FILED JUNE 29, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of	)	Case Nos.: **03-O-04829-LMA**
	)	
RONALD RAYMOND ROSSI,	)	
	)	
Member No. 43067,	)	**DECISION & PRIVATE REPROVAL**
	)	
A Member of the State Bar.	)	

I. INTRODUCTION

In this contested, original disciplinary proceeding, the Office of the Chief Trial Counsel of the State Bar of California (hereafter "State Bar") charges respondent **RONALD RAYMOND ROSSI**[1] with seven counts of professional misconduct arising out of his representation of multiple clients in a single lawsuit.

The State Bar was represented by Deputy Trial Counsel Erica Dennings. Respondent was represented by Attorneys Pamela Phillips, Sean M. SeLegue, and Noah S. Rosenthal of Howard Rice Nemerovski Canady Falk & Rabkin.

For the reasons stated *post*, the court finds that respondent is culpable on only three of the seven counts. Moreover, in light of the nature of the misconduct, the difficult circumstances under which it was committed, the lack of any significant aggravation, and the presence of

[1] Respondent was admitted to the practice of law in this state on January 9, 1969, and has been a member of the State Bar of California since that time. He has no prior record of discipline.

extensive, if not compelling, mitigation (including, but not limited to, respondent's extreme good faith, the lack of any harm, and respondent's outstanding good character), the court concludes that a private reproval without conditions, the *lowest* level of discipline, will adequately fulfill the purposes of attorney discipline. Any greater level of discipline would be punitive. Accordingly, the court will privately reprove respondent.

II. KEY PROCEDURAL HISTORY

The State Bar filed the notice of disciplinary charges (hereafter "NDC") in this matter on March 26, 2008. Respondent filed his response to the NDC on April 23, 2008.

On November 4, 2008, the parties filed an extensive and detailed, but partial stipulation as to facts. (Rules Proc. of State Bar, rule 131.)

An 11-day trial was held on November 4, 5, 12, 13, and 14, 2008; December 12, 2008; and February 3, 4, 5, 18, and 19, 2009. And, after each party filed a posttrial brief, the court took this matter under submission for decision on March 30, 2009.

On April 6, 2009, respondent filed a motion to strike portions of the State Bar's posttrial brief. On April 15, 2009, the State Bar filed an opposition to respondent's motion. Respondent's motion to strike is DENIED no good cause being shown.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Many of the court's findings are based in large part on credibility determinations. After carefully observing respondent testify before it and after carefully considering, inter alia, respondent's demeanor while testifying; the manner in which he testified; the character of his testimony; his interest in the outcome in this proceeding; his capacity to perceive, recollect, and communicate the matters on which he testified; and after carefully reflecting on the record as a whole, the court finds respondent's testimony to be extremely credible. (See, generally, Evid.

Code, § 780; *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 736-737.) Respondent's testimony was direct, clear, specific, and very believable.

A. Findings of Fact

In 2002, the law firm of Verboon, Milstein, and Peter, LLP (hereafter "Verboon firm")[2] represented the owners of approximately 103 homes in the Chantelane Subdivision in Stockton, California. In about September 2002, the Verboon firm filed, in the San Joaquin County Superior Court, three construction defect lawsuits against Greenbriar Homes Communities, Inc., (hereafter "Greenbriar Homes") and others on behalf of those homeowners. The three lawsuits were eventually consolidated into one action, which is hereafter referred to as the "*Acosta* lawsuit." The *Acosta* lawsuit was not a class action lawsuit; accordingly, each of the *Acosta* plaintiffs was required to prove, inter alia, his or her individual damages. In the *Acosta* lawsuit, Greenbriar Homes was represented by the law firms Cox, Castle & Nicholson and Bowman & Brooke.

Between January 21, 2003, and March 21, 2003, Greenbriar Homes sent at least three letters to the homeowners in the Chantelane Subdivision. In those letters, Greenbriar Homes encouraged the homeowners to contact Greenbriar Homes directly regarding any concerns or problems they had with their homes and to give Greenbriar Homes a chance to address and resolve the problems. During and after that time period, Greenbriar Homes had direct contact with a number of the plaintiffs in the *Acosta* lawsuit and offered to make certain repairs to their homes. Greenbriar Homes hoped that its repair efforts would satisfy the *Acosta* plaintiffs and cause them to withdraw from the lawsuit.

[2] The Verboon firm is now known as Milstein Adelman & Kreger, LLP.

On February 27, 2003, Attorney Lee Jackson with the Verboon firm sent a letter to Attorney Robert Infelise with the Cox, Castle & Nicholson firm. In his letter, Attorney Jackson stated that the *Acosta* plaintiffs did not want Greenbriar Homes to contact them. In addition, Attorney Jackson instructed that all Greenbriar Homes' future communications with the *Acosta* plaintiffs were to go through the Verboon firm.[3] Of course, notwithstanding Attorney Jackson's letter, Greenbriar Homes had every right to communicate with the *Acosta* plaintiffs directly, and the Cox, Castle & Nicholson firm was free to advise Greenbriar Homes of its right to do so. (Rules Prof. Conduct, rule 2-100, Official Discussion.)

