FILED JUNE 16, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **PAUL JAY MESSER** **Member No. 224537** A Member of the State Bar.	)	Case No.: **06-O-14595-RAH (06-O-15198)** **DECISION INCLUDING DISBARMENT RECOMMENDATION AND INVOLUNTARY INACTIVE ENROLLMENT ORDER**

I. INTRODUCTION

In this disciplinary matter, Brandon K. Tady appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Paul Jay Messer did not appear in person or by counsel.

After considering the evidence and the law, the court recommends, among other things, that respondent be disbarred.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on October 10, 2008, and was properly served on respondent on that same date at his then-official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section[1] 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of

[1]Future references to section are to the Business and Professions Code.

mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.)

On November 6, 2008, respondent was properly served at his official address with a notice advising him, among other things, that a status conference would be held on November 20, 2008.

Respondent did not appear at the November 20, 2008 status conference. On December 2, 2008, he was properly served with a status conference order at his official address by first-class mail, postage prepaid. The order noted another conference scheduled for January 21, 2009. It also stated that the State Bar had served the NDC again on respondent at his current official address and that a response to the NDC was due on December 15, 2008.[2]

Respondent did not appear at the January 21, 2009 status conference. On January 22, 2009, he was properly served with a status conference order at his official address by first-class mail, postage prepaid. The order indicated that no response had been filed to the NDC.

Respondent did not file a responsive pleading to the NDC. On February 17, 2008, a motion for entry of default was filed and properly served on respondent at his official address by certified mail, return receipt requested. The motion advised him that disbarment would be sought if he was found culpable. Respondent did not respond to the motion.

On March 10, 2009, the court entered respondent's default and enrolled him inactive effective three days after service of the order. The order was filed and properly served on him at his official address on that same date by certified mail, return receipt requested.

The State Bar's and the court's efforts to contact respondent were fruitless. The court

[2] The court's file does not contain a declaration of service regarding the second service of the NDC. The declaration of Brandon K. Tady, attached to the motion for entry of default, discussed below, indicates that the NDC was served for a second time on November 18, 2008, by certified mail, return receipt requested, on respondent at his current official address. (Tady declaration, paragraph 6.) Because service was proper the first time, the court will accept the statement in the Tady declaration. However, the better practice is to file an original declaration of service whenever an NDC is served.

concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415.)

The matter was submitted for decision without hearing after the State Bar filed a brief on April 10, 2009.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (§6088; Rules of Proc. of State Bar[3], rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on March 28, 2003, and has been a member of the State Bar at all times since.

B. Case no. 06-O-14595 (The Bihary Matter)

1. Facts

On May 12, 2005, Nicklas Bihary hired respondent to probate the estate of his deceased spouse, Claire Williams. Respondent told Bihary that he would charge him advanced attorney fees and costs of $1,500 to begin the probate, including but not limited to, filing fees. Bihary gave respondent a check for $1,500 payable to respondent's law practice, the Legal Help Center of North County (Center), with the memo "probate fees." Respondent deposited Bihary's $1,500

[3]Future references to the Rules of Procedure are to this source.

check into the Center's general rather than in a client trust account (CTA).

On May 17, 2005, respondent filed a petition for letters of administration and a document entitled "Duties and Liabilities of Personal Representative" in the matter entitled *Estate of Claire Williams*, San Diego Superior Court case no. PN 28592.

On June 20, 2005, respondent filed a request for letters of administration and an order authorizing independent administration of estate with full authority in the *Estate of Williams*. The courted appointed Bihary as administrator with full authority of Williams' estate with an expiration date of December 15, 2006.

During a June 23, 2005, meeting, respondent told Bihary that: (a) the attorney's fees for the estate would amount to $35,000; (b) an estate tax return would have to be prepared; (c) estate taxes would have to be paid; and (d) it would cost $32,000 to prepare the estate tax return and pay the estate taxes. At the time that respondent gave Bihary that information, respondent knew or was grossly negligent in not knowing that the statements were false. Respondent made the statements, in part, to obtain payment of $35,000 and $32,000 ($67,000) from Bihary.

