judge Kolostian as “Mr. Weiss” and “Mr. Kolostian” in that same motion filed with
19 the bankruptcy court. (Exhibit 47 at p. 5.) If these references were intentional and not just
20 typographical errors, then, at best, they represent simply snide commentary by a disgruntled
21 attorney. If Mr. Yagman is protected in calling a federal district court judge “dishonest,”
22 “ignorant,” “ill-tempered,” “buffoon,” “sub-standard human,” “right-wing fanatic,” “a bully,”
23 and “one of the worst judges in the United States,” it is hardly justified to discipline Respondent
24 for using the wrong honorific when referring to these two judges.²² As such, the conduct does
25 not violate his duties under Section 6068(b).

26 In making the above findings, this Court in no way condones the behavior of Respondent
27

28 ²²*Standing Committee v. Yagman* (9th Cir. 1995) 55 F.3d 1430 at p. 1440.

1 in the way he showed disdain for some of the judicial officers he faced. Maintaining respect for
2 the courts is an important component in our system of justice. However, it is fundamental that
3 we preserve the right of our citizens to speak freely about government officials, even if not done
4 in particularly good taste.

5 **iii. Count 4 – Section 6068(a) [Failure to Comply with Laws]**

6 In Count Four, the Office of the Chief Trial Counsel alleges that Respondent sued
7 attorney Robert A. Kahn without complying with California Civil Code section 1714.10.²³ In
8 summary, Civil Code section 1714.10 requires counsel to obtain a prior court order for cases

9
10 ²³Civil Code section 1714.10 reads as follows:

11 (a) No cause of action against an attorney for a civil conspiracy with his or her client arising from
12 any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's
13 representation of the client, shall be included in a complaint or other pleading unless the court
14 enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after
15 the court determines that the party seeking to file the pleading has established that there is a
16 reasonable probability that the party will prevail in the action. The court may allow the filing of a
17 pleading claiming liability based upon such a civil conspiracy following the filing of a verified
18 petition therefor accompanied by the proposed pleading and supporting affidavits stating the facts
19 upon which the liability is based. The court shall order service of the petition upon the party
20 against whom the action is proposed to be filed and permit that party to submit opposing
21 affidavits prior to making its determination. The filing of the petition, proposed pleading, and
22 accompanying affidavits shall toll the running of any applicable statute of limitations until the
23 final determination of the matter, which ruling, if favorable to the petitioning party, shall permit
24 the proposed pleading to be filed.

25 (b) Failure to obtain a court order where required by subdivision (a) shall be a defense to any
26 action for civil conspiracy filed in violation thereof. The defense shall be raised by the attorney
27 charged with civil conspiracy upon that attorney's first appearance by demurrer, motion to strike,
28 or such other motion or application as may be appropriate. Failure to timely raise the defense
shall constitute a waiver thereof.

(c) This section shall not apply to a cause of action against an attorney for a civil conspiracy with
his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) the
attorney's acts go beyond the performance of a professional duty to serve the client and involve a
conspiracy to violate a legal duty in furtherance of the attorney's financial gain.

(d) This section establishes a special proceeding of a civil nature. Any order made under
subdivision (a), (b), or (c) which determines the rights of a petitioner or an attorney against
whom a pleading has been or is proposed to be filed, shall be appealable as a final judgment in a
civil action.

(e) Subdivision (d) does not constitute a change in, but is declaratory of, the existing law.

1 alleging civil conspiracy by an attorney with his or her client. Respondent named Mr. Kahn as a
2 defendant in the abuse of process count of the Fraudulent Transfer Case.²⁴ However, Mr. Kahn
3 was not named in the Civil Conspiracy cause of action.

4 Because the Office of the Chief Trial Counsel felt that the fraudulent transfer count
5 necessarily implied an allegation against Mr. Kahn of knowledge and an agreement to participate
6 in the wrongdoing, it is argued that this is equivalent to a civil conspiracy. However, the essence
7 of Civil Code section 1714.10 is to limit allegations of conspiracies *between an attorney and*
8 *client*. The Fraudulent Transfer cause of action does not sufficiently allege such a civil
9 conspiracy, but rather simply that Mr. Kahn assisted in the transfer of certain assets from Horwitz
10 Designs to Tri Star and that Mr. Kahn had a conflict of interest. As such, there appears to be no
11 violation of Civil Code section 1714.10 and count four of the NDC must fail.

12 **iv. Count Five – Section 6068(c) [Maintaining an Unjust Action]**

13 It is alleged that Respondent wilfully violated section 6068(c) by seeking to depose
14 several superior court judges and commissioners in a federal bankruptcy matter for improper
15 purposes. After considering the matter, the Court finds that there is clear and convincing
16 evidence of a violation of section 6068(c).

