THE STATE BAR COURT

HEARING DEPARTMENT - LOS ANGELES

PUBLIC MATTER

In the Matter of **DUANE L. McCOLLUM,** **Member No. 150239,** A Member of the State Bar.	**Case No . 03-O-04761-RAH** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. Introduction

In this default matter, Respondent **DUANE L. McCOLLUM** is charged with 35 counts of misconduct in a single client matter, including taking $19,114 in client funds for his own use. Respondent is charged with (1) failing to obey a court order; (2) maintaining an unjust action; (3) failing to communicate; (4) failing to perform services competently; (5) failing to maintain respect for the courts; (6) failing to deliver client funds promptly; (7) committing an act of moral turpitude; (8) failing to avoid interests adverse to a client; (9) failing to return client files; (10) withdrawing from employment improperly; (11) failing to render accounts; (12) failing to cooperate with the State Bar; and (13) failing to update membership address.

This court finds, by clear and convincing evidence, that Respondent is culpable of the charged acts of misconduct. Based upon the egregious nature and extent of culpability, as well as the applicable aggravating circumstances, 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) filed and

properly served on Respondent a Notice of Disciplinary Charges (NDC) on July 1, 2004. (Rules Proc. of State Bar, rule 60.) The NDC was returned as undeliverable. Respondent did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

On State Bar's motion, Respondent's default was entered and he was enrolled as an inactive member on September 10, 2004, under Business and Professions Code section 6007(e).[1] An order of entry of default was sent to Respondent's official membership records address but was returned as unclaimed.

Respondent did not participate in the disciplinary proceedings. The court took this matter under submission on September 9, 2004, following the filing of the State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of Respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 4, 1990, and has since been a member of the State Bar of California.

B. The Short Action Matter (Counts 1-17, 23-24 and 31-33)

In January 1997, Ernest Short employed Respondent to represent him in a wrongful termination action against his employer, Arrowhead Financial Group (AFG).

On August 12, 1997, Respondent filed a wrongful termination complaint in Riverside County Superior Court, captioned *Ernest Short v. Arrowhead Central Credit Union, et al.*, case number 300311 (the Short action).

Thereafter, the parties engaged in discovery. Specifically, defense counsel served interrogatories and requests for admissions and genuineness of documents, and scheduled the

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[1]All references to section (§) are to the Business and Professions Code, unless otherwise indicated.

deposition of Short.

1. The First Set of Discovery

On April 7, 1998, defense counsel served Respondent with form interrogatories, set one, and requests for admissions and genuineness of documents, set one (set one of the discovery). Responses to the discovery were due on or before May 12, 1998. However, on April 30, 1998, Respondent was granted an extension until June 15, 1998, to respond to the discovery. Respondent failed to serve responses to the discovery by June 15, 1998.

On June 17, 1998, defense counsel spoke with Respondent and inquired about the overdue responses to the discovery. Respondent indicated that he had not prepared the responses and, for the first time, Respondent questioned the validity of the discovery because the wrong case number and judge were identified on the caption pages.

On June 23,1998, defense counsel spoke with Respondent and again inquired about the status of the responses to the discovery. At that time, Respondent indicated that his client, Short, had not provided any responses to the written discovery. However, Respondent's assertion was not true as Short had, in fact, cooperated with Respondent in responding to the written discovery. Respondent refused to serve responses to the written discovery.

On July 7, 1998, because Respondent had not served responses to the discovery, defense counsel filed a motion to compel answers to the interrogatories and a motion for an order establishing the admission of facts and the genuineness of documents. In each motion, defense counsel sought sanctions for Respondent's failure to comply with the discovery.

On August 5, 1998, Respondent filed an opposition to the motion to compel responses to the interrogatories on the ground that the discovery propounded contained the wrong case number. On August 12, 1998, the court granted the motion to compel responses to the interrogatories. In addition, the court ordered sanctions in the amount of $477, to be paid by Short and Respondent, jointly and severally, within 20 days, or by September 1, 1998. Respondent did not pay the sanctions.

The court denied the motion to deem matters admitted, but ordered Short to respond to the requests for admissions, without objections, within 20 days, or by September 1, 1998. In addition,

the court ordered that $477 in sanctions be paid by Short and Respondent, jointly and severally, within 20 days, or by September 1, 1998.

On August 12, 1998, Respondent was properly served with the notice of ruling on the discovery motions and sanctions in connection with the interrogatories and the requests for admissions and the two discovery sanctions orders – $477 each.

On September 4, 1998, Respondent served responses to the discovery. However, the responses were inadequate, and defense counsel requested further responses to the discovery. Respondent acknowledged that the responses were inadequate. On October 15 and November 2, 1998, he served supplemental responses and second supplemental responses to the interrogatories, respectively.

On November 3, 1998, defense counsel sent Respondent a letter describing how the responses to the interrogatories were incomplete and how the responses to the requests for admissions did not comply with Code of Civil Procedure section 2033(f)(l). Defense counsel requested that further supplemental responses be received no later than November 12, 1998. Respondent did not serve any further supplemental responses.

2. The Depositions

On April 17, 1998, during the sixth day of the deposition of Short, Respondent unilaterally terminated the deposition before defense counsel completed his questioning of Short.

On April 30, 1998, Respondent told defense counsel that Respondent would contact him by May 4, 1998 to schedule the next session for Short's deposition. However, Respondent did not contact counsel.

On May 6, 1998, defense counsel served on Respondent a notice of taking Short's deposition on June 24, 1998. Thereafter, Respondent agreed to schedule the next session of Short's deposition for June 19, 1998. However, on June 17, 1998, Respondent informed defense counsel that Short would not appear for his deposition.