In May 2003, Mike and Carol Meyer (hereafter collectively "the Meyers"), who are the owners of Greenbriar Homes, telephoned respondent's office. Respondent had never previously represented Greenbriar Homes, but had previously represented the Meyers (and a couple of other entities in which they had an ownership interest) in a case about a mechanics' lien dispute. That matter ended more than five years earlier in February 1998. Respondent had also previously represented the Chantelane Homeowners' Association concerning a resident who was harassing homeowners and repeatedly suing the developer in baseless lawsuits. When respondent represented the homeowners' association, some or all of its officers were Greenbriar employees. Respondent's representation of the homeowners' association ended more than six years earlier in 1997. In short, respondent's prior dealings with the Meyers, their related entities, and the Chantelane Homeowners' Association were remote in time, minimal, and unrelated to the *Acosta* lawsuit.

[3] In his letter, Attorney Jackson also stated that Greenbriar Homes' "supposed desire to properly repair [the Acosta plaintiffs'] homes is a farce. It is solely intended . . . to improperly interfere with the attorney/client relationship" between the Acosta plaintiffs and the Verboon firm. Nothing in the record supports these statements.

When the Meyers telephoned respondent's office in May 2003, respondent was unavailable because he was at home recovering from hip surgery. Thus, the Meyers spoke to Attorney Sam Chuck, who is one of respondent's law partners. During that phone conversation, the Meyers stated that some of the plaintiffs wanted to get out of the *Acosta* lawsuit, but that the Verboon firm failed to follow the plaintiffs' instructions to dismiss them from the lawsuit. The Meyers also stated that they wanted respondent and his firm to review the plaintiffs' fee agreements with the Verboon firm to determine if there was a way to get some of the *Acosta* plaintiffs out of the lawsuit without their having to pay costs.

After the conversation, Attorney Chuck wrote a memo to the file. In his memo, Chuck wrote that the first goal is to get the *Acosta* plaintiffs out of the litigation and that the second goal is to defend them against any claim by the Verboon firm that they have to pay costs. In addition, Chuck wrote that Greenbriar Homes also wants to know "if we can sue these people in some type of class action because there is apparently six large law firms that do this [throughout] the State of California that are making a fortune. According to our clients these people fly private jets on these things. . . . The long term goal is to destroy all of these firms. . . ." Chuck ends his memo by stating that the Meyers are going to talk to respondent about this matter next week. Respondent did not see Chuck's memo or know of its contents until some time after October 2003 when the memo was produced during discovery in the Verboon firm's lawsuit against respondent and others, which lawsuit is discussed *post*. Moreover, respondent never adopted the purported long term goal of destroying six large law firms. And the record does not establish that respondent attempted to destroy the Verboon firm or any other law firm.

In June 2003, after respondent returned to work after recovering from his hip surgery, he spoke on the telephone with Mike Meyer, and they discussed respondent helping some of the plaintiffs get out of the *Acosta* lawsuit. Meyer explained that the Verboon firm had failed to

follow some of the plaintiffs' instructions to dismiss them from the *Acosta* lawsuit. Respondent expressed an interest in helping these *Acosta* plaintiffs.

Beginning on about June 12, 2003, respondent sent, to those *Acosta* plaintiffs who had contacted his office for assistance directly or through Greenbriar Homes, a form letter (hereafter "introductory letter").[4] In his introductory letter, respondent explained his understandings (1) that the plaintiff homeowners wished to be dismissed from the *Acosta* lawsuit, (2) that the homeowners had been unsuccessful in getting the Verboon firm to dismiss them from the *Acosta* lawsuit, and (3) that the homeowners desired respondent's assistance in obtaining their dismissal. In the introductory letter, respondent also made it clear to, the homeowners, that if they wished "to remain involved in the [*Acosta*] lawsuit, this letter is not intended to solicit your business or interfere in any way with the attorney-client relationship you have in the lawsuit at issue with [the Verboon firm]."

The introductory letter clearly disclosed that respondent's fees would be paid by Greenbriar Homes. Specifically, respondent stated in the letter: "I understand that you have discussed this matter with Greenbriar representatives and wish to engage our services in this regard at Greenbriar's cost to effectuate without liability your removal from the suit as an active plaintiff." In addition, respondent stated later in the letter: "As mentioned above, the costs and fees involved will be borne by Greenbriar Homes."

The introductory letter also served as a proposed engagement agreement. It included a form that the homeowners could sign to indicate whether they wished to retain respondent's services. If the homeowners wanted to retain respondent's services, they were to check the box

[4] One introductory letter was sent to one *Acosta* plaintiff who had not first contacted either respondent or Greenbriar Homes. Nonetheless, that plaintiff responded that she wanted to be dismissed from the lawsuit. Notably, there is no evidence suggesting that respondent deliberately or recklessly sent an introductory letter to that plaintiff.

next to the following text: "We wish to have our names deleted as plaintiffs in the [*Acosta* lawsuit] at no cost or liability to us, and wish to engage the services of [respondent's law firm] to have our names deleted as plaintiffs, with the understanding that *we will not be responsible for any fees* for [these] services." (Italics added.) Each *Acosta* plaintiff who retained respondent checked the box next to the foregoing text, signed the form, and returned it to respondent.

