

PUBLIC MATTER

FILED FEBRUARY 11, 2011

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO**

In the Matter of) Case No.: **05-O-04522-PEM**
)
E. LYNETTE LEMAIRE,)
Member No. 176339,) **DECISION¹**
)
A Member of the State Bar.)

I. Introduction

In this original disciplinary proceeding, respondent **E. LYNETTE LEMAIRE** pleaded nolo contendere to the three counts of professional misconduct charged in the notice of disciplinary charges (NDC). (Bus. & Prof. Code, § 6085.5, subd. (c);² Rules Proc. of State Bar, former rule 103(c)(2)(ii) [now rule 5.43(C)(2)].) The Office of the Chief Trial Counsel of the State Bar of California (State Bar) was represented by Deputy Trial Counsel Maria J. Oropeza. Respondent represented herself.

As discussed *post*, the court finds respondent culpable on the three counts of professional misconduct charged in the NDC and concludes that the appropriate level of discipline is two

¹ The Rules of Procedure of the State Bar of California were amended effective January 1, 2011. The court orders the application of the former Rules of Procedure of the State Bar in this proceeding because it has determined that injustice would otherwise result. (See Rules Proc. of State Bar (eff. Jan. 1, 2011), Preface, item 3.)

² Unless otherwise noted, all statutory references are to the Business and Professions Code.

years' stayed suspension and two years' probation on conditions, but no period of actual suspension.

II. Pertinent Procedural History

The State Bar filed the NDC in this proceeding on March 26, 2010. On June 7, 2010, respondent filed a response to the NDC in which she both pleaded nolo contendere to the NDC and then denied the allegations in paragraph numbers 56 and 57 of the NDC. Later, respondent affirmatively asserted that she has paid a total of \$69,703.82 of the sanctions alleged in paragraph numbers 56 and 57. Even though the parties waived their rights to a hearing on the issue of discipline, they failed to address the effect of respondent's denial of the allegations in paragraph numbers 56 and 57 and respondent's assertion that she has paid a total of \$69,703.82 in sanctions. Accordingly, the court filed an order on November 8, 2010, in which it, inter alia, set the matter for a status conference on November 15, 2010.

On November 12, 2010, respondent filed a second response to the NDC in which she pleaded nolo contendere to the entire NDC without denying the allegations in paragraph numbers 56 and 57.³ Accordingly, at the November 15, 2010 status conference, the court accepted respondent's November 12, 2010 plea of nolo contendere to the entire NDC and the took the matter under submission for decision again without a hearing.

III. Findings of Fact and Conclusions of Law

Section 6085.5, subdivision (c) provides that, in a disciplinary proceeding, a nolo contendere plea has the same *legal effect* as an admission of culpability and that the court is to find the attorney culpable. The State Bar did not proffer any exhibits into evidence.

Accordingly, this court's findings of fact are based only on: (1) the factual allegations in the

³ Respondent's second response to the NDC supersedes her first response filed on June 7, 2010.

NDC to which respondent pleaded nolo contendere (Rules Proc. of State Bar, former rule 103(c)(2)(ii) [now rule 5.43(C)(2)]); and (2) the Court of Appeal opinions in *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416 and *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, of which the court takes judicial notice (Evid. Code, §§ 451, subd. (a), 452, subd. (d)).⁴

In multiple instances, the factual allegations in the NDC conflict with the facts recited in *Pollock v. University of Southern California, supra*, 112 Cal.App.4th 1416 and *Gutkin v. University of Southern California, supra*, 101 Cal.App.4th 967. In addition, in multiple instances, the holdings in *Pollock* and *Gutkin* are misstated in the NDC. In each of those instances, this court's findings are based on the Court of Appeal's opinions in *Pollock* and *Gutkin* and not on the allegations in the NDC. (Cf. *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 318, citing *Remainders, Inc. v. Bartlett* (1963) 215 Cal.App.2d 295 [in default proceedings, when the evidence negates the allegations of the NDC that have been deemed admitted by the respondent's default, it is the evidence (and not the allegations) that controls the court's findings].)

