

ORIGINAL

<p>Counsel for the State Bar THE STATE BAR OF CALIFORNIA OFFICE OF THE CHIEF TRIAL COUNSEL BROOKE A. SCHAFER, No. 194824 CHARLES A. MURRAY, No. 146069 1149 South Hill Street, 10th Floor Los Angeles, California 90015-2299 Telephone: (213) 765-1000</p>	<p>Case Number(s) 01-O-02625-RMT 02-O-11285 01-O-04251 01-O-5300 02-O-12362 02-O-10672 01-O-04162</p>	<p>(for Court use) PUBLIC MATTER LODGED APR 27 2004 STATE BAR COURT CLERK'S OFFICE LOS ANGELES</p>
<p>Counsel for Respondent Michael G. Gerner, Esq. 10100 Santa Monica Boulevard, #800 Los Angeles, CA 90067</p>	<p>FILED JUL 09 2008 STATE BAR COURT CLERK'S OFFICE LOS ANGELES</p>	
<p>In the Matter of Duane R. Folke Bar # 137341 A Member of the State Bar of California (Respondent)</p>	<p>Submitted to Pilot Program Judge STIPULATION RE FACTS AND CONCLUSIONS OF LAW <input type="checkbox"/> PREVIOUS STIPULATION REJECTED</p>	

A. Parties' Acknowledgments:

(1) Respondent is a member of the State Bar of California, admitted December 7, 1988
(Date)

(2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition (to be attached separately) are rejected or changed by the Supreme Court. However, if Respondent is not accepted into the Lawyer Assistance Program, this stipulation will be rejected and will not be binding on Respondent or the State Bar.

(3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." This stipulation consists of 19 pages.

(4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts".

(5) Conclusions of law, drawn from and specifically referring to the facts, are also included under "Conclusions of Law."

(6) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.

(7) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§ 6086.10 & 6140.7 and will pay timely any disciplinary costs imposed in this proceeding.

Note: All information required by this form and any additional information which cannot be provided in the space provided, shall be set forth in the text component (attachment) of this stipulation under specific headings, i.e., "Facts", "Dismissals", "Conclusions of Law."



B. Aggravating Circumstances (Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b).) Facts supporting aggravating circumstances are required.

- (1) Prior Record of Discipline [see standard 1.2(f)]
- (a) State Bar Court Case # of prior case 99-0-10837
- (b) Date prior discipline effective April 3, 2002
- (c) Rules of Professional Conduct/State Bar Action violations RPC 3-700 (D)(2)
Business & Professional Code sec.6068(m); RPC 3-110(A)
RPC 4-100(A)
- (d) Degree of prior discipline 30 days actual suspension; 2 years stayed suspension; 2 years probation
- (e) If Respondent has two or more incidents of prior discipline, use space provided below or under "Prior Discipline"
- (2) Dishonesty: Respondent's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.
- (3) Trust violation: Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.
- (4) Harm: Respondent's misconduct harmed significantly a client, the public or the administration of justice.
- (5) Indifference: Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.
- (6) Lack of Cooperation: Respondent displayed a lack of candor and cooperation to the victims of his/her misconduct or the State Bar during disciplinary investigation or proceedings.
- (7) Multiple/Pattern of Misconduct: Respondent's current misconduct evidences multiple acts of wrong doing or demonstrates a pattern of misconduct.
- (8) No aggravating circumstances are involved.

Additional aggravating circumstances:

C. Mitigating Circumstances [standard 1.2(e)]. Facts supporting mitigating circumstances are required.

- (1) No Prior Discipline: Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious.
- (2) No Harm: Respondent did not harm the client or person who was the object of the misconduct.
- (3) Candor/Cooperation: Respondent displayed spontaneous candor and cooperation to the victims of his/her misconduct and to the State Bar during disciplinary investigation and proceedings.
- (4) Remorse: Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.
- (5) Restitution: Respondent paid \$ _____ on _____ in restitution to _____ without the threat of force of disciplinary, civil or criminal proceedings.
- (6) Delay: These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.
- (7) Good Faith: Respondent acted in good faith.
- (8) Emotional/Physical Difficulties: At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish were directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drugs or substance abuse, and Respondent no longer suffers from such difficulties or disabilities.
- (9) Severe Financial Stress: At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.
- (10) Family Problems: At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.
- (11) Good Character: Respondent's good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.
- (12) Rehabilitation: Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.
- (13) No mitigating circumstances are involved.

Additional mitigating circumstances:

ATTACHMENT TO
STIPULATION RE FACTS AND CONCLUSIONS OF LAW

IN THE MATTER OF: Duane R. Folke, member no. 137341

CASE NUMBER(S): 01-O-02625 (Ross/Akins); 02-O-11285 (Hyacinth); 01-O-04251 (Ford/Howard); 01-O-05300 (Phillips); 02-O-12362 (Armstrong); and 02-O-10672 (Nunez); and investigation no. 01-O-04162 (SBI)

FACTS AND CONCLUSIONS OF LAW.

Duane R. Folke ("Respondent") admits the following facts are true and that he is culpable of the following violations of the specified statutes and/or Rules of Professional Conduct.

Respondent was admitted to the practice of law in California on December 7, 1988, and was at all times pertinent hereto a member of the State Bar of California ("State Bar").

Respondent was ordered on inactive status on November 25, 2001 due to an unpaid fee arbitration award pursuant to Business and Professions Code section 6203. Respondent was suspended for 30-days from April 3, 2002 through May 3, 2002 pursuant to the stipulation in Case Nos. 99-O-10837 et al., as ordered by the Supreme Court on March 4, 2002. As of July 17, 2003, he has been back on active status.

