

JAN 14 2005

PUBLIC MATTER

STATE BAR COURT CLERK'S OFFICE
SAN FRANCISCO

kwiktag®

022 605 132



THE STATE BAR COURT

HEARING DEPARTMENT - LOS ANGELES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In the Matter of)
MIKE THOMAS TARASKA,)
Member No. 138090,)
A Member of the State Bar.)

Case No. 03-J-04488-JMR
DECISION INCLUDING DISBARMENT
RECOMMENDATION AND
INVOLUNTARY INACTIVE
ENROLLMENT ORDER

I. INTRODUCTION

Respondent Mike Thomas Taraska (Respondent) was disbarred by order the Supreme Court of the State of Arizona. As a result, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated the above-entitled proceeding pursuant to Business and Professions Code section 6049.1(b), and rules 620-625, of the Rules of Procedure of the State Bar.

The issues in this proceeding are limited to: (1) the degree of discipline to be imposed upon respondent in California; (2) whether, as a matter of law, respondent's culpability in the Arizona proceeding would not warrant the imposition of discipline in California under the laws or rules applicable in this State at the time of respondent's misconduct in Arizona; and (3) whether the Arizona proceeding lacked fundamental constitutional protection. (Bus. & Prof. Code, Section 6049.1(b).¹)

Pursuant to section 6049.1(b), respondent bears the burden of establishing that the conduct

¹All further references to "section" refer to the Business and Professions Code unless otherwise noted.

1 for which he was disciplined in Arizona would not warrant the imposition of discipline in
2 California and/or that the Arizona proceedings lacked fundamental constitutional protection.

3 For the reasons indicated below, the court recommends that respondent be disbarred.

4 II. SIGNIFICANT PROCEDURAL HISTORY

5 The Notice of Disciplinary Charges (NDC) was filed with the State Bar Court and
6 properly served on respondent on February 13, 2004.

7 On April 9, 2004, respondent filed his Answer to the NDC.

8 Trial in this matter was held on September 29, 2004. On September 30, 2004, the court
9 ordered the State Bar to file a closing brief by October 4, 2004, Respondent to file a closing brief
10 by October 11, 2004, and the State Bar to file a reply brief, if any, by October 15, 2004.

11 On October 5, 2004, the State Bar filed a Brief on Culpability and Discipline Following
12 Trial. Respondent did not file a closing brief.

13 On October 18, 2004, the court ordered this matter to stand submitted for decision.

14 III. JURISDICTION

15 Respondent was admitted to the practice of law in the State of California on December 7,
16 1988, was a member at all times pertinent to these charges, and is currently a member of the State
17 Bar of California. Respondent argues that neither the State Bar of Arizona nor the State Bar of
18 California have jurisdiction over him since he was "no longer a member" of either bar after he
19 ceased paying bar membership fees. Such arguments are groundless.²

20 Since respondent neither resigned nor was disbarred at any point during this disciplinary
21 proceeding, he remains a member of the State Bar of California, albeit one whose membership is

22
23 ²The court notes that Respondent's Arizona disciplinary hearing preceded his suspension
24 from the Arizona State Bar. According to the Notice of Summary Suspension which the Arizona
25 State Bar addressed to respondent and dated May 5, 2003, respondent was approved for summary
26 suspension on April 25, 2003, for failure to pay active membership dues. The last day of
27 testimony in respondent's Arizona disciplinary proceeding concluded on September 25, 2002,
28 and respondent filed his post-hearing memorandum on February 26, 2003. The hearing officer
issued his decision in the proceeding on March 27, 2003. Respondent's disbarment was not
precluded by the fact that the report of the Disciplinary Commission of the Supreme Court of
Arizona and the Judgment and Order of the Supreme Court of Arizona were not issued until after
respondent's summary suspension for failure to dues.

1 subject to reinstatement upon payment of delinquent fees.³ Thus, this court's exercise of personal
2 jurisdiction over respondent in this proceeding is proper. (*In the Matter of Pyle* (Review Dept.
3 1998) 3 Cal. State Bar Ct. Rptr. 929, 933.) The same conclusion is true for Respondent's
4 disciplinary matter in Arizona. He was suspended based on his failure to pay dues, but he was
5 still a member subject to the disciplinary proceedings.

6 IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

7 Business and Professions Code section 6049.1(a) provides, in pertinent part, that a
8 certified copy of a final order by any court of record of any state of the United States,
9 determining that a member of the State Bar committed professional misconduct in that
10 jurisdiction shall be conclusive evidence that the member is culpable of professional misconduct
11 in this state.

12 State Bar Exhibit 1 and 2 attached to the NDC and respondent's exhibit A-H are admitted
13 into evidence.

14 A. Background of Arizona Disciplinary Matter

15 Respondent was admitted to practice law in the State of Arizona on May 22, 1987.

16 The record in the Arizona proceeding conclusively establishes the following facts:

17 On September 11, 2003, the Supreme Court of Arizona issued an order disbaring Respondent
18 effective that date and requiring him to pay a total of \$524,449.50 in previously ordered court
19 sanctions. Respondent was also ordered to "pay in full any and all claims paid by the Client
20 Protection Fund, not to exceed the maximum permissible payment of \$100,000.00."⁴

21 The Arizona Supreme Court's order was based upon the report of the Disciplinary
22 Commission of the Supreme Court of Arizona filed July 1, 2003, which unanimously
23 recommended adopting and incorporating by reference the Hearing Officer's findings of fact,
24

25 ³On its own motion, pursuant to Evidence Code section 452(h), the court takes judicial
26 notice of State Bar membership records which reflect that effective September 16, 2004,
27 respondent was not entitled to practice law as a result of his failure to pay bar membership fees.

28 ⁴State Bar Exhibit 1, Judgment and Order of the Supreme Court of Arizona filed
September 11, 2003.

1 conclusions of law and discipline recommendation. The Hearing Officer's Report and
2 Recommendation was filed on March 28, 2003. On April 16, 2003, respondent filed a Notice of
3 Appeal of the Hearing Officer's report. On April 17, 2003, the Disciplinary Clerk filed a Notice
4 that the transcript of proceedings and exhibits had been filed and that the matter was scheduled
5 for consideration by the Disciplinary Commission on June 21, 2003. According to the Notice,
6 respondent had 20 days from the date of the Notice to file an opening brief. However,
7 respondent never filed a brief on appeal,⁵ and the court finds the Judgment and Order of the
8 Supreme Court of Arizona disbaring respondent from the practice of law in the State of Arizona
9 is final.

10 **B. Background Regarding Arizona Misconduct**

11 In April 1992, promoter Larry Willis (Willis) became interested in a certain business
12 project. He wanted to turn a dilapidated bar into an adult club (the Project). Willis thereafter
13 became involved in a business deal with an Arizona corporation known as Cosan Enterprises,
14 Inc. (Cosan) which soon began to unravel. Willis, with the help of his attorney and neighbor,
15 Leighton Clark (Clark), sued Cosan in November 2002 to get possession of the Project.

16 In March 1993, a temporary restraining order was entered in favor of Willis giving him
17 the property but not the financing necessary to make the Project work. Willis therefore turned to
18 his friends, Larry and Linda Jarnigan (the Jarnigans) who agreed to loan Willis a considerable
19 sum of money.

20 With Clark's assistance, in January 1993, Willis set up Larry's Apartment Company,
21 L.L.C. (LALLC) to act as purchase nominee and the operating entity of the Project. In June
22 1993, with Clark's assistance, Willis set up a Nevada corporation called N. D. Duco Corporation
23 (NDDC) which was to end up owning the real property and renting it to LALLC. The Jarnigans
24 expected to become the sole owners of NDDC, but did not intend to operate the Project.

25
26 ⁵Respondent contends that he did not have to file a brief on appeal because his
27 membership in the State Bar of Arizona was terminated. While respondent was summarily
28 suspended for failing to pay his membership fees which required him to pay active dues,
delinquency penalties and a reinstatement fee to reinstate his membership, respondent cites no
authority in support of his contention that he did not need file an appellate brief.