17 Respondent filed a motion in the Bankruptcy Court under Federal Rules of Bankruptcy
18 Procedure, rule 2004, seeking an order allowing him to take the depositions of many people
19 either directly or indirectly involved in the cases he was litigating. Attached to the motion was
20 Exhibit B that listed approximately 40 individuals or entities he was seeking to depose. In that
21 list were several parties and their attorneys, Commissioners Weiss and Reichman, Judges
22 Kolostian, Yaffe, Bobb, Chavez, Krieger, Mohr, and the Commission on Judicial Performance.
23 Noticing a deposition, even of a judicial officer, is not, by itself, inappropriate. In certain
24

25 ²⁴While not alleged in this count of the NDC, Respondent also named David Hagen and
26 his law firm in the Fraudulent Transfer Case. In briefs submitted to this Court, however, the
27 Office of the Chief Trial Counsel also notes that the same violation allegedly occurred with Mr.
28 Hagen and his firm, as is claimed occurred with respect to Mr. Kahn. To the extent the Office of
the Chief Trial Counsel seeks to include as misconduct the naming of Mr. Hagen and his firm in
the lawsuit, the Court's analysis applies equally to both.

1 contexts, although exceedingly rare, deposing a judicial officer may clarify issues in an
2 appropriate case. Here, however, Respondent was not seeking to elucidate the issues presented
3 to these judicial officers and court employees. Rather, based on the evidence at trial, it is this
4 Court's view that he was either seeking to exact revenge for what he felt were incorrect rulings,
5 was attempting to intimidate these bench officers to influence their future decisions, or both of
6 the above. Neither of these reasons is an appropriate justification for setting these depositions.²⁵
7 Based on the above, the Office of the Chief Trial Counsel has sustained its burden of proving a
8 violation of Section 6068(c) with respect to the actions of Respondent in serving these deposition
9 notices.

10 **v. Count Six – Section 6068(c) [Maintaining an Unjust Action]**

11 The Office of the Chief Trial Counsel alleges that Respondent also maintained an unjust
12 action in filing and prosecuting the unmeritorious Abuse of Process Case against all parties and
13 their counsel who had previously been involved in the Horwitz cases. (Exhibit 72, pp. 38-50.)
14 There is clear and convincing evidence that, in so doing, Respondent wilfully violated section
15 6068(c).

16 As was described above, Judge Kolostian sustained a demurrer to the complaint in this
17 case. (Exhibit 51.) In his ruling on September 8, 2000, Judge Kolostian stated that it was
18 "impossible to file this action" and that it "was a totally frivolous lawsuit and [the demurrer]
19 must be sustained without leave to amend." (Exhibit 51, p. 11.) The court's civil findings,
20 although made under a preponderance of the evidence standard, are entitled to a strong
21 presumption of validity before the State Bar Court if, as here, they are supported by substantial
22 evidence. *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.) As
23 such, the Court finds that the Office of the Chief Trial Counsel has sustained its burden of proof
24 of a violation of Section 6068(c).

25
26 ²⁵Respondent claimed at trial that he never actually intended to take the depositions, but
27 rather, simply obtain documents. The deposition notices and Respondent's actual behavior force
28 this Court to a contrary conclusion. Had that been his intent, he could have simply served a
subpoena duces tecum on the custodian of records for the appropriate court. He did not do so, for
the very reason that he wanted to effect the result(s) set forth above.

1 **vi. Count Seven – Rule of Professional Conduct 3-200(A) [Malicious**
2 **Prosecution]**

3 The Office of the Chief Trial Counsel asserts that Respondent violated rule 3-200(A) of
4 the Rules of Professional Conduct (“RPC”) by: (1) naming Mr. Kahn in the Fraudulent Transfer
5 Case with a purpose of forcing his withdrawal as attorney for parties in the matter; and (2)
6 bringing the unmeritorious Abuse of Process Case against all parties and their counsel who had
7 previously been involved in the Horwitz cases. The Office of the Chief Trial Counsel can prove
8 a violation of RPC 3-200(A) if it shows that Respondent acted as an attorney for Maria for the
9 purpose of bringing an action or asserting a position in litigation without probable cause and to
10 harass or maliciously injure another.

