FILED JANUARY 26, 2010

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case Nos.: **03-O-03566-PEM**
	)	(05-O-00428-PEM)
ROY RICKARD WITHERS,	)	
	)	**DECISION & ORDER OF**
Member No. 120779,	)	**INVOLUNTARY INACTIVE**
	)	**ENROLLMENT**
A Member of the State Bar.	)	

I. Introduction

In this original disciplinary proceeding, respondent **ROY RICKARD WITHERS** is charged with a total of 14 counts of professional misconduct involving two related client matters. The charged misconduct includes (1) misappropriating client/trust funds involving moral turpitude and dishonesty, (2) failing to obey court orders, (3) misrepresentations, (4) failing to safeguard client property, (5) failing to report an adverse civil judgment, and (6) representing multiple conflicted clients without their informed written consent. The court finds, by clear and convincing evidence, that respondent is culpable on 10 of 14 counts of misconduct. In light of the serious nature and extent of respondent's misconduct and the aggravating circumstances and the lack of compelling mitigation, the court recommends that respondent be disbarred from the practice of law in California.

II. Pertinent Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a 15-count notice of disciplinary charges (NDC) on March 19, 2008.[1]

On March 21, 2008, the proceeding was initially assigned to State Bar Court Judge Richard A. Platel for adjudication. But, on September 30, 2009, the proceeding was reassigned from Judge Platel to State Bar Court Judge Pat E. McElroy.

On April 16, 2008, respondent faxed, to the court, a response to the NDC. However, that response was never filed presumably because it did not contain an original signature.

On May 20, 2008, the State Bar filed a motion in which it requested that the court apply principles of collateral estoppel to preclude respondent from relitigating, in the State Bar Court, the civil fraud issues that were previously decided against him by clear and convincing evidence in San Diego County Superior Court case number GIC839809, styled *Donna Tobey, individually and as [proposed] Personal Representative of the Estate of John Richardson, Deceased v. Roy Withers*. Respondent opposed the motion.

On July 8, 2008, Judge Platel filed an order in which he granted the State Bar's motion; applied principles of collateral estoppel and precluded respondent from relitigating the adverse civil fraud findings in *Tobey v. Withers*; and held that those adverse fraud findings conclusively establish respondent's culpability for: (1) failing to maintain client/trust funds in a trust account in willful violation of Rules of Professional Conduct of the State Bar of California, rule 4-100(A)[2] as charged in count 1 of the NDC; (2) misappropriating $150,000 in client/trust funds

[1] At the October 6, 2009 pretrial conference in this proceeding, the State Bar dismissed count 10 of the NDC.

[2] Unless otherwise noted, all further references to rules are to these Rules of Professional conduct.

in willful violation of Business and Professions Code, section 6106[3] as charged in count 2; and (3) misappropriating $12,000 in client/trust funds in willful violation of section 6106 as charged in count 8.[4]

On July 8, 2008, respondent filed a motion for an order shortening time; a request for an order referring respondent to the Alternative Discipline Program (ADP) Judge for determination of eligibility; and an alternative motion for an order referring respondent to ADP Program Judge for determination of eligibility, pursuant to Rules of Procedure of the State Bar, rule 801(a). The State Bar filed an opposition to respondent's motion on July 9, 2008.

On July 21, 2008, Judge Platel determined that a referral to the ADP in this matter was not warranted because respondent's current misconduct involved acts of moral turpitude, dishonesty, or corruption that resulted in significant harm to one or more clients or the administration of justice. (Rules Proc. of State Bar, rule 802(c)(3).)

A three-day trial was held on October 14, 15, and 16, 2009. On the first day of trial, the parties filed an extensive 13-page partial stipulation as to facts. The State Bar was represented by Deputy Trial Counsel Eli D. Morgenstern, and respondent was represented by Attorney James I. Ham.

On October 23, 2009, after the parties filed closing briefs, the court took the matter under submission for decision.

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[3] Unless otherwise noted, all further statutory references are the Business and Professions Code.

[4] In count 8, respondent was originally charged with misappropriating $21,500; however, at an October 6, 2009 pretrial conference, the parties effectively stipulated to amend count 8 to charge respondent with misappropriating only $12,000.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the parties' October 14, 2009 partial stipulation as to facts and on the evidence introduced at the three-day trial in this disciplinary proceeding.

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 16, 1985, and has been a member of the State Bar of California since that time.

B. The Richardson Client Matter

1. Findings of Fact

Clara Richardson (Clara) and John Richardson (John) (Clara and John are collectively referred to as the Richardsons) were married in November1944. The Richardsons have three grown daughters whose names are Diane Stretton (Diane), Donna Tobey (Donna), and Sharon Freeburn (Sharon).

In January 2001, John hired respondent to represent him in various matters related to Diane's and her son's physical (elder) abuse of John. At the time, John was elderly and in ill health -- John suffered from progressive amyotrophic lateral sclerosis (sometimes called Lou Gehrig's disease) among other illnesses. Eventually, John became a paraplegic.

On February 1, 2001, Clara filed a marriage dissolution petition against John in the San Diego Superior Court, case number D463674, styled *In re the Marriage of Clara Richardson v. John Richardson* (*Richardson v. Richardson*). Thereafter, John also retained respondent to represent him in *Richardson v. Richardson* and in a number of matters related to *Richardson v. Richardson*, including (1) the preparation of a will; (2) estate planning; (3) a breach of contract and warranty lawsuit that Diane had filed against John; (4) motions for protective orders that

John filed against Diane and her son; and (5) motions for protective orders that Diane filed against John.