1 The Project floundered in the spring and summer of 1993, when a falling out occurred
2 between Willis and Clark resulting in Clark filing suit and stirring up the then dormant litigation
3 between Cosan and Willis.

4 LALLC assigned its option to purchase the real property to NDDC in April 1993. NDDC
5 exercised its option and leased the building to LALLC for \$50,000 per month (the Original
6 Lease). Under the Original Lease, the build out of the Project was to be paid by LALLC. The
7 Original Lease and its promise of \$50,000 in monthly rent was important to the Jarnigans, as this
8 was to be their source of repayment for the money they had put into the Project. The Jarnigans
9 owned all of the stock in NDDC and Willis owned substantially all of the ownership interests in
10 LALLC.

11 In the summer of 1993, Respondent met Willis. On October 9, 1993, Respondent and
12 Willis signed a retainer agreement for Respondent to represent Willis and LALLC in Clark's
13 litigation and assist with the transfer of a liquor license from Cosan to LALLC. As his fee,
14 Respondent obtained an 18% ownership interest in LALLC.

15 In the fall of 1993, the Jarnigans met Respondent. Between the fall of 1993 and the fall
16 of 1994, Willis and the Jarnigans believed respondent was acting as the attorney for all of the
17 entities and individuals involved in the Project, including the Jarnigans, Willis, NDDC and
18 LALLC.

19 As Willis was not seen by the Liquor Department as a fit person to hold a liquor license,
20 Respondent prepared an agreement transferring 79% of Willis's interest in LALLC to respondent
21 for \$711,000⁶ plus the assumption of a \$180,000 in debt owned to Cosan. Thus, respondent had
22 become the owner of 97% of LALLC after only about 30 days after he was retained by Willis.⁷

24 ⁶This was to be paid by a lump sum payment of \$40,000 plus \$491,000 represented by
25 three promissory notes due on different dates.

26 ⁷The promissory notes were eventually assigned to the Jarnigans. Respondent's father
27 provided a \$40,000 check but, according to Willis, when he received the check, respondent had
28 Willis cash the check and give the money to respondent. As the promissory notes were later
canceled in litigation respondent filed against Willis, respondent paid Willis nothing for the 79%
interest which Willis transferred to respondent.

1 In an effort to get back into the Project, Clark convinced Cosan to reactivate the 1992
2 litigation which had been filed against Cosan by LALLC's predecessor entity. Cosan's counsel
3 petitioned the court to issue a temporary restraining order giving Cosan immediate possession of
4 the Project. The petition was granted by the court which authorized issuance of the temporary
5 restraining order on condition that bond be posted. However, in order to prevent the temporary
6 restraining order from becoming effective, before the bond was posted, respondent put LALLC
7 into a Chapter 11 bankruptcy. The Cosan litigation then became an adversarial matter in the
8 bankruptcy proceeding.

9 At first there was a good relationship between respondent, Willis, the Jarnigans, LALLC
10 and NDDC. The parties felt like they were a team working to defeat Clark and bring the Project
11 to fruition. However, this positive relationship amongst the parties did not last and, ultimately,
12 complex and protected litigation occurred, as well as other legal maneuvering, including
13 proceedings in bankruptcy court.

14 Of particular note are three lawsuits filed in the fall of 1994 and which continued for
15 years.

16 The first case, filed on October 5, 1994, became known as the Contract Case. In this
17 matter, respondent, representing LALLC, claimed contract damages from NDDC for failing to
18 finish the Project build out and also fraud relating to the Project build out. Respondent filed the
19 lawsuit against NDDC and the Jarnigans.

20 The second matter, filed November 1, 1994, was *Del Duco v. NDDC, et al.* and was
21 known as the Foreclosure matter. Nicholas Del Duco, owner of the dilapidated bar that Willis
22 wanted for the Project, began a deed of trust foreclosure against NDDC, LALLC, respondent and
23 the Jarnigans.

24 The third lawsuit was filed on November 8, 1994, by respondent and LALLC against
25 NDDC, the Jarnigans, Del Duco and the Atlanta investors.⁸ This matter became known as the
26

27
28 ⁸At some point, the Jarnigans determined that they wanted out of the Project and the
Atlanta investors would take over the Project.

1 Fraud Case. The lawsuit alleged a conspiracy amongst NDDC, the Jarnigans, Del Duco and the
2 Atlanta investors to force respondent out of the Project.

3 NDDC and the Jarnigans retained Fennemore Craig⁹ to represent them in November
4 1994.

5 **Count One**

6 Respondent called the Jarnigans' house on May 22, 1995, and left a message on the
7 Jarnigans' telephone answering machine. Linda Jarnigan understood the message to be a
8 reference to the Contract, Fraud and Foreclosure Cases, and the fact that the litigation was
9 costing the Jarnigans a considerable amount of money.

10 On May 22, 1995, respondent was a party, adverse to the Jarnigans in the Foreclosure and
11 Fraud Cases, and knew that Fennemore Craig represented the Jarnigans and NDDC in those
12 cases. On May 22, 1995, respondent was also counsel for LALLC in the Contract Case, where
13 LALLC was adverse to NDDC and the Jarnigans, who respondent knew to be represented by
14 Fennemore Craig.

15 On May 23, 1995, Weatherwax instructed respondent not to again contact the Jarnigans
16 directly.

17 On July 26, 1995, respondent again called Linda Jarnigan directly regarding the Contract
18 and Fraud Cases. During that telephone conversation, respondent talked about the merits of the
19 litigation and told Linda Jarnigan that Fennemore Craig was not acting in the best interests of the
20 Jarnigans or NDDC. Respondent also told Linda Jarnigan that Weatherwax did not want to settle
21 the litigation because Weatherwax was making a lot of money from it and needed the cases to
22 keep busy.

23 Respondent's purpose in making the call was to drive a wedge between the Jarnigans and
24 their counsel so as to make a settlement of the pending litigation that would be more favorable to
25 respondent.

26
27
28 ⁹Most of the work on these matters was handled by attorneys Duane Fox (Fox), David
Weatherwax (Weatherwax) and Keith Hendricks (Hendricks).

1 On October 5, 1996, in the Contract Case, Judge Arellano found that in contacting the
2 Jarnigans directly, respondent had violated Ethical Rule 4.2 of the Arizona Rules of Professional
3 Conduct (hereinafter "ER").

4 On October 25, 1995, in the Fraud Case, Judge Hutt found that in contacting Linda
5 Jarnigan directly, respondent had violated ER 4.1, ER 4.2 and ER 4.4. Judge Hutt granted the
6 Jarnigans' and NDDC's motion for sanctions and dismissed respondent's individual claims in the
7 Fraud Case and ordered him to pay reasonable attorney's fees and costs to NDDC and the
8 Jarnigans.

9 After Judge Arellano's ruling on October 5, 1996, respondent caused a judicial complaint
10 to be filed against Judge Arellano. As a consequence, the judge recused herself and the Contract
11 Case was reassigned to Judge Hutt.

12 On February 16, 1996, Judge Hutt quantified the attorney fee awards and ordered
13 respondent to pay a \$6,006.50 sanction for his improper ex-parte contacts in the Fraud Case and
14 an \$18,443.00 sanction in the Contract Case.

15 **Count Two**

16 Judge Arellano, on October 5, 1995, ordered respondent "not [to] have direct
17 communication with Mr. and Mrs. Jarnigan, N. D. Duco Corporation or Nicholas Del Duco," and
18 to direct all communication through their lawyers.

19 Judge Hutt issued a minute entry in the Fraud Case on October 25, 1995, prohibiting
20 respondent from directly contacting the Jarnigans.

21 Judge Hutt ordered respondent on February 16, 1996, to have no further direct
22 communications with the Jarnigans, NDDC, or any other represented party in the Contract, Fraud
23 or Foreclosure Cases.

24 Respondent called the Jarnigans' Canadian counsel, Joseph Schaffer, on May 2, 1996, to
25 ask permission to speak with the Jarnigans directly. Schaffer refused to consent and notified
26 Fennemore Craig of the contact.