11 There is clear and convincing evidence that Respondent wilfully violated RPC 3-200(A)
12 as to naming Mr. Kahn in litigation. The allegation regarding the Abuse of Process case is
13 duplicative of the section 6068(c) charge of which Respondent has been found culpable. (*In the*
14 *Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr., *supra*, at p. 118.) There were
15 other instances of similar conduct whose ethical propriety was litigated during these disciplinary
16 proceedings that will also be addressed in this section. As to those matters, if culpability of
17 violating section RPC 3-200(A) is found, it will be considered as uncharged misconduct, an
18 aggravating circumstance pursuant to standard 1.2(b)(iii).

19 A review of Respondent’s actions with respect to other attorneys, when combined with
20 his attempts to remove judicial officers, reveals a distinct plan and scheme to use judicial
21 procedures to harass others into submitting to his position in the litigation. On several occasions,
22 Respondent sought to eliminate his adversaries when they disagreed with him. He did it to
23 judicial officers and to attorneys, as discussed above. In August 1999, he named Mr. Kahn in the
24 Fraudulent Transfer Case with the goal of intimidating him and eliminating him from the
25 litigation.²⁶ Shortly after being served with the complaint, Mr. Kahn withdrew from the
26

27
28 ²⁶As noted above, Respondent also named David Hagen (Mark’s bankruptcy attorney)
and Steven Dem (the Dems’ attorney)

1 representation of one of the parties to the litigation. Armed with this newly-found power, in May
2 2000, Respondent sought to disqualify Mr. Steele, the attorney replacing Mr. Kahn. That was
3 denied. He then filed the Abuse of Process Case against Mr. Steele. Mr. Steele still failed to
4 withdraw. Undaunted, Respondent sought to disqualify Mr. Steele a second time. In March
5 2002, that, too, was denied. It is significant that Judge Black, in denying the second motion,
6 noted that the motion had already been brought before Judge Kolostian and had been denied.
7 (Exhibit 61, at pp. 2-3.)

8 This Court finds that Respondent sued Mr. Kahn for the purpose of improperly removing
9 him from the litigation, with the intent of thereby gaining a strategic advantage in the litigation.
10 As such, the Office of the Chief Trial Counsel has met its burden of proof with respect to the
11 violation of Section 3-200(A). He also attempted, without success, to do the same with other
12 attorneys. This will be considered as an aggravating factor below.

13 **vii. Count Eight – Section 6106 [Moral Turpitude]**

14 Respondent has been charged with wilfully violating section 6106 by: (1) making
15 misrepresentations to the Court of Appeal; (2) misleading trial judicial officers; and
16 (3) bringing frivolous lawsuits and motions against judicial officers and attorneys representing
17 parties in the Horwitz cases.

18 The first item – misrepresentations to the Court of Appeal – must fail for lack of
19 evidence. The Office of the Chief Trial Counsel failed to prove, by clear and convincing
20 evidence, that Respondent made misrepresentations of fact to the Court of Appeal. Rather,
21 Respondent’s hyperbole was simply his opinion of the judges whose orders he was appealing.

22 The second item has already been addressed as a violation of section 6068(d). The last
23 allegation has been addressed as a violation of section 6068(c). It is generally inappropriate to
24 find redundant charged allegations. The appropriate level of discipline for an act of misconduct
25 does not depend on how many rules of professional conduct or statutes proscribe the misconduct.
26 “There is ‘little, if any, purpose served by duplicative allegations of misconduct.’” (*In the Matter*
27 *of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) Accordingly, this charge is
28 dismissed with prejudice. (See also, *In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar

1 Ct. Rptr. 446, 457.)

2 **5. Level of Discipline**

3 **A. Mitigation**

4 Respondent bears the burden of proving mitigating circumstances by clear and
5 convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. For Atty. Sanctions for Prof.
6 Misconduct, std. 1.2(e) (“Standards”).)

7 Respondent had approximately 12 years of practice without prior discipline at the time the
8 misconduct commenced. (Standard 1.2(e)(i).)

9 Standard 1.2(e)(ii) allows for mitigation for facts indicating the member’s good faith.
10 Whether Respondent can rely on this ground for mitigation is somewhat problematic. The Court
11 is impressed by Respondent’s dedication to Maria, his client.²⁷ When he learned of what
12 appeared to be fraudulent transfers of assets by Mark, seemingly to avoid spousal support
13 obligations, he began to employ his considerable intelligence and creativity to attempting to
14 unwind the transactions and bring them back into the marital estate. In the face of extraordinary
15 opposition, Respondent fought for Maria’s rights and sought to protect her interest in the divorce.
16 Respondent was genuinely infuriated by what he felt were unfair tactics employed by Mark, his
17 father, and their associates to attempt to deprive Maria of her community property rights. As an
18 example, he saw Mark take a job working for his new wife and watched as Mark’s income
19 purportedly “declined” to \$48,000 per year, down from \$284,000 a few years earlier. He also
20 saw Mark’s father, Leo, file the Bank Indemnity Case against only Maria, despite the fact that
21 both Mark and Maria were jointly liable on the alleged debt, and further, that Mark and Leo were
22 the principal officers in the company, not Maria. Respondent felt, perhaps justifiably so, that this
23 action was simply an attempt to “squeeze” Maria into settling the Dissolution Case. These
24 examples of tactics employed by the opposition galvanized Respondent’s intent to fight back and
25 win the case for his client. His motives were honorable. His tactics to accomplish that goal were
26 not.