On June 30, 1998, defense counsel filed a motion not only to compel Short's deposition, but also to have sanctions imposed. Respondent filed a response to the motion wherein he indicated, "Plaintiff neither opposes nor consents to the motion for an order compelling his resumed

deposition."

On August 6, 1998, the court granted the deposition motion. On August 12, 1998, pursuant to Code of Civil Procedure sections 2023 and 2025, the court ordered sanctions in the amount of $717, to be paid by Short and Respondent, jointly and severally, within 20 days, or by August 26, 1998. This was the third sanctions order against Respondent.

On August 12, 1998, notice of the court's ruling on the deposition motion and the court's discovery sanction were properly served on Respondent by defense counsel. Respondent did not pay the sanctions.

At some point, Respondent scheduled the depositions of the defendants. On August 25, 1998, defense counsel filed a motion for a protective order, asserting that Respondent had engaged in bad faith in insisting upon conducting defendants' depositions on dates when deponents were unavailable.

Despite Respondent's opposition to the motion for a protective order, on September 8, 1998, the court granted the motion, ordered that the depositions be set at times and dates convenient with the attorneys, and ordered that Respondent pay a $1,134 sanction, Respondent's fourth sanction order. Respondent waived notice of the court's ruling during the hearing on the motion. Further, on September 29, 1998, the court clarified its order to reflect that Respondent pay the $1,134 sanction to defendants, as Respondent had acted without substantial justification, and that the depositions be taken on dates amenable to all counsel and each individual defendant or deponent. Respondent again did not pay the sanctions.

On October 26, 1998, defense counsel filed another motion for a protective order preventing certain depositions, and requesting sanctions under Code of Civil Procedure section 2023, citing

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Respondent's abusive conduct during previous depositions in August and September 1998.[2]

Despite Respondent's opposition to the motion, on December 2, 1998, the court granted the motion, ordered that the depositions of five deponents be conducted by written interrogatories only, and ordered that Respondent pay defendants' counsel a $1,550 sanction, Respondent's fifth sanction order. The order was stayed for 30 days to allow Respondent to appeal the order. The order was properly served on Respondent by the court. Respondent again did not pay the sanctions.

3. The Second Set of Discovery

On July 30, 1998, defense counsel served Respondent with set two of form interrogatories and requests for admissions (set two of the discovery). Responses to set two of the discovery were due on September 3, 1998. However, Respondent failed to serve timely responses to set two of the discovery. Respondent served the responses to set two of the discovery on October 13, 1998.

4. The Third Set of Discovery

On September 11, 1998, defendants' requests for admissions, set three, and form interrogatories, set three (set three of the discovery), were properly served on Respondent by personal service. Responses to the third set of discovery were served timely on October 12, 1998.

However, in October 1998, Respondent acknowledged to defense counsel that Short's responses to sets two and three of the discovery were inadequate.

On October 29, 1998, defense counsel received supplemental responses to set two of the

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[2]Defense counsel cited the following as examples of Respondent's abusive conduct:

1. During a September 28, 1998 deposition of Marie Alonzo, Respondent twice told defendants' counsel to "shut up" and said that defendants' counsel was "acting like a little boy," after defendants' counsel objected to Respondent's questions; Respondent indicated that Alonzo had provided an evasive response and suggested that Alonzo violated civil and criminal statutes in doing so; Respondent asked Alonzo if she believed in God or if she believed that she would be punished for lying because of her religious beliefs; Respondent told Alonzo that she was making herself look like "a fool" by giving what Respondent thought to be evasive answers; and, Respondent called defendants' counsel "an ass."

2. During a September 9, 1998 deposition of defendant Robert McDonald, Respondent called counsel's objections "stupid," and disparaged defendants' counsel with the phrase, "stupid is as stupid does."

discovery. However, the responses were inadequate.

On October 30, 1998, Respondent served supplemental responses to set three of the discovery, but the supplemental responses were also inadequate.

5. The Motions to Strike/Dismiss and to Compel Discovery and for Sanctions

On December 9, 1998, defense counsel filed a motion for an order striking the complaint and dismissing the action with prejudice, or alternatively, for an order imposing issue sanctions, and for monetary sanctions; and filed motions to compel further responses to sets two and three of the discovery, and for sanctions for failure to comply with discovery. The motion to strike the complaint was based on Short's failure to comply with the court's August 12, 1998, discovery order that he provide complete responses to the first set of discovery. The motions to compel discovery alleged that evasive and incomplete responses had been served by Respondent in connection with sets two and three of discovery.

Respondent did not tell Short about the motions filed by defense counsel. Respondent filed no response to the subject motions. However, on January 2, 1999, three days before the opposition to the motion to strike was due, Respondent assured Short that he would file an opposition to the motion to strike.

On January 6, 1999, Respondent called Short and told Short that Respondent had "lost it," that he was having trouble getting out of bed and that he had "forced" himself to get out of bed and come to the office and call Short. At that time, Respondent did not tell Short about the motions to compel discovery. However, Respondent told Short that he would not be filing an opposition to the motion to strike the complaint, and that the deadline to file an opposition had passed. Respondent also told Short that he would not appear at the January 12, 1999, hearing on the motion to strike.

On January 7, 1999, Short hired an associate counsel at additional expense to Short. For the first time, Short learned of the motions to compel discovery, when associate counsel made him aware that the motions had been filed. Associate counsel also informed Short that in two instances, sanctions had been imposed against Short, as well as Respondent. Before that time, Short understood that the sanctions had been imposed against Respondent only.

Thereafter, associate counsel filed oppositions to the motions to compel further discovery.