The introductory letters and multiple other letters respondent and his staff sent to his homeowner clients and to the Verboon firm noted that copies of the letters had been sent to the "Client." The "Client" notation on those letters referred to Greenbriar Homes. In other words, the "Client" notation on a letter meant that a copy of the letter had been sent to Greenbriar Homes. Respondent admits that he did not obtain written consent from his homeowner clients to send copies of these letters to Greenbriar Homes. Moreover, respondent admits that, in a February 29, 2004 billing statement, he referred to Greenbriar Homes as the "client." Notwithstanding these client notations on many of respondent's letters and the other documentary evidence which indicating that Greenbriar Homes or perhaps the Meyers were also respondent's clients at the time, respondent's credible testimony establishes that neither respondent nor respondent's law firm represented Greenbriar Homes or the Meyers at the same time respondent and his law firm represented any of the *Acosta* plaintiffs.[5]

Initially, about 10 sets of homeowners (usually husband and wife sets) executed and returned the engagement agreement to respondent. When the plaintiff homeowners sent respondent an executed engagement agreement indicating that they wanted to retain respondent,

[5] This finding is also supported by, inter alia, Greenbriar Homes' March 2, 2004 indemnity agreement with respondent's law firm (see exhibit 53, page 3) and the very credible testimony of Mike Meyer, Carol Meyer, and Molly Edgar. It is also consistent with Mike Meyer's July 7, 2003 voicemail message to respondent (see exhibit J2).

the homeowners entered into an attorney-client relationship with respondent and his firm for the purpose of obtaining their dismissal from the *Acosta* lawsuit.

On July 9, 2003, respondent sent the Verboon firm a letter in which he notified it of the 10 sets of *Acosta* plaintiffs who had retained him. Also, in that letter, respondent asked the Verboon firm to file dismissals without prejudice for the *Acosta* plaintiffs who had retained him. Regrettably, the Verboon firm neither dismissed respondent's clients nor contacted them to verify whether they wanted to be dismissed. Instead, the Verboon firm sent respondent a number of letters demanding, inter alia, confidential information regarding his representation of the 10 sets of plaintiffs.

On July 22, 2003, respondent sent Mike Meyer (of Greenbriar Homes) a letter in which respondent wrote, inter alia:

> I'm going to go ahead and prepare a tolling and reservation of rights agreement. Since they're dismissing their lawsuits, and since [the Verboon firm] has alluded to statutes of limitation problems, and since you're going to do the repairs anyway, I think it prudent to have a tolling agreement so no one can say we're pulling a fast one on these people by getting them out of the lawsuit, they lose their case, and now we don't do the repairs. I'll send the agreement to you shortly for review, but I think it's the right, fair thing to do, ethically, legally, and tactically.

In his July 22 letter, respondent enclosed a copy of a follow-up letter that he sent to the Verboon firm.

At times, respondent sent Greenbriar Homes charts indicating which *Acosta* plaintiffs had contacted and retained him. For example, on July 23, 2003, respondent sent, to Mike Meyer, a letter and a chart of the 12 sets of plaintiffs that then wanted to be dismissed from the *Acosta* lawsuit. Respondent sent this letter and chart to Meyer in response to a voicemail from Meyer stating that 16 sets of plaintiffs wanted to be dismissed at the time. Furthermore, at times, respondent sent other correspondence to Greenbriar Homes or the Meyers updating them on the

status of his *Acosta* plaintiff clients' cases and sometimes included copies of his recent correspondence with those clients or with the Verboon firm. Respondent did not obtain written consent from his homeowner clients to send these letters and correspondence to Greenbriar Homes or the Meyers.

When the Verboon firm failed to promptly dismiss the 10 sets of plaintiffs who had retained respondent to date, respondent again sent the Verboon firm follow-up letters on August 1, 2003, and August 8, 2003. In each of those follow-up letters, respondent again asked the Verboon firm to file dismissals without prejudice for the 10 sets of plaintiffs who had retained him. In his August 8 letter, respondent aptly noted that "When a client requests to be dismissed from a lawsuit, the client's wishes are paramount. The wishes of the attorney for compensation are irrelevant." (See, e.g., *Schwartz v. Schwartz* (1953) 119 Cal.App.2d 102, 105.) Of course, the client's wishes remain paramount even if "the client seeks a substitution of attorneys for the purpose of dismissing the action to the alleged detriment of original counsel. [Citations.]" (*Meadow v. Superior Court* (1963) 59 Cal.2d 610, 616-617.)

On July 28, 2003, respondent faxed and mailed, to Mike Meyer, a tolling agreement from Greenbriar Homes to respondent's *Acosta* plaintiff clients. Also, on July 28, respondent suggested to the Verboon firm that it contact each of respondent's clients to confirm for itself that they had retained respondent to assist them in being dismissed from the *Acosta* lawsuit. And, on August 8, 2003, the Verboon firm wrote to respondent stating that it was in the process of communicating directly with the clients regarding respondent's contention that the clients wanted to be dismissed from the litigation.

Respondent learned from at least one of his clients that, on August 12, 2003, the Verboon firm sent a letter to that client in which the Verboon firm unequivocally stated that it would dismiss the client from the *Acosta* lawsuit if the client signed the letter in six different places and

had each of the six signatures notarized (hereafter "Verboon firm's 6-signature letter"). That same client gave respondent a copy of the Verboon firm's 6-signature letter. The Verboon firm's 6-signature letter, explained the potential adverse consequences the client might suffer if he or she was dismissed from the *Acosta* lawsuit.