I(A) Facts - Case No. 01-O-02625 - Ross/Akins

1. On June 2, 1999, Betty Ross ("Ross") retained Respondent to represent her son, Randy Akins ("Akins"), in a Writ of Habeus Corpus ("Writ") following Akins' murder conviction. Akins granted Ross authority to act on Akins' behalf in matters pertaining to Akins' legal matters. The same day Ross paid Respondent \$1,000 on behalf of Akins.

2. On June 28, 1999, Respondent entered into a Retainer Agreement with Akins and agreed to perform the following, *inter alia*:

"Investigation of the claim(s) against you, and the preparation of a Writ of Habeus Corpus for the presentation of new evidence which should reasonably show that you are not the perpetrator of the crime you now stand convicted of with response to both written and oral argument in your defense; however, if you are provided a new trial in lieu of a complete vacating of your sentence, this office shall not be obligated to defend a new trial without further compensation."

3. The Retainer Agreement required Akins to pay a total fee of \$5,500 by making an initial payment of \$1,000 and payments of \$500 on the 28th of each month beginning on July 28, 1999, until the total amount was paid. The Retainer Agreement required Akins to be responsible for all costs.

4. In July 1999 Ross paid Respondent an additional \$500 on behalf of Akins.

5. On August 19, 1999, Ross paid Respondent another \$500 on behalf of Akins. Moreover, between October 1999 and October 2000, Ross paid an additional \$2500.00 on behalf of Akins. Ross paid a total of \$4500.00 to Respondent on Akins' behalf.

6. In March and April 2000 Ross also paid Respondent's private investigator \$1500.00 for work investigating the facts of Akins' case.

7. On September 1, 2000, Respondent sent a letter to Akins, who was in prison in Vacaville, California, advising that Akins' family had provided funds to pursue a Writ and promising that Respondent would contact Akins' counselor to assist in arranging an initial visit:

[W]e will contact your counselor to assist this office in arranging our initial visit with you over the course of the next few weeks. I believe the best use of the limited resources I am being called upon to utilize to address your matter dictates that perhaps the best use of our time and efforts are to have you provide, in writing, as much information as possible; this, so that I can begin to review and further research the law on the facts you provide.

Proceeding in this manner will assure that upon our initial meeting we can cover a great deal of information such that we can work with each other by written communication. Obviously, from time to time we will need to meet face to face, but given the resources and time necessary to commute from Los Angeles to Sacramento and Vacaville is for all intent [*sic*] and purposes prohibitive at best.

Thereafter, neither Respondent nor anyone in his employ ever met with Akins, and after September 2000 Respondent did not communicate with Akins.

8. Ross made numerous telephone calls to Respondent to obtain a status report on the Writ. Between July 1999 and February 2001 Ross called and left approximately 70 messages with Respondent's office. Respondent did not return those calls.

9. Finally, in July 2001, Respondent called Ross and told her that they were working on the Writ, that they would need six more months to complete it and that they would need an additional \$2,000 to complete the Writ. Ross requested on behalf of Akins that Respondent provide proof of the work that Respondent had done on the Writ. Respondent never provided proof of the work that he had done on the Writ to Akins or Ross. No Writ was ever prepared or filed.

10. On July 6, 2001, the State Bar opened investigation, case no. 01-O-02625, pursuant to the complaint filed by Akins ("the Akins matter"). On July 11, 2001, State Bar Investigator Ysabel Naetzel ("Naetzel") wrote to Respondent regarding the Akins matter. The letter set forth Akins' complaint and requested that Respondent respond in writing along with any supporting documents to specific allegations of misconduct being investigated by the State Bar. Respondent received the July 11, 2001, letter but failed to respond to it.

11. On July 25, 2001, Naetzel sent a second letter to Respondent regarding the Akins matter. The letter requested that Respondent respond to the allegations set forth in the letter dated July 11, 2001, which was attached. Respondent received the July 25, 2001, letter but failed to respond.

I(B) Conclusions of Law - Case No. 01-O-02625 - Ross/Akins

- By never interviewing or contacting Akins, by not preparing the Writ, by not communicating with Ross for over a year regarding Akins' case, by not informing Akins that he would not be preparing the Writ nor taking any steps to protect his rights should he desire new counsel, and by not providing proof of the work Respondent performed (if any) despite being asked, Respondent

repeatedly failed to perform legal services with competence in violation of rule 3-110(A) of the Rules of Professional Conduct.

– By collecting \$4,500 from Akins to prepare and file the Writ, which was never prepared or filed, and by failing to refund any of the \$4,500 paid by Akins, Respondent failed to refund promptly any part of a fee paid in advance that has not been earned in violation of rule 3-700(D)(2) of the Rules of Professional Conduct.

– By not providing a written response to the allegations in the Akins matter or otherwise cooperating in the investigation of the Akins matter, Respondent failed to cooperate in a disciplinary investigation in violation of Business and Professions Code section 6068(i).

II(A) Facts - Case No. 02-O-11285 - Hyacinth

12. In March 2001 Octave Hyacinth (“Hyacinth”) retained Respondent to obtain compensation from his former employer Watkins Engineering & Constructors (“Watkins Engineering”) for, *inter alia*, retaliation, failure to correct a hostile work environment, harassment and race discrimination (“tortious treatment”).

13. Respondent agreed in the Retainer Agreement to assist Hyacinth in procuring right to sue letters from the Equal Employment Opportunity Commission (“EEOC”) and from the state Department of Fair Employment and Housing (“DFEH”) as prerequisites to filing an action in federal and/or state court.

14. Respondent agreed to do the work for “\$7,500 based on an hourly retainer basis at \$175.00 per hour.” At the initial meeting on March 10, 2001, Hyacinth paid Respondent \$750.00.