In April 2001, John moved to Michigan to live with Donna and her husband, Bob Tobey (Bob) (Donna and Bob are collectively referred to as the Tobeys). The Tobeys took care of John.

On August 6, 2001, Attorney Richard S. Kolek, who respondent employs as an associate attorney, obtained an order from the superior court in *Richardson v. Richardson* to liquidate the Richardsons' accounts at Solomon Smith Barney and Franklin Templeton Investments.

On August 27, 2001, the superior court issued a second order with respect to the Richardsons' Solomon Smith Barney and Franklin Templeton accounts. Pursuant to that second order, the funds from these two investment accounts were to be liquidated and released to respondent to hold in trust, until after payment of all existing community obligations owed by the Richardsons on the real property that they owned on Royal Oak Way in Stanton, California. Pursuant to the order, after the payment of all existing community obligations on the Royal Oak Way property, the remaining funds were to be divided equally between Clara and John and disbursed to them.

In August 2001, respondent received two checks totaling $22,323.49 from the liquidation of the Richardsons' Solomon Smith Barney account. At the time, respondent maintained a non-interest bearing, client-trust account at First National Bank titled "Law Office of Roy R. Withers, A Professional Corporation," account number 80188873 (CTA). On August 27, 2001, when the balance in the account was $100, respondent deposited the two checks totaling $22,323.49 into his CTA for the Richardsons.

On August 31, 2001, respondent caused CTA check number 1003 to be issued to the "Law Offices of Roy R. Withers" in the sum of $3,000. The memo portion of the check states:

"Richardson, John." The $3,000 was taken from the $22,323.49 that respondent deposited into his CTA.

In September 2001, respondent received a $6,949.35 check from the liquidation of the Richardsons' Franklin Templeton account. On September 12, 2001, respondent deposited that check into his CTA for the Richardsons. In total, respondent received and deposited into his CTA $29,272.84 ($22,323.49 plus $6,949.35) from the liquidation of the Richardsons' Solomon Smith Barney and Franklin Templeton accounts.

On September 12, 2001, respondent issued CTA check number 1005 to the "Law Offices of Roy Withers" in the sum of $5,000. The memo portion of the check states: "Richardson, John." The $5,000 came from the liquidated funds from the Richardsons' Solomon Smith Barney and Franklin Templeton accounts.

On September 24, 2001, respondent caused CTA check number 1008 to be issued to "Huntington West Properties" in the sum of $1,115. That check was in satisfaction of the Richardsons' community obligations, and was issued in accordance with the superior court's September 27, 2001 order. On September 24, 2001, respondent also caused CTA check number 1006 to be issued to "Robert J. Baumer, Esq.," who was Clara's counsel in *Richardson v. Richardson*, in the sum of $12,813.06. That check was also issued in accordance with the superior court's September 27, 2001 order.

On September 25, 2001, respondent caused CTA check number 1007 to be issued to "Dovenmuehle Mortgage, Inc." in the sum of $2,568.50. That check was in satisfaction of the Richardsons' community obligations and issued pursuant to the superior court's September 27, 2001 order.

On October 12, 2001, respondent caused CTA check number 1005 to be issued to the "Law Offices of Roy R. Withers" in the sum of $4,000. The memo portion of the check states:

"Richardson, John." The $4,000 came from the liquidated funds from the Richardsons' Solomon Smith Barney and Franklin Templeton accounts.

On October 18, 2001, the superior court in *Richardson v. Richardson* ordered that the funds maintained by the Richardsons in a Wells Fargo Investments account be divided equally and released in equal amounts to the attorneys for John and Clara.

In November 2001, pursuant to the superior court's October 18, 2001 order, respondent received a check from Wells Fargo Investments in the sum of $15,274.32. And, on November 9, 2001, respondent deposited that $15,274.32 check into his CTA for the Richardsons.

On November 13, 2001, respondent issued CTA check number 1014 in the sum of $10,000 to the "Law Offices of Roy R. Withers." The memo portion of the check states: "Richardson Family Matters." And, on November 21, 2001, respondent issued CTA check number 1015 in the amount of $4,750 to the "Law Offices of Roy R. Withers." The memo portion of the check states: "Richardson/Rollins."

On January 31, 2002, the superior court in *Richardson v. Richardson* ordered that the two pieces of real property which the Richardsons owned (the Richardsons' real property) be listed for sale and sold within 45 days.

On March 4, 2002, respondent's associate Attorney Kolek appeared on an *"Ex Parte* Application for the Appointment of a Real Estate Broker, Elisor, Appraiser; Order for Special Inspection, Request for Attorney's Fees and Request for Penalties and/or Sanctions" that respondent filed for John in *Richardson v. Richardson*. In that application, John sought, inter alia, a superior court order (1) to list for sale and to sell the Richardsons' real property because Clara failed to comply with the court's January 31, 2002 order, and (2) to pay Clara's and John's attorney's fees from the sales proceeds. The superior court ordered the Richardsons' real property listed and sold and appointed a real estate broker and appraiser, but denied respondent's

request to pay the parties' attorney's fees from the sales proceeds. Attorney Kolek approved the proposed order's form and content. The superior court signed that proposed order**.**

On March 27, 2002, the first piece of the Richardsons' real property was sold for about $154,000. After subtracting the closing costs, the Richardsons were to receive about $140,175.56.

