

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

In the Matter of	)	Case No. 00-O-13443; [01-O-00330;
	)	01-O-00534; 01-O-00760;
RICHARD ROGER HURLEY,	)	01-O-01536]; 01-O-04703;
	)	02-O-11058; 00-O-11302;
Member No. 183440,	)	02-O-13821; 02-O-15482;
	)	02-O-15981
A Member of the State Bar.)	
)	
	)	DECISION; ORDER REGARDING
	)	INVOLUNTARY INACTIVE
	)	ENROLLMENT; AND ORDER FILING
	)	AND SEALING CERTAIN DOCUMENTS

I. INTRODUCTION

This consolidated disciplinary proceeding involving respondent Richard Roger Hurley (“respondent”) arises out of several client matters and involves several acts of misconduct including the failure to perform legal services with competence, improper withdrawal, the failure to return unearned fees, trust account violations, and the misappropriation of client funds. In September 2003, respondent and the Office of the Chief Trial Counsel of the State Bar of California (“State Bar”) entered into a Stipulation Re Facts and Conclusions of Law (“stipulation”) in this consolidated proceeding. By separate order executed February 24, 2004, the court approved the stipulation nunc pro tunc from January 20, 2004, the date respondent executed a Contract and Waiver for Participation in the State Bar Court’s Pilot Program for Respondents with Substance Abuse or Mental Health Issues (hereinafter referred to as “Alternative Discipline Program” or “ADP”) and was accepted into the ADP. As set forth in greater detail below, respondent was terminated from the State Bar Court’s ADP based upon respondent’s termination from the State Bar’s Lawyer Assistance Program (“LAP”).

In light of respondent’s misconduct as set forth herein, the court recommends that

respondent be suspended from the practice of law in the State of California for a period of three (3) years and until (a) he complies with the requirements of standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct; and (b) he provides satisfactory proof to the Office of Probation that he has made specified restitution, that execution of said suspension be stayed, and that respondent be placed on probation for a period of five (5) years on certain conditions including that he be actually suspended from the practice of law in the State of California for the first two (2) years of the period of probation and until he (a) complies with the requirements of standard 1.4(c)(ii) and (b) provides satisfactory proof to the Office of Probation that he has made specified restitution.

II. SIGNIFICANT PROCEDURAL HISTORY

On February 7, 2002, the State Bar filed a Notice of Disciplinary Charges (“NDC”) against respondent in Case No. 00-O-13443 [01-O-00330; 01-O-00534; 01-O-00760; 01-O-01536].

On March 27, 2002, respondent filed a response to the NDC in Case No. 00-O-13443, etc.

Case No. 00-O-13443, etc. was originally assigned to the Honorable Robert M. Talcott.¹

On June 26, 2002, a NDC was filed in Case No. 01-O-04703. This matter was also assigned to the Honorable Robert M. Talcott.

On or before August 9, 2002, respondent contacted the LAP to assist him with his substance abuse and mental health issues.

On October 18, 2002, respondent filed an answer to the NDC in Case No. 01-O-04703.

Pursuant to a Status Conference Order filed on November 19, 2002, respondent was referred to the ADP Judge and Case Nos. 00-O-13443, etc. and 01-O-04703 were consolidated.

On December 20, 2002, respondent signed a Participation Agreement with the LAP.

On June 25, 2003, respondent executed an amendment to his LAP Participation Agreement.

¹Judge Talcott’s judicial appointment terminated on November 1, 2006.

In September 2003, respondent and the State Bar entered into a stipulation in this proceeding. In addition to the above-mentioned matters, the stipulation also included the following investigation matters: 00-O-11302; 02-O-11058; 02-O-13821; 02-O-15482; 02-O-15981.

LAP Participation Reports dated August 4, September 18 and December 9, 2003, reflect that respondent was in compliance with the terms of his LAP Participation Agreement.

On January 15, 2004, respondent executed a Contract and Waiver for Participation in the State Bar Court's ADP.

On January 20, 2004, the following documents were lodged with the court: (1) the parties' stipulation executed in September 2003; (2) the court's Decision Re Alternative Recommendations for Degree of Discipline; and (3) the executed Contract and Waiver for Participation in the State Bar Court's ADP. On that same date, respondent was accepted as a participant in the State Bar Court's ADP.

On February 26, 2004, the court lodged an order approving the parties' stipulation as to facts and conclusions of law nunc pro tunc from January 20, 2004.

LAP Participation Reports dated May 4, September 14, October 6, October 14, November 1, and December 3, 2004, reflect that respondent was not in compliance with the terms of his LAP Participation Agreement.

On November 9 and December 9, 2004, the court issued an order following the ADP status conference held on each date that reflected that respondent was not in compliance with conditions of the ADP and the LAP.

On December 21, 2004, respondent executed an amendment to his LAP Participation Agreement.

LAP Participation Reports dated February 17, April 27, and September 21, 2005, reflect that respondent was in compliance with the terms of his LAP Participation Agreement.

LAP Participation Reports dated December 9, 2005, and January 3, 2006, reflect that respondent was not in compliance with the terms of his LAP Participation Agreement.

On January 5, 2006, respondent executed an amendment to his LAP Participation

Agreement. LAP Participation Reports dated January 20 and February 17, 2006, reflect that respondent was not in compliance with the terms of his LAP Participation Agreement.

LAP Participation Reports dated March 27 and 28, 2006, reflect that respondent was in compliance with the terms of his LAP Participation Agreement.