On January 8, 1999, Respondent filed a declaration regarding his failure to file a written opposition to the motion to strike and a declaration regarding his failure to file written oppositions to the motions to compel discovery. Respondent claimed that a sudden illness had prevented him from preparing the oppositions.

On February 24, 1999, the court held a hearing, and denied terminating sanctions, but ordered that Short and Respondent pay a $1,062 sanction, Respondent's sixth sanction order. In addition, the court granted the motion to compel further responses to sets two and three of discovery, and ordered that the responses to the interrogatories be served within 20 days. On February 25, 1999, notice of the court's order was served on Respondent by the court clerk. Respondent again did not pay the sanctions.

6. Motion for Summary Judgment

On June 1, 1999, defense counsel filed a motion for summary judgment in the Short action. Respondent assured Short that an opposition would be filed to the motion for summary judgment. However, Respondent did not do so, and he did not inform Short that he was not opposing the motion. In fact, prior to the hearing on the summary judgment motion, Short left numerous messages for Respondent requesting the status of his case, but Respondent did not respond to the messages.

On July 7, 1999, Short contacted Respondent, who told Short that he was preparing for the hearing on the summary judgment motion, which was to be held the next day. Respondent did not tell Short that Respondent had not filed an opposition to the summary judgment motion. Respondent promised to call Short back on July 13, 1999.

On July 8, 1999, a hearing was held on the motion for summary judgment, at which time Respondent admitted that he had not reviewed the motion. Respondent claimed to have suffered from poor health and stated, "I've had one court experience where I felt like the voodoo doll. My voodoo doll was being poked one time in January when this occurred..."

On July 8, 1999, the motion for summary judgment was granted in favor of the defendants as no opposition to the motion had been filed. Respondent was present at the hearing on the motion for summary judgment.

On July 12, 1999, the court entered a judgment for defendants in the Short action.

Respondent did not call Short on July 3, 1999, as promised. On July 20, 1999, Short called Respondent, who told Short that he had been "laid up for two weeks," and that he would file a motion in the case. Respondent did not tell Short the outcome of the summary judgment motion.

On July 27 and August 5, 1999, Respondent called Short and guaranteed that a summary judgment motion would be granted in Short's favor, instead of telling Short that the motion had been granted in the defendants' favor.

In late July 1999, Short obtained from the court a transcript of the hearing on the motion for summary judgment. Upon reviewing the transcript, Short learned that Respondent had not filed an opposition to the motion for summary judgment, and that the court had granted summary judgment in favor of the defendants.

7. Court Reporting Services Bill

On November 23, 1998, Respondent sent Short a $4,587.07 bill for court reporting services in the Short action and requested Short to pay for those services. On December 8, 1998, Short sent a $4,500 check payable to Respondent for the court reporting services.

On December 22, 1998, Respondent negotiated the $4,500 check, but did not forward the $4,500 to pay the court reporting services.

8. Substitution of Attorney

In September 1999, after terminating Respondent's employment in the Short action, Short hired attorney Richard Hart to represent him in the Short action.

On September 22, 1999, attorney Hart sent a substitution of attorney to Respondent and requested that Respondent sign the substitution of attorney forms and return the forms with Short's files to attorney Hart. Respondent did not respond to attorney Hart's request and did not return the substitution of attorney forms or the files to attorney Hart or to Short.

On October 1, 1999, attorney Hart sent a second request to Respondent that he sign the substitution of attorney form and return the forms along with the case files immediately, or that he make arrangements to have the files available for pick up. Again, Respondent did not comply with attorney Hart's second request and did not return the substitution of attorney forms or the files to

attorney Hart or to Short.

On November 8, 1999, attorney Hart filed a motion for substitution of attorney in the Short action as Respondent had failed to consent to substitute out of the case. On December 10, 1999, the motion was denied on the ground of improper service on Respondent.

On December 22, 1999, Hart filed a motion for reconsideration of the order denying the motion for substitution of attorney on the ground that proper service had been made. On January 7, 2000, the court granted Hart's motion for reconsideration of the denial of the motion for substitution of attorney and attorney Hart was substituted in place of Respondent as Short's attorney in the Short action.

After Respondent was formally substituted out of the Short action, Respondent did not account for the $4,500 paid for the court reporting services.

Count 1: Rule 3-110(A) of the Rules of Professional Conduct[3] (Failure to Perform Services)

Respondent intentionally, recklessly, and repeatedly failed to perform legal services with competence, in wilful violation of rule 3-110(A), by failing to serve timely and complete responses to the written discovery and by not filing timely oppositions to the December 1998 motions to compel discovery and to strike/dismiss the complaint filed in the Short action.

Counts 2 and 5: Business and Professions Code Section 6106 (Misrepresentation)

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

Respondent wilfully violated section 6106 by committing an act involving moral turpitude, dishonesty and corruption when he misrepresented to defense counsel that his client had failed to provide any response to the written discovery in count 2.

Moreover, Respondent committed an act of moral turpitude, dishonesty or corruption, by affirmatively concealing the status of Short's case on July 20, 1999. At that time, summary judgment already had been granted against Short and judgment was entered. Respondent was present in court when the ruling was made. Nevertheless, when Short contacted him on July 20,

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[3]References to rule are to the Rules of Professional Conduct, unless otherwise noted.

1999, he did not tell Short of the outcome of the motion, but rather, represented that he had been ill and would file a motion in the matter. Respondent's concealment of the status of the matter constituted an act of moral turpitude or dishonesty in wilful violation of section 6106 in count 5.

Count 3: Section 6068(c) (Failure to Maintain Just Action)

Section 6068(c) provides that it is the duty of an attorney to maintain just actions.