27
28 ²⁷As noted above, Maria was an immigrant who, prior to her marriage to Mark Horwitz,
worked as his maid. She had minimal education.

1 In order to establish good faith as a mitigating circumstance, an attorney must prove that
2 his or her beliefs were both honestly held and reasonable. (*In the Matter of Rose* (Review Dept.
3 1997) 3 Cal. State Bar Ct. Rptr. 646, 653.) The problematic nature of giving Respondent
4 mitigation credit for good faith derives from two sources. First, Respondent was arguably doing
5 only what we expect of all attorneys – to zealously represent their clients’ interests. Second, his
6 good faith motives rather quickly evolved into actions that can only be considered as bad faith
7 misuses of the court system. Under these circumstances, the Court cannot grant Respondent
8 mitigation credit under Standard 1.2(e)(ii).

9 Respondent presented several witnesses to attest to his good character. Such evidence is
10 relevant in mitigation. Standard 1.2(vi). The witnesses were in two general categories: clients
11 for whom Respondent had provided *pro bono* services; and attorneys who Respondent had
12 worked with or opposed.

13 Respondent had represented Kenneth Maurice Washington in a family law dispute
14 between 1997 and 2001. He had just been laid off from work and had no money to pay for legal
15 fees. Respondent appeared in court on his behalf and otherwise assisted him. As a result,
16 Respondent completely resolved his problem. Respondent never sent him a bill, but Mr.
17 Washington did send Respondent three gift certificates as a token of his appreciation. It is
18 unclear the exact extent of Mr. Washington’s knowledge as to these disciplinary proceedings.

19 James H. Walker and Mary T. F. Altman were neighbors of Respondent. Respondent had
20 voluntarily helped Mr. Walker with a title dispute concerning his property. Respondent’s efforts
21 resulted in a very favorable result with Mr. Walker’s title company and the previous owner. In
22 the witness’ words, “The matter was handled very elegantly.” It is unclear the exact extent of
23 Mr. Walker’s knowledge of these disciplinary proceedings.

24 Respondent represented his own homeowners’ association in a matter involving the
25 County planning department. Ms. Altman was the contact with the association and was
26 overwhelmingly pleased at the services of Respondent. Specifically, she commented on the 15-
27 20 meetings he attended, including several before the Board of Supervisors and individually with
28 Mike Antonovich, a member of the Board of Supervisors for the County of Los Angeles. At all

1 of these meetings, Respondent was the primary speaker on behalf of the association. She spoke
2 passionately about his commitment to his client and his tenacity in fighting for the association's
3 rights. She explained that he took their case and pursued it "full throttle." She described
4 Respondent as having the "highest moral character" and said that throughout their dispute, he
5 was the one "wearing the white hat." Respondent did not charge the association. The
6 association gave him a gift basket and \$800 for his expenses. She testified that she did not know
7 much about this disciplinary proceeding.

8 Jean Jojola was a client of Respondent in a family law matter in 1999. She could not
9 afford to pay Respondent, so he agreed to work *pro bono*. Ms. Jojola was facing the loss of her
10 child as a result of being served with child custody papers by the child's father. Within one week
11 of Respondent's participation, the husband withdrew his request. Respondent has continued to
12 represent her in ongoing support issues. Ms. Jojola credits Respondent's efforts as the reason she
13 still has her son.

14 Respondent also represented Linda Janelle Montgomery in a Dependency Court case.
15 Her ex-husband had been accused of sexually abusing her daughter, so she sought a divorce.
16 When she offered to pay Respondent his fees, Respondent told her "to save her money to get an
17 apartment." Respondent has been to court on her behalf about 12 times. Ms. Montgomery stated
18 that "Randy is the only person that stayed with us and protected us" and was the "only person
19 who can make my ex stop bothering us." When asked what she knew about the disciplinary
20 proceeding, she stated that it was her understanding that "Randy tried too hard to help" Ms.
21 Horwitz.