LAP Participation Reports dated May 5 and June 30, 2006, reflect that respondent was not in compliance with the terms of his LAP Participation Agreement.

On July 7, 2006, the State Bar filed a NDC against respondent in Case No. 05-O-04823. This matter was subsequently consolidated with State Bar Court Case No. 00-O-13443, etc.

On July 26, 2006, respondent executed an amendment to his LAP Participation Plan.

A LAP Report dated August 1, 2006, reflects that respondent was not in compliance with the terms of his LAP Participation Agreement.

An order following an ADP status conference held on August 7, 2006, reflects that respondent was not in compliance with conditions of the ADP.

LAP Reports dated August 31, September 21 and September 27, 2006, reflect that respondent was not in compliance with the terms of his LAP Participation Agreement.

An order following an ADP status conference held on September 27, 2006, reflects that respondent was not in compliance with conditions of the ADP.

Effective September 28, 2006, respondent's participation in the LAP was terminated for failing to comply with a recommendation of the LAP Evaluation Committee.

On October 4, 2006, the court filed an order involuntarily enrolling respondent as an inactive member of the State Bar of California pursuant to Business and Professions Code section 6233 until further order of the court in light of respondent's violation of the terms of his ADP contract. Respondent's inactive enrollment was effective October 7, 2006.

On October 5, 2006, the court filed a Notice of Order to Show Cause In Person Status Conference ("OSC hearing") setting a status conference on October 27, 2006, as to the issue of why respondent should not be terminated from the ADP in light of the fact that respondent's participation in the LAP was terminated effective September 28, 2006.

On October 27, 2006, the OSC hearing was continued to November 1, 2006.

On November 1, 2006, respondent was terminated from the ADP and this matter was referred to State Bar Court Hearing Department Supervising Judge Richard A. Honn. A status conference order was filed on that same date, setting forth: (1) that respondent was not in compliance with the conditions of the State Bar Court's ADP; (2) terminating respondent from the ADP; (3) that the parties' stipulation would be filed; (3) that the court would prepare its decision and recommendation regarding the higher level of discipline; and (4) referring this matter to Supervising Judge Richard A. Honn for further proceedings. Thereafter, on November 1, 2006, the parties' stipulation and the court order approving the stipulation were filed.

On November 2, 2006, the State Bar filed a motion seeking to sever Case No. 05-O-04823 from Case No. 00-O-13443, etc.

On November 30, 2006, the court issued an order granting the State Bar's motion to sever Case No. 05-O-04823 from Case No. 00-O-13443, etc. and returning Case No. 05-O-04823 to standard proceedings.

This matter was submitted for decision on November 1, 2006.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW²

A. Jurisdiction

Respondent was admitted to the practice of law in California on July 29, 1996, and has been a member of the State Bar of California at all times since that date.

B. Case No. 00-O-13443

1. Counts One and Two - Case Nos. 00-O-13443; 01-O-00330; 01-O-00760 (Failure to Maintain Funds in Client Trust Account)

At all times relevant to respondent's misconduct in this proceeding, he was suffering from a subsequently diagnosed mental illness known as a dual diagnosis chemical dependency and bipolar disorder. While respondent continued to accept clients and to practice law, his judgment and ability to maintain his law practice were adversely affected. Respondent kept poor records relating to his client trust account. Due to his poor record-keeping, between May 2000 and January 2001, respondent issued checks from his client trust account at the Bank of America that

²The parties' stipulation is hereby incorporated by reference as if set forth in full herein.

were drawn against insufficient funds. As a result, there was a negative balance in respondent's client trust account on at least five occasions between November 10, 2000 and January 23, 2001.

Respondent admitted that he was grossly negligent in the handling of his client trust account during this period of time and that his repeated issuance of NSF checks drawn upon his trust account and his failure to maintain accurate records of client money in the trust account constitutes a wilful violation of rule 4-100(A) of the Rules of Professional Conduct of the State Bar of California.³

The parties jointly requested this court to dismiss Count Two of the NDC in Case No. 00-O-13443, etc. which alleged that respondent failed to cooperate with the State Bar's disciplinary investigation of the trust account matter in violation of Business and Professions Code section 6068, subdivision (i). The court granted the parties' motion, and this count is hereby dismissed with prejudice.

2. Counts Three through Eight - Case No. 01-O-00534 (The White Matter)

On August 25, 2000, Shawn White was sentenced by the Orange County Superior Court to serve 180 days in county jail and was placed on three years' probation. White was ordered to report for his jail commitment by October 27, 2000, but failed to do so.

White retained respondent on November 7, 2000, to represent him in seeking to either withdraw his guilty plea or, if he was unable to do so, to seek a modification of his sentence. Respondent agreed to perform these services for a fee of \$4,600. White paid \$500 to respondent on November 7, 2000, leaving a remaining balance of \$4,100.

White told respondent that he had been duped by other individuals involved in a drug manufacturing scheme, and that his own involvement in the scheme was minimal. As evidence in support of a motion for relief from White's guilty plea, respondent advised White to get an opinion from a psychologist or psychiatrist attesting that White was easily taken advantage of by others.

³Unless otherwise indicated, all further references to rules refer to the Rules of Professional Conduct of the State Bar of California.

On November 16, 2000, the court issued a bench warrant for White's arrest due to his failure to timely report for his jail commitment.