"We agree ... that attorneys have a duty to zealously represent their clients and assert unpopular positions in advancing clients' legitimate objectives. However, as officers of the court, attorneys also have a duty to judicial system to assert only legal claims or defenses that are warranted by the law or are supported by a good faith belief in their correctness." (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591.)

Here, Respondent asserted frivolous defenses in his motions (such as wrong case number) and abruptly terminated his client's deposition that were neither warranted by the law or were supported by a good faith belief in their correctness. He forced defendants' counsel to move the court for orders compelling further responses to the first, second and third sets of form interrogatories without substantial justification. He terminated Short's deposition on April 17, 1998 and failed to cooperate in the rescheduling of the deposition without substantial justification. He insisted on scheduling depositions of defendants on dates when the deponents were unavailable without substantial justification. Finally, he used abusive deposition tactics, telling opposing counsel to "shut up" and calling the deponent "a fool."

Therefore, Respondent wilfully violated section 6068(c).

Count 4: Section 6068(m) (Failure to Communicate)

Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients with regard to which the attorney has agreed to provide legal services.

Respondent wilfully violated section 6068(m) by failing to respond to the messages of Short seeking information about the status of his case; and by failing to inform Short of the following significant events: that sanctions were imposed against Short on six separate occasions, that motions to compel discovery were filed, that Respondent did not oppose the summary judgment motion, and

finally, that the court granted summary judgment against Short.

Counts 6, 8, 10, 12, 14, and 16: Section 6103 (Failure to Obey Court Orders)

Section 6103 requires attorneys to obey court orders and provides that the wilful disobedience or violation of such orders constitutes cause for disbarment or suspension.

By not paying the six sanctions ($477; $477; $717; $1,134; $1,550; and $1,062), totaling $5,417, ordered by the court due to Respondent's repeated failures to comply with discovery orders, Respondent wilfully disobeyed and violated the six court orders requiring him to do an act connected with or in the course of Respondent's profession which he ought to have done in good faith in wilful violation of § 6103 in counts 6, 8, 10, 12, 14, and 16.

Counts 7, 9, 11, 13, 15, and 17: Section 6068(b) (Failure to Maintain Respect)

Section 6068(b) provides that it is the duty of an attorney to maintain the respect due to the courts of justice and judicial officers.

"Obedience to court orders is intrinsic to the respect attorneys and their clients must accord the judicial system....In the case of court-ordered sanctions, the attorney is expected to follow the order or proffer a formal explanation by motion or appeal as to why the order cannot be obeyed....An attorney with an affirmative duty to the courts and his clients whose interests were affected cannot sit back and await contempt proceedings before complying with or explaining why he or she cannot obey a court order." (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403-404.)

Therefore, Respondent's personal knowledge of the orders and his wilful, unexcused failure to pay the six court sanctions ($477; $477; $717; $1,134; $1,550; and $1,062) constituted violations of § 6068(b) in counts 7, 9, 11, 13, 15 and 17.

However, because the misconduct underlying both §§ 6068(b) and 6103 violations is the same, the court will not attach additional weight to the finding of the two violations in determining the appropriate discipline to recommend in this matter. Little, if any, purpose is served by duplicative allegations of misconduct. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

Count 23: Rule 4-100(B)(4) (Failure to Promptly Pay Client Funds)

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver any funds or properties in

the possession of the attorney which the client is entitled to receive.

By failing to forward the $4,500 to pay for the court reporting services, Respondent wilfully failed to pay promptly funds in Respondent's possession in wilful violation of rule 4-100(B)(4).

Count 24: Section 6106 (Misappropriation)

Respondent had a fiduciary duty not to misuse client funds. "Thus the funds in his possession are impressed with a trust, and his conversion of such funds is a breach of the trust." (*Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156.) Here, Short paid Respondent $4,500 for the court reporting services. But Respondent negotiated the check without paying the bill. Therefore, Respondent misappropriated $4,500 from Short, an act of moral turpitude, in wilful violation of section 6106.

Count 31: Rule 3-700(D)(1) (Failure to Return Client File)

Respondent is charged with a violation of rule 3-700(D)(1), which provides that a member whose employment has terminated must promptly release all papers and property to the client at the request of the client.

By failing to send Short's files to attorney Hart or Short or to make arrangements to have the client files available for pick up, despite attorney Hart's two requests, Respondent wilfully failed to release promptly, upon termination of employment, to the client all the client's papers and property in the Short action in wilful violation of rule 3-700(D)(1).

Count 32: Rule 3-700(A)(2) (Improper Withdrawal from Employment)

Rule 3-700(A)(2) provides that an attorney shall not withdraw from employment until he has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client.

By failing to send Short's files to attorney Hart or Short or to make arrangements to have Short's files available for pick up, by failing to return executed substitution of attorney to attorney Hart or Short, and by requiring attorney Hart to file a motion for substitution of attorney in the Short action, Respondent wilfully failed, upon termination of employment, to take reasonable steps to avoid reasonably foreseeable prejudice to his client, in wilful violation of rule 3-700(A)(2).

Count 33: Rule 4-100(B)(3) (Failure to Render Accounts)

Rule 4-100(B)(3) provides that an attorney shall maintain records of all funds of a client in

his possession and render appropriate accounts to the client.

The Supreme Court noted the duty of an attorney to keep proper accounting books and client transactions records so that the attorney could produce them and show fair dealing if the attorney's actions were called into question. "The failure to keep proper books ... is in itself a suspicious circumstance." (*Clark v. State Bar* (1952) 39 Cal.2d 161, 174.)