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 2, 1995, and has been a member of the State Bar of California since that time.

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⁴ The State Bar cited to these two opinions in its August 13, 2010 level of discipline brief.

B. Count One – Maintaining An Unwarranted Claim (Rules Prof. Conduct, rule 3-200(B))

1. Pollock Client Matter

a. *Pollock I*

Sometime before April 3, 2000, the University of Southern California (USC) initiated disciplinary proceedings to terminate Professor V. Pollock, who was a tenured professor at USC. Professor Pollock retained respondent to represent her (i.e., Pollock) in an action against USC.

On about April 3, 2000, while Professor Pollock's disciplinary proceedings at USC were still ongoing, respondent filed a complaint on behalf of Professor Pollock in the Los Angeles Superior Court (hereafter *Pollock I*). (*Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1420.) About four months later in July 2000, respondent filed a first amended complaint in *Pollock I*. The gist of each of those complaints was "to challenge USC's disciplinary proceedings against Pollock."

On August 23, 2000, the superior court sustained USC's demurrer to the first amended complaint without leave to amend because the superior court determined, inter alia, that Professor Pollock's relief was limited to administrative review. Thereafter, on September 21, 2000, the superior court entered judgment in favor of USC. And, in about October 2000, respondent appealed *Pollock I* to the Court of Appeal (the *Pollock I* appeal).

Respondent also filed, with the Court of Appeal, three petitions for writ of mandate in *Pollock I*. Respondent filed those petitions on about June 29, 2001; July 13, 2001; and November 27, 2001, respectively. And the Court of Appeal summarily denied each of those petitions on July 19, 2001; August 1, 2001; and December 5, 2001, respectively.

On November 29, 2001, the Court of Appeal issued its opinion in the *Pollock I* appeal. In that opinion, the Court of Appeal affirmed the superior court's order sustaining USC's demurrer without leave to amend. However, the Court of Appeal affirmed the superior court's order "on

the ground that because the dismissal process had not been completed and no decision about Pollock's continued employment had been made, no cognizable adverse employment action had yet been taken against Pollock.” (*Pollock v. University of Southern California, supra*, 112 Cal.App.4th at p. 1421.)

Moreover, the Court of Appeal did not hold that Professor Pollock’s relief was limited to “administrative review” as the superior court apparently did (see NDC at ¶ 4). Instead, the Court of Appeal held that Professor Pollock’s “sole remedy for alleged defects in the process by which the University revoked her tenure and discharged her from service [as distinguished from her claims for retaliation and discrimination] is by administrative mandamus.” (*Pollock v. University of Southern California, supra*, 112 Cal.App.4th at pp. 1420, 1421.) In California, except for discrimination claims “judicial review of tenure decisions [in both public and private universities] is limited to evaluating the fairness of the [university’s] administrative hearing in an administrative mandamus action [in the superior court].” (*Pomona College v. Superior Court (Corin)* (1996) 45 Cal.App.4th 1716, 1726; accord *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 977, 979; *Pollock v. University of Southern California, supra*, 112 Cal.App.4th at p. 1421.)

On about January 10, 2002, respondent petitioned for review by the Supreme Court of California, which was denied on about February 20, 2002.

b. *Pollock II*

On about June 7, 2001, “after Pollock was finally discharged from employment, but while her appeal in *Pollock I* was pending before [the Court of Appeal],” respondent filed a second superior court action against USC for Professor Pollock (*Pollock II*). (*Pollock v. University of Southern California, supra*, 112 Cal.App.4th at p. 1420.) The gist of the complaint

in *Pollock II* was nearly identical to that in each of the two complaints that respondent filed in *Pollock I*.

On about September 28, 2001, the superior court sustained USC's demurrer to the complaint in *Pollock II* without leave to amend because the superior court determined, inter alia, that Professor Pollock's relief was limited to administrative review. In *Pollock II*, the superior court imposed \$1,000 in sanctions on respondent and Pollock. Those sanctions were timely paid on about October 25, 2001, by respondent, Pollock, or both respondent and Pollock.