15. Hyacinth made numerous subsequent payments between March and July 2001. Total payments to Respondent were \$2350.00.

16. Hyacinth and Respondent met one more time on March 24, 2001. After that the two had no more meetings.

17. In late May 2001, Hyacinth began phoning Respondent to get status updates on his legal matters. Hyacinth left messages for Respondent each time, requesting that Respondent return his call. Respondent did not reply to Hyacinth’s requests for status inquiries.

18. In late July 2001, Hyacinth left a telephone message for Respondent advising him that Hyacinth had another \$200 payment for him, but that Hyacinth would not send the money until Respondent returned Hyacinth’s telephone call. Respondent called Hyacinth back later that day and instructed Hyacinth to go to the EEOC and file a charge. Respondent also instructed Hyacinth to continue to make the \$200 payments every two weeks as set forth in the Retainer Agreement. That was the last conversation the two had. After this conversation Hyacinth never heard from Respondent or anyone from his office again.

19. After their conversation in late July 2001, Hyacinth called Respondent several times, each time asking that he contact him about filing the EEOC charge. Respondent did not return Hyacinth’s calls. Respondent effectively abandoned Hyacinth’s legal matters.

II(B) Conclusions of Law - Case No. 02-O-11285 - Hyacinth

– By not assisting Hyacinth in filing the EEOC charge, by not assisting Hyacinth in filing the DFEH charge, by not returning numerous messages left by Hyacinth, by not telling Hyacinth that he was intending to stop work on his legal matters, by not informing Hyacinth of his attempts to obtain compensation from Watkins Engineering since July 2001, and by not filing an action against Watkins Engineering, Respondent repeatedly failed to perform legal services with competence in violation of rule 3-110(A) of the Rules of Professional Conduct.

– By collecting \$2,350 to obtaining compensation from Watkins Engineering for its tortious treatment of Hyacinth, by failing to take any action to obtain compensation from Watkins Engineering, and by failing to refund some portion of the \$2,350 paid by Hyacinth, Respondent failed to refund promptly any part of a fee paid in advance that has not been earned in violation of rule 3-700(D)(2) of the Rules of Professional Conduct.

III(A) Facts - Case No. 01-O-04251 - Ford/Howard

A. The Writ to the Court of Appeal

20. On October 23, 1997, Emelda Ford (“Ford”) retained Respondent to represent her son, Kenji Howard (“Howard”), in a Writ of Habeas Corpus to the Court of Appeal (“Writ”), following Howard’s murder conviction in the Los Angeles Superior Court. Howard gave Ford authority to act on his behalf in the legal matters being handled by Respondent. The same day, Respondent entered into an agreement with Howard to appear at the sentencing hearing, prepare post-trial motions and file the Writ. The terms of the contract were acknowledged by Respondent in a letter to Ford dated October 23, 1997.

21. The contract called for periodic payments to be paid between October 1997 and March 1998, totaling \$4000.00. The contract also made Howard responsible for \$3,000 for “investigation and such costs - when and if a new trial is granted.”

22. Ford timely paid Respondent on behalf of Howard the full \$4,000 for the Writ by March 23, 1998.

23. On May 27, 1998, Respondent requested an extension of time from the Court of Appeal to file the opening brief, which was granted on May 29, 1998. The extension allowed Respondent until July 5, 1998 to file the opening brief.

24. Respondent did not timely file the opening brief, and the appeal was dismissed on July 14, 1998. On July 31, 1998, Respondent filed a motion to reinstate the appeal, which was granted by the Court of Appeal on August 12, 1998. On August 12, 1998, Respondent filed the opening brief.

25. On August 27, 1998, the Attorney General of the State of California (“Attorney General”) filed a motion to strike the opening brief for failure to comply with the California Rules of Court.

26. Despite the serious and complex nature of the case and the length of the record, the opening brief only contained a 2 ½-page “Statement of the Facts,” which did not contain citations to the record of the proceedings below. In fact, not one citation to the Reporter’s Transcript is included in the Statement of Facts. Moreover, despite the length of the record, the serious nature of the case,

and the fact intensive nature of appellant's contentions,¹ the opening brief provided only four isolated citations to the record of appellant's trial.

27. By order dated September 17, 1998, the Court of Appeal granted the Attorney General's motion to strike and struck the opening brief.

28. On September 28, 1998, Respondent re-filed the opening brief.

29. After the Attorney General filed its opening brief, Respondent requested and was granted two extensions of time to file the reply brief.

30. However, Respondent failed to file his reply brief on time, and Respondent was denied a third extension to time to file the reply brief. The case was considered fully briefed on March 16, 1999. Respondent never filed a reply brief.

31. On June 8, 1999, the Court of Appeal affirmed Howard's conviction.

B. "Appeal Costs"

32. In November 1998, Respondent told Ford that he needed an addition \$2,500 for what Respondent described as "appeal costs," "costs on appeal," and "additional costs for Kenji Howard appeal" ("appeal costs") for the appeal to the Court of Appeal. Respondent never explained to Ford or Howard why they needed to pay "appeal costs" or what the "appeal costs" actually were.

33. Between November 1998 and February 1999 Ford timely paid Respondent on behalf of Howard the full \$2500.00 for "appeal costs."

C. Transferring Howard to Tehachippi State Prison

34. In March 1999 Respondent agreed to represent Howard in a request to transfer him from Salinas Valley State Prison to Tehachippi State Prison to be closer to his family. Ford agreed to pay Respondent approximately \$1,000 on behalf of Howard to have Howard transferred.