On November 22, 2000, White endorsed for deposit in respondent's client trust account, an inheritance check from the Claude White Trust payable to White in the amount of \$29,856.75. Respondent agreed to deposit the funds in his client trust account, to take \$2,000 for attorney's fees and then return the rest of the money to White in three equal payments of \$9,285.58. Respondent deposited the inheritance check from White into his client trust account on November 22, 2000.

On November 25, 2000, respondent gave White a receipt showing that he had received a total of \$2,500 in attorney fees from White as of that date.⁴ Thereafter, on four dates between November 30, 2000 and December 13, 2000, respondent disbursed a total of \$25,071.17 to White in checks and cash. White was entitled to receive an additional \$2,785.58 from respondent, but respondent never disbursed those funds to White or to any third person on White's behalf but, instead, misappropriated White's funds through gross negligence.

Except for the \$2,000 in attorney fees that White had authorized him to withdraw, respondent never had authorization or consent from White to disburse funds to anyone other than White. Despite the fact that respondent was required to maintain \$2,785.58 in his client trust account until he had paid those funds to White, by December 16, 2000, the balance in respondent's trust account was only \$1.34. By December 20, 2000, respondent's client trust account was overdrawn in the amount of \$22.66. Respondent's trust account remained overdrawn until it was closed on February 23, 2001.

White obtained the psychiatric evaluation suggested by respondent in November 2000. On November 25, 2000, respondent told White that he would file a motion on White's behalf by November 27, 2000. Despite his promise, respondent never filed any motion on behalf of White nor took any action to contest White's criminal conviction or sentencing.

⁴This amount included both White's initial payment of \$500 on November 7, 2000, and the additional \$2,000 that he authorized respondent to retain on November 22, 2000.

White was taken into custody by the police on February 22, 2001. Upon his incarceration, White contacted respondent by telephone and requested the return of his funds. Respondent told White that he still had White's funds in his client trust account. On February 26, 2001, White appeared in court, accompanied by respondent, for a probation violation hearing. At respondent's request, the hearing was continued to March 7, 2001.

Respondent failed to appear at the hearing on March 7, 2001. At that time, the court relieved respondent as counsel and appointed a public defender to represent White.

Respondent claims that his investigation of White's version of events led him to believe that White played a more central role in the drug manufacturing scheme and, as a result, a motion for post-sentencing relief would not be meritorious. Respondent acknowledged that, instead of pursuing alternative bases for relief or properly withdrawing as counsel and providing an accounting of his work, he simply abandoned White.

Respondent admitted that his abandonment of White's matter constitutes a wilful violation of rule 3-110(A) of the Rules of Professional Conduct.

Respondent further admitted that (a) he wilfully violated rule 4-100(B)(4) by failing to promptly pay to his client, Shawn White, upon his request the \$2,785.58 that White was entitled to receive; (b) he wilfully violated rule 4-100(A) by failing to maintain the \$2,785.58 of White's funds in his client trust account; and (c) he committed an act of moral turpitude, dishonesty or corruption in violation of Business and Professions Code section 6106 by misappropriating \$2,785.58 of White's funds through gross negligence.

The parties jointly requested that the court dismiss Counts Seven and Eight of the NDC in Case No. 00-O-13443, etc. which allege that respondent failed to refund unearned fees to White in wilful violation of rule 3-700(D)(2) of the Rules of Professional Conduct (Count Seven) and that he failed to cooperate with the State Bar's disciplinary investigation of the White matter in violation of Business and Professions Code section 6068, subdivision (i) (Count Eight). The Court granted the parties' motion to dismiss, and these counts are hereby dismissed with prejudice.

3. Counts Nine through Thirteen - Case No. 01-O-01536 - (The Garrity Matter)

On February 3, 1999, Michael J. and Gayle S. Garrity consulted with respondent regarding a noise dispute they were having with their neighbors, Steve and Linda Coleman. Respondent agreed to send a letter to the Colemans asking them to cease the noise. The Garritys paid \$500 to respondent for sending this letter and, on March 13, 1999, paid him an additional \$200 to send a second letter to the Colemans regarding the ongoing noise dispute.

Thereafter, on March 22, 1999, the Garritys retained respondent to bring a civil action against the Colemans. At the time they retained him, the Garritys paid \$2,500 to respondent as advanced attorney fees.

On April 23, 1999, respondent filed a civil action on behalf of the Garritys entitled *Garrity v. Coleman*, Orange County Superior Court Case No. 808521. The Garritys paid the filing fee of \$188. The Colemans filed an answer to the complaint on May 25, 1999. Counsel for the Colemans served a copy of the answer on respondent by mail addressed to him at his official membership address. The Colemans' counsel also served discovery requests upon respondent by mail, addressed to him at his official membership address. Respondent did not respond to these discovery requests.

In May 1999, the Garritys telephoned respondent's office on numerous occasions to inquire about the status of their action. Although they left a message for respondent on each occasion asking him to return their call, he failed to do so. Thereafter, in June 1999, the Garritys went to respondent's office and learned, for the first time, that he had vacated those offices. Respondent did not provide the Garritys with a new address or telephone number at which he could be reached and did not file a notice of his change of address with the court in the *Garrity v. Coleman* action.

On June 23, 1999, the court issued an order in the *Garrity v. Coleman* action, setting an evaluation conference for October 6, 1999, and ordering respondent to give notice of the conference to all parties. On the same date, the court clerk served a copy of the minute order on respondent by mail addressed to him at his official membership address. Respondent never provided notice of the evaluation conference to either his clients or to the Colemans' counsel.