On April 5, 2002, the second piece of the Richardsons' real property was sold for about $347,000. After subtracting the closing costs, the Richardsons were to receive about $319,327.17. And, on April 22, 2002, the superior court ordered respondent to hold the sales proceeds in trust in his client trust account for the Richardsons pending further court order. Respondent received notice of the order.

On May 2, 2002, $140,175.56 was wired to respondent's CTA on behalf of the Richardsons. After that wire transfer deposit of $140,175.56, the balance in respondent's CTA was about $144,190.54. On May 6, 2002, an additional $319,327.17 was deposited into respondent's CTA on behalf of the Richardsons. After that $319,327.17 deposit, respondent held in trust about $459,502.73 ($140,175.56 plus $319,327.17) in proceeds from the sale of the Richardsons' real property. And respondent was required to maintain, in his CTA, that $459,502.73 less any payments ordered by the superior court.

Between about May 6, 2002, and March 3, 2003, the balance in respondent's CTA fell below the sum of $459,502.73 less the payments ordered by the superior court on repeated dates, including, but not limited to the following.[5]

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[5] A "*****" after a payee's name denotes that the payment was properly made in accordance with the superior court's orders.

DATE PAID	CHECK NO.	PAYEE	AMOUNT	AMOUNT HELD IN CTA FOR RICHARDSONS	AMOUNT THAT SHOULD BE HELD IN CTA FOR RICHARDSONS
5/6/02	1023	Roy R. Withers	$5,000	$458.517.71	$459,502.73
5/13/02	1028	Roy R. Withers	$5,000	$451,616.71	$459,502.73
5/20/02	1026	Donna Tobey*****	$10,000	$439,616.71	$449,502.73
5/24/02	1027	Adam Wertheimer*****	$10,000	$429,791.32	$439,502.73
6/10/02	1029	Roy R. Withers	$5,000	$424,616.71	$439,502.73
6/17/02	1030	Roy R. Withers	$5,000	$419,616.71	$439,502.73
6/17/02	1030	Roy R. Withers	$5,000	$419,616.71	$439,502.73
7/1/02	1031	Roy R. Withers	$5,000	$414,616.71	$439,502.73
7/11/02	1032	Roy R. Withers	$5,000	$409,616.71	$439,502.73
7/23/02	1033	Roy R. Withers	$5,000	$404,616.71	$439,502.73
8/5/02	1034	Roy R. Withers	$5,000	$399,616.71	$439,502.73
8/20/02	1035	Roy R. Withers	$5,000	$394,616.71	$439,502.73
9/3/02	1036	Roy R. Withers	$5,000	$389,616.71	$439,502.73
9/16/02	1037	Roy R. Withers	$5,000	$386,616.71	$439,502.73
9/20/02	1041	Rou R. Withers	$5,000	$383,616.71	$439,502.73
10/01/02	1043	Roy R. Withers	$5,000	$398,991.71	$439,502.73
10/15/02	1045	Roy R. Withers	$5,000	$390,491.71	$439,502.73
10/16/02	1047	Roy R. Withers	$5,000	$385,491.71	$439,502.73

DATE PAID	CHECK NO.	PAYEE	AMOUNT	AMOUNT HELD IN CTA FOR RICHARDSONS	AMOUNT THAT SHOULD BE HELD IN CTA FOR RICHARDSONS
10/29/02	1218 [sic]	Roy R. Withers	$5,000	$370,491.71	$439,502.73
11/7/02	1053	Roy R. Withers	$5,000	$365,491.71	$439,502.73
11/18/02	1054	Roy R. Withers	$10,000	$355,491.71	$439,502.73
12/13/02	1056	Roy R. Withers	$5,000	$343,616.71	$439,502.73
12/20/02	1058	Adam Wertheimer*	$50,000	$285,116.71	$389,502.73
12/30/02	1059	Diane Peters*	$50,000	$235,166.71	$339,502.73
12/31/02	1060	Roy R. Withers	$5,000	$230,116.71	$339,502.73
1/10/03	1061	Roy R. Withers	$5,000	$225,116.71	$339,502.73
1/14/02	1062	Roy R. Withers	$5,000	$220,116.71	$339,502.73
1/21/03	1063	Roy R. Withers	$5,000	$215,116.71	$339,502.73
1/31/03	1064	Roy R. Withers	$5,000	$210,116.71	$339,502.73
2/7/02	1066	Roy R. Withers	$5,000	$207,616.71	$339,502.73
2/18/03	1071	Roy R. Withers	$5,000	$200,116.71	$339,502.73
2/19/03	1072	Roy R. Withers	$5,000	$195,116.71	$339,502.73
3/3/03	1073	Roy R. Withers	$5,000	$190,116.71	$339,502.73
3/28/03	1074	Richard Petersen*	$189,502.76	$626.95	$149,999.97

John died on May 8, 2002. Notwithstanding respondent's testimony to the contrary, the court finds that, before John's death, respondent did not obtain John's or the Tobeys'

authorization to collect any of his attorney's fees out of the funds he held in trust from the sale of the Richardsons' real property. Moreover, respondent never obtained authorization from the superior court in *Richardson v. Richardson* to collect any of his attorney's fees out of those sale proceeds. Nonetheless, between May 2, 2002, and March 24, 2003, respondent collected about $149,999.97 (the $150,000) in attorney's fees out of the funds he held in trust from the sale of the Richardsons' real property.