35. On March 28, 1999, however, Howard wrote a letter to Respondent informing Respondent that Ford was working two jobs and all of the overtime she could manage while in poor health just to pay the cost of Howard's appeals. He informed Respondent that he believed that Respondent was "taking advantage of [Ford's] funds" and that they wanted to be "treated, not cheated, and charged fairly for [Respondent's] services." Consequently, Howard instructed Respondent not to work on transferring Howard from Corcoran State Prison to Tehachippi State Prison unless Respondent was willing to work "free of charge" on the transfer.

36. Respondent did not respond to Howard's letter. Respondent continued to accept money from Ford on behalf of Howard to attempt to have Howard transfer from Corcoran State Prison to Tehachippi State Prison.

37. On April 21, 1999, Ford paid Respondent \$560 on behalf of Howard to attempt to have Howard transferred from Corcoran State Prison to Tehachippi State Prison. Respondent accepted

¹ The opening brief alleged a purported tainted confession, denial of right to a speedy trial, denial of counsel and ineffective assistance of counsel.

\$560 from Ford, even though his client, Howard, had specifically instructed him not to accept any money to attempt to have him transferred. Ultimately Ford timely paid Respondent on behalf of Howard the full \$1,000 to attempt to have Howard transferred from Corcoran State Prison to Tehachippi State Prison.

38. Although Ford paid Respondent to attempt to have Howard transferred to Tehachippi State Prison, Ford did not perform any work to attempt to have Howard transferred and Howard was never transferred to Tehachippi State Prison.

39. On May 5, 1999, Howard wrote to Respondent asking him for a status update on the oral argument before the Court of Appeal and on the attempt to have Howard transferred. Howard told Respondent that his efforts to transfer Howard probably would be ineffective until Respondent came up to Corcoran State Prison and made himself "visible" to demonstrate that they were "serious." Howard also told Respondent that visiting the prison would also provide Howard and Respondent an opportunity to meet because he was being transferred to Salinas Valley State Prison.

40. Respondent did not provide a status report or respond to Howard's May 5, 1999, letter in any way.

D. The Writ to the Supreme Court

41. In July 1999, after the Court of Appeals had upheld Howard's conviction, Ford retained Respondent to represent Howard in a Writ of Habeas Corpus to the California Supreme Court. Respondent agreed to prepare and file the Writ to the Supreme Court for \$2500.00. On July 12, 1999, Ford paid Respondent an initial \$500 payment on behalf of Howard to prepare the Writ to the Supreme Court.

42. On September 1, 1999, Respondent sent a letter to Howard, advising him that the appeal filed in the Court of Appeal had been denied, but that Respondent would file an appeal with the Supreme Court and seek to have him transferred to Tehachippi State Prison to be closer to his family.

43. By January 2000 Ford had timely paid Respondent on behalf of Howard the full \$2500.00 for the Writ to the Supreme Court.

44. Respondent never filed the Writ to the Supreme Court, even though Ford paid Respondent the agreed upon amount of \$2500.00 on behalf of Howard to prepare the Writ.

45. Ford made numerous telephone calls on behalf of Howard to Respondent to obtain a status report on the Writ to the Supreme Court. Ford left telephone messages for Respondent on behalf of Howard to contact Ford that Respondent would not return. Ford left messages for Respondent to contact her to obtain a status report during the following months, *inter alia*: approximately 13 calls in or about April 2000; approximately 4 calls in or about June 2000; approximately 2 calls in or about October 2000.

46. Respondent did not contact Howard or anyone else authorized to act on behalf of Howard after February 2000.

III(B) Conclusions of Law - Case No. 01-O-04251 - Ford/Howard

– By failing to timely file the opening brief with the Court of Appeal resulting in the dismissal of the appeal, by failing to file a competent opening brief with the Court of Appeal resulting in the opening

brief being stricken, by failing to file a reply brief with the Court of Appeal, by failing to file a Writ with the Supreme Court, by accepting money from Ford to transferring Howard after Howard directed him not to accept money for that purpose, by failing to work on transferring Howard, and by failing to respond to Howard's and Ford's requests for information, Respondent repeatedly failed to perform legal services with competence in violation of rule 3-110(A) of the Rules of Professional Conduct.

– By not preparing the Writ to the Supreme Court, by not informing Howard that Respondent had not taken any steps to file the Writ to the Supreme Court, and by not contacting Howard concerning the status of the Writ to the Supreme Court after February 2000, Respondent effectively abandoned his client and improperly withdrew from employment in violation of rule 3-700(A)(2) of the Rules of Professional Conduct.

– By providing no services to Howard with respect to “appeal costs,” transfer of Howard and/or Writ to the Supreme Court, and by not refunding any of the \$6,000 to Howard, Respondent failed to refund unearned fees in violation of rule 3-700(D)(2) of the Rules of Professional Conduct.

IV(A) Facts - Case No. 01-O-05300 - Phillips

47. On August 18, 1999, Wendel Phillips retained Respondent to represent him in a dissolution of marriage (“Phillips’ dissolution”). The retainer agreement states that Wendel Phillips will pay Respondent \$2,000, by making an initial payment of \$1,000, a second payment of \$500 on or before September 18, 1999, and a third payment of \$500 on or before October 18, 1999. Wendel Phillips timely paid Respondent the full \$2,000 for the Phillips’ dissolution.

48. The parties worked out the details of the Phillips dissolution. On August 25, 1999, Respondent filed a “Stipulation and Order on Order [sic] to Show Cause.”

49. On November 29, 1999, Respondent sent a letter to David M. Gordon (“Gordon”), the attorney for Wendel Phillips’ former spouse, Dynita Phillips, requesting that Gordon prepare the final judgment in the Phillips dissolution.