On or about June 12, 2002, respondent appealed *Pollock II* to the Court of Appeal (the *Pollock II* appeal). And, on October 30, 2003, the Court of Appeal issued its opinion in the *Pollock II* appeal. (*Pollock v. University of Southern California, supra*, 112 Cal.App.4th 1416.) In that opinion, the Court of Appeal affirmed the superior court's order sustaining USC's demurrer in *Pollock II* without leave to amend because, inter alia, the contentions in *Pollock II* were nearly identical to the "meritless contentions" that respondent raised in *Pollock I*; res judicata barred respondent from relitigating those issues again in *Pollock II*; and respondent failed to pursue Pollock's claims in a petition for writ of administrative mandamus. (*Id.* at p. 1422.)

The Court of Appeal also determined that the *Pollock II* appeal was frivolous and imposed sanctions of (1) \$3,000 on respondent payable to the Court of Appeal within 15 days after the issuance of the remittitur and (2) \$14,000 on Pollock and respondent payable to USC. The Court of Appeal did not state when the \$14,000 in sanctions was to be paid. Accordingly, this court presumes that it was due at the same time the \$3,000 sanction was due (i.e., 15 days

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after the issuance of the remittitur). On about December 8, 2003, respondent petitioned for review in *Pollock II* by the Supreme Court, which was denied on February 24, 2004.⁵

The superior court entered judgment for USC in *Pollock II* on April 27, 2005.

c. *Pollock III*

On about September 22, 2004, respondent filed yet a third matter in superior court for *Pollock* -- a petition for writ of mandate seeking to compel USC to reinstate Pollock (*Pollock III*).⁶

On about December 2, 2004, the superior court issued an order on USC's motion to strike in *Pollock III* that, inter alia, struck part of Professor Pollock's petition and set an order to show cause (OSC) re sanctions for January 6, 2005.

On about December 15, 2004, respondent appealed the superior court's order granting USC's motion to strike in *Pollock III* and requested a stay of the OSC on January 6, 2005, to the Court of Appeal (first *Pollock III* appeal).

On about January 6, 2005, the superior court issued an order after the OSC in *Pollock III* that imposed sanctions of \$1,000 on respondent payable to the superior court no later than March 21, 2005, and ordered respondent to report the sanctions to the State Bar.

On about March 1, 2005, the Court of Appeal issued its opinion in the first *Pollock III* appeal. The Court of Appeal found that respondent's petition for a writ had no merit and that any reasonable attorney would agree the appeal was totally and completely without merit and imposed sanctions of \$9,358.50 on respondent payable to USC. On about April 5, 2005,

⁵ On about December 21, 2004, respondent petitioned again for review in *Pollock II* by the Supreme Court, which was denied on February 16, 2005.

⁶ This petition for writ of mandate is in addition to the three petitions for writ of mandate that respondent filed in *Pollock I* in 2001.

respondent petitioned for review in the first *Pollock III* appeal by the Supreme Court, which was denied on or about June 8, 2005.

The superior court entered judgment for USC in *Pollock III* on August 16, 2005. On about September 22, 2005, respondent appealed that judgment to the Court of Appeal (second *Pollock III* appeal).

On about May 31, 2006, in the second *Pollock III* appeal, the Court of Appeal affirmed the superior court's decision presumably because respondent had been told that Pollock could raise her procedural based claims only by way of a petition for writ of administrative mandamus in the superior court. The Court of Appeal determined that the second *Pollock III* appeal was frivolous and imposed sanctions of \$6,000 on respondent payable to the Court of Appeal within 15 days of the remittitur. On about July 6, 2006, respondent petitioned for review in the second *Pollock III* appeal by the Supreme Court, which was denied on or about August 16, 2006.

On about March 13, 2007, the Court of Appeal iterated its May 31, 2006 order to respondent to pay the \$6,000 in sanctions that were imposed on him in the second *Pollock III* appeal.

2. Gutkin Client Matter

a. *Gutkin I*

Sometime before January 31, 2001, USC initiated a disciplinary proceeding to terminate Professor E. Gutkin's employment as a tenured professor at USC. Professor Gutkin retained respondent to represent him in an action against USC.