22 Steven Kaplan is a lawyer who testified on behalf of Respondent. He has been in practice
23 since 1988, and before that, was a certified public accountant. He met Respondent while a
24 student at Claremont McKenna College. Mr. Kaplan worked with Respondent on several cases,
25 including Maria's case. He sees Respondent socially once or twice a year.

26 Mr. Kaplan considers Respondent very intelligent and a good lawyer. He feels that
27 Respondent cares about his clients and is willing to continue to represent clients, even where
28 there is no chance of getting paid. He has never known Respondent to be dishonest in either his

1 personal or professional life. In general, Mr. Kaplan thinks Respondent has outstanding ethical
2 standards. He and Respondent discussed this disciplinary action approximately three weeks
3 before his testimony.

4 Neil Freedman was admitted to the practice of law 32 years ago. He is a partner in a 28-
5 member firm in Century City. In 1999, he won the Century City Business Litigator of the Year
6 Award. He has opposed Respondent in two cases, and through that introduction, has gotten to
7 know Respondent. According to this witness, Respondent has always been "very civil" and has
8 shown himself to this witness to be a "fine lawyer" with "excellent skills." Mr. Freedman has
9 referred Respondent several clients. He considers Respondent a dedicated father, spending a lot
10 of time with his children. It is not clear the extent of Mr. Freedman's knowledge of the
11 accusations in this disciplinary matter. Without diminishing the value of the other witnesses
12 presented on behalf of Respondent, Mr. Freedman's testimony was particularly informative.

13 David M. Livingston was admitted to the Bar in 1999. He met Respondent in 2001 as an
14 opposing counsel in a case. He and Respondent vigorously litigated that matter but were always
15 able to communicate well with each other. He also reported on another family law matter that
16 Respondent had worked on involving an indigent client. The opposing counsel was a large
17 Century City law firm. Respondent gave the client \$500 to purchase a car and defended her
18 without charging a fee.

19 Mr. Livingston concluded by saying that Respondent was a "great attorney" with the
20 highest personal and professional moral and ethical standing. It is not clear the extent to which
21 Mr. Livingston was aware of these disciplinary charges.

22 Joaquin Talleda was a past president of the Cuban American Bar Association. He was
23 admitted to the Bar in 1985. He first met Respondent in 1990 or 1991, and has referred cases to
24 Respondent since that time. Primarily, their relationship is through the telephone, but he has met
25 with him personally on four to five occasions.

26 Mr. Talleda stated that Respondent's technical skills are excellent, that he aggressively
27 fights for his clients' rights and that he has excellent moral character. Respondent frequently
28 handles some of the witness' indigent clients. Mr. Talleda stated that Respondent takes these

1 cases even if it is clear that the clients cannot afford to pay him. He has never known
2 Respondent to threaten anyone. Mr. Talleda was aware of the nature of the charges against
3 Respondent.

4 As noted above, with respect to some of these witnesses, there was no evidence that they
5 were told the details of Respondent's alleged misconduct. To the extent these witnesses were
6 unaware of these charges, the weight given to their testimony is thereby limited. However,
7 several were members of the legal community who were aware of the nature of the misconduct,
8 and that fact is given great weight in evaluating their testimony. (Standard 1.2(e)(vi); Cf.
9 *Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.)

10 Further, Respondent's pro bono work merits mitigation credit, although, arguably, the
11 work done for his own homeowner's association may have been beneficial to him. (*In the Matter*
12 *of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 729.)

13 **B. Factors in Aggravation**

14 Respondent engaged in multiple acts of wrongdoing. (Standard 1.2(b)(ii).)

15 Respondent's misconduct was surrounded by other violations of the ethical rules.
16 (Standard 1.2(b)(iii).) As fully described above, Respondent engaged in misconduct that was
17 uncharged but violated section 6068(b) and RPC 3-200(A).

18 Respondent's misconduct caused significant harm to his client and the public. (Standard
19 1.2(b)(iv).) Maria Horwitz was sanctioned jointly with Respondent several times as a result of
20 Respondent's conduct. The sanctions totaled \$21,652. In addition, she suffered terminating
21 sanctions in the Bank Indemnity case because of Respondent's failure to cooperate in discovery.
22 Further, other parties had to replace counsel because Respondent forced counsel's
23 disqualification by naming them as defendants in lawsuits.