50. On March 27, 2000, approximately four months after the first letter, Respondent sent a second letter to Gordon requesting that Gordon prepare the final judgment in the Phillips’ dissolution.

51. On August 22, 2000, approximately five months after the second letter, Respondent sent a third letter to Gordon requesting that Gordon prepare the final judgment.

52. On February 26, 2001, approximately six months after the third letter, Respondent sent a fourth letter to Gordon requesting that Gordon prepare the final judgment in the Phillips dissolution and threatening sanctions if Gordon did not prepare the final judgment.

53. Respondent never obtained the final judgment from Gordon and never sought to prepare the final judgment himself or otherwise finalize the Phillips’ dissolution.

54. In August 2001 Wendel Phillips transmitted a Substitution of Attorney to Respondent to allow Wendel Phillips to proceed in pro per. Respondent did not return the Substitution of Attorney to Wendel Phillips.

55. On February 21, 2002, Respondent and Wendel Phillips met at the State Bar at the request of both parties to execute the Substitution of Attorney in the Phillips’ dissolution.

IV(B) Conclusions of Law - Case No. 01-O-05300 - Phillips

– By failing to obtain the final judgment in the Phillips’ dissolution from Gordon, by failing to prepare the final judgment in the Phillips’ dissolution himself, by failing to finalize the Phillips’ dissolution over a two-year period, and by failing to execute the Substitution of Attorney, Respondent repeatedly failing to perform legal services with competence in violation of rule 3-110(A) of the Rules of Professional Conduct.

– By failing to finalize the Phillips’ dissolution, Respondent did not earn all of the fees paid by Wendel Phillips, by collecting \$2,000 for the Phillips’ dissolution and by failing to refund some portion of the \$2,000 paid by Wendel Phillips, Respondent failed to refund promptly any part of a fee paid in advance that has not been earned in violation of rule 3-700(D)(2) of the Rules of Professional Conduct.

V(A) Facts - Case No. 02-O-12362 - Armstrong

56. On March 17, 1999, Nedra Armstrong (“Armstrong”) retained Respondent to defend her in an administrative proceeding brought against her by the Nevada Civil Right Commission (“NCRC”) and to file a federal civil rights action alleging employment discrimination against her employer, the Clark County Department of Juvenile Justice (“Department of Juvenile Justice”).

57. On or about March 17, 1999, Respondent entered into a retainer agreement with Armstrong to defend her in the NCRC proceeding and to file the federal civil rights action. The retainer agreement required Armstrong to pay a total fee of \$7,500 for these services, which she did.

58. On March 29, 1999, Armstrong learned from the office of Human Resources of the Department of Juvenile Justice that she had 180 days to file a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”). Armstrong informed Respondent that she had been informed by the Department of Juvenile Justice that she had 180 days from March 29, 1999 to file the EEOC charge, *i.e.*, by September 25, 1999. Respondent agreed that Armstrong had 180 days from March 29, 1999, to file the charge with the EEOC.

59. On July 12, 1999, Armstrong sent Respondent a letter by facsimile requesting his advice about accepting early separation from the Department of Juvenile Justice. Respondent did not respond to Armstrong’s letter dated July 12, 1999.

60. On September 8, 1999, Armstrong sent a letter to Respondent by facsimile requesting his assistance in responding to new allegations of employment discrimination by the Department of Juvenile Justice. Respondent did not respond to Armstrong’s letter dated September 8, 1999.

61. Respondent did not file a charge of discrimination against the Department of Juvenile Justice with the EEOC by the deadline of September 25, 1999.

62. On November 10, 1999, Armstrong sent a letter to Respondent by facsimile requesting his assistance in responding to an attempt by Clark County to transfer her to another department.

63. Respondent did not respond to Armstrong’s letter dated November 10, 1999, or attempt to contact Armstrong at any time between November 10, 1999 to August 29, 2000.

64. On August 29, 2000, Armstrong called Respondent to discuss the NCRC proceeding and federal civil rights action. Respondent requested that Armstrong provide information concerning

the NCRC proceeding and federal civil rights action to his office, including but not limited to Armstrong's work history, copy of the civil law suit, hiring flyers, newspaper articles, hate mail left in Armstrong's mailbox, a description of the program Armstrong was supervising. information.

65. On August 29, 2000, Armstrong sent a packet of information to Respondent's office as he requested, including but not limited to Armstrong's work history, copy of the civil law suit, hiring flyers, newspaper articles, hate mail left in Armstrong's mailbox, a description of the program Armstrong was supervising.

66. Respondent did not take any action after receiving Armstrong's August 29, 2000 packet of information, nor did he attempt to contact her from August 2000 to April 2002.

67. By April 4, 2002, Armstrong had learned that Respondent recently had been disciplined by the State Bar and lost confidence in his ability and his interest in representing her. Consequently, Armstrong decided to terminate Respondent as her attorney and demanded that he refund the \$7,500 that she had paid him.

68. On April 4, 2002, Armstrong called Respondent's office and left a message for Respondent on his voice mail system requesting that Respondent contact Armstrong.

69. On April 9, 2002, Respondent called Armstrong and requested that she overnight documents regarding the NCRC proceeding and federal civil rights action to his office.

70. On April 9, 2002, Armstrong sent Respondent a letter dated April 9, 2002 by U.S. First Class Mail and by U.S. First Class Mail, Return Receipt Requested, that informed Respondent that Armstrong had learned that: (a) Respondent had been placed on inactive status as the result of disciplinary action that took place on April 3, 2002; (b) disciplinary action had been taken against Respondent on November 25, 2002; (c) Respondent had failed to perform the duties set forth in the retainer agreement; and (d) Respondent had failed to file a complaint with the EEOC within 180 days of March 29, 1999. Armstrong complained that Respondent had never informed her that he had been placed on inactive status. Armstrong demanded that Respondent refund the \$7,500 retainer fee that Armstrong had paid. Respondent received this letter.