On January 31, 2001, respondent filed a complaint on behalf of Professor Gutkin in the Los Angeles Superior Court (hereafter *Gutkin I*). Sometime thereafter, respondent filed a first amended complaint in *Gutkin I*. In both of those complaints, Professor Gutkin sought to challenge the disciplinary proceedings that USC brought against him.

On about May 1, 2001, the superior court sustained a demurrer without leave to amend that USC filed against five of the seven causes of action in *Gutkin I* because the court found, inter alia, that Professor Gutkin's relief was limited to administrative review. On about May 8, 2001, respondent filed, with the Court of Appeal, a petition for writ of mandate in *Gutkin I* (first *Gutkin I* appeal), but the Court of Appeal summarily denied that petition on about May 31, 2001.

On August 8, 2001, the superior court denied respondent's motion for leave to amend the complaint in *Gutkin I*. Thereafter, on August 10, 2001, respondent filed a voluntary request for dismissal of the two remaining causes of action in *Gutkin I* without prejudice. The entry of such a request for dismissal is a ministerial act.

On about August 17, 2001, respondent appealed *Gutkin I* to the Court of Appeal (second *Gutkin I* appeal).

b. *Gutkin II*

On about September 9, 2002, the Court of Appeal issued its opinion in the second *Gutkin I* appeal. (*Gutkin v. University of Southern California, supra*, 101 Cal.App.4th 967.) The Court of Appeal affirmed the superior court's order sustaining the demurrer in *Gutkin I* after it determined, inter alia, that Gutkin's procedural claims could only be raised by way of a petition for writ of administrative mandamus in the superior court. (*Id.* at pp. 977, 980.) On about October 17, 2002, respondent petitioned for review in *Gutkin I* by the Supreme Court, which was denied on December 11, 2002.

On about September 9, 2003, respondent filed a second superior court matter for Gutkin and against USC -- a superior court petition for writ of mandate (*Gutkin II*).

On about November 12, 2003, the superior court sustained USC's demurrer to the petition in *Gutkin II* with leave to amend. On about November 21, 2003, respondent filed, in the Court of Appeal, a petition for writ of mandate in *Gutkin II* (first *Gutkin II* appeal), which was

denied on about December 2, 2003. On about December 11, 2003, respondent petitioned for review in the first *Gutkin II* appeal by the Supreme Court, which was denied on or about December 22, 2003.

On about December 22, 2003, the superior court entered a judgment of dismissal in *Gutkin II* after respondent failed to amend the petition. And, on about December 29, 2003, respondent appealed *Gutkin II* to the Court of Appeal (second *Gutkin II* appeal).

On about December 7, 2004, the Court of Appeal issued its opinion in the second *Gutkin II* appeal. The Court of Appeal affirmed the superior court's sustaining of the demurrer in *Gutkin II*. The Court of Appeal determined that the appeal was frivolous and imposed sanctions of \$16,633.65 on respondent payable to USC.

On about January 14, 2005, respondent petitioned for review of the second *Gutkin II* appeal by the Supreme Court, which was denied on or about March 16, 2005.

3. Hall Client Matter

a. Hall I

Sometime before August 3, 2001, USC dismissed M. Hall as a graduate student at USC. Thereafter, Hall employed Attorney Richard Rosenthal to represent her in an action against USC. On about August 3, 2001, Attorney Rosenthal filed a complaint against USC for Hall in the Los Angeles Superior Court (*Hall I*). The gist of the complaint was to challenge Hall's dismissal by USC.

On about January 10, 2003, the superior court granted USC's motion for summary judgment in *Hall I* and thereafter entered judgment in favor of USC on about January 22, 2003.

b. Hall II

Before October 14, 2003, Hall employed respondent to represent her in an action against USC challenging her dismissal as a graduate student.

On about October 14, 2003, respondent filed a complaint against USC for Hall in the Los Angeles Superior Court (*Hall II*). The gist of the complaint was to again challenge USC's dismissal of Hall.