Respondent had his secretary use the copy of the Verboon firm's 6-signature letter his client gave him as a form for his other clients to sign. Respondent's secretary "whited out" the names of the plaintiff homeowners to whom the Verboon firm had originally addressed the letter and then "cloned" the letter by making multiple copies of it and "typing in" the names and addresses of respondent's clients. A small number of respondent's clients received the cloned Verboon firm's 6-signature letter with no name or address filled in. Neither respondent nor his secretary made any changes to the text of the letter; all of the text written by the Verboon firm remained unchanged.

Respondent's office thereafter sent the cloned letters to his clients, along with a cover letter on respondent's letterhead in an envelope bearing the name of respondent's law firm.[6] Respondent's cover letter instructed the plaintiff homeowners he represented to sign the cloned letter only if "it is the exact replica of the [Verboon] letter each of you received from the [Verboon] firm." Respondent's cover letter went on to state, "If the letter you received is different, I would like to see that before advising you as to how to proceed." What is more, respondent *clearly* stated in his cover letter that the Verboon firm's warnings to the *Acosta*

[6] Respondent admits that he sent the cloned letters to his clients without notifying the Verboon firm or asking for its permission to do so. Nonetheless, respondent had his secretary clone the Verboon firm's 6-signature letter and then sent the cloned letter to his clients because he honestly and reasonably believed that the Verboon firm would dismiss his clients from the Acosta lawsuit if they executed a cloned copy of the Verboon firm's 6-signature letter.

plaintiffs of the risks involved in having their claims dismissed from the *Acosta* lawsuit, which warnings are set forth in the Verboon firm's 6-signature letter, were generally correct.

In the same cover letter, which respondent first sent out on August 21, 2003, respondent also stated:

> I also wanted to advise you that I represented the Homeowners' Association at Chantelane in 1996. The officers of that association were Greenbriar Homes employees, and I was paid by Greenbriar Homes. Greenbriar Homes is also paying me for my representation of you in this case. I am not defending them in this case, however, and I am not representing them in any case pending at this time.[7]

Respondent had not previously disclosed, to his *Acosta* plaintiff clients, his prior representation of the homeowners' association or that Greenbriar Homes paid his fees for that representation. What is more, respondent did not include, in this disclosure paragraph, his prior representation of the Meyers (and others) in the case dealing with a mechanics' lien dispute. Furthermore, in his cover letter, respondent notified his clients that they:

> need to be aware of the fact that the Verboon law firm could come after you for the reasonable value of the services Greenbriar supplied in repairing your homes and claim a percentage of this value pursuant to their fee agreement with you. In that regard, Greenbriar has signed an agreement (copy enclosed) providing that they will pay our fees in defending you against any and all actions, lawsuits, or anything else the Verboon firm may file against you for compensation to the law firm and will pay any and all damages, awards, attorneys' fees and costs as occasioned by that defense, should the Verboon firm attempt to try and collect something from you.

Many of respondent's clients entered into the indemnity agreement with Greenbriar Homes.

On September 11, 2003, Mike Meyer faxed respondent a draft of a letter that Greenbriar Homes intended to send directly to the *Acosta* plaintiffs. The cover page of that fax incorrectly included the header "attorney-client privilege" by mistake. And, on September 15, 2003, Meyer

[7] Before respondent sent the cover letter to his clients, he sent a draft of it to Mike Meyer. In response to comments from Meyer, respondent revised the portion of the letter in which he disclosed his prior dealings with entities owned by the Meyers to read as quoted here.

faxed respondent a memo and drafts of two more letters to the *Acosta* plaintiffs. The memo to respondent, which was also incorrectly marked attorney-client privilege by mistake, stated: "I would appreciate it if you would review the attached letters and let me know your thoughts by this afternoon." Respondent wrote a few comments on the memo and faxed it back to Meyer. On November 4, 2003, Meyer sent respondent yet another draft letter and requested respondent's comments.

Mike Meyer sent these foregoing faxes to respondent as a "professional courtesy" to keep respondent "informed" of his contacts with the *Acosta* plaintiffs and other owners of Greenbriar Homes presumably because respondent kept Greenbriar Homes informed of many of his activities in representing his *Acosta* plaintiff clients. As a number of respondent's *Acosta* plaintiff clients credibly testified in this disciplinary proceeding, they always assumed that respondent and Greenbriar Homes were communicating with each other about respondent's activities in representing them because the clients knew respondent and Greenbriar Homes had some type of relationship since the clients all learned of respondent's services from Greenbriar Homes and knew that Greenbriar Homes was paying respondent's fees for representing them.

On September 15, 2003, respondent spoke to Carol Meyer regarding the *Acosta* lawsuit. Also, on September 15, respondent sent Carol Meyer packages for her to distribute to additional *Acosta* plaintiffs who might indicate to Greenbriar Homes that they want respondent to help them get dismissed from the lawsuit. The packages included respondent's detailed conflict disclosures.

By October 2003, the Verboon firm had not dismissed any of respondent's *Acosta* plaintiff clients. (The Verboon firm had actually dismissed *Acosta* plaintiff Amy Dang before she retained respondent.) On October 14, 2003, when respondent's other means failed to persuade the Verboon firm to follow the instructions of those *Acosta* plaintiffs who wished to be

dismissed, respondent had his *Acosta* plaintiff clients sign substitution of attorney forms substituting respondent in as their attorney of record in place of the Verboon firm.