71. Respondent did not respond to Armstrong's letter dated April 9, 2002, nor has Respondent communicated with Armstrong since April 9, 2002.

72. Respondent has not refunded any of the \$7,500 retainer fee to Armstrong.

73. Respondent did not: file a complaint with the EEOC within 180 days of the incident giving rise to the charge of discrimination, defend Armstrong against the administrative proceeding brought by the NCRC, or file a Federal action alleging employment discrimination by the Department of Juvenile Justice.

V(B) Conclusions of Law - Case No. 02-O-12362 - Armstrong

– By failing to timely file a charge with the EEOC, by failing to assist Armstrong in defending against the NCRC proceeding, by failing to file a federal civil rights action against the Department of Juvenile Justice, and by failing to provide timely advice to Armstrong, Respondent recklessly failed to perform legal services with competence in violation of rule 3-110(A) of the Rules of Professional Conduct.

– By not preparing any documents in the matters for which he was retained. by not informing Armstrong that he had not prepared any documents in the matters for which he was retained. by not informing Armstrong that he had been placed on inactive status on November 21, 2001. by not transferring Armstrong's case to another attorney. and by not maintaining contact with Armstrong concerning the matters for which he had been retained, Respondent effectively abandoned his client and improperly withdrew from employment in violation of rule 3-700(A)(2) of the Rules of Professional Conduct.

– By providing no services to Armstrong and by not refunding the \$7,500 fee to Armstrong, Respondent failed to refund unearned fees in violation of Rules of Professional Conduct, rule 3-700(D)(2).

VI(A) Facts - Case No. 02-O-10672 - Nunez

74. In January 2000 the County of Los Angeles filed a complaint to collect back child support ("support proceedings") against Armando Nunez, Jr. ("Nunez") for support of his children, Nikolas and Janelle. The complaint was filed in Los Angeles County.

75. In March 2000 Nunez retained Respondent to represent him in the support proceedings, and provided Respondent with information necessary to his defense.

76. In April 2000 the County of Los Angeles requested, and the court granted, dismissal of the support proceedings related to Janelle. The support proceedings regarding Nikolas continued.

77. On July 26, 2000, the County of Los Angeles obtained an order entering default against Nunez in the support proceedings. The Superior Court ordered Nunez to pay support for Nikolas for \$799 per month beginning on February 1, 2000. On August 29, 2000, Respondent filed a motion to set aside the default judgment. Hearing on the motion was scheduled for October 10, 2000.

78. On September 7, 2000, the County of Los Angeles and Respondent signed and filed an ex parte stipulation and order setting aside the default judgment entered on July 26, 2000 on the condition that Nunez file his Answer by September 18, 2000. The stipulation and order agreed to stop all enforcement proceedings and to advance and vacate the October 10, 2000 hearing on the motion to set aside the judgment. The stipulation and order was ordered by the Superior Court on September 7, 2000.

79. Respondent filed Nunez' Answer to the Complaint on September 29, 2000, rather than by September 18, 2000, as stipulated to and as ordered by the court on September 7, 2000.

80. On February 5, 2001, a hearing in the support proceedings was held. The Superior Court continued the matter until April 23, 2001 at Respondent's request and ordered genetic testing.

81. On April 23, 2001, the court continued the matter until May 23, 2001, because Respondent was involved in a criminal trial.

82. On May 23, 2001, hearing was begun in the support proceedings. The hearing was continued until September 7, 2001 at 8:00 a.m. Respondent was present for the May 23rd hearing and waived formal notice of the September 7th hearing.

83. On September 7, 2001, a hearing was conducted in the support proceedings. Respondent failed to appear and default was entered against Nunez. The Superior Court ordered Nunez to pay \$799 per month beginning on February 1, 2000 for the support of Nikolas. Respondent was ordered to pay \$7,581 for the support of Nikolas from April 1999 through January 2000 by making payments of \$227.43 per month beginning February 1, 2000.

84. Respondent never moved to set aside the September 7, 2001, default judgment.

85. After he received notice of judgment in the mail, in late September 2001, Nunez placed several telephone calls to Respondent to determine how the County of Los Angeles had obtained an entry of judgment against him. Each time Nunez left a message for Respondent to call him back, but Respondent did not return Nunez' telephone calls.

86. On November 25, 2001, Respondent was placed on "not entitled" status by the State Bar Court due to an unpaid fee arbitration award pursuant to Business and Professions Code section 6203. Respondent received notice that he was placed on not entitled status from the State Bar Court dated November 21, 2001.

87. Nunez retained new counsel, Krystal Clemens ("Clemens") in or about December 2001.

88. On January 15, 2002, Clemens sent Respondent a letter requesting that informed Respondent that Nunez had retained Clemens to represent him in further proceedings in *COLA v. Nunez*. The letter requested that Respondent: (a) sign and return a Substitution of Attorney substituting Clemens as attorney of record for Nunez; (b) forward Nunez' file to Clemens; and (c) provide Clemens with a declaration explaining Respondent's failure to appear on September 7, 2001, to attach to Clemens' motion to set aside the default pursuant to Code of Civil Procedure section 473, *i.e.*, relief from default taken due to mistake, inadvertence, surprise or excusable neglect. The letter was sent certified mail, return receipt requested. The letter was received by Respondent's office on January 18, 2002.