After Respondent was formally substituted out of the Short action, Respondent did not account for the $4,500 paid for the court reporting services. By not accounting for the $4,500 paid for the court reporting services; Respondent wilfully failed to render appropriate accounts to a client regarding all funds of the client coming into Respondent's possession in clear and wilful violation of rule 4-100(B)(3).

C. The AFG Action Matter (Counts 18-20 and 31-32)

On April 14, 1998, AFG filed an action for breach of contract, breach of fiduciary duty, and accounting against Short entitled, *Arrowhead Financial Group, Inc. v. Ernest Short*, San Bernardino County Superior Court, case No. SCV46962 (the AFG action). Respondent agreed to defend Short in the AFG action.

1. Motion to Compel Production of Documents

On June 17, 1998, AFG served a request for production of documents in the AFG action. On July 13, 1998, Respondent properly served objections to the request and did not produce any of the requested documents.

On August 25, 1998, AFG filed a motion to compel Short's responses to the request for production of documents and for sanctions under Code of Civil Procedure section 2023(b)(l) for misuse of the discovery process. On March 2, 1999, during the hearing on the motion to compel, Respondent stipulated that Short would provide specific documents to AFG no later than April 16, 1999. The court granted the motion and adopted the stipulation as the court's order on the motion to compel, but denied monetary sanctions.

However, Respondent did not provide the requested documents by April 16, 1999. AFG sent a letter to Respondent requesting the documents be provided no later than April 30, 1999. Again, Respondent did not produce the documents.

On June 9, 1999, Short sent Respondent the documents responsive to the motion to compel. But Respondent did not serve the documents on AFG.

2. Motion to Compel Interrogatory Responses

On January 4, 1999, AFG served form interrogatories on Respondent. On February 3, 1999, Respondent served Short's response to the interrogatories. On March 10, 1999, Respondent agreed to serve supplemental responses to the interrogatories by April 8, 1999. As of April 21, 1999, AFG did not receive any further responses.

On April 21, 1999, AFG granted another 10-day extension to respond to the interrogatories. Respondent did not serve the supplemental responses to the interrogatories.

On June 2, 1999, Respondent informed Short to be available for a deposition on June 28, 1999. He also told Short that a trial had been set and that Short needed to be available for a settlement conference. Respondent made no mention of the overdue interrogatory responses.

On June 3, 1999, AFG served a motion to compel interrogatory responses and for sanctions under Code of Civil Procedure sections 2023 and 2030 on the ground that the failure to provide the responses was without justification and in bad faith.

On June 14, 15, 22, 23, 25, and 29, 1999, Short left messages for Respondent in which he requested the status of the AFG action. Respondent did not respond to Short's messages until June 30, 1999, when Short received a message that Respondent had called Short.

3. The Motion to Strike

On June 3, 1999, having received none of the requested documents, AFG filed a motion to strike Short's answer in the AFG action for failing to comply with the court's March 2, 1999 order and properly served it on Respondent by mail. Respondent did not file a written opposition to the motion to strike and did not appear at the June 22, 1999 hearing on the motion to strike.

At the hearing, Short's answer was stricken. This rendered the motion to compel responses to the interrogatories moot. On June 23, 1999, AFG properly served notice of the court's ruling on Respondent by mail.

On July 1, 1999, when Short contacted Respondent, he was told that the motion to strike Short's answer in the AFG action had been granted. But Respondent falsely claimed that he had not

been notified of the motion and that he had considered filing a motion to reconsider. Respondent further claimed that he decided to permit the entry of Short's default because of the time demands in the Short action and because the claimed damages in the AFG action were relatively minor. Respondent had not obtained Short's consent to allow his default to be entered. When Short requested that Respondent file the motion for reconsideration, Respondent agreed to do so.

On July 7, 1999, Respondent informed Short that he had not filed the motion for reconsideration, but would be filing it immediately. Although he also told Short that he would contact Short by July 13, 1999, he did not do so.

On July 20, 1999, Respondent informed Short that he had been "laid up for two weeks" and that he would file a motion in the AFG action. Respondent did not file the motion for reconsideration. On July 27 and August 5, 1999, Respondent called Short and guaranteed that Short's default in the AFG action would be set aside. Respondent requested that Short send additional money or further services would not be performed.

Thereafter, in August 1999, Short terminated Respondent's employment in the AFG action. As found in the wrongful termination matter, Short also hired attorney Richard Hart to represent him in the AFG action.

On September 22, 1999, attorney Hart sent a substitution of attorney to Respondent and requested that Respondent sign the substitution of attorney forms and return the forms with Short's files to attorney Hart. Respondent did not respond to attorney Hart's request and did not return the substitution of attorney forms or the files to attorney Hart or to Short.

On October 1, 1999, attorney Hart sent a second request to Respondent that he sign the substitution of attorney form and return the forms along with the case files immediately, or that he make arrangements to have the files available for pick up. Again, Respondent did not comply with attorney Hart's second request and did not return the substitution of attorney forms or the files to attorney Hart or to Short.

On October 29, 1999, attorney Hart filed a motion for substitution of attorney in the AFG action as Respondent failed to consent to substitute out of the case. The motion was granted. He also filed a motion to set aside the order striking Short's answer and to set aside the default.

However, on January 4, 2000, the motion to set aside the default was denied. The court found that Short's answer was stricken and default entered due to the gross mishandling of the case by Respondent, and that Short's proper remedy was the malpractice suit he had filed against Respondent on August 5, 1999.

On February 4, 2000, a $203,979.41 judgment was entered in favor of AFG and against Short in the AFG action.

Count 18: Rule 3-110(A) (Failure to Perform Competently)

By not producing Short's documents to AFG even though the client had given them to Respondent, by not providing supplemental responses to the form interrogatories, by not opposing the motion to strike and permitting the entry of default against Short in the AFG action without Short's consent, and by not filing a motion for reconsideration, Respondent intentionally, recklessly and repeatedly failed to perform legal services with competence in wilful violation of rule 3-110(A).