On August 16, 1999, the Garritys mailed a letter to respondent at a new address at which they believed he could be reached. In the letter, the Garritys terminated respondent's services and requested a refund of \$2,500 of the \$3,200 they had paid to him. At or about the same time, the Garritys employed new counsel to represent them in the *Garrity v. Coleman* action.

Respondent did not respond to the Garritys' request for a refund of unearned fees. Therefore, the Garritys filed a request for fee arbitration through the State Bar's Office of Mandatory Fee Arbitration. Following a fee arbitration hearing on March 9, 2000, the fee arbitrator awarded the Garritys the sum of \$2,499, plus their arbitration filing fee of \$75, for a total award of \$2,574. On May 10, 2000, Michael Garrity sent a letter to respondent at his then current official membership address, requesting that respondent pay the fee arbitration award. Respondent began making payments on the award in March 2002. As of September 2003, respondent still owed the Garritys the sum of \$1,165.

Respondent admitted that he wilfully violated rule 3-110(A) of the Rules of Professional Conduct by failing to respond to opposing counsel's discovery requests in the *Garrity v. Coleman* action, by failing to inform his clients and opposing counsel of the change in his address, by failing to respond to his clients' inquiries about the status of their action and by failing to give notice of the evaluation conference.

Respondent also admitted that he improperly withdrew from his employment by the Garritys in wilful violation of rule 3-700(A)(2) of the Rules of Professional Conduct, and that he failed to promptly refund unearned fees to the Garritys in wilful violation of rule 3-700(D)(2).

The parties jointly requested this court to dismiss Counts 10 and 13 of the NDC in Case No. 00-O-13443, etc. which allege that respondent failed to adequately communicate with the Garritys in violation of Business and Professions Code section 6068, subdivision (m) (Count Ten), and that he failed to cooperate with the State Bar's disciplinary investigation of the Garrity matter in violation of section 6068, subdivision (i) (Count Thirteen). The court granted the parties' motion to dismiss these counts, and said counts are hereby dismissed with prejudice.

C. State Bar Court Case No. 01-O-04703 (The Sonek Matter)

Respondent was retained by Edward and Lillian Sonek on February 24, 2001, to represent

their daughter, Denine Sonek, in a criminal matter. At the time respondent was retained, Denine Sonek was in jail on a warrant. Denine's parents had authority to communicate and act on her behalf with respect to respondent's legal representation. Respondent told the Soneks that he would seek to have Denine's warrant cleared and secure her release from custody for a flat fee of \$1,000. On the same day, Lillian Sonek gave a check to respondent in the amount of \$500, with the balance to be paid after Denine Sonek's warrants were quashed.

Respondent had a short conversation with Denine Sonek in jail on February 24, 2001, in which he told Denine that, after he was retained, he would visit her in jail and get the information he needed to gain her release. Despite this representation, respondent neither visited Denine in jail nor communicated with her in any way.

Edward Sonek telephoned respondent on March 2, 2001, to inquire about the status of Denine's case. Respondent promised to keep in touch with Edward about the case. Edward Sonek made several subsequent telephone calls to respondent's office to inquire about Denine's case and left messages on respondent's answering machine asking him to return the calls. Respondent failed to return those telephone calls.

Respondent did not take any action to achieve Denine's release from jail, never made any court appearance on her behalf and failed to perform any legal services on her behalf. Despite his failure to perform any legal services on her behalf, respondent failed to refund any portion of the \$500 advanced fee that the Soneks had paid to him. Respondent admitted that he effectively withdrew from his representation of Denine Sonek.

Respondent admitted that he wilfully violated rule 3-110(A) of the Rules of Professional Conduct by failing to competently perform the legal services for which he was retained on behalf of Denine Sonek, and that he wilfully violated rule 3-700(D)(2) of the Rules of Professional Conduct by failing to refund any part of the \$500 in advanced fees, none of which had been earned at the time he withdrew from employment.

D. Case No. 02-O-15981 (The McFadden Matter) [Investigation Matter]

Respondent was retained by Sonya McFadden in April 2002 following her arrest for petty theft. McFadden paid respondent a total of \$1,000 in two equal installments in April and May

2002. Respondent was aware that McFadden's first court appearance was scheduled for June 26, 2002.

In May 2002, respondent told McFadden that he would go to court prior to June 26, 2002, and "take care of it." In light of respondent's representation, McFadden did not appear at the June 26, 2002, hearing. Respondent failed to appear at the hearing. Because neither McFadden nor respondent appeared, the court issued a bench warrant for McFadden's arrest.

McFadden spoke with Respondent on July 8, 2002, at which time respondent admitted that he had forgotten about her June 26, 2002, court appearance. Respondent told McFadden that he would go back to court and attempt to have the warrant set aside. Despite his promise, respondent did not attempt to have McFadden's warrant set aside and, after July 8, 2002, failed to respond to any of McFadden's many attempts to contact him. McFadden was compelled to retain another attorney to represent her in the criminal matter. Although respondent failed to perform any work on McFadden's behalf, he did not refund any portion of the \$1,000 in advanced fees he had received from her.

Respondent admitted that he violated rule 3-110(A) of the Rules of Professional Conduct by failing to competently perform the legal services for which he was retained by McFadden.⁵

E. Case No. 00-O-11302 (The Wilder Matter) [Investigation Matter]

On March 6, 1998, respondent was retained by Donald Wilder to represent him in two matters: (1) a family law matter entitled *Wilder v. Jenkins*, relating to a restraining order; and (2) a federal lawsuit for violation of civil rights, entitled *Wilder v. City of Brea*.