24 **C. Discussion**

25 The primary purposes of attorney disciplinary proceedings are the protection of the
26 public, the courts and the legal profession; the maintenance of high professional standards by
27 attorneys; and the preservation of public confidence in the legal profession. (Standard 1.3;
28 *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

1 Standard 1.6(b) provides that the appropriate sanction for the misconduct must be
2 balanced with any mitigating or aggravating circumstances, with due regard for the purposes of
3 imposing discipline. If two or more acts of professional misconduct are found in a single
4 disciplinary proceeding and different sanctions are prescribed by the standards for those acts, the
5 sanction recommended shall be the most severe. Moreover, discipline is progressive. (Standard
6 1.7(b).) The standards, however, are only guidelines and do not mandate the discipline to be
7 imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-
8 251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid
9 standards." (*Id.* at p. 251.)

10 In this instance, the standards provide for the imposition of discipline ranging from
11 reproof to disbarment. (Standards 2.6(a) and (b); and 2.10.) The most severe sanction is found
12 at standard 2.6 which recommends suspension or disbarment for violations of sections 6068 and
13 6103, among others, depending on the gravity of the offense or harm, if any to the victim, with
14 due regard to the purposes of imposing discipline.

15 OCTC seeks actual suspension of two years. Respondent avers that the level of discipline
16 ranges from a reproof to 90 days actual suspension. Having considered the facts and the law,
17 the Court recommends, among other things, actual suspension of six months and probation on
18 conditions including restitution to Maria Horwitz as sufficient for the protection of the public.

19 Respondent herein has been found culpable of violating sections 6103, 6068(c) and (d)
20 and RPC 3-200(A). Aggravating factors include harm to a client and the public, multiple acts of
21 misconduct, and uncharged acts of misconduct violating RPC 3-200(A) and section 6068(b).
22 Mitigating factors, which were afforded varying weights, include no prior discipline, pro bono
23 work and good character.

24 This Court believes that "significant actual suspension is in order to impress on
25 respondent that advocacy is not the sole role of a lawyer. ... (Citations omitted) ... 'When an
26 attorney, in his zeal ..., assumes a position inimical to the interests of his client, he violates his
27 duty of fidelity to his client. (Citations omitted.)' The failure of respondent to understand this
28 requirement ... necessitates significant discipline." (Cf. *In the Matter of Yagman, supra*, 3 Cal.

1 State Bar Ct. Rptr. at p. 808.)²⁸ In consideration of the nature and extent of the misconduct, the
2 aggravating and mitigating circumstances and the concern for preventing recidivism, the Court
3 recommends, among other things, actual suspension of six months and specified probation
4 conditions, including restitution, as sufficient to protect the public, the courts and the legal
5 profession from further transgressions of this nature by this Respondent.

6 In determining its recommended degree of discipline, the Court considered cases such as
7 *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, *In the Matter of Varakin* (Review Dept. 1994) 3
8 Cal. State Bar Ct. Rptr. 179, *In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct.
9 Rptr. 446 and *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112.

10 In *Sorensen*, Sorensen vindictively reacted to a \$ 45 billing dispute with a court reporter
11 by filing a complaint for fraud which sought \$ 14,000 in punitive damages and which required
12 the reporter to incur legal fees and expenses of about \$ 4,375. (*Sorensen v. State Bar, supra*, 52
13 Cal.3d at pp. 1038-1040, 1045.) Declaring that the discipline for this abuse of the judicial process
14 had to reflect the harm to the reporter, provide assurance to the public and the bar that such
15 misconduct would not be tolerated, and reflect Sorensen's lack of insight and remorse, the
16 Supreme Court imposed a one-year stayed suspension and two-year probation, conditioned on
17 restitution and a thirty-day actual suspension. (*Id.* at pp. 1044-1045.) *Sorensen* is distinguishable
18 in that Respondent herein engaged in more extensive misconduct.

19 In *Scott*, the attorney filed and pursued a series of four related lawsuits. After each action
20 was resolved unfavorably to respondent, he filed the next. His filing and pursuing frivolous
21 actions in bad faith and for a corrupt motive, as a whole, was found to violate sections 6068(c)
22 and (g). Although the hearing judge found that Respondent also violated section 6106, the
23 Review Department concluded that any such violation would be duplicative of the above
24 violations and would not change the determination of the appropriate discipline. In mitigation,
25 Respondent had no prior record of discipline in eight years of practice before the misconduct and
26 three years after the misconduct and before the State Bar trial. Respondent's evidence of good

27
28 ²⁸Although, initially, Respondent's conduct was not intended to be adverse to Ms.
Horwitz's interests, in the end, it had that effect.

1 character and community service was discounted because the character witnesses were not aware
2 of the full extent of respondent's misconduct. In aggravation, Respondent's misconduct harmed
3 Judge Ross and the administration of justice and he showed no recognition of his wrongdoing.
4 Discipline included two years stayed suspension, two years probation and 60 days actual
5 suspension. This case is distinguishable from the present case in that the misconduct and the
6 aggravating factors herein are significantly greater than those in *Scott*.