27 Weatherwax wrote a letter on May 3, 1996, a copy of which was sent to respondent,
28 telling respondent not to contact the Jarnigans directly and to refer all settlement proposals to

1 Fennemore Craig.

2 On July 6, 1996, respondent called Linda Jarnigan directly. Respondent's reasons for
3 contacting the Jarnigans was to undermine the attorney-client relationship the Jarnigans had with
4 their counsel so as to obtain a more favorable settlement for himself in the pending litigation.

5 On December 18, 1996, Judge McVey found probable cause to believe that respondent's
6 conduct in directly contacting Linda Jarnigan on July 6, 1996, constituted criminal contempt of
7 Judge Hutt's February 16, 1996, order and referred the matter to an order to show cause hearing
8 on March 7, 1997. Judge McVey, following the hearing, found respondent guilty of criminal
9 contempt of court, a class 2 misdemeanor and set the matter for sentencing for March 27, 1997.
10 Judge McVey placed respondent on two years of probation, the terms of which included a 10
11 days in jail and a \$300.00 fine.

12 On the basis of these facts, respondent was found culpable of violating the following
13 Arizona ethics rules:

14 (1) By violating orders issued by Judge Arellano and Judge Hutt prohibiting respondent
15 from directly communicating with the Jarnigans, respondent violated Rule 42, Arizona Rules of
16 Court, Rules of the Supreme Court (hereinafter referred to as "Ariz. R. S. Ct." as cited in the
17 Hearing Officer's Report and Recommendation); specifically ERs 3.4(c) (fairness to opposing
18 counsel and party - knowingly disobeying an obligation under tribunal rules), 4.2
19 (communication with a represented person), 8.4(c) (misconduct to engage in conduct involving
20 fraud, deceit, dishonesty or misrepresentation) and (d) (misconduct to engage in conduct
21 prejudicial to administration of justice) and Rules 51(e) (wilful disobedience or violation of court
22 order or rule) and (k) (wilful violation of a state court order).¹⁰

23 **Legal Conclusions - Counts One and Two**

24 By violating court orders issued by Judge Arellano and Judge Hutt, respondent wilfully
25

26
27 ¹⁰In Arizona, disciplinary allegations must be proven by the State Bar by clear and
28 convincing evidence. (Exhibit 1[Hearing Officer's Report and Recommendation filed March 28,
2003]; rule 48(d), Arizona Rules of Court, Rules of the Supreme Court, [former Ariz St S Ct R
54(c),(d)]; *In the Matter of Connelly* (2002) 203 Ariz. 413, 417.)

1 violated section 6103 of the Business and Professions Code and engaged in acts involving moral
2 turpitude, dishonesty or corruption in wilful violation of section 6106.¹¹

3 **Count Three**

4 Judge Moorman enjoined respondent on February 14, 1997, from filing further pleadings
5 in the LALLC Chapter 11 administrative or related adversarial proceedings without prior Court
6 permission.

7 Respondent filed on July 12, 1997, a request for clarification of the Court's February 14,
8 1997, order and a request for permission to file an objection to the trustee's fee application.

9 On July 18, 1997, Judge Moorman refused to modify his prior order and denied
10 respondent leave to file an objection to the trustee's fee application. The court also restated its
11 earlier order prohibiting respondent from filing any pleadings in the Chapter 11 proceeding
12 without leave of court.

13 Respondent filed an "Objection to Disclosure Statement" in the Chapter 11 proceeding
14 without leave of Court on September 16, 1997.

15 Judge Moorman thereafter struck respondent's September 16, 1997, filing. The court
16 found that respondent had filed the objection without leave of court; that it contained a number of
17 unfounded scandalous allegations; and that the objection was an attempt by respondent to
18 continue to harass and delay the Chapter 11 proceedings.

19 Without leave of court, on December 22, 1997, respondent filed an "Emergency Request
20 for Clarification of Court's February 14, 1997, Order and Request for Permission to File
21 Expedited Motion for Evidentiary Hearing to Remove Trustee Michael W. Carmel for Improper
22 and Illegal Conduct Including Sexual Harassment." (Emphasis in original). The motion
23 contained allegations of misconduct by, and derogatory comments about, Carmel. The motion
24 was not limited to a request to file a pleading. It included factual allegations relating to the

25
26 ¹¹In its Brief on Culpability and Discipline Following Trial, the State Bar contends in nine
27 counts that respondent's conduct constitute a violation of section 6068(b). However, the NDC
28 did not charge respondent with a violation of section 6068(b). Thus, for due process reasons, the
court will not find that respondent's conduct constitutes a wilful violation of section 6068(b) in
any of these counts.

1 merits of the motion. Attached to the motion was a copy of a sworn statement of a dancer from
2 the Project containing derogatory statements about Carmel.

3 Judge Moorman denied respondent's December 22 request on December 23, 1997. The
4 court found that the request included defamatory and scandalous allegations against Carmel. The
5 court also found that respondent's request was an attempt to interfere with the court's pending
6 ruling in the Parking Lot Trial, an adversary proceeding associated with the Chapter 11
7 proceeding, and that respondent had again violated the Court's February 14, 1997, order.

8 Without leave of Court, on December 26, 1997, respondent filed a pleading in connection
9 with the Parking Lot Trial. Respondent was not a party to the Parking Lot Trial.

10 Judge Moorman denied respondent's request for relief in the Parking Lot Trial on
11 December 30, 1997, because respondent was not a party to the Parking Lot Trial and therefore
12 lacked standing to request relief. The court ordered the pleading stricken because it contained
13 defamatory and scandalous allegations against the court and the parties.

14 Without leave of Court, on March 10, 1998, respondent filed another request to file a
15 motion to remove Michael Carmel as trustee in the Chapter 11 proceeding. The request
16 contained some of the same material Judge Moorman had previously sealed and stricken as
17 defamatory and scandalous.

18 On March 12, 1998, Judge Moorman found respondent to be in violation of the February
19 13 and 14, 1997,¹² orders and set an order to show cause to consider a sanction.

20 Respondent admitted at the order to show cause hearing that he filed scandalous
21 pleadings, but claimed he had not violated the express terms of the court's orders. Respondent
22 stated that his training and education as a tax lawyer caused him to take a very strict reading of
23 the court's February 13 and 14, 1997, orders. Respondent admitted he may have violated the
24 spirit of the court's orders, but argued that his educational experience prevented him from
25 recognizing that at the time.

26 _____
27 ¹²A protective order was also entered on February 13, 1997, prohibiting respondent from
28 filing any further pleadings in the LALLC bankruptcy or related proceedings without court
permission.

1 Following the hearing, Judge Moorman found that respondent had repeatedly and
2 intentionally violated the Court's orders of February 13 and 14, 1997, and a \$10,000 sanction was
3 imposed against respondent.

4 On the basis of these facts, respondent was found culpable of violating the following
5 Arizona ethics rules:

6 (1) For violating Judge Moorman's orders prohibiting respondent from filing any
7 pleadings in either the LALLC Chapter 11 proceeding or any associated matter without leave of
8 court, respondent violated Rule 42, Ariz. R. S. Ct; specifically, ERs 3.1 (meritorious contentions
9 and claims), 3.3(a) (candor toward tribunal), 3.4(c), 4.1(a) (truthfulness in statements to others) -
10 lawyer shall not knowingly make a false statement of law or material fact to a third person), 4.4
11 (respect for third persons' rights), 8.4(c) and (d) and Rule 51(e) and (k).

12 **Legal Conclusion - Count Three**

13 By filing four pleadings without prior court permission in violation of Judge Moorman's
14 order, respondent wilfully violated section 6103.

15 By filing pleadings containing unfounded, defamatory allegations and to harass and delay
16 legal proceedings, respondent wilfully violated section 6068(c), (d) and his actions constitute acts
17 of moral turpitude in wilful violation of section 6106.

18 **Count Four**

19 Respondent represented LALLC and himself in settlement negotiations with Cosan.
20 Respondent also represented the Jarnigans, NDDC and Willis in those negotiations.