On October 15, 2003, the Verboon firm filed a lawsuit against respondent, respondent's firm, Greenbriar Homes, and others, alleging intentional interference with contractual relationship, intentional interference with prospective economic advantage, and violation of section 17200 of the Business and Professions Code.[8] The Verboon firm even sought a preliminary injunction to stop respondent from contacting any of the *Acosta* plaintiffs (even those who had already retained respondent). After a hearing, the superior court refused to issue an injunction. The Verboon firm's lawsuit against respondent and others was settled in March 2006.

On October 20, 2003, respondent sent the Verboon firm the executed substitution of attorney forms requesting the Verboon firm to sign and return them.

On October 21, 2003, respondent sent another letter to his *Acosta* plaintiff clients. In this letter, respondent made a further disclosure of potential conflicts of interest arising from respondent's acceptance of fees from Greenbriar Homes, his prior representation of the Chantelane Homeowners' Association, and what respondent described as his prior representation of Greenbriar Homes. This letter sought the informed written consent of respondent's *Acosta* plaintiff clients, which they all granted by signing and returning the letter.

Respondent failed to disclose to the plaintiffs that he had sent and was sending to Greenbriar Homes copies of correspondence that respondent sent to the plaintiffs and to the Verboon firm.

[8] All further statutory references are to the Business and Professions Code.

Respondent filed at least 19 substitution of attorney forms with the court substituting respondent in place of the Verboon firm in the *Acosta* lawsuit after other means failed to persuade the Verboon firm to follow the instructions of those homeowners who wished to be dismissed. When respondent began substituting in as counsel of record for his clients in the *Acosta* lawsuit, he determined that he should review his clients' files at the Verboon firm. Therefore, he wrote to his clients, requesting that they execute a form directing the Verboon firm to provide him with their client files, including any expert reports and test results. After obtaining his client's written consent, respondent requested that the Verboon firm provide his clients' files.

On March 2, 2004, Greenbriar Homes and respondent entered into an indemnity agreement whereby Greenbriar Homes agreed to indemnify, defend, and hold harmless respondent and his law firm against any and all liability, suits, actions, administrative proceedings, liens, claims, demands, loss, costs and expenses, sanctions, awards, damages, judgment, settlements, litigation costs, attorney fees, and interest made against or incurred by respondent and his law firm arising from their representation of the *Acosta* plaintiffs. Thereafter, respondent notified his clients in writing that the Verboon firm had sued him and his firm and that "Greenbriar has agreed to pay my lawyers for that defense."

In May 2004, respondent began filing dismissals on behalf of his *Acosta* plaintiff clients. Before obtaining those dismissals, respondent informed his clients in writing that they might be giving up valuable rights by dismissing their claims. He also offered to retain an expert to evaluate the value of his clients' claims. Respondent also insisted that Greenbriar Homes sign a tolling agreement in favor of his clients in which Greenbriar Homes agreed to waive the statute of limitations on the clients' claims against it until October 1, 2004, or August 1, 2005 (depending on when the tolling agreement was executed).

None of respondent's clients complained to the State Bar about respondent or the many services he provided to them. Only the Verboon firm complained about respondent to the State Bar. Further, all of respondent's *Acosta* plaintiff clients who testified at the trial in this disciplinary proceeding were *completely* satisfied with respondent and his representation of them. Not surprising, the same client witnesses expressed significant frustration with the Verboon firm.

B. Conclusions of Law[9]

Count 1 – Representation of Clients with Conflicting Interests (Rule 3-310(C)(2))

In count 1, the State Bar charges that respondent wilfully violated rule 3-310(C)(2) of the State Bar Rules of Professional Conduct,[10] which provides: "A member shall not, without the informed written consent of each client: [¶] . . . [¶] (2) 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:

> By agreeing to represent the homeowners in the *Acosta* case at the same time that he represented Greenbriar and Greenbriar's interest, without disclosing this conflict and without obtaining the client's informed written consent and by then continuing to represent the homeowners in the *Acosta* case at the same time that he represented Greenbriar and Greenbriar's interest, without providing full disclosure of the conflict and obtaining the clients' informed written consent, respondent accepted and continued representation of more than one client in a matter in which the interests of the clients actually conflicted without the informed written consent of each client.

As found *ante*, respondent never represented any of the plaintiff homeowners in the *Acosta* lawsuit at the same time that he represented Greenbriar Homes or Greenbriar Homes' interests. Accordingly, respondent is not culpable of any of the misconduct

[9] In the interest of clarity, the court does not address the seven counts in numerical order. Specifically, the court address count 6 after count 2 and before count 3.

[10] Unless otherwise noted, all further references to rules are to these State Bar Rules of Professional Conduct.

charged in count 1. Count 1 is DISMISSED with prejudice. (See *In the Matter of Kroff* (Review Dept.1998) 3 Cal. State Bar Ct. Rptr. 838, 843 [the dismissal of a count after a trial on the merits is always with prejudice].)