On about February 18, 2004, the superior court sustained USC's demurrer in *Hall II* without leave to amend based, in part, on the grounds that *Hall II* was barred by the res judicata established by *Hall I* and that Hall's relief was limited to administrative review. The superior court determined that *Hall II* was improper, baseless, and frivolous, and imposed sanctions of \$5,000 on respondent payable to the superior court and \$6,250 on respondent payable to USC. On about February 25, 2004, the superior court dismissed *Hall II* with prejudice.

On about April 6, 2004, respondent appealed *Hall II* to the Court of Appeal (*Hall II* appeal). On about December 8, 2004, the Court of Appeal stayed the superior court's February 18, 2004 order imposing sanctions on respondent until after the remittitur was issued in the *Hall II* appeal.

On about February 4, 2005, the Court of Appeal issued its opinion in the *Hall II* appeal. The Court of Appeal affirmed the superior court's dismissal of *Hall II*, held that the appeal was frivolous, and imposed sanctions of \$16,675 on respondent payable to USC. On about March 4, 2005, respondent petitioned for review of the *Hall II* appeal by the Supreme Court, which was denied on or about April 27, 2005.

On about May 10, 2005, the Court of Appeal issued the remittitur in the *Hall II* appeal. And, on about September 30, 2005, the superior court entered judgment for USC in *Hall II*.

4. Conclusion on Law

In count one, the State Bar charges that respondent willfully violated State Bar Rules of Professional Conduct, rule 3-200(B), which provides "A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such

employment is: [¶] . . . [¶] (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.”

Specifically, in a catch-all paragraph,⁷ the State Bar charges that respondent willfully violated rule

3-200(B):

By continuing to prosecute actions and appeals against USC as set forth above after the Court of Appeal held in [the *Pollock I* appeal] on or about November 29, 2001, *that individuals could not challenge disciplinary proceedings and dismissals at USC in civil proceedings because their relief was limited to administrative review*, respondent sought, accepted, and continued employment when respondent knew or should have known that the objective of such employment was to present a claim or defense in litigation that was not warranted under existing law.

(Italics added.)

Without question, the charged violation of rule 3-200(B) is premised on the allegation that respondent knew or should have known that the objective of her employment was to present a claim in litigation that was not warranted under existing law because the “Court of Appeal held in [the *Pollock I* appeal] on or about November 29, 2001, *that individuals could not challenge disciplinary proceedings and dismissals at USC in civil proceedings because their relief was limited to administrative review[by USC].*” (Italics added.) The record, however, does not establish that the Court of Appeal ever made such a holding in the *Pollock I* appeal or in any other appeal. In fact, as noted *ante*, the Court of Appeal in *Pollock I* held only that individuals could not seek money damages for any procedural unfairness (i.e., any due process violation) in the University’s disciplinary or dismissal process (as distinguished from damages for

⁷ The Supreme Court has consistently criticized the use of such catch-all charging paragraphs. (See *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 501, and cases there cited.)

discrimination or retaliation) and that such claims for procedural unfairness may be raised in the superior court only in an administrative mandamus action. (*Pollock v. University of Southern California, supra*, 112 Cal.App.4th at pp. 1421-1422.)

In short, the State Bar clearly misstated the relevant holding in the Court of Appeal's opinion in the *Pollock I* appeal. While this court does not condone such imprecise charges or the use of catch-all charging paragraphs, the court concludes that, when the charge in count one is viewed in context with the supporting factual allegations, the misstatement of the Court of Appeal's holding does not rise to the level of a due process violation in light of respondent's November 12, 2010 nolo contendere plea and her failure to object to the NDC.