On August 29, 2002, respondent filed a probate matter concerning John's will in San Diego Superior Court case number P182652, styled *In re the Estate of John Richardson* (*Estate of Richardson*). On November 21, 2002, Clara's attorney filed a "Petition for Appointment of a Special Administrator" and a "Petition for Family Allowance before Inventory" in *Estate of Richardson*. Respondent received copies of those petitions. And, on December 6, 2002, respondent faxed and mailed a letter to Clara's attorney in which respondent stated:

> As I am sure you have been advised, *my office currently has in a trust account the proceeds from the sales of two pieces of real property owned by the Richardsons. These were Court ordered sales. However, these funds have been frozen pending further order of the family court.* The Court froze these assets pending among other things, a valuation of the Riverside condominium that was awarded to [Clara], and an equalization payment to [John] (equal to the value of the condominium).
>
> Therefore, as you can clearly see, there is no current estate from which to pay any allowance, family or otherwise.

(Italics added.)

When respondent prepared and mailed that December 6, 2002 letter, he knew that his statements that proceeds from the sales of the Richardsons' real property were "in a trust account" and "frozen" and that "there is no current estate from which to pay any allowance, family or otherwise" were false. (See exhibit 44.) As of December 6, 2002, only about $355,491.71 of the sales proceeds remained on deposit in respondent's CTA when there should have been about $439,502.73 on deposit.

In December 2002, respondent filed, for Donna and Sharon, an objection to Clara's petitions for appointment of special administrator and for family allowance (objection) in the *Estate of Richardson*. In the objection, respondent stated:

> **January 2002:** Trial [of the dissolution] was had in the Family Court on January 31, 2002, with the Honorable J. Ronald Domintz, presiding. . . .
>
> Furthermore, Judge Domintz retained jurisdiction for the final division and disbursement of property. . . .
>
> **April 2002:** *During the month of April, two pieces of community property were sold pursuant to the Judge's orders, with the funds being held in trust until disposition by the Family Court. These funds are still held in trust, and have been frozen pending further order by the family Court.*

(Exhibit 44 at pp. 2-3, bold original, italics added.)

. In January 2003, Diane J. Peters was appointed by the superior court to be the special administrator of the *Estate of Richardson.*

On January 8, 2003, Clara died.

On January 29, 2003, the superior court approved Attorney Richard M. Peterson as the attorney for the special administrator of the *Estate of Richardson,* which included representing the *Estate of Richardson* in *Richardson v. Richardson.*

On February 28, 2003, Attorney Peterson gave notice to the attorneys in *Richardson v. Richardson,* including respondent, that he would appear ex parte in *Richardson v. Richardson* on March 5, 2003, to seek an order requiring respondent to transfer the funds respondent held in trust for the Richardsons to Attorney Peterson. Respondent received notice of the ex parte. At the March 5, 2003 ex parte, respondent's associate Attorney Kolek appeared on behalf of Donna and Sharon. At the conclusion of the hearing, the superior court orally ordered that the funds respondent held in trust for the Richardsons be transferred to Attorney Peterson's client trust account, which Attorney Kolek acknowledged. In its written order, the superior court ordered: (1) that the funds held by respondent on behalf of the Richardsons be transferred to Attorney

Peterson's client trust account; and (2) that respondent to submit an accounting of those funds to Attorney Peterson.

On March 7, 2003, Attorney Peterson mailed a letter to respondent in which he included a copy of the superior court's signed March 5, 2003 order. The letter requested that respondent and Attorney Kolek immediately forward the funds held in trust for the Richardsons and the accounting. Respondent received that letter and copy of the superior court's March 5, 2003 letter.

Also, on March 7, 2003, respondent filed for bankruptcy under chapter 7 of the Bankruptcy Code. On March 24, 2003, respondent sent CTA check number 1074 in the amount of $189,502.76 to Attorney Peterson. Along with that check, respondent sent Peterson an accounting for the Richardsons' funds, which stated, *inter alia*, that respondent had paid his own law office $150,000 for legal fees and reimbursement of costs from the funds he held in trust for the Richardsons and that the remaining balance of the funds he held in trust for the Richardsons was $189,502.76.

On March 24, 2003, Attorney Peterson gave the parties notice that he would appear ex parte in *Richardson v. Richardson* on March 26, 2003, to request that the superior court order respondent to replace the $150,000 he had misappropriated from the funds held in trust for the Richardsons and to provide an accounting along with all trust account ledgers, bank statements, and documentation relating to the funds held in trust for the Richardsons. Respondent received notice of the ex parte.

At the March 26, 2003 ex parte in *Richardson v.* Richardson, Attorney Kolek appeared "on behalf of [him]self." In addition, the superior court ordered respondent to forward $150,000 to Attorney Peterson by 1:00 p.m. on March 26, 2003, and to "forthwith submit an accounting to [Peterson] of the funds in the above matter that were held by him from the date of receipt of the

funds to and including the date of distribution." The Superior Court ordered that the "accounting shall include, but not be limited to, the trust account ledgers for the Richardson funds, all bank statements relating to the trust account, and all other documentation relating to the Richardsons trust funds" (the CTA documents). The superior court stated that it would issue an order to show cause (OSC) re sanctions if respondent failed to forward the funds. Respondent received notice of the order requiring him to forward the $150,000 and produce the CTA documents.

Respondent, however, did not forward the $150,000 or produce the CTA records pursuant to the order of the superior court. And, on March 26, 2003, the superior court issued an OSC re sanctions in *Richardson v. Richardson* for April 1, 2003. The superior court served notice of the OSC re sanctions on respondent. And respondent received that notice.