Count 2 – Failure to Disclose Prior Relationships (Rule 3-310(B)(3))

In count 2, the State Bar charges that respondent wilfully violated rule 3-310(B)(3), which provides that "A member shall not accept or continue representation of a client without providing written disclosure to the client where: [¶] . . . [¶] (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter." Specifically, the State Bar charges:

> By accepting employment from the *Acosta* plaintiffs without providing them with written disclosure of respondent's current or prior representation of and relationship with Greenbriar, by continuing to represent the *Acosta* plaintiffs without providing them with an accurate and complete written disclosure of his current or prior representation of and relationship with Greenbriar, and by continuing to represent the *Acosta* plaintiffs without providing them with written disclosure that respondent and Greenbriar had entered into an indemnity agreement, respondent accepted and continued representation of clients without providing written disclosure that he has or had a legal, business, financial, professional, or personal relationship with another person or entity the respondent knows or reasonably should know would be affected substantially by the resolution of the matter.

The record clearly establishes that respondent is culpable of willfully violating rule 3-310(B)(3) because he *accepted employment* from the *Acosta* plaintiffs without providing them with written disclosure of his prior relationship with Greenbriar Homes. Before respondent accepted employment from any of the *Acosta* plaintiffs, he was required to disclose to them in writing that he represented the Homeowners' Association at Chantelane in 1996, that the officers of that association were Greenbriar Homes employees, and that Greenbriar Homes paid his fees

for representing the association. As noted *ante*, respondent did not make these disclosure until August 21, 2003.

Other than the foregoing violation, respondent did not violate rule 3-310(B)(3) as charged in count 2.[11] Even though respondent did not specifically state that Greenbriar Homes and his law firm entered into "an indemnity agreement," respondent clearly disclosed that Greenbriar Homes was paying for his defense in that lawsuit.

Count 6 – Failure to Maintain Client Confidences (§ 6068, subd. (e)(1))

In count 6, the State Bar charges that respondent willfully violated section 6068, subdivision (e)(1), which provides that an attorney must "maintain inviolate the confidences, and at every peril to himself or herself to preserve the secrets, of his or her client."

Specifically, the State Bar charges: "By revealing communications he had with the *Acosta* plaintiffs to Greenbriar on a regular basis without obtaining their consent, respondent failed to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his client."

The record clearly establishes that respondent willfully violated section 6068, subdivision (e)(1) when he provided Greenbriar Homes with copies of his letters to his *Acosta* plaintiff clients without the clients' prior express consent. The fact that respondent did not disclose any client "secrets" is irrelevant for culpability purposes. Letters between an attorney and his or her

[11] Respondent never notified his *Acosta* plaintiff clients of his past representation of the Meyers in a case about a mechanics' lien dispute. Nevertheless, the court does not address whether respondent was also required to disclose that past representation under rule 3-310(B)(3) because no such violation was charged. "An attorney may not be disciplined for a violation not alleged in the [NDC]. [Citations.]" (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35.) When the evidence at the hearing discloses misconduct not charged in the original notice, the State Bar may move to amend the notice to conform to the proof; but, if the State Bar fails to do so, the attorney may be disciplined only for the misconduct alleged in the original notice." (*Ibid.;* see also *In re Silverton* (2005) 36 Cal.4th 81, 93, fn. 4.) Moreover, the court declines to consider any such possible violation for aggravation purposes because the State Bar failed to request that it do so.

clients are confidential communications even if the letters do not contain any "secrets." Section 6068, subdivision (e)(1) prohibits disclosure of much more information than the attorney-client privilege. (*Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621.) Moreover, the fact that respondent's clients "ratified" his disclosures (i.e., have no complaints over them) is also irrelevant for culpability purposes. Finally, the lack of any harm is also irrelevant for culpability purposes. Lack of harm is, of course, a mitigating circumstance.

Count 3 – Fees Paid by One Other Than Client (Rule 3-310(F))

In count 3, the State Bar charges that respondent wilfully violated rule 3-310(F), which provides:

> (F) A member shall not accept compensation for representing a client from one other than the client unless:
>
> > (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
> >
> > (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
> >
> > (3) The member obtains the client's informed written consent. . . .

For purposes of rule 3-310, " 'Informed written consent' means the client's . . . written agreement to the representation following written disclosure." (Rule 3-310(A)(2).) " 'Disclosure' means informing the client . . . of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client." (Rule 3-310(A)(1).) Specifically, the State Bar charges in count 3:

> By accepting compensation to represent the plaintiffs from Greenbriar when there was interference with respondent's independent professional judgement and the attorney-client relationship, when respondent disclosed client confidences to Greenbriar, when there was no written consent prior to the representation commencing and prior to receiving some of the compensation, and by accepting this representation without the informed written consent of the clients, respondent

improperly accepted compensation for representing a client from one other than the client.

Even though the State Bar failed to establish that Greenbriar Homes (or anyone else) interfered with respondent's independent professional judgment or with his attorney-client relationship with his *Acosta* plaintiff clients, the record clearly establishes that respondent accepted compensation from Greenbriar Homes for his representation of his *Acosta* plaintiff clients without the informed written consent of the clients in willful violation of rule 3-310(F)(3). To be sure, respondent had his clients' advance written consent. But he did not have their informed written consent in that he failed to first notify them in writing "of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client." Specifically, respondent failed to first notify his clients in writing that, because he was being paid by Greenbriar Homes, he may favor Greenbriar Homes over his clients or somehow disclose confidential client information to Greenbriar Homes (e.g., in a detailed client billing statement). Respondent, however, did not make such written disclosures to his clients until after he had already received some compensation from Greenbriar Homes. Moreover, the record establishes that respondent provided Greenbriar Homes with copies of his letters to his *Acosta* plaintiff clients without the clients' prior express consent in willful violation of 3-310(F)(2). However, that violation is duplicative of the section 6068, subdivision (e)(1) violation already found in count 6 *ante*. Accordingly, the court does not afford the rule 3-310(F)(2) violation any additional weight for purposes of discipline.