The record clearly establishes that respondent willfully violated rule 3-200(B) by filing the appeal in *Pollock II* on about June 12, 2002; by filing the petition for writ of mandate in *Pollock III* on about September 22, 2004; by filing the first *Pollock III* appeal on about December 15, 2004; by filing the second *Pollock III* appeal on about September 22, 2005; by filing the petition for writ of mandate in *Gutkin II* on about September 9, 2003; by filing the first *Gutkin II* appeal on about November 21, 2003; and by filing the *Hall II* appeal on about April 6, 2004, because, at the time, she knew or should have known that she could not make any good faith argument for the reversal of the relevant holdings in the *Pollock I* appeal or in *Pomona College v. Superior Court, supra*, 45 Cal.App.4th at p. 1726 to the effect that, except for discrimination claims, "judicial review of tenure decisions [in both public and private universities] is limited to evaluating the fairness of the [university's] administrative hearing in an administrative mandamus action [in the superior court]." (Accord *Gutkin v. University of Southern California, supra*, 101 Cal.App.4th 967; *Pollock v. University of Southern California, supra*, 112 Cal.App.4th 1416.)

C. Count two – Failure to Obey Court Orders (§ 6103)

On about March 19, 2004, respondent paid the \$3,000 in sanctions that the Court of Appeal imposed on her in the *Pollock II* appeal. Moreover, on about May 22, 2005, respondent paid \$15,686.82 to USC in satisfaction of the \$14,000 in sanctions that the Court of Appeal imposed on Pollock and respondent in the *Pollock II* appeal. As noted *ante*, the \$3,000 and \$14,000 in sanctions were due within 15 days after the issuance of the remittitur. The record, however, does not establish the date on which the remittitur was issued. Accordingly, the record does not establish, by clear and convincing evidence, that respondent paid the \$3,000 or \$14,000 in sanctions late.

Even though the superior court in *Pollock III* ordered respondent to pay the court \$1,000 in sanctions no later than March 21, 2005, respondent failed to pay those sanctions until June 29, 2005, which is about three months late. Respondent never requested or received permission from the Court to pay the sanctions late.

Even though the superior court in *Hall II* ordered respondent to pay \$5,000 in sanctions to the superior court and to pay \$6,250 in sanctions to USC, the Court of Appeal stayed the sanctions order until after the remittitur was issued in the *Hall II* appeal. Moreover, even though the Court of Appeal issued the remittitur on about May 10, 2005, respondent has not paid any part of those sanctions. Nor has respondent asked or received an extension of time to pay the sanctions.

On December 7, 2004, in the *Gutkin II* appeal, the Court of Appeal ordered respondent to pay \$16,633.65 in sanctions to USC. The record, however, does not establish the date on which the sanctions were to be paid. Respondent has not paid any part of the \$16,633.65 in sanctions. Nor has respondent asked or received an extension of time to pay the sanctions.

On May 31, 2006, in the second *Pollock III* appeal, the Court of Appeal ordered respondent to pay \$6,000 in sanctions to the court within 15 days after the remittitur. Respondent has not paid any part of the \$6,000 in sanctions. Nor has respondent asked or received an extension of time to pay the sanctions.

Respondent had actual knowledge of each of the foregoing sanction orders shortly after they were made by the superior court and the Court of Appeal. Thus, the record clearly establishes that respondent willfully violated her duty, under section 6103, to obey court orders requiring her to do or forbear an act connected with or in the course of her profession, which she ought in good faith to do or forbear (1) by paying the \$1,000 in sanctions that the superior court imposed on her in *Pollock III* more than three months late; (2) by not paying the \$5,000 and \$6,250 in sanctions that the superior court imposed on her in *Hall II* without ever *seeking* relief from the order or an extension of time to pay; (3) by not paying the \$16,633.65 in sanctions that the Court of Appeal imposed on her in the *Gutkin II* appeal without ever *seeking* relief from the order or an extension of time to pay; and (4) by not paying the \$6,000 in sanctions that the Court of Appeal imposed on her in the second *Pollock III* appeal without ever *seeking* relief from the order or an extension of time to pay. (See *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868, fn. 4.)

D. Count Three – Failure to Timely Report Sanctions (§ 6068, subd. (o)(3))

On about January 6, 2005, the superior court ordered respondent to report the \$1,000 in sanctions that it imposed on respondent in *Pollock III* to the State Bar. Thereafter, respondent timely reported the \$1,000 in sanctions imposed on her in *Pollock III* on January 11, 2005.