21 Respondent told Mark Pyper, Cosan's attorney, that for purposes of settlement he
22 represented himself, LALLC and NDDC. During the negotiations, Pyper considered respondent
23 to be representing the interests of NDDC.

24 Larry Jarnigan signed the Cosan settlement agreement at respondent's direction without
25 reading it.

26 Based upon respondent's advice, the Jarnigans, through NDDC, provided most or all of
27 the money needed for settlement with Cosan.

28 At least \$180,000 of the amount due Cosan was respondent's personal liability.

1 The Cosan settlement agreement divided the six parties into two categories. Respondent,
2 NDDC and LALLC were collectively referred to as the "Second Party." The agreement stated
3 that notices to the "Second Party" were to be sent to respondent at his address in California.

4 The final, signed Cosan settlement agreement required the signatures of Larry Jarnigan,
5 Nicholas Del Duco and Larry Willis, none of whom were included in the draft settlement
6 agreement that Pyper sent to respondent. Neither the first nor the second draft provided for
7 signature by Kevin Witasick (Witasick).¹³

8 The Jarnigans considered respondent to be both their attorney and NDDC's attorney even
9 after the association of Witasick, because respondent told them he was still their lawyer and
10 continued to discuss the case with Larry Jamigan, review and sometimes change documents
11 prepared for filing by Witasick, and meet with Witasick and Larry Jarnigan to discuss the
12 handling of the case.

13 Linda Jarnigan never talked with or met Witasick.

14 Prior to settling the Cosan litigation, respondent did not inform Larry Jarnigan of the
15 potential conflict of interest between LALLC and respondent on the one hand and the Jarnigans
16 and NDDC on the other. Respondent did not inform the Jarnigans that they might wish to seek
17 independent counsel relating to the Cosan settlement. Furthermore, respondent did not give the
18 Jarnigans sufficient time to retain or consult with independent counsel.

19 Weatherwax sent a letter to respondent on May 23, 1995, stating that because respondent
20 represented NDDC in connection with the Cosan settlement, respondent was precluded from
21 representing LALLC and other clients with interests materially adverse to NDDC in related
22 matters. Weatherwax advised respondent that NDDC had not and would not consent to his
23 representation of LALLC in any matter adverse to NDDC. Weatherwax demanded that
24 respondent withdraw from further representation of LALLC in the Fraud, Contract and
25 Foreclosure Cases and the Chapter 11 proceeding.

26 Respondent did not withdraw as counsel for LALLC in any of those matters.

27
28 ¹³Witasick was later another attorney working on the Project.

1 NDDC filed a motion on June 13, 1995, to disqualify respondent from representing
2 LALLC in the Fraud Case. NDDC filed a motion on June 26, 1995, to disqualify respondent
3 from representing LALLC in the Contract Case. NDDC and the Jarnigans filed a motion on
4 November 2, 1995, to disqualify respondent from representing LALLC in the Foreclosure Case.

5 Judge Arellano concluded that respondent had violated ER 1.9 and ER 3.7, and
6 disqualified him from representing LALLC in the Contract Case.

7 Judge Hutt disqualified respondent from continuing to represent LALLC in the Fraud
8 Case on June 21, 1995, because of his prior representation of NDDC.

9 Respondent was disqualified in the Foreclosure Case after he withdrew his objection to
10 disqualification.

11 On the basis of these facts, respondent was found culpable of violating the following
12 Arizona ethics rules:

13 (1) Due to the conflict of interest based upon respondent's representation of LALLC in
14 the Fraud, Contract and Foreclosure Cases against NDDC and the Jarnigans in spite of having
15 formerly represented NDDC and the Jarnigans in substantially related matters, respondent
16 violated Rule 42, Ariz. R. S. Ct; specifically, ERs 1.7 (conflict of interest), 1.9 (conflict of
17 interest as to former client) and 8.4(d).

18 **Legal Conclusion - Count Four**

19 Respondent wilfully violated rule 3-310(E) of the Rules of Professional Conduct of the
20 State Bar of California¹⁴ by representing LALLC in the Fraud, Contract and Foreclosure Cases
21 against NDDC and the Jarnigans, without the informed written consent of NDDC and the
22 Jarnigans, when he had formerly represented NDDC and the Jarnigans in substantially related
23 matters.

24 **Count Five**

25 By February of 1997, the Jarnigans and NDDC had obtained judgments for sanctions
26

27
28 ¹⁴Unless otherwise indicated, all further references to rules refer to the Rules of
Professional Conduct of the State Bar of California.

1 against respondent totaling approximately \$464,449.50.

2 Thereafter, NDDC initiated garnishment proceedings to collect the judgments. NDDC
3 served writs of garnishment on Urban Vibzz, L.L.C. on February 5, 1997, and the Phoenician
4 Dynasty, L.L.C. on February 12, 1997.¹⁵ NDDC also subpoenaed those two entities and their
5 managing members, Cole Bailey (Phoenician Dynasty) and Rob Denoweth (Urban Vibzz) for
6 documents and testimony.

7 Respondent represented the Phoenician Dynasty, L.L.C., and Urban Vibzz, L.L.C., at
8 various times for compensation.

9 Respondent undertook representation of the Phoenician Dynasty, L.L.C. and Urban
10 Vibzz, L.L.C in connection with the garnishments.

11 Respondent advised Urban Vibzz, L.L.C.'s agent, Rob Denoweth, to ignore the
12 subpoenas served on Urban Vibzz, L.L.C. by NDDC. As a result, Denoweth did not appear for
13 the deposition scheduled for February 18, 1997.

14 Respondent also instructed Cole Bailey not to answer several questions posed to him
15 during a deposition.

16 On March 3, 1997, NDDC filed an application for an order to show cause why Bailey
17 and the Phoenician Dynasty, L.L.C. and Denoweth and Urban Vibzz, L.L.C should not be
18 sanctioned for their refusal to comply with the subpoenas. Respondent filed a response to the
19 application on behalf of Denoweth and Urban Vibzz.

20 Respondent filed responses to the application on behalf of Bailey and the Phoenician
21 Dynasty, L.L.C. Bailey on March 17, 1997.

22 At a hearing on the order to show cause, Judge McVey found that respondent's continued
23 representation of the garnishees was improper and precluded respondent from representing them
24 at the hearing.

25 Judge McVey declined to sanction either Denoweth or Bailey only because they had acted
26 in reliance on the bad legal advice of respondent.

27 _____
28 ¹⁵These entities were believed to be controlled or owned by respondent.

1 On the basis of these facts, respondent was found culpable of violating the following
2 Arizona ethics rules:

3 Respondent was found to have violated Rule 42, Ariz. R. S. Ct; specifically, ER 1.7(b)
4 (conflict of interest - lawyer cannot represent a client if the representation of the client may be
5 materially limited by the lawyer's responsibilities to another client or third person or the lawyer's
6 own interest unless client consents after consultation and lawyer reasonably believes the
7 representation will not be adversely affected) by undertaking to represent Phoenician Dynasty,
8 LLC and its agent, Cole Bailey, and Urban Vibzz, LLC and its agent, Rob Denoweth, in
9 connection with writs of garnishment served on both entities by Fennemore Craig to collect
10 money damages against respondent.

11 **Legal Conclusion - Count Five**

12 By advising Urban Vibzz, L.L.C.'s agent, Rob Denoweth, to ignore the subpoenas served
13 on Urban Vibzz, L.L.C. by NDDC, respondent wilful failed to perform legal services with
14 competence in wilful violation of rule 3-110(A).¹⁶

15 **Count Six**

16 On April 10, 1994, respondent handwrote an "April Agreement" that changed the rent
17 payable under the Original Lease for the Project building from \$50,000 per month to 82% of "net
18 revenues." The April Agreement also transferred an 18% ownership interest in NDDC to
19 respondent and a 48% ownership interest in LALLC to the Jarnigans. The April Agreement
20 further stated that LALLC would be responsible for paying the entire Nicholas Del Duco debt.

21 Respondent told Larry Jarnigan that the April Agreement was in Jarnigan's interest
22 because it would allow repayment sooner of the money loaned by Jarnigan to the Project.