Count 4 – Communicating with Represented Party (Rule 2-100(A))

In count 4, the State Bar charges that respondent wilfully violated rule 2-100(A), which provides: "*While representing a client*, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by

another lawyer in the matter, unless the member has the consent of the other lawyer." (Italics added.)

Specifically, the State Bar charges: "By sending correspondence to the *Acosta* plaintiffs when respondent knew they were represented by counsel, respondent represented a client and communicated about the subject of that representation with a party that respondent knew was represented by another lawyer without the consent of that lawyer." Respondent is not culpable of the misconduct charged in count 4 because, at the time respondent contacted the *Acosta* plaintiffs, he was not "representing a client." Again, as noted *ante*, respondent was not representing either Greenbriar Homes or the Meyers at the time he represented his *Acosta* plaintiff clients.

Moreover, respondent's communications with the *Acosta* plaintiffs were not prohibited because the communications were in effect "initiated by a party [i.e., the *Acosta* plaintiffs] seeking advice or representation from an independent lawyer of the party's choice." (Rule 2-100(C)(2).) To hold that respondent wilfully violated rule 2-100(A) would impermissibly punish respondent for exercising his rights under the First Amendment to the United States Constitution. "Disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment. First Amendment protection survives even when an attorney violates an ethical rule that he or she swore to obey when admitted to the practice of law." (*In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 781.)

Finally, to hold that respondent wilfully violated rule 2-100(A) would also improperly deprive the *Acosta* plaintiffs of their right to retain an attorney who would effectuate their instructions to the Verboon firm to dismiss them from the lawsuit. Regardless of the wisdom, or the lack thereof, of the *Acosta* plaintiff clients' instructions to the Verboon firm to dismiss them from the lawsuit, the clients were clearly entitled to have their instructions followed and, if

necessary, to retain other counsel to make sure that their instructions were followed. (Cf. *Meadow v. Superior Court, supra*, 59 Cal.2d at pp. 616-617.) In sum, count 4 is DISMISSED with prejudice.

Count 5 – Moral Turpitude (§ 6106)

In count 5, the State Bar charges that respondent wilfully violated section 6106, which proscribes acts involving moral turpitude, dishonesty, or corruption. Specifically, the State Bar charges: "By altering letters authored by Verboon and sending the letters to plaintiffs making it appear that Verboon had written the letters to them without Verboon's knowledge or permission, respondent committed an act involving moral turpitude, dishonesty or corruption."

As found in footnote 5 *ante*, respondent had his secretary clone the Verboon firm's 6-signature letter and then sent the cloned letter to his clients because he honestly and reasonably believed that the Verboon firm would dismiss his clients from the *Acosta* lawsuit if they executed a cloned copy of the Verboon firm's 6-signature letter. It is well established that such an honest but mistaken belief, even if unreasonable, precludes a finding of moral turpitude, dishonesty, or corruption. (E.g., *In the Matter of* Silverton (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 252, 262; In *the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, 662.) Moreover, the court finds that respondent did not intend to mislead anyone into believing that the cloned letters came from the Verboon firm. Nor could any reasonable person have been so misled. In sum, the record fails to establish, by clear and convincing evidence, that respondent is culpable of the misconduct charged in count 5. Accordingly, count 5 is DISMISSED with prejudice.

Count 7 – Moral Turpitude (§ 6106)[12]

In count 7, the State Bar again charges respondent with wilfully violating section 6106's proscription of acts involving moral turpitude, dishonesty, or corruption. Specifically, the State Bar charges:

> By implementing a broader long term strategy to destroy plaintiffs construction defect firms, alienating *Acosta* plaintiff homeowners from Verboon, intentionally exploiting the *Acosta* plaintiffs' unsophisticated knowledge of retainer agreements and the effect of a pre-existing attorney-client relationship, engaging in concurrent conflicted representation without the clients' actual knowledge, failing to fully disclose respondent's current and prior relationship with Greenbriar, improperly soliciting conflict waivers without fully informed consent from plaintiffs, appearing to act on the plaintiffs' behalf when in fact he put the interests of Greenbriar ahead of the interests of the *Acosta* plaintiffs, and interfering with the plaintiffs' attorney-client relationship, respondent committed acts involving moral turpitude, dishonesty, or corruption.

The record fails to establish, by clear and convincing evidence, that respondent is culpable of the misconduct charged in count 7. There is no credible evidence that respondent implemented a strategy to destroy plaintiffs' construction defect firms. Nor is there any credible evidence that respondent alienated any of the *Acosta* plaintiffs from the Verboon firm. If anything, the record suggests that the Verboon firm alienated many of the *Acosta* plaintiffs (its own clients) by ignoring, for many, many months, their instructions to dismiss them from the lawsuit. There is no evidence that respondent intentionally exploited the *Acosta* plaintiffs in any manner. Again, respondent did not engage in concurrent conflicted representation. Nor did he improperly solicit conflict waivers. Nor did he put the interest of Greenbriar Homes or of anyone else ahead of those of his *Acosta* plaintiff clients. Finally, to the extent that respondent interfered with the *Acosta* plaintiffs' attorney-client relationship with the Verboon firm, he did so

[12] In the NDC, count 7 is incorrectly designated as count 6.

in good faith and in furtherance of his clients' instructions and interests. (See *Meadow v. Superior Court, supra*, 59 Cal.2d at pp. 616-617.)