Also, on January 11, 2005, respondent reported the following sanctions to the State Bar for the first time: (1) the \$1,000 sanctions that were imposed in *Pollock II* on about September 28, 2001; (2) the \$3,000 and \$14,000 sanctions that were imposed in the *Pollock II* appeal on

October 30, 2003; (3) the \$5,000 and \$6,250 sanctions that were imposed in *Hall II* on February 18, 2004; and (4) the \$16,633.65 sanctions that were imposed in the second *Gutkin II* appeal on December 7, 2004. The record clearly establishes that respondent willfully violated her duty, under section 6068, subdivision (o)(3), to report the sanctions set forth in item numbers (1) through (4) in the preceding sentence to the State Bar in writing within 30 days after her knowledge of the sanction.

The record does not establish that respondent failed to report or report late the \$6,000 in sanctions that were imposed in the second *Pollock* appeal on May 31, 2006.

IV. Aggravating & Mitigating Circumstances

A. Aggravating Circumstances

Respondent's misconduct involved multiple acts of misconduct. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(ii).)⁸

Respondent's misconduct harmed the administration of justice. (Std. 1.2(b)(iv).)

B. Mitigating Circumstances

Respondent has no prior disciplinary record. (Std. 1.2(e)(i).) However, respondent had only been admitted to the practice of law for seven years prior to her first act of misconduct. As such, only minimal weight in mitigation may be given for this factor. (See *Kelly v. State Bar* (1988) 45 Cal.3d 649, 658 [seven and one-half years "not especially commendable"].)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve confidence in the profession and to maintain the highest possible

⁸ All further references to standards are to this source.

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.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (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 Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for respondent 's misconduct is found in standard 2.6, which applies to respondent's violations of sections 6103 and 6068, subdivision (o)(3). Under standard 2.6, respondent's misconduct "shall 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." Standard 1.3 provides:

The primary purposes of disciplinary proceedings conducted by the State Bar of California and of sanctions imposed upon a finding or acknowledgment of a member's professional misconduct are the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession. Rehabilitation of a member is a permissible object of a sanction imposed upon the member but only if the imposition of rehabilitative sanctions is consistent with the above-stated primary purposes of sanctions for professional misconduct.

Citing *In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446, the State Bar contends that respondent should be actually suspended for 60 days. In that case, Attorney Scott filed and pursued a series of four related lawsuits. After each action was resolved unfavorably to Scott, he would file the next. He was found culpable of filing and pursuing

frivolous actions in bad faith and for a corrupt motive in violation of section 6068, subdivisions (c) and (g). Even though the hearing judge found that Scott's conduct involved moral turpitude in willful violation of section 6106, the review department concluded that any such violation would be duplicative of the section 6068 violations and would not affect the determination of the appropriate discipline.

In mitigation, Attorney Scott had no prior record of discipline in eight years of practice before the misconduct and three years after the misconduct and before the State Bar trial. Scott's evidence of good character was discounted because the character witnesses were not aware of the full extent of Scott's misconduct. In aggravation, Scott's misconduct harmed a judge and the administration of justice, and Scott showed no recognition of his wrongdoing. The discipline imposed on Scott included two years' stayed suspension and two years' probation with conditions, including a 60-day suspension.

In the court's view, *In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446 is distinguishable from the present proceeding in that the first of the four cases in *Scott* resulted in sanctions against Attorney Scott in the amount of \$218,299 for having filed and pursued a frivolous lawsuit in bad faith. Accordingly, the court rejects the State Bar's contention that respondent should be actually suspended for 60 days. However, the court concludes that the appropriate level of discipline is two years' stayed suspension and two years' probation. The court further concludes that, even though the State Bar has not requested it, respondent should be required to pay, during the period of her probation, the sanctions that were imposed on her in the Pottock, Gutkin, and Hall client matters. (*In the Matter of Respondent Y, supra*, 3 Cal. State Bar Ct. Rptr. at p. 869.)