On April 1, 2003, respondent's attorney appeared for respondent at the OSC hearing in *Richardson v. Richardson.* The Superior Court continued the hearing until May 13, 2003, to provide sufficient notice to respondent. Respondent received notice of the continued hearing.

On May 13, 2003, respondent and his attorney appeared for the OSC hearing in *Richardson v. Richardson.* Respondent's attorney claimed that respondent could not be held in contempt for failing to transfer the $150,000 to Attorney Peterson because respondent did not have $150,000 as evidenced by respondent's personal bankruptcy and documents demonstrating that respondent did not have sufficient funds in his CTA or his general account. The superior court found (1) that respondent had been given two opportunities to turn over all of the Richardsons' funds and to provide the "complete accounting of those monies," but had failed to do so; (2) that respondent had failed to comply with its orders of March 5, 2003, and March 26, 2003; and (3) that respondent had failed to produce sufficient evidence that he did not have the ability to comply with the order to pay $150,000 to Attorney Peterson. The superior court ordered respondent to pay $1,500 in sanctions to the superior court.

To date, respondent has not paid the $1,500 sanctions to the superior court. Nor has respondent ever sought relief from the imposition of the sanctions based on an inability to pay. At no time did respondent produce the CTA documents to Attorney Peterson.

In August 2003, the State Bar opened an investigation pursuant to a complaint filed by Attorney Peterson (Peterson complaint). On September 23, 2003, a State Bar investigator mailed a letter to respondent requesting, inter alia, that respondent (1) provide his CTA records from January 1, 2002, to the present; (2) provide documentation supporting the legal fees and costs he claimed were part of the $150,000 he withheld from the Richardsons; (3) identify who authorized him to withhold the $150,000 from the Richardsons; (4) explain why he failed to comply with the orders of the superior court dated March 5 and 6, 2003; and (5) provide proof of payment of the sanctions.

On November 5, 2003, respondent sent the investigator a letter in which respondent stated that, he "tendered my client [John] a bill for the sum paid. [John] authorized the payment." (Exhibit 26.)

Between August 2001 and December 2003, the Tobeys spoke with respondent or his staff members on a monthly basis if not more regarding the status of *Richardson v. Richardson* and/or the *Estate of Richardso*n. The Tobeys requested an invoice for the legal services that respondent had rendered at least once a month. Respondent, however, did not provide the requested monthly invoices.

On August 15, 2003, the Tobeys sent respondent an email in which they requested an invoice from respondent. Respondent received the messages requesting invoices from his staff and the email. In August 2003, respondent provided an invoice *for unpaid attorney's fees of $150,029.40* [amount not in the stipulation] to the Tobeys for legal services allegedly provided to John in *Richardson v. Richardson* between January 22, 2001, and April 30, 2002.

On January 8, 2004, respondent mailed a letter to the State Bar investigator regarding the Peterson complaint in which respondent falsely stated: "Enclosed please find the John Richardson billing that you requested justifying the fees paid to me. My client authorized this payment, and I took him up on it." (Exhibit 27.)

2. Conclusions of Law

Count One: Failure to Maintain Funds in Trust Account (Rule 4-100(A))
Count Two: Misappropriation (§ 6106)

Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith. Moreover, it is well-established that the term "client" as used in rule 4-100 includes nonclients with whom an attorney has, either voluntarily or by operation of law, entered into a fiduciary relationship. (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979; *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632-633.) Having assumed the responsibility, under the superior court's orders in *Richardson v. Richardson*, to hold the proceeds from the sales of the Richardsons' real property in trust, respondent owed Clara, and not just John, the obligations of a "client" under rule 4-100. (*Guzzetta v. State Bar, supra*, 43 Cal.3d at 979.) The court finds that respondent's testimony to the effect that he never read and did not know that the superior court's orders directed him to hold the sales proceeds in trust for the Richardsons pending further court order to lack credibility, if not candor.

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty, or corruption.

The superior court in *Richardson v. Richardson* never authorized respondent to collect $150,000 in attorney's fees out of the sales proceeds from the Richardsons' real property, which respondent held in trust for the Richardsons. Nor did John ever authorize respondent to collect

$150,000 in attorney's fees from those sales proceeds. Moreover, as Judge Platel held in his July 8, 2008 collateral estoppel order, respondent's culpability for the acts of misconduct charged in counts one and two are established by the civil fraud findings made against respondent by clear and convincing evidence in *Tobey v. Withers*.

Specifically, respondent is culpable for willfully violating rule 4-100(A) as charged in count one because he (1) failed to maintain at least $459,502.73 of the sales proceeds in his CTA for the Richardsons between May 6, 2002, and May 13, 2002; (2) failed to maintain at least $439,502.73 of the sales proceeds in his CTA for the Richardsons between May 24, 2002, and December 20, 2002; and (3) failed to maintain at least $339,502.73 of the sales proceeds in his CTA for the Richardsons between about December 30, 2002, and about March 28, 2003. In addition, respondent is culpable for willfully violating section 6106 as charged in count two because he engaged in conduct involving dishonesty when he withdrew and deliberately misappropriated, for his own use and benefit, $150,000 of the sales proceeds he held in trust for the Richardsons in his CTA.[6] Even if respondent had earned $150,000 in attorney's fees, he simply was not entitled to unilaterally determine and collect his fees from the sales proceeds that he held in trust for the Richardsons. Moreover, the legality of respondent's fees of $150,000 are called into question because he collected those fees without the superior court's authorization. (Cf. *In the Matter of* Phillips (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 323.)