On June 23, 2005, respondent prepared two checks payable to the Center on an account belonging to the estate for Bihary to sign and return. The first check for $35,000 states in the memo section that it was for "Attorney's fees." The second check for $32,000 states in the memo section that it was for "prep filing paying estate tax." Respondent deposited the checks into the Center's general account.

At the time that he accepted the checks for $67,000, respondent knew or was grossly negligent in not knowing that he was not entitled to collect those amounts from Bihary. Respondent did not provide any services to respondent in exchange for the $67,000.

On February 22, 2006, respondent filed an inventory and appraisal indicating an appraised value of $170,470.34 for the estate. Respondent caused the inventory and appraisal to

bear the simulated signature of Bihary under penalty of perjury. Bihary did not sign nor authorize his signature to be affixed to the inventory.

On March 13, 2006, respondent filed a "First and Final Account and Report of Executor; and Petition for Settlement, Allowance of Commission and Fees, and Final Distribution" (First and Final Account) in *Estate of Williams*. Respondent caused the First and Final Account to bear the simulated signature of Bihary under penalty of perjury. Bihary did not sign nor authorize his signature to be affixed to the accounting.

The First and Final Account states that: (a) the value of the estate was $170,470.34 cash; (b) "no compensation has been paid to ... [respondent] other than pursuant to a prior court order"; and (c) sought "authoriza[tion] and direct[ion] to pay Paul J. Messer the [sic] of 5,000 in discharge of the statutory attorney fees for services to petitioner and to the estate."

On March 13, 2006, the court set a hearing on the First and Final Account for April 7, 2006. Respondent received notice of the hearing served by the court.

At the time that he prepared and filed the First and Final Account, respondent knew or was grossly negligent in not knowing that he had received a total of $68,500 ($1,500 plus the $67,000) in advanced attorney fees and costs in connection with *Estate of Williams* without court approval. Respondent made the misrepresentation, in part, to conceal his misconduct from the court.

On April 3, 2006, the court continued the April 7, 2006 hearing on the First and Final Account to May 12, 2006 to permit respondent to correct errors in the pleadings. Respondent received notice of the errors to be corrected and of the new hearing date from the court.

On April 4, 2006, respondent changed his official membership address from the Center, located in Oceanside, California, to a post office box in San Diego, California.

Respondent did not inform Bihary that he was vacating the Center; provide Bihary

with his new address; inform Bihary that the Center's telephone number would no longer be in service; or provide Bihary with his new telephone number.

Respondent did not file a change of address with the court or notify it that he had moved.

On May 5, 2006, the court continued the May 12, 2006 hearing on the First and Final Account for *Estate of Williams* to June 23, 2006 to permit respondent correct errors in the pleadings. Respondent received notice of the errors and of the new hearing date from the court.

On June 15, 2006, the court continued the June 15, 2006 hearing on the First and Final Account to August 4, 2006 and ordered respondent to appear regarding the errors in the pleadings. The notice served by the court on respondent at the Center was returned by the U.S. Post Office with the notation on the envelope: "Return to Sender - Attempted Not Known - Unable to Forward."

On or before August 4, 2006, Bihary called respondent at the Center and received recorded message from the telephone company stating that the Center's telephone number was no longer in service. On that same date, Bihary drove to the Center without an appointment to meet with respondent and found that the office had been vacated.

Respondent did not appear at the August 4, 2006, hearing on the First and Final Account for *Estate of Williams*. Bihary appeared and told the court that respondent's office was vacant; that he had been unable to contact respondent; and that he had paid advanced fees and costs to respondent. The court called respondent and determined that his telephone number was no longer in service. The court performed a search of the telephone directory for alternative numbers for respondent, but found none.

By: (a) ceasing to work on *Estate of Williams*; (b) vacating the Center without providing Bihary with his new address; (c) permitting the Center's telephone number to be

disconnected without providing Bihary his new telephone number; and (d) ceasing to communicate with Bihary, respondent constructively terminated his representation of Bihary on April 4, 2006.