On June 25, 1998, Wilder paid respondent advanced costs and fees of \$1,000 for Wilder's federal court matter. Thereafter, on July 27, 1998, Wilder paid \$100 to respondent for service of process in the family law matter. Respondent deposited the \$100 in his client trust account on the same date that he received it from Wilder.

⁵Although the stipulated facts would appear to support a legal conclusion that respondent violated Business and Professions Code section 6068, subdivision (m), by failing to respond to McFadden's repeated status inquiries, and that he wilfully violated rule 3-700(D)(2) of the Rules of Professional Conduct by failing to refund unearned fees to McFadden, he was not charged with those violations.

Respondent filed the federal court action on May 12, 1999. The following day, the U.S. District Court filed and served an order upon respondent directing him to file a corrected complaint no later than May 27, 1999, with the proper type font in compliance with local court rules. Respondent failed to file the corrected complaint. As a result, the U.S. District Court struck Wilder's complaint on June 16, 1999.

On June 1, 1999, respondent filed a motion to set aside the restraining order in Wilder's family law matter. Respondent failed to appear at the scheduled hearing on the motion on July 29, 1999. The court continued the hearing, but subsequently took Wilder's family law matter off the calendar when respondent also failed to appear at the rescheduled hearing.

Wilder terminated respondent's employment in both matters in August 1999 and retained new counsel to represent him in the federal court action. Respondent agreed to refund the \$1,100 in advanced costs and fees to Wilder by August 29, 1999.

On August 29, 1999, respondent issued a check payable to Wilder in the amount of \$1,100. The check was drawn upon respondent's general account at the Bank of America. When Wilder sought to negotiate the check, it was returned by the bank for insufficient funds. Wilder then filed a small claims court action against respondent in September 1999 to recover the advanced costs and fees. Respondent failed to appear at the scheduled trial of the small claims court matter, and the court entered judgment in Wilder's favor. As of September 2003, respondent had not paid the judgment.

In September 1999, Wilder filed a motion to set aside the U.S. District Court's June 16, 1999, order striking his complaint. In support of Wilder's motion, respondent provided a declaration acknowledging that Wilder's complaint had been dismissed as a result of respondent's negligence in failing to file a corrected complaint as ordered by the court. Respondent further acknowledged that he had not received the court's May 13, 1999, order until July 2, 1999, due to his failure to notify the court of the change in his office address. The U.S. District Court granted Wilder's application and set aside the order striking his complaint.

Respondent admitted that he wilfully violated rule 3-110(A) of the Rules of Professional Conduct by (a) failing to file the corrected complaint in Wilder's federal court action, resulting in

the dismissal of the action; (b) failing to appear at multiple scheduled hearings in Wilder's family law matter; and (c) failing to promptly refund unearned fees to Wilder.

F. Case No. 02-O-13821 (The Tate Matter) [Investigation Matter]

Respondent was retained by Alvin Tate in May 2001 to review the record of Tate's criminal conviction and to file a motion for a new trial. In light of the size of the record, respondent asked Tate for \$5,000 to review the record and to file the motion for new trial. Respondent agreed to begin reviewing the transcripts for an advanced fee of \$1,250, which Tate paid. The remainder of the \$5,000 fee was to be paid before respondent prepared the post-conviction relief papers.

Respondent visited Tate in jail. Respondent claimed that he had read the transcripts and had performed some of the work on Tate's matter, but wanted the remainder of the \$5,000 fee before proceeding further. When the money was not forthcoming, respondent and Tate had a disagreement and respondent performed no further work on Tate's matter.

Respondent did not arrange for other counsel on Tate's behalf and did not move the court for permission to withdraw. Respondent failed to appear at Tate's scheduled court hearings on July 10, July 11, September 24, September 25 and September 26, 2001. Respondent effectively abandoned Tate and never filed the motion for new trial on his behalf.

Respondent has not refunded any portion of the \$1,250 in advanced fees that he received from Tate, despite Tate's repeated requests. Respondent claimed that he earned all or most of the advanced fees for the preliminary work he performed.

Respondent admitted that he wilfully violated rule 3-700(A)(2) of the Rules of Professional Conduct by withdrawing from his employment by Tate without taking reasonable steps to avoid reasonably foreseeable prejudice to Tate and by failing to appear at multiple scheduled court hearings while he was still Tate's attorney of record.

G. Case No. 02-O-15482 (The Davis Matter) [Investigation Matter]

Respondent was retained by Benita Davis in December 2001 to defend her in a criminal case involving Davis's alleged driving under the influence. Respondent agreed to represent Davis, with whom he had a previous professional relationship, for a fee of \$1,500, plus travel

expenses since Davis both lived and was charged with the criminal offense in Northern California, while respondent lived in Southern California.

Several court appearances in Davis's matter were scheduled. Respondent requested a continuance of the January 28, 2002, hearing on the grounds that he was out of town. The court granted the continuance. Respondent was granted a second continuance on March 26, 2002, for the same reason. Respondent and Davis then appeared on April 5, 2002, at which time a new pretrial conference was scheduled for May 22, 2002.

Respondent failed to appear at the May 22, 2002, pretrial conference, but telephoned the court and requested another continuance. The continuance was granted to May 30, 2002, but respondent also failed to appear on that date. Likewise, respondent failed to appear at Davis's plea and sentencing hearings in July 2002, or at any time thereafter. Davis was represented by other attorneys at these hearings.