Count 19: Section 6068(m) (Failure to Communicate)

Although Short left numerous messages for Respondent in June 1999 and Respondent did respond until two weeks later, a period of two weeks was not so unreasonable as to constitute a professional violation. Therefore, he did not wilfully fail to respond promptly to reasonable status inquiries of a client in wilful violation of section 6068(m).

But, Respondent did wilfully fail to keep Short reasonably informed of significant developments in a matter in which Respondent had agreed to provide legal services in wilful violation of section 6068(m) in that he did not inform Short that the supplemental responses to the interrogatories were overdue, he did not inform Short of the motion to compel interrogatory responses, and he did not inform Short of the motion to strike until after it was granted.

Count 20: Section 6106 (Misrepresentation)

By falsely claiming that he had not been notified of the motion to strike in the AFG action, Respondent misrepresented to Short, an act involving dishonesty, in wilful violation of section 6106.

Count 31: Rule 3-700(D)(1) (Failure to Return Client File)

As found in the wrongful termination matter, by failing to send Short's files to attorney Hart or Short or to make arrangements to have the client files available for pick up, despite attorney Hart's

two requests, Respondent wilfully failed to release promptly, upon termination of employment, to the client all the client's papers and property in the AFG action in wilful violation of rule 3-700(D)(1).

Count 32: Rule 3-700(A)(2) (Improper Withdrawal from Employment)

As found in the wrongful termination matter, by failing to send Short's files to attorney Hart or Short or to make arrangements to have Short's files available for pick up, by failing to return executed substitution of attorney to attorney Hart or Short, and by requiring attorney Hart to file a motion for substitution of attorney in the AFG action, Respondent wilfully failed, upon termination of employment, to take reasonable steps to avoid reasonably foreseeable prejudice to his client, in wilful violation of rule 3-700(A)(2).

D. The Federal Causes of Action Matter (Counts 21-22 and 33)

Respondent agreed, on behalf of Short, to file federal causes of action against Arrowhead Central Credit Union and its agents for alleged theft of Short's personal records and violation of his privacy rights.

In November 1998, at Respondent's request, Short gave Respondent a $500 check payable to Respondent for filing fees for the federal action.

Respondent did not file any federal action on behalf of Short; but on November 9, 1998, he negotiated the $500 check. He did not account for the $500 paid for the filing fees in the federal action.

Count 21: Rule 3-110(A) (Failure to Perform Competently)

By failing to file any federal action for Short regarding the alleged theft of Short's personal records and violation of his privacy rights, Respondent wilfully failed to perform legal services with competence, in wilful violation of rule 3-110(A).

Count 22: Section 6106 (Misrepresentation)

By negotiating the $500 check without filing the federal action, Respondent misappropriated client funds, in wilful violation of section 6106.

Count 33: Rule 4-100(B)(3) (Failure to Render Accounts)

By not accounting for the $500 paid for the filing fees in the federal action, Respondent

wilfully failed to render appropriate accounts to a client regarding all funds of the client coming into Respondent's possession, in wilful violation of rule 4-100(B)(3).

E. The Client Loans Matter (Counts 25-30)

In 1998 to 1999, during Respondent's representation of Short, Respondent asked his client to lend him funds in an accumulative amount of $14,114 on six separate occasions. Respondent never repaid the loans to Short.

1. $2,000 Loan for Sanctions

In 1998, Respondent requested Short to loan him money to pay the sanctions ordered in the Short action. Respondent did not set forth in writing the terms for repayment of the loan to Short.

Pursuant to the oral loan agreement, Short transmitted a $2,000 check made payable to Respondent. On September 1, 1998, Respondent negotiated the $2,000 check without complying with the prophylactic requirements that (1) the transaction or acquisition and its terms were fair and reasonable to the client; (2) the transaction or acquisition and its terms were fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; (3) the client was advised in writing that the client may seek the advice of an independent lawyer of the client's choice; (4) the client was given a reasonable opportunity to seek that advice; and (5) the client thereafter consented in writing to the terms of the transaction or acquisition (prophylactic requirements).

Respondent did not use any of the $2,000 for payment of the sanctions and did not pay any of the sanctions imposed against him in the Short action. Also, Respondent did not repay the $2,000 loan to Short.

2. $4,000 Personal Loan

In 1998, Respondent asked Short to loan him $4,000 for his personal benefit. Respondent did not set forth in writing the terms for the repayment of the loan to Short.

Pursuant to the oral loan agreement, Short transmitted a $4,000 check payable to Respondent as a loan. On November 9, 1998, Respondent negotiated the $4,000 check without complying with the prophylactic requirements. Respondent did not repay the $4,000 loan to Short.

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3. $352 Loan for Malpractice Insurance Premium

On December 30, 1998, Respondent contacted Short and stated that he had made "some bad decisions" in the Short action. Respondent requested that Short pay his malpractice insurance premium to protect Short's interests. Short agreed to loan the money to Respondent for the premium, but Respondent did not set forth, in writing, the terms for the repayment of the loan.

On January 11, 1999, Respondent told Short that the monthly premium was $352 and that his malpractice carrier was Great American Insurance Company (Great American). Short then transmitted a $352 check payable to Great American for Respondent's premium.

Respondent negotiated the $352 check the next day without complying with the prophylactic requirements. Respondent did not repay the $352 loan to Short.