In late September or early October of 2006, the court ordered respondent and Bihary to appear on October 27, 2006 regarding *Estate of Williams*. Respondent and Bihary received notice of the hearing.

On October 20, 2006, respondent filed a supplement to the First and Final Account (first supplement) in *Estate of Williams*. Respondent caused the supplement to bear the simulated signature of Bihary under penalty of perjury. Bihary did not sign nor authorize his signature to be affixed to the supplement.

In October of 2006, the court continued the hearing from October 27, 2006 to November 17, 2006, and ordered respondent to provide an accounting of all funds he received regarding the estate. Respondent and Bihary received notice of the hearing and of the court-ordered accounting. Respondent did not file the court-ordered accounting.

At the November 17, 2006, hearing, respondent appeared but did not present an accounting. The court continued the hearing until January 12, 2007, and ordered respondent to provide an accounting of all funds he received "in proper form" for any purpose regarding the estate. Respondent received notice of the hearing and of the court-ordered accounting.

On January 5, 2007, respondent filed a second supplement to the First and Final Account (second supplement) in *Estate of Williams*. The supplement was not a proper accounting and was not verified by Bihary. It stated, among other things, that respondent: (a) received $67,000 from Bihary that "covered an offer and compromise for state and federal income taxes, back child support ... estate planning and other services provided to the petitioner"; (b) sold his practice in November 2005; (c) was unable to locate the individual who had purchased his

practice; (d) could not verify that the individual had provided all of the services; and (e) refunded the $67,000 received from Bihary.

The second supplement contained misrepresentations because respondent had not: (a) received the $67,000 from Bihary to perform legal services related to "state and federal income taxes, back child support ... estate planning and other services"; (b) sold his practice to any individual; or (c) refunded the $67,000 received from Bihary. At the time he prepared and filed the supplement, respondent knew or was grossly negligent in not knowing that it contained misrepresentations. Respondent made the misrepresentations, in part, to conceal his misconduct from the court.

On January 12, 2006, respondent and Bihary appeared for the hearing in *Estate of Williams*. The court continued the hearing until March 14, 2007, and ordered respondent to provide an accounting of all funds he received in the proper form. Respondent and Bihary received notice of the continued hearing and of the court-ordered accounting. Respondent did not file the court-ordered accounting.

On March 14, 2007, the court continued the hearing to May 11, 2007. Respondent and Bihary received notice of the continued hearing.

On May 11, 2007, respondent did not appear for the hearing in *Estate of Williams*. Bihary's new attorney, Richard B. MacGurn, appeared for the hearing. The court found that a verified accounting had not been filed by respondent. It ordered him to file an accounting in the proper form by June 15, 2007 and appear for the hearing continued to June 22, 2007. The court ordered MacGurn to give notice of its rulings to respondent.

On May 15, 2007, MacGurn substituted into *Estate of Williams* as the attorney of record for Bihary in place of respondent.

On May 18, 2007, the court signed an order to account prepared by MacGurn ordering

respondent to file a verified accounting that complied with the Probate Code and with the local rules on or before June 15, 2007.

On June 5, 2007, MacGurn caused the order to account to be served on respondent's spouse. Respondent received the order.

On June 11, 2007, respondent filed a third supplement to the First and Final Account (third supplement) in *Estate of Williams* stating that he was unable to provide the accounting ordered by the court because Bihary "refuses to return any of [his] telephone calls, letters or to meet with [him]."

The third supplement contained a misrepresentation. Respondent had Bihary's file and the records from respondent's bank accounts. He could have prepared the accounting without communicating with Bihary. Respondent made the misrepresentation, in part, to attempt to conceal his misconduct from the court.

On June 22, 2007, MacGurn appeared for the hearing in *Estate of Williams*. The court issued an order to show cause (OSC) as to why respondent should not be held in contempt for failure to account, The court directed MacGurn to research respondent's misrepresentations and possible forgeries. The hearing was continued to August 3, 2007.