Count Three: Failure to Obey Court Order (§ 6103)

In count three, the State Bar charges that respondent willfully violated section 6103, which provides that the willful "disobedience or violation of an order of the court requiring him

[6] It is not duplicative to find that respondent willfully violated both rule 4-100(A) and section 6106. (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 169.) That is because it is not duplicative to find that an attorney's violation of a Rule of Professional Conduct is so egregious that it rises to the level of an act involving moral turpitude, dishonesty, or corruption in willful violation of section 6106. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520.)

to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." Specifically, the State Bar charges that respondent violated section 6103 "By failing to maintain the funds in trust regarding the Richardson[s] pursuant to the order of the superior court. . . ." This court, however, relied on respondent's failure to maintain the sales proceeds from the Richardsons' real property in his CTA to find respondent culpable of violating rule 4-100(A) and section 6106 as charged in counts one and two, *ante*. Thus, it would be inappropriate for the court to again rely on that same failure to find respondent culpable of willfully violating section 6103. In other words, the charged section 6103 violation is duplicative of the found rule 4-100(A) and section 6106 violations. "It is generally inappropriate to find redundant charged violations. [Citations.]" (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) And that is because the appropriate level of discipline for an act of misconduct does not depend upon how many rules or statutes proscribe the misconduct. (*Ibid*.)

In short, count three is dismissed with prejudice.

Count Four: Misrepresentation to Opposing Counsel (§ 6106)

When respondent prepared and mailed his December 6, 2002 letter to Clara's attorney stating that the sales proceeds belonging to the Richardsons were "in a trust account" and "frozen" and that "there is no current estate from which to pay any allowance, family or otherwise," those statements were false because respondent's CTA held only about $343,616.71 of the $439,502.73 in sales proceeds that respondent should have held in trust for the Richardsons as of December 13, 2002, and respondent knew the statements were false. By sending Clara's attorney a letter deliberately misrepresenting that the sales proceeds belonging to

the Richardsons were held in a trust account, respondent committed an act involving not just moral turpitude, but also dishonesty in willful violation of section 6106.

Count Five: Misrepresentation to Superior Court (§ 6106)

When respondent prepared and filed the objection stating that the sales proceeds belonging to the Richardsons "were still held in trust, and have been frozen," the statement was false because respondent's CTA held only about $343,616.71 of the $439,502.73 in sales proceeds that respondent should have held in trust for the Richardsons as of December 13, 2002, and respondent knew the statement was false. By filing the objection in which respondent deliberately misrepresented to the superior court that the funds belonging to the Richardsons were still held in a trust account, respondent committed an act involving not just moral turpitude, but also dishonesty in willful violation of section 6106.

Count Six: Failure to Obey Court Order (§ 6103)

In count six, the State Bar charges that respondent willfully violated section 6103. The record clearly establishes that respondent willfully violated his duty, under section 6103, to obey court orders connected with or in the course of his practice of law when he failed (1) to produce the CTA records to Attorney Peterson and (2) to pay the $1,500 sanctions to the superior court without ever seeking relief from the sanctions based on an inability to pay. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868 & fn. 4.)

Count Seven: Misrepresentation to State Bar (§ 6106)

Respondent willfully violated section 6106 because he engaged in acts of dishonesty when he mailed, to the State Bar, letters in which he deliberately misrepresented that John had authorized him to collect $150,000 in fees out of the sales proceeds from the Richardsons' real property, which respondent held in trust for the Richardsons.

Count Eight: Misappropriation (§ 6106)

The record clearly establishes that, in willful violation of section 6106, respondent deliberately misappropriated, for his own use and benefit, $12,000 of the funds that he held in trust from the liquidation of the Richardsons' Solomon Smith Barney, Franklin Templeton Investments, and Wells Fargo accounts.

Count Nine: Failure to Communicate (§ 6068, subd. (m))

Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients. The record clearly establishes that respondent willfully violated section 6068, subdivision (m) when he failed to provide the Tobeys with the requested monthly invoices regarding *Richardson v. Richardson* between August 2001 and August 2003 and regarding the *Estate of Richardson* between May 2002 and December 2003.

Count Ten: Misrepresentation to Client (§ 6106)

As noted *ante,* the State Bar dismissed count ten at the October 6, 2009 pretrial conference.

Count Eleven: Misrepresentation to Client (§ 6106)

In count eleven, the State Bar charges that, in May 2003, respondent made statements to the Tobeys about the OSC for sanctions that was filed against him in *Richardson v. Richardson*. According to the State Bar, respondent violated section 6106 because some of his statements to the Tobeys were misleading and because respondent did not disclose various other facts to the Tobeys. The misconduct charged in count eleven is either duplicative of the misconduct charged in other counts or has not been clearly established.

In short, count eleven is dismissed with prejudice.

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Count Twelve: Failure to Safeguard Client Property (Rule 4-100(B))

In count twelve, the State Bar charges that respondent violated his duty, under rule 4-100(B), to safeguard client property coming into his possession. According to the State Bar, respondent lost certain promissory notes and a letter and abandoned and failed to account for a 1995 Buick, a motorized scooter, and rack that belonged to John. The testimony on these issues was less than clear, and the evidence failed to establish the charged misconduct. Accordingly, count twelve is dismissed with prejudice.

C. The Tobey Client Matter

1. Finding of Facts

After John's death on May 8, 2002, Donna hired respondent to have her named as the personal representative of John's estate pursuant to John's will in the *Estate of Richardson.* Respondent also represented Sharon as a supporter of Donna's attempt to become the personal representative in the *Estate of Richardson*. But, as noted *ante*, in January 2003, the superior court appointed Diane Peters as the special administrator of the *Estate of Richardson*. Thus, in January 2003, Donna and Sharon hired Respondent to represent them as beneficiaries of the *Estate of Richardson*.