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VI. Recommended Discipline

This court recommends that respondent **E. LYNETTE LEMAIRE**, State Bar Number 176339, be suspended from the practice of law in the State of California for two years, that execution of the two-year suspension be stayed, and that she be placed on probation for a period of two years subject to the following conditions:

1. Lemaire is to comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar, and all of the conditions of this probation.
2. Within 30 days after the effective date of the Supreme Court order in this proceeding, Lemaire must contact the State Bar's Office of Probation in Los Angeles and schedule a meeting with Lemaire's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Lemaire must meet with the probation deputy either in-person or by telephone. Thereafter, Lemaire must promptly meet with the probation deputy as directed and upon request of the Office of Probation.
3. Lemaire is to maintain, with the State Bar's Membership Records Office and Office of Probation, her current office address and telephone number or, if no office is maintained, an address to be used for State Bar purposes (Bus. & Prof. Code, § 6002.1, subd. (a)(1)). In addition, Lemaire is to maintain, with the State Bar's Office of Probation, her current home address and telephone number (Bus. & Prof. Code, § 6002.1, subd. (a)(5)). Lemaire's home address and telephone number are not to be made available to the general public unless her home address is also her official address on the State Bar's Membership Records. (Bus. & Prof. Code, § 6002.1, subd. (d).) Lemaire must notify the Membership Records Office and the Office of Probation of any change in this information no later than 10 days after the change.
4. Lemaire is to submit written quarterly reports to the State Bar's Office of Probation no later than January 10, April 10, July 10, and October 10 of each year. Under penalty of perjury under the laws of the State of California, Lemaire must state in each report whether she has complied with the State Bar Act, the Rules of Professional Conduct of the State Bar, and all conditions of this probation during the preceding calendar quarter. If the first report will cover less than 30 days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to the quarterly reports, Lemaire is to submit a final report containing the same information during the last 20 days of her probation.

5. Lemaire must pay the following sanctions within the period of her probation.

(A) In accordance with the superior court's February 18, 2004 order in *Hall II*, Lemaire must pay \$5,000 in sanctions to the Los Angeles Superior Court and \$6,250 in sanctions to the University of Southern California.

(B) In accordance with the Court of Appeal's December 7, 2004 order in the *Gutkin II* appeal, Lemaire must pay \$16,633.65 in sanctions to the University of Southern California.

(C) In accordance with the Court of Appeal's May 31, 2006 order in the second *Pollock III* appeal, Lemaire must pay \$6,000 in sanctions to the Court of Appeal for the Second Appellate District of California.

6. Subject to the assertion of any applicable privilege, Lemaire is to fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to her, whether orally or in writing, relating to whether she is complying or has complied with the conditions of this probation.
7. Within the first year of her probation, Lemaire is to attend and satisfactorily complete the State Bar's Ethics School and to provide satisfactory proof of her successful completion of that program to the State Bar's Office of Probation. The program is offered periodically at either 180 Howard Street, San Francisco, California 94105-1639 or at 1149 South Hill Street, Los Angeles, California 90015-2299. Arrangements to attend the program must be made in advance by calling (213) 765-1287 and by paying the required fee. This condition of probation is separate and apart from Lemaire's Minimum Continuing Legal Education ("MCLE") requirements; accordingly, she is ordered not to claim any MCLE credit for attending and completing this program. (Accord, Rules Proc. of State Bar, rule 3201.)
8. This probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of this probation, if Lemaire has complied with all the terms of probation, the order of the Supreme Court suspending her from the practice of law for two years will be satisfied.

VII. Professional Responsibility Examination

The court further recommends that respondent **E. LYNETTE LEMAIRE** be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and to provide proof of passage to the Office of Probation within one year after the effective date of the Supreme Court's disciplinary order in this matter. Failure to pass the MPRE within the specified time results, without hearing, in actual suspension until passage. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; but see Cal. Rules of Court, rule 9.10(b); Rules Proc. of State Bar, rule 5.162.)

VIII. Costs

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

Dated: February 11, 2011.

PAT McELROY
Judge of the State Bar Court