4. $352 Loan for Malpractice Insurance Premium

On February 27, 1999, Respondent again contacted Short and indicated that his malpractice insurance premium was past due. Respondent requested that Short send him a $352 check for the insurance premium, but to designate on the check that the $352 was for Respondent's services in the AFG action. Short agreed to loan $352 to Respondent for the premium, but Respondent did not set forth, in writing, the terms for the repayment of the loan to Short.

Soon thereafter, Short transmitted a $352 check payable to Respondent for the outstanding premium pursuant to the verbal loan agreement.

On March 11, 1999, Respondent negotiated the $352 check without complying with the prophylactic requirements. Respondent did not repay the $352 loan to Short.

5. $2,410 Loan for Malpractice Insurance Premium

On March 2, 1999, Respondent requested that Short do what he could to pay Respondent's malpractice insurance premiums for the duration of the policy period. Short contacted and was informed by Great American that the premium due under Respondent's policy was $2,410. Short agreed to loan $2,410 to Respondent for the premium, but Respondent did not set forth, in writing, the terms for the repayment of the loan to Short.

Short transmitted a $2,410 check payable to Great American for Respondent's malpractice insurance premium pursuant to the verbal loan agreement.

On March 8, 1999, the $2,410 check was negotiated without Respondent complying with the prophylactic requirements. Respondent did not repay the $2,410 loan to Short.

6. $5,000 Loan for Malpractice Insurance Premium

On March 9, 1999, Respondent telephoned Short and indicated that he needed a $7,500 loan "to go forward." Short informed Respondent that Short had paid $2,410 to Great American for Respondent's malpractice insurance premiums. Respondent indicated that a loan of an additional $5,000 would be sufficient. Short verbally agreed to loan Respondent $5,000 for Respondent's personal benefit. Respondent did not set forth, in writing, the terms for the repayment of the loan to Short.

Short transmitted a $5,000 check payable to Respondent pursuant to their verbal agreement. On March 19, 1999, Respondent negotiated the $5,000 check without complying with the prophylactic requirements.

Respondent did not repay the $5,000 loan to Short.

Counts 25-30: Rule 3-300 (Avoiding Interests Adverse to a Client)

Rule 3-300 provides that an attorney must not enter into a business transaction with a client or knowingly acquire an interest adverse to a client unless the transaction or acquisition is fair and reasonable to the client, is fully disclosed to the client, the client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to do so, and the client thereafter consents in writing to the transaction or acquisition. The purpose of this rule is to "recognize the very high level of trust a client reposes in his attorney and to ensure that that trust is not misplaced. [Citations.] Sadly, this case stands with too many others as an example of an attorney's preference of his personal interests in manifest disregard of the interests of his client." (*In the Matter of Kittrell* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 615, 623.)

Here, Respondent received six loans from his client, totaling $14,114, without ever repaying the funds. Respondent clearly and convincingly violated rule 3-300 in counts 25 through 30 by failing to comply with its prophylactic terms. The term of the loan was not fair and reasonable because it was not secured. Respondent did not advise Short to seek independent counsel's advice,

provide him with a written loan agreement with full disclosure of its terms, or obtain written consent from him.

F. The State Bar Matter (Counts 34-35)

On December 17, 2003, the State Bar wrote to Respondent regarding Respondent's handling of the Short action, the AFG action and other related matters. The letter was properly sent to Respondent's membership record address at 6759 Brockton Avenue, Riverside, CA 92506. It was returned to the State Bar as "Not Deliverable as Addressed, Unable to Forward," and, "Notify Sender of New Address: Crabtree and Associates, 10020 Indiana Avenue, Ste. 211, Riverside, CA 92503." Respondent did not respond or otherwise communicate with the State Bar.

On August 9, 2004, Deputy Trial Counsel Eli D. Morgenstern attempted to reach Respondent by telephone at his official membership records telephone number. But the number was disconnected. He then telephoned Crabtree and Associates at (909)352-0255. He was told that Crabtree and Associates was a CPA office, that Respondent did not presently work at the office, and that the person who answered the phone did not know Respondent.

Count 34: Section 6068(i) (Failure to Cooperate With the State Bar)

Section 6068(i) provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney. By failing to respond to the State Bar's December 2003 letter or participate in the investigation of the Short matter, Respondent failed to cooperate with the State Bar in wilful violation of section 6068(i).

Count 35: Section 6068(j) (Failure to Update Membership Address)

Section 6068(j) states that a member shall comply with the requirements of section 6002.1, which provides that Respondent shall maintain on the official membership records of the State Bar a current address and telephone number to be used for State Bar purposes. By clear and convincing evidence, Respondent wilfully violated section 6068(j) when he failed to maintain a current official membership records address and the December 2003 letter from the State Bar was returned as undeliverable and when Deputy Trial Counsel Morgenstern tried to contact him by phone, the number was disconnected.

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IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[4]

Respondent has no record of prior discipline in his eight years of practice when the misconduct began in 1998. His lack of record is considered somewhat as mitigation. (Std. 1.2(e)(i).)

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent committed multiple acts of wrongdoing, including failing to perform services, failing to communicate, failing to render an accounting, failing to avoid interests adverse to a client, committing acts of moral turpitude, dishonesty or corruption, failing to obey a court order, maintaining an unjust action, failing to maintain respect for the courts, failing to return client files, failing to deliver client funds promptly, and improperly withdrawing from employment. (Std. 1.2(b)(ii).)

Respondent's misconduct of obtaining six loans, totaling $14,114, from his client without repayment and failing to comply with discovery orders were surrounded by bad faith, dishonesty, concealment, and overreaching and therefore, is considered as aggravation. (Std. 1.2(b)(iii).)