23 In addition, respondent also drafted the Short Form Lease. The Short Form Lease
24 provided for Project rent based upon a variable percentage of monthly "gross revenues," starting
25 at \$100,000 per month.

26 _____
27 ¹⁶As there is no evidence of whether or not respondent provided written disclosure to his
28 clients, there is no clear and convincing evidence that respondent wilfully violated rule 3-
310(B)(4).

1 Under pressure from respondent, Larry Jarnigan signed the Short Form Lease.
2 Respondent informed Jarnigan that the document was needed to deal with an investigation by the
3 Liquor Department that might cost the Project its liquor license and thus all of the money
4 Jarnigan had thus far invested. Respondent advised Jarnigan that the Original Lease would later
5 be reinstated.

6 Larry Jarnigan was misled by respondent as to the purpose of the April Agreement and
7 the Short Form Lease.

8 Respondent did not provide the Jarnigans and NDDC with the following as to either the
9 April Agreement or the Short Form Lease: (a) oral or written discussion of the nature of the
10 transaction and all of its terms; (b) the way in which respondent's participation in the transaction
11 might affect the exercise of his professional judgment on behalf of NDDC and the Jarnigans; (c)
12 the advantages and risks to NDDC and the Jarnigans on the one hand and respondent and
13 LALLC on the other; and (d) any legal rights or consequences the Jarnigans or NDDC might
14 have as a result of the transaction. Respondent further failed to advise the Jarnigans to seek
15 independent counsel and failed to give them a reasonable opportunity to do so prior to entering
16 into the transactions.

17 Both the April Agreement and the Short Form Lease were less favorable to the Jarnigans
18 and NDDC than the Original Lease that Respondent did not draft.

19 Respondent knew, when he advised Jarnigan to sign the Short Form Lease that, in the two
20 months preceding June 1, 1994, Project gross revenues had not reached \$50,000 a month.

21 On the basis of these facts, respondent was found culpable of violating the following
22 Arizona ethics rules:

23 Respondent was found to have violated Rule 42, Ariz. R. S. Ct; specifically, ERs 1.7(b),
24 1.8 (conflict of interest - prohibited transactions) and 8.4(d) as a result of the conflict of interest
25 based on respondent's preparation of the April Agreement and the Short Form Lease both of
26 which respondent had a direct financial interest in and which was adverse to the interests of
27 NDDC and by causing Larry Jarnigan to sign the documents without the transaction and terms
28 being fair to Jarnigan and fully disclosed and transmitted in writing to Jarnigan in a way which

1 could be reasonably understood; without giving Jarnigan a reasonable opportunity to seek the
2 advice of independent counsel; and without obtaining Jarnigans's written consent.

3 **Legal Conclusion - Count Six**

4 By misleading Larry Jarnigan as to the purpose of the documents, respondent engaged in
5 an act involving moral turpitude, dishonesty or corruption in wilful violation of section 6106.

6 Respondent wilfully violated rule 3-300 by obtaining a pecuniary interest adverse to a
7 client without satisfying the requirements of rule 3-300.

8 **Count Seven**

9 This count was dismissed and therefore not addressed in the Arizona disciplinary
10 proceeding.

11 **Count Eight**

12 According to the Original Lease, LALLC was to rent the Project in its "present condition"
13 and that LALLC "may, at its cost and expense, make improvements to the leased premises."

14 Respondent, on April 29, 1994, authored and signed an agreement that stated, in part, that
15 LALLC had agreed to complete and pay for the build out of the tenant improvements to the
16 Project.

17 The Short Form Lease, which respondent drafted, did not say that NDDC was obligated
18 to provide LALLC with a "commercially habitable premise," or state that NDDC was responsible
19 for paying for build out costs.

20 Respondent told the Jarnigans that he would pay all remaining build out costs if the
21 Jarnigans would pay the costs to "get the doors open" to the Project.

22 On October 5, 1994, respondent filed the Contract Case against NDDC, alleging
23 fraud and breach of contract. Count one, the breach of contract allegation, was frivolous because
24 respondent knew that none of the contracts in effect at the time required NDDC to pay the build
25 out costs or to provide a "commercially habitable premise." Count two, the fraud allegation, was
26 frivolous because respondent knew NDDC was not legally obligated to obtain a certificate of
27 occupancy from the city of Phoenix or pay the build out costs necessary to obtain the certificate.

28 Judge Hutt entered judgment in the Contract and Fraud Cases on November 16, 1996,

1 finding that both were frivolous and groundless. LALLC's claims in that case were dismissed,
2 and LALLC was ordered to pay \$302,300.05 for attorneys fees and \$1,569,167 for past due rent
3 and interest.

4 On the basis of these facts, respondent was found culpable of violating the following
5 Arizona ethics rules:

6 Respondent was found to have violated Rule 42, Ariz. R. S. Ct; specifically, ERs 3.1, 4.4
7 and 8.4(d) for filing the frivolous Contract Case for an improper purpose, to run off certain
8 investors and harass the Jarnigans.

9 **Legal Conclusions - Count Eight**

10 By filing the frivolous Contract Case when he knew that none of the contracts in
11 effect at the time required NDDC to pay the build out costs or to provide a "commercially
12 habitable premise," respondent wilfully violated section 6068(c) and committed an act involving
13 moral turpitude, dishonesty or corruption in wilful violation of section 6106.

14 **Count Nine**

15 Fennemore Craig filed a motion on March 20, 1995, to lift the stay in the Chapter 11
16 proceeding so the state court could resolve the default judgment issue in the Contract Case.
17 Thomas Gorrill, an attorney retained by respondent to represent LALLC in the Chapter 11
18 proceeding, stipulated on May 9, 1995, that the stay could be lifted so that the motion to set aside
19 the default judgment could be resolved in state court. The bankruptcy court granted NDDC's
20 motion.

21 On the same day the stay was lifted by stipulation, respondent removed the Contract Case
22 back to the bankruptcy court. The Foreclosure and Fraud Cases were also removed by
23 respondent.

24 On May 24, 1995, the bankruptcy court, on its own motion, remanded all three cases back
25 to the state court, finding that respondent's removal of the Contract Case was an abuse of process
26 as it had just entered an order allowing the state court to resolve the default judgment dispute.

27 By his removal of the three case, respondent intended to delay the state court proceedings
28 to prevent Judge Hutt from ruling on the pending summary judgment motions.

1 Respondent filed a motion on June 2, 1995, to consolidate the Contract, Foreclosure and
2 Fraud Cases. Judge Arellano ordered on July 14, 1995, that the three cases be consolidated for
3 discovery purposes but not for trial.

4 Respondent filed a pleading in the Contract Case on August 4, 1995, which stated the
5 following in the caption: "Consolidated for Discovery Purposes with: CV 94-17484 and CV 94-
6 18041." The same language was used by respondent on a pleading he filed on September 18,
7 1995. Respondent filed a pleading in the Fraud Case on September 20, 1995, which included the
8 following in the caption: "Consolidated for Discovery Purposes with: CV 94-17484 and CV 94-
9 15873." On October 4, 1995, respondent also used the same language in another pleading.

10 Respondent on December 28, 1995, knew that Judge Arellano had consolidated the
11 Contract, Fraud and Foreclosure Cases for discovery but not for trial.

12 On April 26, 1996, the same date respondent filed a personal Chapter 11 bankruptcy in
13 California, he removed the Contract and Fraud Cases from the Arizona Superior Court to the
14 California bankruptcy court.

15 Judge Hutt was scheduled to rule on the pending motions for summary judgment in both
16 the Fraud and Contract Cases on April 29, 1996.

17 On April 29, 1996, Judge Hutt found that California was an improper venue for removal
18 of the Contract Case because respondent was not a party to that case. Judge Hutt also found that
19 the Fraud and Contract Cases had been consolidated for discovery but not for trial.

20 The California bankruptcy court converted respondent's Chapter 11 bankruptcy to a
21 Chapter 7 bankruptcy proceeding on June 18, 1996.