7 In *Lais*, a two-year actual suspension was imposed for violation of section 6068(c) in two
8 client matters as well as for violation of section 6106. In a marital settlement dispute,
9 Respondent Lais, a certified family law specialist, filed a patently frivolous appeal and, in a child
10 custody matter, he lied to police and misled a judge in a complaint. In mitigation, his lengthy
11 blemish-free practice, community service and charitable activities were considered as well as his
12 efforts to correct the problems surrounding the disciplinary matters. The Review Department
13 noted, however, that his experience as a family law specialist and as a State Bar investigation
14 referee should have aided him to avoid the misconduct. In aggravation, his one prior record of
15 discipline was given diminished weight because the misconduct was approximately
16 contemporaneous with the misconduct in question. Also considered were multiple acts of
17 misconduct, lack of insight, failure to comply timely with discovery requests and to file his
18 pretrial statement in the disciplinary proceeding and presenting misleading evidence in
19 mitigation. The Review Department was concerned about the similarity of Respondent Lais'
20 misconduct in the present and prior disciplinary matters, noting that it could not be attributed to
21 inexperience or "simple zealousness" and there was nothing in the record to ascribe it to any
22 health or other such condition. (*Id.* at p. 123.) It was also concerned about the possibility of
23 recidivism. *Lais* is distinguishable from the present case because, in *Lais*, the attorney was found
24 culpable of committing acts of moral turpitude and there were significantly more aggravating
25 circumstances present.

26 In *Varakin*, the attorney repeatedly filed frivolous motions and appeals in four different
27 cases for twelve years for the purpose of delay and harassment of his ex-wife and others. He
28 continued this pattern despite being sanctioned numerous times. Varakin greatly harmed the

1 individuals involved and the administration of justice, lacked insight into his misconduct,
2 expressed no remorse and refused to mend his ways. He was disbarred. The Office of the Chief
3 Trial Counsel correctly recognized that the present case does not rise to the level of *Varakin*.

4 The Supreme Court views "restitution a necessary condition of probation designed to
5 effectuate [Respondent's] rehabilitation and to protect the public from similar future misconduct.
6 ... [W]e believe the same protective and rehabilitative principles apply in the case of party who
7 has been forced to incur legal fees as a result of an attorney's violation of section 6068,
8 subdivisions (c) and (g)...private persons have incurred specific out-of-pocket losses directly
9 resulting from attorney misconduct. Restitution of these amounts emphasizes the professional
10 responsibility of lawyers to account for their misconduct, and thereby serves to both protect the
11 public and instill public confidence in the bar." (*Sorensen v. State Bar, supra*, 52 Cal.3d at pp.
12 1044-1045.) Accordingly, this Court recommends that Respondent be responsible for paying all
13 of the sanctions ordered against him and Ms. Horwitz, jointly and severally, or against Ms.
14 Howitz, individually, so that she is not exposed to liability for them. To the extent that she has
15 paid all or some of the sanctions, it is recommended that he make restitution to her, with interest,
16 as set forth below.

17 **6. DISCIPLINE RECOMMENDATION**

18 IT IS HEREBY RECOMMENDED that Respondent Randy E. Bendel be suspended from
19 the practice of law for two years and until he pays the court-ordered sanctions imposed on him
20 individually (if any), on him and Maria Horwitz, jointly and severally, and on Maria Horwitz,
21 individually (collectively, "the Sanctions") totaling \$21,652; and until he makes restitution to
22 Maria Horwitz (or the Client Security Fund, if appropriate) to the extent she has paid any portion
23 of the Sanctions, plus 10% interest per annum from the date(s) she made such payment(s). It is
24 also recommended that he shall also remain suspended until he furnishes satisfactory proof of
25 such payments to the State Bar Office of Probation; and until he provides proof satisfactory to the
26 State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the
27 general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional
28 Misconduct. It is further recommended that execution of that suspension be stayed, and that he

1 be placed on probation for two years, with the following conditions:

2 1. Respondent shall be actually suspended from the practice of law for the first six
3 months of probation;

4 2. During the period of probation, Respondent shall pay all of the Sanctions, in the total
5 amount of \$21,652. To the extent Maria Horwitz has paid any portion of the Sanctions,
6 Respondent shall, during the period of probation, make restitution to Maria Horwitz (or the
7 Client Security Fund, if appropriate) plus 10% interest per annum from the date(s) she made such
8 payment(s). In each quarterly report (condition number 5 below), Respondent shall state whether
9 he has paid any of the Sanctions to the court and whether he has made any restitution payments
10 to Ms. Horwitz. As to each such payment, he shall set forth the date and amount paid, to whom
11 it was paid and provide proof of such payment;