89. Respondent did not: (a) sign and return the Substitution of Attorney substituting Clemens as attorney of record for Nunez; (b) forward Nunez' file to Clemens; or (c) provide Clemens with a declaration explaining Respondent's failure to appear on September 7, 2001, to attach to Clemens' motion to set aside the default.

VI(B) Conclusions of Law - Case No. 02-O-10672 - Nunez

- By failing to file Nunez' Answer by September 18, 2000; by failing to appear as ordered at the September 7, 2001, hearing; by failing to inform Nunez that default had been entered against him; by failing to move to set aside the September 7, 2001, default entered against Nunez; and by failing to assist Nunez' subsequent attorney Clemens, Respondent recklessly and repeatedly failed to perform legal services with competence in violation of rules 3-110(A) of the Rules of Professional Conduct

- By failing to appear at the September 7, 2001, hearing; by failing to inform Nunez that default had been entered against him; by failing to move to set aside the default judgment; and by, in essence, ceasing all work on Nunez' legal case after September 1, 2001, Respondent effectively abandoned Nunez and improperly withdrew from employment in wilful violation of Rules of Professional Conduct, rule 3-700(A)(2).

- By failing to release Nunez' file to Clemens upon receipt of Clemens' request for the file and the substitution of attorney, Respondent failed to release promptly, upon termination of employment, to

the client, at the request of the client, all the client papers and property in wilful violation of rule 3-700(D)(1) of the Rules of Professional Conduct, rule 3-700(D)(1).

VI(A) Facts – Investigation no. 01-O-04162 (SBI)

90. Dawn Weber hired Respondent in June 2001, and paid him \$2500.00 advance fees on June 11, 2001. Respondent agreed to represent Ms. Weber in a criminal matter. However, Respondent also represented Ms. Weber's co-defendant, and the defense in the Weber case was that the co-defendant was entirely to blame for the crimes committed in the Weber case, not Ms. Weber. On June 27, 2001, the court ordered Respondent to withdraw from Ms. Weber's case and to refund the \$2500.00 she had paid Respondent within thirty days.

91. Respondent failed to refund the entire amount within thirty days of June 27, 2001, as ordered by the court. Respondent made a \$500.00 payment in early September 2001. The court ordered Respondent to appear on October 26, 2001, and show cause why he had not complied with its order to pay. On October 26, 2001, the court ordered Respondent to pay Ms. Weber \$300.00 a month until the remaining \$2000.00 was paid. Respondent failed to comply with the court's October 26, 2001, order.

92. In January 2002 Respondent filed a status report regarding the unpaid advance fees with the court. In it, he explained that he was having financial difficulties due to unpaid arbitration award, marital break-up and other reasons. He represented to the court that within the next 30 days many of these issues would be resolved such that the fees owing to Ms. Weber would be repaid or at least closer to a final resolution. The court at no time relieved Respondent of his responsibility to refund the fees, however, or of its orders that he do so.

93. On March 1, 2002, Respondent was again before the court on the refunded fees issue. The court ordered him to pay \$100.00 to Ms. Weber's new attorney and to appear in May 2002 for another OSC. Respondent failed to pay the \$100.00 to Ms. Weber's new attorney. At the May 29, 2002, OSC Respondent was ordered to obtain a money order in the sum of \$1100.00 and deliver it to Ms. Weber's new attorney. The court set another OSC for August 29, 2002, on the issue of proof of payment of the \$1100.00 as well as the issue of the refunded fees balance.

94. Respondent did not provide a money order for \$1100.00 by the August 29, 2002, OSC hearing. At that hearing he was given another chance to complete the refund of fees to Ms. Weber – until October 29, 2002.

95. Respondent made no additional payments prior to the October 29, 2002, hearing. At that hearing the court ordered him to make a \$300.00 payment "forthwith." As of December 6, 2002, he failed to make the \$300.00 payment. Between December 6, 2002, and February 21, 2003, Respondent finally paid Ms. Weber, through her new attorney, all money owed.

VII(B) Conclusion of Law – investigation no. 01-O-04162 (SBI)

– By failing to make any payments disgorging any advance fees paid by Ms. Weber between September 2001 and December 2002, despite multiple orders of the court that he do so, Respondent wilfully disobeyed an order of the court requiring him to do an act connected with or in the course of his profession which he ought in good faith to do, in wilful violation of B&PC section 6103.

AGGRAVATING FACTORS, cont'd from page 2:

Prior Discipline The timeframe of the prior misconduct (December 1997 to February 2001) overlaps somewhat with the instant misconduct, which occurred 1998 through December 2002. As such the court may give the prior less weight in aggravation. (*In re Sklar* (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602. However, the prior need not be disregarded entirely, since had the full facts of all the disciplinary matters been part of the prior the discipline in that matter surely would have been higher. (*See Rhodes v. State Bar* (1989) 49 Cal.3d 50.)

MITIGATING FACTORS, cont'd from page 3:

Family Problems In December 2001 Respondent experienced the break-up of his 12 year marriage. He assumed custody of his three minor children. The events leading up to the dissolution, as well as the adjustments to his life caused by his becoming sole caretaker of his children, created financial and physical stresses on him.