Then, in April 2003, Donna and Sharon hired respondent to represent them in a will contest involving Clara's will in San Diego Superior Court case number P184008, styled *Estate of Clara Richardson*.

On December 5, 2003, respondent provided an invoice for unpaid attorney's fees of $33,406.56 to Donna and Sharon for the legal services he allegedly provided to them in the *Estate of Richardson* between May 2002 and November 2003. In a letter accompanying the invoice, respondent stated: "You will note significant gaps. This was an internal administrative error resulting in a loss of 'time sheets.' " Sharon paid one-half of the invoice. Donna, however,

refused to pay. In fact, in December 2003, Donna terminated respondent's employment. To date, respondent still represents Sharon in the *Estate of Richardson,* the *Estate of Clara* Richardson, and other related matters. When respondent simultaneously represented Donna and Sharon, respondent did not obtain a written waiver of any conflict of interest from Donna or Sharon.

Because Donna refused to pay one-half of respondent's December 5, 2003 invoice, respondent filed a breach of contract complaint against Donna to recover that sum on July 8, 2004, in San Diego Superior Court case number IC832537, styled *Roy R. Withers v. Donna Tobey* (*Withers v. Tobey*).

On December 10, 2004, Donna filed a cross-complaint against respondent in San Diego Superior Court case number GIC839809, styled *Donna Tobey, individually and as [Proposed] Personal Representative of the Estate of John Richardson, v Roy R. Withers* (*Tobey v. Withers*). Then, on January 4, 2005, *Withers v. Tobey* and *Tobey v. Withers* were consolidated.

On January 31, 2005, the State Bar opened an investigation pursuant to a complaint filed by the Tobeys (the Tobey complaint). On March 7, 2005, a State Bar investigator mailed respondent a letter regarding the Tobey complaint and requested that respondent respond in writing to the allegations being investigated by the State Bar, including respondent's taking $150,000 from the funds he held in trust for the Richardsons. Respondent received the investigator's March 7, 2005 letter. (Exhibit 34.)

On April 8, 2005, respondent faxed and mailed a letter to the investigator in which respondent falsely stated that the "Tobeys consent to [his] being paid" and that his office thought that it had a valid court order permitting respondent to collect his attorney's fees out of the funds held in trust for the Richardsons. (Exhibit 35.)

On May 19, 2006, Donna filed her (erroneously labeled) "Third Amended Cross-Complaint" in *Tobey v.* Withers. That complaint included causes of action for breach of

contract, breach of fiduciary duty, constructive fraud, professional negligence, and declaratory relief, which arose out of respondent's representation of John and Donna in *Richardson v. Richardson* and the *Estate of Richardson*. On October 6, 2006, the superior court granted Donna's motion for summary judgment against respondent in *Withers v. Tobey*. Therefore, only *Tobey v. Withers* proceeded to trial.

On April 5, 2007, in *Tobey v. Withers*, the superior court filed a judgment in favor of Donna and against respondent on seven of Donna's causes of action, including constructive fraud, breach of fiduciary duty, and professional negligence. The judgment not only awarded Donna actual damages, but it also awarded her a total of $36,000 in punitive damages against respondent. In addition, the judgment voided respondent's attorney-client fee agreement with John and ordered that respondent take nothing on his complaint against Donna. As of April 5, 2007, the monetary value of Donna's judgment against respondent (together with interest thereon) was $289,433.67.

Respondent admits that he did not report to the State Bar that a judgment had been entered against him in *Tobey v. Withers* for breach of fiduciary duty, constructive fraud, and professional negligence arising out of his representation of clients.

2. Conclusions of Law

Count Thirteen: Misrepresentation to State Bar (§ 6106)

The record clearly establishes that respondent willfully violated section 6106 because he engaged in acts of dishonesty when he faxed and mailed, to the State Bar, his April 8, 2006 letter in which he deliberately misrepresented that the Tobeys consented to his collecting $150,000 in fees from the funds he held in trust for the Richardsons and that he thought that his office had a valid court order permitting him to collect $150,000 in fees from the funds he held in trust for the Richardsons.

Count Fourteen: Failure to Report Judgment (§ 6068, subd. (o)(2))

Respondent admits that he willfully violated his duty, under section 6068, subdivision (o)(2), to report certain judgments rendered against him involving his practice of law when he failed to report, to the State Bar, the judgment rendered against him in *Tobey v. Withers* for constructive fraud, breach of fiduciary duty, and professional negligence.

Count Fifteen: Representing Clients with Actual Conflicts (Rule 3-310(C)(2))

In count fifteen, the State Bar charges that respondent willfully violated rule 3-310(C)(2), which provides that an attorney must "not, without the informed written consent of each client: [¶] Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict." Specifically, the State Bar charges that, in willful violation of rule 3-310(C)(2), respondent continued to represent *more than one client* in a matter in which the interests of the clients actually conflicted without the informed written consent of each client when he continued "to represent Sharon in *Estate of Richardson, Estate of Clara Richardson*, and other related matters after: (A) Donna terminated him; (B) he sued Donna for the attorney's fees he had purportedly incurred representing Donna and Sharon; (C) Donna sued Respondent for breach of fiduciary duty, constructive fraud, and professional negligence concerning his representation of John, Donna and Sharon; and (D) Donna obtained a judgment against him for $289,433.67 for breach of fiduciary duty, constructive fraud, and professional negligence during his representation of John, Donna and Sharon." The court cannot agree.