In early 2002, respondent moved to Northern California and shared a house with Davis. In June and July 2002, an actual conflict arose out of their personal relationship which prevented respondent from continuing his representation of Davis. Despite this conflict, however, respondent never moved to withdraw as Davis's attorney of record, never arranged for any successor counsel and never gave proper notice of his withdrawal to Davis to avoid reasonably foreseeable prejudice. Once the conflict developed, respondent effectively abandoned Davis.

Respondent admitted that, by failing to make scheduled court appearances and failing to take reasonable steps to avoid reasonably foreseeable prejudice to Davis's interests, he improperly withdrew from his employment in wilful violation of rule 3-700(A)(2).

H. Case No. 02-O-11058 (The Ives Matter) [Investigation Matter]

In July 2001, respondent agreed to represent David Ives, who was charged with felonies in Orange County. By late fall 2001, Ives became frustrated and dissatisfied with respondent's representation. Ives's parents, who had authority to act as Ives's agent in communicating with respondent, tried to reach respondent by telephone on approximately 20 occasions. Although they left messages for him, respondent never returned their calls. Finally, Ives's father was able to reach respondent on December 14, 2001, and, at that time, told respondent that they were going to

terminate respondent's services and seek alternate counsel for their son. As a result of this conversation, respondent understood that Ives would ask the court to relieve respondent as his counsel at the pretrial conference scheduled for December 21, 2001. Respondent promised Ives's father that he would provide him with copies of Ives's file on December 15, 2001, so they could give the files to the next attorney prior to the pretrial conference. However, respondent failed to contact Ives or his parents or to make arrangements to release Ives's file prior to the pretrial conference on December 21, 2001.

Even though he had not been relieved by the court as Ives's attorney, respondent failed to appear at the pretrial conference on December 21, 2001, and failed to move the court to be relieved. In light of respondent's failure to appear at the pretrial conference, the court set an Order to Show Cause (OSC) hearing for January 7, 2002, to inquire into the reasons for respondent's failure to appear at the pretrial conference.

Respondent failed to appear at the January 7, 2002, OSC hearing. Although the court had served notice of the hearing upon him at his last known address of record, respondent had moved his offices several months earlier and had failed to update his address with the court, as required.

The court ultimately appointed a public defender to represent Ives. Respondent promptly returned the fees that had been paid to him by the Ives family.

Respondent admitted that he wilfully violated rule 3-110(A) of the Rules of Professional Conduct by (a) failing to adequately communicate with his client and his client's parents; (b) failing to appear at the December 21, 2001, pretrial conference or to properly withdraw from his representation of Ives; (c) failing to arrange for the prompt delivery of Ives's file; and (d) failing to notify the court of the change in his office address.

IV. AGGRAVATION AND MITIGATION

A. Aggravating Circumstances

Respondent's current misconduct evidences multiple acts of wrongdoing. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b)(ii) ("standard").)

Additionally, respondent's misconduct significantly harmed a client, the public or the administration of justice. The following clients were harmed by respondent's misconduct: (a)

Shawn White; (b) Michael and Gayle Garrity; (c) Denine Sonek; (d) Sonya McFadden; (e) Donald Wilder; (f) Alvin Tate; and (g) Benita Davis. (Standard 1.2(b)(iv).)

B. Mitigating Circumstances

Respondent has no prior record of discipline since his admission to practice on July 29, 1996. However, respondent's misconduct commenced as early as May 1999, less than three years after his admission. Such a short period of time without prior discipline is not entitled to weight as a mitigating factor. (Standard 1.2(e)(i); *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 473 [practice of law for four years without discipline is not mitigating]; *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 66 [admission to practice for five years without discipline does not entitle attorney to mitigating credit].)

Respondent has displayed candor and cooperation with the State Bar in its disciplinary investigation and in this proceeding. (Standard 1.2(e)(v).)

Additionally, respondent has paid some restitution to various clients and has agreed to pay the remaining restitution as a condition of probation in this proceeding.⁶ Timing of restitution is a factor which may affect the degree of discipline. (*In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 213.) Restitution that is made under the threat or force of disciplinary, civil or criminal proceedings is not properly considered to have any mitigating effect. (*Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 709.) While the timing of respondent's restitution to Shawn White is unclear, the parties stipulated that the Garritys were compelled to seek fee arbitration due to respondent's failure to refund the unearned fees. Based upon the foregoing, the court concludes that respondent is entitled to only limited mitigation for his restitution efforts to date. (*In re Billings* (1990) 50 Cal.3d 358, 368.)

⁶The stipulation reflects that respondent claims that he made full restitution to Shawn White in the amount of \$2,785.58, plus interest from March 1, 2001. The parties have also stipulated that respondent made partial restitution to the Garritys and that, as of September 2003, still owed \$1,165.38, plus interest. (Stipulation, at p. 21.) Respondent will be required to provide the Office of Probation with satisfactory proof of restitution to both White and to the Garritys, as well as the additional restitution included in the stipulation and ordered in this Decision; Order Regarding Involuntary Inactive Enrollment; and Order Filing and Sealing Certain Documents.

V. DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney but, rather, to protect the public, to preserve public confidence in the legal profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In addition, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case the standards provide for the imposition of sanctions ranging from reproof to disbarment. (Standards 2.2(a), 2.2(b), 2.4(b), 2.6 and 2.10.) In addition, standard 1.6(a) states, in pertinent part, “If two or more acts of professional misconduct are found or acknowledged in a single disciplinary proceeding, and different sanctions are prescribed by these standards for said acts, the sanction imposed shall be the more or most severe of the different applicable sanctions.”

The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) “[E]ach case must be resolved on its own particular facts and not by application of rigid standards.” (*Id.* at p. 251.)

In this matter, respondent stipulated that his conduct violated rules 4-100(A) (two matters), 3-110(A) (six matters), 4-100(B)(4) (one matter), 3-700(A)(2) (three matters), 3-700(D)(2) (two matters) and section 6106 of the Business and Professions Code (one matter). In mitigation, respondent displayed candor and cooperation with the State Bar in its disciplinary investigation and in this proceeding. However, respondent is entitled to only limited mitigation for his restitution efforts to date. In aggravation, respondent’s current misconduct evidences multiple acts of wrongdoing and significantly harmed clients.

In accordance with applicable Supreme Court case law, an attorney’s rehabilitation from alcoholism or other substance abuse problems can be accorded significant mitigating weight if it is established that (1) the abuse was addictive in nature; (2) the abuse causally contributed to the misconduct; and (3) the attorney has undergone a meaningful and sustained period of

rehabilitation. (*Harford v. State Bar* (1990) 52 Cal.3d 93, 101; *In re Billings*, *supra*, 50 Cal.3d at p. 367.)

Similarly, Supreme Court and Review Department case law establish that extreme emotional difficulties are a mitigating factor where expert testimony establishes that those emotional difficulties were directly responsible for the misconduct, provided that the attorney has also established, through clear and convincing evidence, that he or she no longer suffers from such difficulties. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 527; *In re Naney* (1990) 51 Cal.3d 186, 197; *In re Lamb* (1989) 49 Cal.3d 239, 246; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.) However, the Supreme Court has also held that, absent a finding of rehabilitation, emotional problems are not considered a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney*, *supra*, 51 Cal.3d at p. 197.)

Respondent has both a mental health problem and a substance abuse problem that is addictive in nature. Furthermore, there is a causal connection between respondent's mental health and substance abuse problems and the misconduct set forth herein. However, as a result of respondent's termination from the ADP as a result of his termination from the LAP, respondent is not found to have undergone a meaningful and sustained period of rehabilitation from his substance abuse problem or to no longer suffer from his mental health problem. Accordingly, the court will not consider respondent's mental health and substance abuse problems as mitigating circumstances in this matter.

On September 26, 2003, the State Bar lodged its Brief Re Level of Discipline. Respondent did not submit a brief regarding the discipline that should be recommended or imposed in this proceeding. In its brief, the State Bar cites a number of cases in support of its discipline recommendation. The discipline imposed in the cases cited by the State Bar ranged from one year actual suspension (*Hawes v. State Bar* (1990) 51 Cal.3d 587) to two years actual suspension (*Bledsoe v. State Bar* (1991) 52 Cal.3d 1074; *Martin v. State Bar* (1991) 52 Cal.3d 1055) to disbarment (*Cannon v. State Bar* (1990) 51 Cal.3d 1103).

In this proceeding, the State Bar recommended an actual suspension of two years in the event respondent failed to successfully complete the ADP. The State Bar also recommended that

respondent be ordered to make restitution to various clients. The court concludes that the State Bar's recommendation is entirely appropriate and should be the recommended disposition in this proceeding.

Therefore, upon consideration of the Supreme Court precedent set forth above, the court concludes that the disposition set forth below is appropriate.

VI. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent **RICHARD ROGER HURLEY** be suspended from the practice of law in the State of California for a period of three (3) years and until (a) he provides satisfactory proof to the State Bar Court of his rehabilitation, present fitness to practice law and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct; and (b) he provides satisfactory proof to the Office of Probation that he has made restitution to the below-named individuals in the indicated amounts, plus interest. It is further recommended that execution of such suspension be stayed, and that respondent be placed on probation for a period of five (5) years on the following conditions:

1. Respondent must be actually suspended from the practice of law in the State of California for the first two (2) years of the period of probation and until he (a) provides satisfactory proof to the State Bar Court of his rehabilitation, present fitness to practice law and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct; and (b) provides satisfactory proof to the Office of Probation that he has made restitution to (1) Shawn White in the amount of \$2,785.58, plus interest of ten percent (10%) per annum from March 1, 2001; (2) Michael and Gayle Garrity in the amount of \$1,165.38, plus interest of ten percent (10%) per annum from August 16, 1999; (3) Lillian Sonek in the amount of \$500, plus interest of ten percent (10%) per annum from April 1, 2001; (4) Sonya McFadden in the amount of \$1,000, plus interest of ten percent (10%) per annum from August 1, 2002; (5) Donald Wilder in the amount of \$1,100, plus interest of ten percent (10%) per annum from September 1, 1999; and (6) Benita Davis in the amount of \$750,

plus interest of ten percent (10%) per annum from July 1, 2002. If the Client Security Fund (“CSF”) has already reimbursed any of the above-named individuals for all or any portion of their respective losses, respondent must make restitution to the CSF, during the period of his actual suspension, to the extent of any payment from the funds to any of the above-named individuals, plus applicable interest and costs, in accordance with Business and Professions Code section 6140.5. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d). To the extent that respondent has paid any restitution prior to the effective date of the Supreme Court’s final disciplinary order in this proceeding, respondent will be given credit for such payment(s) provided satisfactory proof of such is or has been shown to the Office of Probation;