Respondent's misconduct caused his client and the administration of justice substantial harm. (Std. 1.2(b)(iv).) The client had to hire another attorney to take over the cases which Respondent had abandoned. As a result of Respondent's gross negligence, a default judgment of $203,979.41 was entered into against his client. He also caused harm to the administration of justice by wasting its resources with his repeated refusal to comply with discovery orders, resulting in the opposing counsel having to seek court orders and sanctions against Respondent and his client on six separate instances, totaling $5,417.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He has yet to return funds to Short or pay the

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

sanctions.

Respondent's failure to participate in this disciplinary matter prior to the entry of his default is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

This case involves egregious misconduct. The standards for Respondent's misconduct provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds.1.6, 2.2, 2.3, 2.4(b), 2.6, 2.8 and 2.10.) The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id.* at p. 251.)

Standard 2.2(a) provides that culpability of wilful misappropriation of entrusted funds shall result in disbarment, unless the amount is insignificantly small or the most compelling mitigating circumstances clearly predominate. Here, Respondent's misappropriation of $5,000 ($4,500 for court reporting services and $500 for filing fees) is significant and there is no compelling mitigation.

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court or a client shall result in actual suspension or disbarment. As discussed above, Respondent's misappropriation and misrepresentation to Short regarding the case status and to opposing party regarding discovery status were an act of moral turpitude and dishonesty.

The State Bar urges disbarment, citing several supporting cases, including *Grim v. State* Bar (1991) 53 Cal.3d 21, *Convoy v. State Bar* (1991) 53 Cal.3d 495, *Borré v. State Bar* (1991) 52 Cal.3d 1047, and *Beery v. State Bar* (1987) 43 Cal.3d 802.

The court agrees. Respondent's misconduct reflects a blatant disregard of professional responsibilities. He had flagrantly breached his fiduciary duties to his client and abused his trust as his attorney.

It is settled that an attorney-client relationship is of the highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) The Supreme Court noted that "[t]he essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." (*Id.*)

The misappropriation of client funds is a grievous breach of an attorney's ethical responsibilities, violates basic notions of honesty and endangers public confidence in the legal profession. In all but the most exceptional cases, it requires the imposition of the harshest discipline – disbarment. (*Grim v. State Bar* (1991) 53 Cal.3d 21.) In *Grim*, the Supreme Court disbarred an attorney for misappropriating $5,546 from a client after she had moved to another state. He had once been disciplined for commingling funds. Here, Respondent not only misappropriated $5,000 from Short, he also took $14,114 from his client as a loan which was never repaid. In other words, Respondent absconded with a total of $19,114 from his client.

In *In the Matter of Kittrell* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 615, the attorney, who had been in practice for 24 years, was actually suspended for three years for entering into a real estate transaction with an unsophisticated client who lost her life savings of $61,000 in the transaction. The attorney concealed material facts and known risks from his client about the investment. Instead, he told the client that it was a "can't lose" investment.

In this matter, Respondent convinced the client that he needed $14,114 in order to pay the insurance premiums to protect Short's interests in the legal malpractice case against Respondent and to help him "to go forward." His taking of the funds is tantamount to misappropriation.

Respondent's acts of dishonesty "manifest an abiding disregard of the fundamental rule of ethics – that of common honesty – without which the profession is worse than valueless in the place it holds in the administration of justice." (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1147.)

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) "It is clear that disbarment is not reserved just for attorneys with prior disciplinary records. [Citations.] A most

significant factor . . . is respondent's complete lack of insight, recognition, or remorse for any of his wrongdoing." (*In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, 83.) An attorney's failure to accept responsibility for actions which are wrong or to understand that wrongfulness is considered an aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100-1101.) Instead of cooperating with the State Bar or rectifying his misconduct, Respondent defaulted in this disciplinary proceeding.

Respondent "is not entitled to be recommended to the public as a person worthy of trust, and accordingly not entitled to continue to practice law." (*Resner v. State Bar* (1960) 53 Cal.2d 605, 615.) Although Respondent's misconduct occurred some five years ago, Respondent's failure to participate in this hearing leaves the court without information about the underlying cause of Respondent's offense or of any mitigating circumstances surrounding his misconduct. Respondent appeared to be experiencing personal problems when he told his client that he had "lost it" and had trouble getting out of bed in January 1999, when he declared to the court that he had a "sudden illness" in January 1999, when he was "laid up for two weeks" during the AFG action in July 1999, and when he told the court that he was suffering from poor health. But without his participation in this proceeding, there is no clear and convincing evidence to demonstrate how his personal problems had impacted his misconduct, if any. Therefore, based on the severity of the offense, the serious aggravating circumstances and the lack of mitigating factors, the court recommends disbarment.

VI. RECOMMENDED DISCIPLINE

This court recommends that Respondent **DUANE L. McCOLLUM** be disbarred from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this State.

It is also recommended that the Supreme Court order Respondent to comply with rule 955, paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.

VII. COSTS

The court recommends that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and payable in accordance with Business and Professions Code

section 6140.7.

VIII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

It is ordered that Respondent be transferred to involuntary inactive enrollment status pursuant to Business and Professions Code section 6007(c)(4) and rule 220(c) of the Rules of Procedure of the State Bar. The inactive enrollment shall become effective three calendar days after service of this order.

Dated: December 7, 2004

RICHARD A. HONN
Judge of the State Bar Court

CERTIFICATE OF SERVICE

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

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on December 8, 2004, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT, filed December 8, 2004

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

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

DUANE L MC COLLUM
ATTORNEY AT LAW
6759 BROCKTON AVE
RIVERSIDE, CA 92506

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

Eli D. Morgenstern, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **December 8, 2004.**

Milagro del R. Salmeron
Case Administrator
State Bar Court