22 Thereafter, Respondent again attempted to remove the Fraud and Contract Cases to the
23 Arizona Chapter 11 proceeding.

24 Judge Moorman again remanded both cases to the state court on July 18, 1996.

25 On the basis of these facts, respondent was found culpable of violating the following
26 Arizona ethics rules:

27 For causing the frivolous removal of the Fraud and Contract Cases from state court to the
28 California bankruptcy court for the purpose of delay to prevent so Judge Hutt from ruling on

1 pending summary judgment motions, respondent was found to have violated Rule 42, Ariz. R. S.
2 Ct; specifically, ERs 3.1, 4.4 and 8.4(d).

3 **Legal Conclusion - Count Nine**

4 By causing the frivolous removal of the Fraud and Contract Cases from state court to the
5 California bankruptcy court for the purpose of delay to prevent Judge Hutt from ruling on
6 pending summary judgment motions, respondent wilfully violated section 6068(c).

7 **Count Ten**

8 Judge Moorman entered an order on July 25, 1996, one provision of which stated, "IT IS
9 FURTHER ORDERED that Movant [respondent] shall file no further pleadings on this matter
10 without prior Court approval thereof."

11 Attorney Keith Hendricks, co-counsel for the Jarnigans and NDDC, filed a pleading
12 which stated that the July 25, 1996, order said "that [respondent] shall file no further pleadings in
13 this matter without prior Court approval thereof."

14 On August 6, 1996, respondent filed a motion for sanctions against the Jarnigans, NDDC,
15 and their counsel in the Fraud Case based solely on a distinction he attempted to draw between
16 use of the prepositions "in" and "on" in the pleading.

17 On the basis of these facts, respondent was found culpable of violating the following
18 Arizona ethics rules:

19 For filing a frivolous pleading requesting sanctions against the Jarnigans, NDDC and
20 their attorneys based solely upon the apparent typographical error in the pleading filed by
21 Hendricks substituting the word "on" for the word "in" when quoting from Judge Moorman's
22 order, respondent was found to have violated Rule 42, Ariz. R. S. Ct; specifically, ERs 3.1, 4.4
23 and 8.4(d).

24 **Legal Conclusion - Count Ten**

25 By filing a frivolous pleading requesting sanctions against the Jarnigans, NDDC and their
26 attorneys based solely upon the apparent typographical error in the pleading filed by Hendricks
27 substituting the word "on" for the word "in" when quoting from Judge Moorman's order,
28 respondent wilfully violated section 6068(c).

1 **Count Eleven**

2 In the various legal matters involving the Jarnigans, NDDC, LALLC, respondent and
3 others, the Jarnigans' attorneys attempted to obtain from respondent all documents required to be
4 disclosed pursuant to Rule 26.1, Arizona Rules of Civil Procedure.

5 Judge Arellano entered an order on September 14, 1995, setting pretrial discovery
6 deadlines and requiring the parties to comply with the applicable discovery rules.

7 Respondent informed Fennemore Craig he would not produce any documents that
8 might hurt respondent's case. Respondent also stated that LALLC and respondent had disclosed
9 all documents in their possession, custody and control, but later disclosed that he and LALLC
10 had withheld some documents. On at least two occasions, respondent told attorney David
11 Weatherwax that he had a document that would influence the resolution of the case, but would
12 not disclose it unless LALLC and respondent lost on summary judgment.

13 Respondent failed to timely produce at least two documents, the April Agreement and the
14 executed settlement agreement between LALLC and Cosan.

15 Respondent delivered a supplemental disclosure statement to Fennemore Craig on April
16 25, 1996, disclosing, for the first time, the existence of the April Agreement. Fennemore Craig
17 asked respondent for a copy of the April Agreement, but he refused to voluntarily supply a copy.

18 Respondent told Weatherwax on April 30, 1996, that respondent would not provide
19 Weatherwax with a copy of the April Agreement unless Fennemore Craig stipulated that the
20 document would not be shown to anyone else.

21 Thereafter, Fennemore Craig filed a motion for production of the April Agreement.

22 Respondent did not produce the April Agreement until the court ordered him to do so on
23 May 1, 1996.

24 The April Agreement was material to the issues in both the Fraud and Contract Cases
25 because it gave Larry Jarnigan a 48% ownership interest in LALLC and gave respondent an 18%
26 ownership interest in NDDC. The April Agreement also purported to replace the Original Lease
27 that provided a much higher rent payment to NDDC.

28 Judge Hutt found on May 7, 1996, that respondent's failure to disclose the April

1 Agreement was grounds to order the sanction of dismissal and a Rule 11 sanction hearing.

2 The Jarnigans and NDDC spent a significant amount of money attempting to obtain
3 documents that respondent failed to produce.

4 On the basis of these facts, respondent was found culpable of violating the following
5 Arizona ethics rules:

6 For failing to voluntarily produce the April Agreement in violation of a rule of court,
7 respondent was found to have violated Rule 42, Ariz. R. S. Ct; specifically, ERs 3.3 (candor
8 toward tribunal), 3.4(c), 4.1 (truthfulness in statements to others), 8.4(c) and (d) and Rule 51(e).

9 **Legal Conclusion - Count Eleven**

10 By stating to Fennemore Craig that LALLC and respondent had disclosed all documents
11 in their possession, custody and control, when he and LALLC had actually withheld some
12 documents, respondent attempted to mislead Fennemore Craig thereby engaging in an act of
13 moral turpitude, dishonesty or corruption in wilful violation of section 6106.

14 **Count Twelve**

15 On June 22, 1994, Willis, with respondent's assistance, filed a Chapter 7 personal
16 bankruptcy in Arizona.

17 On August 4, 1994, respondent filed a civil complaint against Willis in the California
18 federal district court even though respondent knew Willis had filed for bankruptcy in Arizona
19 and the automatic bankruptcy stay precluded the filing of the lawsuit against Willis.

20 Respondent was still representing Willis in the lawsuit filed against Willis by Leighton
21 Clark when respondent filed the California action against Willis. Respondent had also appeared
22 as counsel of record for Willis in litigation against the Jarnigans.

23 On respondent's advice, on August 24, 1994, Willis signed a partially completed answer in
24 the California case drafted by respondent.

25 Respondent later prepared a stipulation for entry of judgment, which included a statement
26 that respondent did not owe any money to Willis.

27 The stipulation was filed on September 6, 1994, and on September 12, 1994, a stipulated
28 judgment was entered while Willis still considered respondent to be his attorney. Respondent

1 continued to represent Willis in unrelated matters until at least January 1995.

2 Both the answer and the stipulation contained information that was not true. The purpose
3 of the filing was to thwart Clark's efforts to collect on the notes respondent had executed in favor
4 of Willis. Willis participated in the scheme under the expectation that he would be paid even if
5 the notes were cancelled. Respondent was the only beneficiary of this plan because of the
6 cancellation of the notes he was obligated to pay.

7 Although respondent promised Willis he would pay Willis the money due him under the
8 notes despite the California judgment, once respondent resolved the on-going garnishment
9 proceedings, respondent failed to pay the sums due under the notes to Willis.

10 On the basis of these facts, respondent was found culpable of violating the following
11 Arizona ethics rules:

12 Based on respondent's conflict of interest and false statements to the court when he filed
13 a lawsuit against Willis in California, respondent was found to have violated Rule 42, Ariz. R. S.
14 Ct; specifically, ERs 1.7, 3.1, 3.3, 4.1, 4.4, 8.4(c) and (d).

15 **Legal Conclusions - Count Twelve**

16 By engaging in a scheme to thwart's Clark's efforts to collect on the notes which would
17 result in a substantial benefit to respondent personally, and by filing pleadings containing false
18 statements, respondent engaged in acts of moral turpitude, dishonesty or corruption in wilful
19 violation of section 6106. Respondent also wilfully violated section 6068(c) by violating his
20 duty to counsel or maintain only actions or proceedings that appear to him just or legal.