2. Within two years after the effective date of the Supreme Court’s final disciplinary order in this proceeding, respondent must comply with any final fee arbitration award and/or resulting order that may be rendered with respect to Alvin Tate and provide proof of such to the State Bar’s Office of Probation;
3. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;
4. Within ten (10) calendar days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, respondent must report such change in writing to both the Office of Probation and to the Membership Records Office of the State Bar;
5. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, respondent must state whether he has complied with the State Bar Act, the Rules of Professional Conduct and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) calendar days, that report must be submitted on the reporting date for the next calendar quarter and must cover the extended

period. In addition to all quarterly reports, respondent must submit a final report, containing the same information required by the quarterly reports. The final report must be submitted no earlier than twenty (20) calendar days before the last day of the probation period and no later than the last day of the probation period;

6. Respondent must obtain psychiatric or psychological help/treatment from a duly licensed psychiatrist, psychologist or clinical social worker at respondent's own expense a minimum of four (4) times per month, and must furnish evidence to the Office of Probation that respondent is so complying with each quarterly report. Help/treatment should commence immediately, and in any event, no later than thirty (30) days after the effective date of the discipline in this matter. Treatment must continue for the period of probation or until a motion to modify this condition is granted and that ruling becomes final.

If the treating psychiatrist, psychologist or clinical social worker determines that there has been a substantial change in respondent's condition, respondent or Office of the Chief Trial Counsel may file a motion for modification of this condition with the Hearing Department of the State Bar Court, pursuant to rule 550 of the Rules of Procedure of the State Bar. The motion must be supported by a written statement from the psychiatrist, psychologist, or clinical social worker, by affidavit or under penalty of perjury, in support of the proposed modification;

7. Upon the request of the Office of Probation, respondent must provide the Office of Probation with medical waivers and access to all of respondent's medical records. Revocation of any medical waiver is a violation of this condition. Any medical records obtained by the Office of Probation will be confidential and no information concerning them or their contents will be given anyone except members of the Office of the Chief Trial Counsel, including the Office of Probation, and the State Bar Court, who are directly involved with maintaining, enforcing or adjudicating this condition;
8. Respondent must abstain from use of any alcoholic beverages, and must not use or possess any narcotics, dangerous or restricted drugs, controlled substances, marijuana, or

- associated paraphernalia, except with a valid prescription;
9. Respondent must attend at least three meetings per week of Alcoholics Anonymous, Narcotics Anonymous or The Other Bar. As a separate reporting requirement, respondent must provide to the Office of Probation satisfactory proof of attendance during each month, on or before the tenth (10th) day of the following month, during the period of probation;
 10. Respondent must select a licensed medical laboratory approved by the Office of Probation. Respondent must furnish to the laboratory blood and/or urine samples as may be required to show that respondent has abstained from alcohol and/or drugs. The samples must be furnished to the laboratory in such a manner as may be specified by the laboratory to ensure specimen integrity. Respondent must cause the laboratory to provide to the Office of Probation, at respondent's expense, a screening report on or before the tenth day of each month of the probation period, containing an analysis of respondent's blood and/or urine obtained not more than ten (10) days previously;
 11. Respondent must maintain with the Office of Probation a current address and a current telephone number at which respondent can be reached. Respondent must return any call from the Office of Probation concerning testing of respondent's blood or urine within twelve (12) hours. For good cause, the Office of Probation may require respondent to deliver respondent's urine and/or blood sample(s) for additional reports to the laboratory described above no later than six hours after actual notice to respondent that the Office of Probation requires an additional screening report;
 12. Subject to the assertion of applicable privileges, respondent must answer fully, promptly and truthfully, all inquiries of the Office of Probation which are directed to him personally or in writing relating to whether respondent is complying or has complied with these probation conditions;
 13. Within one year of the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent must provide the Office of Probation with satisfactory proof of his attendance at a session of State Bar Ethics School and of his passage of the test given at

the conclusion of that session;

14. The period of probation will commence on the effective date of the Supreme Court's final disciplinary order in this proceeding.

The court also recommends that respondent be required, within the period of his actual suspension, to take and pass the Multistate Professional Responsibility Examination ("MPRE") administered by the National Conference of Bar Examiners, and that he be ordered to provide satisfactory proof of his passage of the MPRE to the Office of Probation within that period.

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court (effective January 1, 2007, rule 955 was renumbered to 9.20) and that he be ordered to perform the acts specified in subdivisions (a) and (c) of that rule within thirty (30) and forty (40) calendar days, respectively, after the effective date of the Supreme Court's final disciplinary order in this proceeding.

VII. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VIII. ORDER REGARDING INVOLUNTARY INACTIVE ENROLLMENT

It is ordered that upon the effective date of the Supreme Court's final disciplinary order in this matter, respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6233, which commenced on October 7, 2006, will terminate.

VIII. ORDER FILING AND SEALING CERTAIN DOCUMENTS

The court orders the Clerk to file this Decision; Order Regarding Involuntary Inactive Enrollment and Order Filing and Sealing Certain Documents. Thereafter, pursuant to rule 806(c) of the Rules of Procedure of the State Bar of California, all other documents not previously filed in this matter will be sealed pursuant to rule 23 of the Rules of Procedure.

IT IS SO ORDERED.

Dated: January 4, 2007

RICHARD A. HONN
Judge of the State Bar Court