12 3. During the period of probation, Respondent shall comply with the State Bar Act and
13 the Rules of Professional Conduct;

14 4. Within ten (10) days of any change, Respondent shall report to the Membership
15 Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, and
16 to the Probation Unit, all changes of information, including current office address and telephone
17 number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed
18 by section 6002.1 of the Business and Professions Code;

19 5. Respondent shall submit written quarterly reports to the State Bar Office of Probation
20 on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty
21 of perjury, Respondent shall state whether he has complied with the State Bar Act, the Rules of
22 Professional Conduct and all conditions of probation during the preceding calendar quarter. If
23 the first report will cover less than thirty (30) days, that report shall be submitted on the next
24 following quarter date, and cover the extended period.

25 In addition to all quarterly reports, a final report, containing the same information, is due
26 no earlier than twenty (20) days before the last day of the probation period and no later than the
27 last day of the probation period;

28 6. Subject to the assertion of applicable privileges, Respondent shall answer fully,

1 promptly, and truthfully, any inquiries of the State Bar Office of Probation and any probation
2 monitor assigned under these conditions which are directed to Respondent personally or in
3 writing, relating to whether he is complying or has complied with the conditions contained
4 herein;

5 7. Within one (1) year of the effective date of the discipline herein, Respondent shall
6 provide to the State Bar Office of Probation satisfactory proof of attendance at a session of the
7 Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco,
8 California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and
9 passage of the test given at the end of that session. Arrangements to attend Ethics School must
10 be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is
11 separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent
12 shall not receive MCLE credit for attending Ethics School (Rule 3201, Rules Proc. State Bar.).

13 8. The period of probation shall commence on the effective date of the order of the
14 Supreme Court imposing discipline in this matter.

15 9. At the expiration of the period of this probation, if Respondent has complied with all
16 the terms of probation, the order of the Supreme Court suspending him from the practice of law
17 for two years and until he pays the Sanctions totaling \$21,652, and until he makes restitution to
18 Maria Horwitz (or the Client Security Fund, if appropriate) to the extent she has paid the
19 Sanctions, plus 10% interest per annum from the date(s) she paid any portion of the Sanctions;
20 and until he furnishes satisfactory proof of such payments to the State Bar Office of Probation;
21 and until he complies with standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional
22 Misconduct, shall be satisfied and that suspension shall be terminated.

23 It is further recommended that Respondent take and pass the Multistate Professional
24 Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners,
25 Multistate Professional Responsibility Examination Application Department, P.O. Box 4001,
26 Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the State Bar
27 Office of Probation within one year of the effective date of discipline herein. Failure to pass the
28 Multistate Professional Responsibility Examination within the specified time results in actual

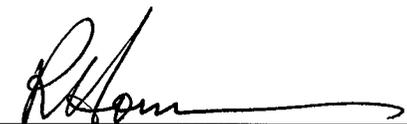
1 suspension by the Review Department, without further hearing, until passage. But see rule
2 951(b), California Rules of Court, and rule 321(a)(1) and (3), Rules of Procedure of the State
3 Bar.

4 It is further recommended that Respondent be ordered to comply with rule 955, California
5 Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule, within
6 thirty (30) and forty (40) days, respectively, from the effective date of the Supreme Court order
7 herein. Wilful failure to comply with the provisions of rule 955 may result in revocation of
8 probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal
9 conviction.

10 **7. COSTS**

11 The Court recommends that costs be awarded to the State Bar pursuant to Business and
12 Professions Code section 6086.10 and that those costs be payable in accordance with section
13 6140.7.

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15
16 Dated: May 19, 2004.

17 
18 _____
19 **RICHARD A. HONN**
20 Judge of the State Bar Court
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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 Los Angeles, on May 19, 2004, I deposited a true copy of the following document(s):

DECISION, filed May 19, 2004

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

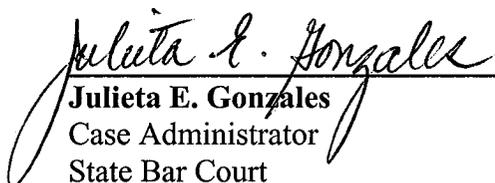
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

RANDY E BENDEL ESQ
21860 BURBANK BLVD #380
WOODLAND HILLS, CA 91367-6493

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

Charles T. Calix and
Kimberly G. Anderson, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **May 19, 2004**.



Julieta E. Gonzales
Case Administrator
State Bar Court