21 **Counts Thirteen to Sixteen and Nineteen**

22 In the Arizona disciplinary proceeding, it was determined that the State Bar of Arizona
23 had failed to prove the allegations in these counts by clear and convincing evidence. Therefore,
24 as respondent was not found culpable in Arizona of any misconduct with respect to these counts,
25 and as the State Bar's Brief on Culpability and Discipline Following Trial filed in this California
26 disciplinary proceeding did not allege any violations of California disciplinary rules or statutes
27 with respect to these counts, the Court will not address these counts further in this proceeding.

28 ///

1 **Counts Seventeen and Eighteen**

2 These counts were dismissed and therefore not addressed in the Arizona disciplinary
3 proceeding.

4 **Count Twenty**

5 While in Los Angeles, California, for a hearing regarding respondent's personal
6 bankruptcy on January 7, 1997, respondent threatened David Weatherwax.

7 Later on that same day, while Weatherwax was walking into another courtroom,
8 respondent grabbed him by the arm and made additional threatening statements. Still later that
9 day, while Weatherwax was waiting for a cab, Weatherwax felt a hard jab to his back, in the area
10 of his left kidney, and heard someone yell, "Bang." Weatherwax then turned and saw
11 respondent, who smiled and crossed the street.

12 On January 28, 1997, the Jarnigans and NNDC filed a motion for protective order,
13 sanctions and other relief against respondent in the LALLC Chapter 11 proceedings.

14 On March 13, 1998, Judge Moorman found that respondent made death threats, threats of
15 physical harm and had physically assaulted Weatherwax. Judge Moorman imposed a \$50,000
16 sanction against respondent.

17 On the basis of these facts, respondent was found culpable of violating the following
18 Arizona ethics rules:

19 For making threats against Weatherwax's well being and life, respondent was found to
20 have violated Rule 42, Ariz. R. S. Ct; specifically, ERs 8.4(b) (professional misconduct to
21 commit criminal act that reflects adversely on lawyer's trustworthiness, honesty or fitness as a
22 lawyer)¹⁷ and (d).

23 **Legal Conclusion - Count Twenty**

24 By making threats against Weatherwax's life and well being, respondent engaged in acts
25 of moral turpitude in wilful violation of section 6106.

26 ///

27 _____
28 ¹⁷In finding respondent's behavior to be criminal, the Hearing Officer cited to California
Penal Code sections 240, 242 and 422.

1 **Count Twenty-One**

2 During the fall or winter of 1994-1995, respondent confirmed to or advised Larry
3 Jarnigan and Willis that Jarnigan and his business partners could legitimately characterize
4 \$461,000 paid to Willis as a consulting fee so that Jarnigan and his partners could claim an
5 income tax deduction and Willis could use some existing tax credits to reduce his income tax
6 obligations.

7 At the time, Larry Jarnigan considered respondent as an attorney representing him
8 regarding the \$461,000 loan transaction and the Project.

9 Willis also considered respondent to be his lawyer and discussed the deduction plan with
10 him.

11 On May 26, 1995, respondent drafted a letter to the district counsel of the Internal
12 Revenue Service regarding Larry Jarnigan, Larry Willis, Carriage Apartments, Inc., and
13 Cimarron Ridge Apartments, and the "funneling" of \$461,000 through Willis to NDDC. The
14 draft letter contained a list of the specific amounts paid, the check numbers, dates of the deposits,
15 including copies of Larry Willis's 1993 individual federal income tax return and copies of checks
16 from the Jarnigans' records relating to the Project.

17 On June 16, 1995, the day after Willis filed an adversary complaint against respondent in
18 Willis's bankruptcy, respondent sent the redrafted letter to the Examination Division and the
19 Criminal Investigations Division of the IRS, stating that Larry Willis and Larry Jarnigan, his
20 clients, had engaged in tax fraud and enclosed the documents attached to the draft letter.

21 Respondent provided the information to the IRS as he wanted to be paid a "finder's fee."

22 Respondent obtained the information disclosed to the IRS during the course of his
23 representation of the Jarnigans and Larry Willis.

24 In November 1995, approximately four months after respondent sent the letter to the IRS,
25 the IRS audited Carriage Apartments, Inc.'s¹⁸ 1993 federal income tax return.

26 Because of the deduction plan, Willis was assessed \$83,000 in taxes.

27 _____
28 ¹⁸This was a business owned by the Jarnigans.

1 On the basis of these facts, respondent was found culpable of violating the following
2 Arizona ethics rules:

3 For inappropriately disclosing client confidences when he sent a letter to the IRS claiming
4 that Jarnigan and Willis had committed tax fraud with the desire to be paid for the information,
5 respondent was found to have violated Rule 42, Ariz. R. S. Ct; specifically, ERs 1.6
6 (confidentiality of information) and 8.4(c).

7 **Legal Conclusion - Count Twenty-One**

8 After Willis filed an adversary complaint against respondent in Willis's bankruptcy,
9 respondent prepared and sent a letter to the IRS regarding the Jarnigans and Willis, stating that
10 his clients had engaged in tax fraud and disclosing information to the IRS that he obtained during
11 the course of his legal representation of his clients and seeking a "finder's fee." In doing so,
12 respondent wilfully violated section 6068(e).

13 **Count Twenty-Two**

14 In the Arizona disciplinary proceeding, it was determined that the State Bar of Arizona
15 had failed to prove the allegations in this count by clear and convincing evidence. Therefore, as
16 respondent was not found culpable in Arizona of any misconduct with respect to this count, and
17 as the State Bar's Brief on Culpability and Discipline Following Trial filed in this California
18 disciplinary proceeding did not allege any violations of California disciplinary rules or statutes
19 with respect to this count, the Court will not address this count further in this proceeding.

20 **Count Twenty-Three**

21 Judge Moorman issued a preliminary injunction on July 3, 1996, enjoining respondent
22 from "communicating with any employees or former employees of the Debtor [LALLC] or the
23 business known as the Jungle Cabaret."

24 While the July 3, 1996 injunction was still in effect, respondent contacted Michael
25 Galam, Jeanne Woodruff, Doug Wooster, Katie Wooster, John Wiggins, Theresa Stutsman, Bob
26 Stuart, Larry Willis, Glen Swafford, John Hoffman and several dancers, all employees or former
27 employees of LALLC,

28 On the basis of these facts, respondent was found culpable of violating the following

1 Arizona ethics rules:

2 For violating Judge Moorman's July 3, 1996, order by contacting employees or former
3 employees of the Project, respondent was found to have violated Rule 42, Ariz. R. S. Ct;
4 specifically, ERs 3.4(c), 8.4(d) and Rule 51(e) and (k).

5 **Legal Conclusion - Count Twenty-Three**

6 By contacting employees or former employees of the Project, respondent violated Judge
7 Moorman's July 3, 1996, letter thereby wilfully violating section 6103.

8 **V. LEVEL OF DISCIPLINE**

9 **A. Factors in Mitigation**

10 Although respondent has no prior record of discipline in California, respondent's lack of
11 a prior record of discipline is entitled to very little weight as he had been admitted in California
12 for less than six years at the time he commenced his misconduct in Arizona.¹⁹ (Rules Proc. of
13 State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e)(i) ("standard");
14 *Kelly v. State Bar* (1988) 45 Cal.3d 649, 658 [7½ years with no prior discipline afforded minimal
15 weight.) The court finds no other mitigating factors.

16 **B. Factors in Aggravation**

17 Respondent's misconduct evidences multiple acts of wrongdoing. (Standard 1.2(b)(ii).)

18 Respondent's misconduct significantly harmed his clients. (Standard 1.2(b)(iv).) The
19 lives of both Larry and Linda Jarnigan were affected by the years they were tangled in the
20 litigation surrounding the Project. The Jarnigans incurred over \$2.2 million in attorney fees to
21 Fennemore Craig and, as of the Arizona disciplinary proceeding, owed additional fees to
22 Fennemore Craig. The Jarnigans had also paid other lawyers and incurred other costs. In
23 addition to the Jarnigans, the personal and professional lives of Fennemore Craig attorneys
24 Hendricks and Weatherwax, as well as that of Willis, Carmel and virtually everyone else who got
25 caught up in this matter, were negatively impacted.