Count 7 is DISMISSED with prejudice.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

Respondent was admitted to the practice of law in the State of California on January 9, 1969, and has no prior record of discipline. He engaged in the found misconduct in mid-2003. Accordingly, his more than 34 years of discipline free practice is an *extremely* strong mitigating circumstance. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std 1.2(e)(i).)[13]

The record establishes that, other than the found violations, respondent provided his *Acosta* plaintiff clients with admirable legal representation under very difficult circumstances not of his own making, consistently put his clients' best interest first, and dealt with his clients in good faith. (Std. 1.2(e)(ii).)

The lack of *any* harm to respondent's *Acosta* plaintiff clients is also a very strong mitigating circumstance. (Std. 1.2(e)(iii).)

Respondent's substantial cooperation with the State Bar and the State Bar Court during this disciplinary proceeding is also a strong mitigating circumstance. (Std. 1.2(e)(v).) In addition to his consistent cooperation throughout these proceedings, respondent entered into an extensive and detailed partial stipulation of facts.

Respondent also clearly demonstrated his *extraordinary* good character through the testimony of nine character witnesses (*three* judges, *four* attorneys, and two former clients).

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

(Std. 1.2(e)(vi).) Respondent's nine character witnesses, who are all individuals of very high repute, were very credible witnesses. They consistently described respondent as honest, having integrity, and being of high moral character. Furthermore, respondent clearly established that he has undertaken numerous pro bono and charitable activities over the years. These very significant activities are additional strong evidence of respondent's *exceptional* character. (See *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 675.)

Respondent's witnesses also praised him for his great lawyer skills, superior ability to communicate with his clients, and dedication to his clients. Without question, respondent is entitled to mitigating credit for his demonstrated legal abilities and dedication to clients. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667; *Hawk v. State Bar* (1988) 45 Cal.3d 589, 602.)

Respondent demonstrated recognition of his shortcomings and commitment not to again engage in misconduct are also mitigating circumstances. (Std. 1.2(e)(vii); *Toll v. State Bar* (1974) 12 Cal.3d 824, 832.)

Finally, the court finds that the passage of almost 5 years without any evidence of additional misconduct is also a mitigating circumstance. (Std. 1.2(e)(viii); *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 112.)

B. Aggravation

Respondent's misconduct in this proceeding involves multiple acts of misconduct. (Std. 1.2(b)(ii).)

V. DISCUSSION ON DISCIPLINE

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) 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.)

A notice of disciplinary charges "may issue for minor offenses as well as serious offenses." (*In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121, 125.) But the ultimate disposition of the charges and any discipline imposed will vary according to the proof. (*Ibid.*) And even purported mandatory standards can be tempered by " 'considerations peculiar to the offense and the offender.' [Citations.]" (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-221.)

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 2.6, which applies to respondent's willful violation of section 6068, subdivision (e)(1). Under standard 2.6, respondent's violation of section 6068, subdivision (e)(1) is to "result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3." In light of the entire record, the court concludes that even a stayed suspension under standard 2.6 would be unjust in the present proceeding.

In his posttrial brief, respondent contends that "the only justifiable discipline [in this proceeding] would be a reproval." Respondent aptly supports his contention with citations to *Connor v. State Bar* (1990) 50 Cal.3d 1047 (because of attorney's good faith, a public reproval

was appropriate for violation of former rule 5-101[now rule 3-300 -- attorney-client business transactions]); *Ames v. State Bar* (1973) 8 Cal.3d 910 (private reproval for violation of former rule 4 [now rule 3-300] was appropriate in light of attorneys' belief they were acting in clients' best interests and no intent to deceive); *In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668 (private reproval for failing to refund unearned fee in violation of rule 3-700 was appropriate in light of attorney's good faith and limited harm); *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716 (for commingling clients funds in violation of former rule 8-101(A) [now rule 4-100(A)], a private reproval [and not 90-days actual suspension provided for in standard 2.2(a)] was appropriate because clients were not significantly harmed).

In sum, the court concludes that, while a public reproval might otherwise be warranted in this case, a private reproval without conditions is appropriate in light of the truly overwhelming mitigation. The record fails to establish that the protection of the public and respondent's interests will be served by imposing reproval conditions on respondent. (Cal. Rules of Court, rule 9.19(a).) Moreover, the court affirmatively finds that reproval conditions, even ethics school, are unnecessary in this case. (See *In the Matter of Respondent Z* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 85, 90 [ethics school is not mandatory in reproval cases].) Finally, the court notes that costs are not awarded to the State Bar in private reproval cases. (§ 6086.10, subd. (a).)

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VI. PRIVATE REPROVAL

The court orders that respondent **RONALD RAYMOND ROSSI** is privately reproved for the misconduct found herein. (Bus. & Prof. Code, § 6078; Rules Proc. of State Bar, rule 270(c).) This reproval is effective upon the finality of this decision. (Rules Proc. of State Bar, rule 270(a).)

Dated: June 29, 2009.

LUCY ARMENDARIZ
Judge of the State Bar Court