When Donna terminated respondent's employment, respondent no longer represented more than one client in any matter dealing with the *Estate of Richardson* or the *Estate of Clara Richardson*. In other words, after Donna terminated respondent's employment, respondent represented only Sharon. In short, the State Bar failed to establish that respondent represented

more than one client in any matter in which the interests of the clients actually conflicted. Accordingly, count fifteen is dismissed with prejudice.

IV. Aggravating and Mitigating Circumstances

A. Aggravating Circumstances

Respondent engaged in multiple acts of misconduct. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std 1.2(b)(ii).)[7]

Respondent's misconduct caused significant harm to his clients and the administration of justice. (Std 1.2(b)(iv).)

Respondent displayed indifference to his misconduct. In addition, he does not appreciate the seriousness of his misconduct. (Std 1.2(b)(v).) Respondent has still not paid any portion of the $1,500 in sanctions. Nor has respondent refunded any portion of the $162,000 ($150,000 plus $12,000) he misappropriated from the Richardsons.

B. Mitigating Circumstances

The parties stipulated that respondent does not have a prior record of discipline. (Std. 1.2(e)(i).) Respondent was admitted in 1985 and did not engage in the misconduct found in this proceeding until early 2001. Accordingly, even though respondent's misconduct is extremely serious, his 16 years of misconduct-free practice (i.e., 1983 through 2001) is a very significant mitigating circumstance. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13.)

Respondent is entitled to significant mitigation for entering into the extensive partial stipulation of facts. (Std. 1.2(e)(v).)

Respondent presented seven character witnesses who testified credibly as to his good character. (Std.1.2(e)(vi).) Even though respondent met all but one of these seven witnesses

[7] All further references to standards are to this source.

through his membership in the Kiwanis Club, the witnesses represented a wide range of references and were individuals of high repute. Accordingly, the court gives respondent substantial mitigating credit for his good character testimony.

V. Discussion on Discipline

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Ba*r (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylo*r (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for respondent 's misconduct is found in standard 2.2(a), which applies to respondent's deliberate and repeated misappropriations totaling $162,000 from the funds respondent held in trust for the Richardsons. Standard 2.2(a) provides:

> Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances.

The Supreme Court has repeatedly held that the willful misappropriation of entrusted funds is a grievous violation. Moreover, the Supreme Court has made clear that even an isolated instance of misappropriation by an attorney who has no prior record of discipline may result in disbarment in the absence of compelling mitigation. (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129; *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1071-1073.) Respondent is entitled to substantial mitigation for his 16 years of misconduct-free practice, his extensive partial

stipulation of facts, and his good character. But that mitigation, even when viewed collectively, does not rise to the level of compelling mitigation under standard 2.2(a). This is particularly true in light of the fact that respondent repeatedly attempted to conceal his misappropriations by deliberately making false statements to opposing counsel, the superior court, and the State Bar.

Other factors also support recommending respondent's disbarment under standard 2.2(a). Even at this late date, respondent has not repaid a single dollar of $162,000 he misappropriated. Nor has respondent paid any portion of the $1,500 in sanctions that were imposed on him in the superior court's May 13, 2003 order. Nor has respondent ever sought relief from that May 13, 2003 order based on an inability to pay the $1,500 in sactins. "The wilful violation of court orders alone is egregious misconduct. 'Other than outright deceit, it is difficult to imagine conduct in the course of legal representation more unbefitting an attorney.' [Citation.]" (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 79.)

In sum, both the standards and case law support a disbarment recommendation in this proceeding. Moreover, the court independently concludes that respondent should be ordered to make restitution (with interest) to the *Estate of Richardson* for the $162,000 he misappropriated. In addition, the court independently concludes that respondent should be ordered to pay the $1,500 sanctions to the superior court with interest. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 869.)

VI. Recommended Discipline

The court recommends that respondent **ROY RICKARD WITHERS** be **DISBARRED** from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

The court further recommends that Roy Rickard Withers be ordered to make restitution to the Estate of John S. Richardson, Deceased, in the amount of $150,000 plus 10 percent interest

per year from March 26, 2003 (or reimburse the Client Security Fund, to the extent of any payment from the fund to the Estate of John S. Richardson or to the personal representative of the Estate of John S. Richardson, in accordance with Business and Professions Code section 6140.5).

The court further recommends that Roy Rickard Withers be ordered to make restitution to the Estate of John S. Richardson, Deceased, in the amount of $12,000 plus 10 percent interest per year from September 14, 2001 (or reimburse the Client Security Fund, to the extent of any payment from the fund to the Estate of John S. Richardson or to the personal representative of the Estate of John S. Richardson, in accordance with Business and Professions Code section 6140.5).

The court further recommends that Roy Rickard Withers be ordered to pay the San Diego Superior Court the $1,500 in sanctions as ordered by that court on May 13, 2003, in case number D463674 plus 10 percent interest per year from June 12, 2003.

The court further recommends that any restitution to the Client Security Fund be enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

VII. Rule 9.20 & Costs

The court further recommends that Roy Rickard Withers be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that those costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VIII. Order of Involuntary Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that Roy Rickard Withers be involuntary enrolled as an inactive member of the State Bar of California effective ten calendar days after the service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).

Dated: January ___, 2010.

PAT E. McELROY
Judge of the State Bar Court