DISMISSED CHARGES

The parties respectfully request the court dismiss the following charges contained in the currently filed NDCs in the interest of justice. Many of the counts originally contained in the charging documents have been consolidated into the instant stipulation:

Case no. 01-O-2625 (Ross/Akins)

- Count Two (Failure to Respond to Client Inquiries)
- Count Three (Unconscionable Fee)
- Count Four (Improper Withdrawal)

Case no. 02-O-11285 (Hyacinth)

- Count One (Failure to Respond to Client Inquiries)
- Count Three (Unconscionable Fee)
- Count Four (Improper Withdrawal)

Case no. 01-O-04251 (Ford/Howard)

- Count Two (Failure to Respond to Client Inquiries)
- Count Five (Moral Turpitude)

Case no. 01-O-05300 (Phillips)

- Count Seven (Improper Withdrawal)
- Count Eight (Failure to Respond to Client Inquiries)
- Count Nine (Improper Withdrawal)

Case no. 02-O-12362 (Armstrong)

- Count Two (Failure to Respond to Client Inquiries)
- Count Five (Moral Turpitude)
- Count Six (Failure to Cooperate)

Case no. 02-O-10672 (Nunez)

- Count Two (Failure to Maintain Respect to the Court)
- Count Three (Failure to Obey Court Order)
- Count Six (Failure to Return Unearned Fees)

PENDING PROCEEDINGS.

The disclosure date referred to, on page one, paragraph A.(6), was October 1, 2003.

RESTITUTION

Respondent shall pay restitution to the following individuals (and/or the Client Security Fund, if appropriate) in the following amounts plus 10 percent interest per annum accruing from the dates indicated. To the extent Respondent has paid any restitution prior to the effective date of the order arising from this stipulation he shall be given credit for such payments provided satisfactory proof is shown to the Probation Unit of the State Bar:

1. Payment to Betty Ross and Randy Akins (and/or the Client Security Fund, if appropriate) of \$4,500 plus 10% interest from July 1, 2001.
2. Payment to Betty Ross and Randy Akins (and/or the Client Security Fund, if appropriate) of \$1,500 plus 10% interest from July 1, 2001 for the payment by Betty Ross to James A. Richardson for investigative services. Respondent will receive credit for the \$1,500 upon presentation of proof to the State Bar that Betty Ross and Randy Akins have recovered \$1,500 plus 10% interest from July 1, 2001 from James A. Richardson.
3. Payment to Octave Hyacinth (and/or the Client Security Fund, if appropriate) of \$2,350 plus 10% interest from July 1, 2001.
4. Payment to Emelda Ford and Kenji Howard (and/or the Client Security Fund, if appropriate) of: (a) \$4,000 plus 10% interest from March 16, 1999 for the Writ to the Court of Appeal; (b) \$2,500 plus 10% interest from February 9, 1998 for "appeal costs;" (c) \$1,000 plus 10% interest from April 21, 1999 to transfer Kenji Howard to Tehachippi State Prison; and (d) \$2,500 plus 10% interest from January 9, 2000 for the Writ to the Supreme Court.
5. Payment to Wendel Phillips, (and/or the Client Security Fund, if appropriate) of \$2000.00 plus 10% interest from September 1, 2001.
6. Payment to Nedra Armstrong (and/or the Client Security Fund, if appropriate) of \$7,500 plus 10% interest from November 10, 1999.
7. Respondent provided some legal services to Nunez, but did not earn all of the \$4312.00 in fees and costs Nunez paid him. Accordingly, Respondent agrees to consent to binding arbitration should his former client pursue the matter in fee arbitration, and further agrees that he will abide by any fee arbitration award and/or resulting order related thereto.

Respondent enters into this stipulation as a condition of his/her participation in the Pilot Program. Respondent understands that he/she must abide by all terms and conditions of Respondent's Pilot Program Contract.

If the Respondent is not accepted into the Pilot Program or does not sign the Pilot Program contract, this Stipulation will be rejected and will not be binding on Respondent or the State Bar.

If the Respondent is accepted into the Pilot Program, upon Respondent's successful completion of or termination from the Program, this Stipulation will be filed and the specified level of discipline for successful completion of or termination from the Program as set forth in the State Bar Court's Statement Re: Discipline shall be imposed or recommended to the Supreme Court.

October 9, 2003

Date



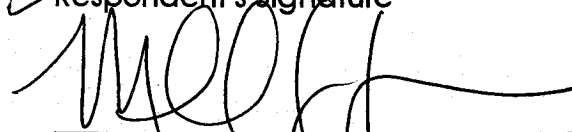
Respondent's Signature

Duane R. Folke

Print Name

10-9-03

Date



Respondent's Counsel Signature

Michael G. Gerasik

Print Name

Oct. 10, 2003

Date



Deputy Trial Counsel's Signature

Brooke A. Schafer

Print Name

ORDER

Finding this stipulation to be fair to the parties, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- The stipulation as to facts and conclusions of law is APPROVED.

- The stipulation as to facts and conclusions of law is APPROVED AS MODIFIED as set forth below.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; 2) this court modifies or further modifies the approved stipulation; or 3) Respondent is not accepted for participation in the Pilot Program or does not sign the Pilot Program Contract. (See rules 135(b) and 802(b), Rules of Procedure.)

The effective date of the disposition is the effective date of the Supreme Court order herein, normally 30 days after the file date of the Supreme Court Order. (See rule 953(a), California Rules of Court.)

Date

4/22/04

Judge of the State Bar Court

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

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on July 9, 2008, I deposited a true copy of the following document(s):

DECISION AND ORDER FILING AND SEALING CERTAIN DOCUMENTS

STIPULATION RE FACTS AND CONCLUSIONS OF LAW

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

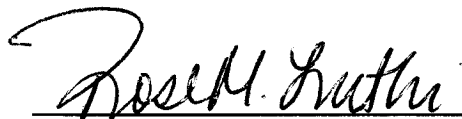
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

DUANE R. FOLKE, ESQ.
LAW OFC DUANE R FOLKE
3450 WILSHIRE BLVD #108-17
LOS ANGELES CA 90010 - 2208

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

DAVID SAUBER, ESQ., Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **July 9, 2008**.



Rose M. Luthi
Case Administrator
State Bar Court