26 Respondent failed to report his Arizona discipline to the State Bar of California in wilful

27
28 ¹⁹Respondent had been admitted to practice law in Arizona for only seven years at the
time his misconduct commenced.

1 violation of section 6068(o)(6). (Standard 1.2(b)(iii).)

2 While respondent was given mitigating credit for having a cooperative attitude toward the
3 Arizona disciplinary proceeding, respondent's attitude in the California proceeding could hardly
4 be characterized as cooperative. Respondent appeared and testified at trial; however, he failed to
5 offer any relevant evidence and acted generally annoyed and arrogant, calling this proceeding a
6 "joke" and stating that he was "railroaded" in Arizona. Respondent thereby displaying a lack of
7 cooperation in the disciplinary proceeding. (Standard 1.2(b)(vi).)

8 Respondent had no remorse and testified at trial that he does not plan to pay the sanctions
9 imposed in the Arizona proceeding. Such an attitude demonstrates indifference toward
10 atonement for or rectification of the consequences of his misconduct. (Standard 1.2(b)(v).)

11 **C. Discussion**

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

16 Standard 1.6(b) provides that the appropriate sanction for the misconduct must be
17 balanced with any mitigating or aggravating circumstances, with due regard for the purposes of
18 imposing discipline. If two or more acts of professional misconduct are found in a single
19 disciplinary proceeding and different sanctions are prescribed by the standards for those acts, the
20 sanction recommended shall be the most severe. The standards, however, are only guidelines
21 and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept.
22 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own
23 particular facts and not by application of rigid standards." (*Id.* at p. 251.)

24 In this instance, the standards provide for the imposition of discipline ranging from
25 reproof to disbarment. (Standards 2.3, 2.4(b), 2.6, 2.8, 2.10.) The most severe sanction is found
26 at standard 2.3 which provides, in pertinent part, that an attorney's culpability of an act of moral
27 turpitude, intentional dishonesty or fraud shall result in actual suspension or disbarment,
28 depending upon the extent to which the victim of the misconduct is misled or harmed and

1 depending upon the magnitude of the act of misconduct and the degree to which it relates to the
2 attorney's acts within the practice of law.

3 Although respondent had the burden of establishing that the conduct for which he was
4 disciplined in Arizona would not warrant the imposition of discipline in California and/or that
5 the Arizona proceedings lacked fundamental constitutional protection (section 6049.1.(b)), other
6 than the jurisdictional argument discussed earlier, respondent did not offer any relevant evidence
7 or argument at the hearing in this matter. As discussed above, the court finds that respondent's
8 misconduct would warrant discipline in California. The court also finds that the Arizona
9 proceeding did not lack fundamental constitutional protection.

10 The State Bar seeks disbarment and the court agrees. Respondent's misconduct in
11 Arizona was found to have involved moral turpitude and dishonesty (five counts), maintaining
12 unjust actions or proceedings (five counts), failing to comply with court orders (three counts),
13 failing to maintain clients confidences and secrets (one count), failing to use truthful means in
14 maintaining actions and/or misleading a judge or judicial officer by an artifice or false statement
15 of law or fact (one count), failing to perform legal services with competence (one count), having
16 improper adverse interests to a client (one count), and representing adverse interests without
17 proper consent (one count). In mitigation, only very little weight was given to respondent's lack
18 of a prior disciplinary record. However, several significant aggravating factors were found in this
19 matter, including multiple acts of misconduct, uncharged misconduct, lack of cooperation in the
20 disciplinary proceeding and indifference toward atonement for or rectification of the
21 consequences of his misconduct.

22 In support of its contention that disbarment is the appropriate level of discipline in this
23 proceeding, the State Bar aptly cites *Ainsworth v. State Bar* (1988) 46 Cal.3d 1218. In
24 *Ainsworth*, the attorney was found culpable of engaging in a wide range of professional
25 misconduct over a period of five years. The misconduct included making misrepresentations to
26 judges and clients, harassing a client for his own gain, disregarding a client's confidences, taking
27 an adverse interest against a client, splitting attorney's fees with a nonattorney, collecting an
28 illegal fee, engaging in the unauthorized practice of law while on actual suspension, and issuing

1 checks without sufficient funds on three separate occasions. In mitigation, the attorney (1)
2 proffered positive character evidence, (2) made restitution, (3) expressed remorse, (4) had
3 recently been assisted in his practice by a more experienced attorney, and (5) did not have a prior
4 record of discipline. In aggravation, the attorney (1) lacked candor at the State Bar hearings, (2)
5 did not cooperate in the State Bar's investigation of the charges against him, and (3) lacked
6 appreciation of the seriousness of his misconduct. Balancing all relevant factors, including
7 mitigating circumstances, the Supreme Court concluded that the attorney's misconduct warranted
8 disbarment.

9 In further support of disbarment, the State Bar cites *Rosenthal v. State Bar* (1987) 43
10 Cal.3d 612. In *Rosenthal*, the attorney engaged in misconduct intended to harass others, delay
11 court proceedings, obstruct justice and abuse the legal process. In addition, he engaged in
12 multiple transactions rife with conflicts and large misappropriations of client funds. The
13 Supreme Court disbarred the attorney. Even though the attorney in *Rosenthal* engaged in
14 repeated instances of self-dealing and disloyalty to a client's interest, he showed no remorse and
15 adamantly maintained that he was completely innocent of any wrongdoing.

16 Therefore, after considering the nature of the misconduct in this matter, the lack of
17 mitigating circumstances and the significant aggravating circumstances, the court finds no reason
18 to deviate from the discipline recommended by the standards and found in the relevant case law,
19 and therefore recommends disbarment.

20 VI. DISCIPLINE RECOMMENDATION

21 Accordingly, IT IS HEREBY RECOMMENDED THAT Respondent Mike Thomas
22 Taraska be DISBARRED from the practice of law in the State of California and that his name be
23 stricken from the rolls of attorneys in this state.

24 It is also recommended that the Supreme Court order respondent to comply with rule 955,
25 paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of
26 the Supreme Court order in the present proceeding, and to file the affidavit provided for in
27 paragraph (c) of the rule within 40 days of the effective date of the order showing his compliance
28

1 with said order.²⁰

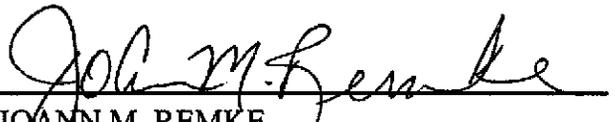
2 **VII. COSTS**

3 The court recommends that costs be awarded to the State Bar pursuant to section 6086.10
4 and that those costs be payable in accordance with section 6140.7.

5 **VIII. ORDER REGARDING INACTIVE ENROLLMENT**

6 It is ordered that respondent be transferred to involuntary inactive enrollment status
7 pursuant to section 6007(c)(4). The inactive enrollment shall become effective three days from
8 the date this order is filed and shall terminate upon the effective date of the Supreme Court's
9 order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its
10 plenary jurisdiction.

11
12
13
14 Dated: January 14, 2005

15 
16 JOANN M. REMKE
17 Judge of the State Bar Court

18
19
20
21
22
23
24
25
26
27 ²⁰Respondent is required to file a rule 955(c) affidavit even if he has no clients to notify.
28 (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) Failure to comply with rule 955 is a proper
consideration in reinstatement proceedings. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1097.)

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

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on January 14, 2005, I deposited a true copy of the following document(s):

**DECISION INCLUDING DISBARMENT RECOMMENDATION AND
INVOLUNTARY INACTIVE ENROLLMENT ORDER**

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

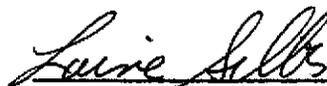
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

**MIKE T. TARASKA
CALAZ OIL COMPANY LLC
710 EAST INDIAN SCHOOL ROAD
PHOENIX AZ 85014**

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

KEVIN TAYLOR, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **January 14, 2005**.



Laine Silber
Case Administrator
State Bar Court