On July 9, 2007, the court issued a citation and OSC to respondent in *Estate of Williams* to appear on August 3, 2007 as to why he should not be held in contempt for failure to account. Respondent received the citation and OSC.

On August 3, 2007, respondent and MacGurn appeared for the OSC. The court read respondent his rights and obtained a waiver from him for court-appointed counsel. The court continued the OSC to October 5, 2007, and ordered respondent to appear. Respondent received notice of the continued hearing.

On October 5, 2007, respondent and MacGurn appeared for the OSC hearing. The court

found that respondent had failed to account; set a contempt hearing for November 19, 2007; and ordered respondent to appear. Respondent received notice of the contempt hearing.

On November 19, 2007, respondent, respondent's counsel, Anthony J. Solare, and MacGurn appeared for the OSC. The court granted Solare's request to continue the contempt hearing and continued it until November 29, 2007. The November 29, 2007 hearing was continued to December 3, 2007. Respondent received notice of the contempt hearing.

On December 3, 2007, respondent, Solare, Bihary and MacGurn appeared for the contempt hearing. After receiving testimony from Bihary but not respondent, who declined to testify, the court found beyond a reasonable doubt that respondent was in contempt for: (a) failing to comply with the court's order to provide an accounting for more than six months; (b) "intent to misled the court" by claiming to have refunded the $67,000 to Bihary to conceal a misappropriation of funds; and (c) intent to mislead the court by filing documents that he knew had not been verified by Bihary to conceal a misappropriation of funds. The court delayed sentencing until December 18, 2007, to permit Solare to file a statement in mitigation on respondent's behalf.

At the time that he filed the inventory and appraisal, First and Final Account and first supplement, respondent knew or was grossly negligent in not knowing that Bihary neither signed nor authorized his signature to be affixed to the pleadings. Respondent committed the dishonesty, in part, to conceal his misconduct from the court.

On December 18, 2007, respondent, Solare and MacGurn appeared for the sentencing hearing. The court, respondent and counsel discussed the matter in chambers and, thereafter, the court recited on the record the stipulation agreed to by the court, respondent and counsel that: (a) the court imposed five days in jail on each of the three charges of contempt; but stayed the five days imposed on the second and third charges on the condition that respondent pay the Estate of

Williams the sum of $67,000; (b) respondent execute a deed of trust on real property he owned in San Diego, California (San Diego property) and give it to MacGurn to secure the obligation to repay the $67,000; and c) respondent was to pay $20,000 on or before March 20, 2008, and $500 per month thereafter until the $67,000 was paid in full. Respondent and his counsel accepted the terms of the stipulation on the record. Thereafter, respondent signed that he had received a copy of order and judgment of contempt setting forth the terms of the stipulation.

Respondent misrepresented his ability to enter into the stipulation because he knew or was grossly negligent in not knowing that the San Diego property had been lost to foreclosure on November 14, 2007. Respondent made the misrepresentation, in part, to obtain a reduced sentence from the court.

On May 12, 2006, the State Bar opened an investigation in case no. 06-0-14595 pursuant to a complaint filed by the court (court matter).

On July 11, 2007 and September 5, 2007, a State Bar investigator prepared and mailed letters to respondent requesting that he respond in writing to specific allegations of misconduct being investigated by the State Bar in the court matter. Respondent received the letters.

On August 1, 2007 and October 4, 2007, respondent prepared and mailed letters to the State Bar stating, among other things, that: (a) he sold the Center in February 2006 to an individual with whom he attended law school named "Eric," but he did not have a current phone number or address for Eric; (b) he had "tried repeatedly to refund Mr. Bihary's money to him, but [Bihary] refuses to meet with [respondent] or take [respondent's] check"; (c) he "left many voice mails and sent many letters to Mr. Bihary to meet so we could settle the matter, but all of my attempts have gone unanswered"; and (d) he was unable to provide an accounting for any of the services that he allegedly provided to Bihary because he gave Bihary's file to Eric.

At the time that he prepared and mailed the letters to the State Bar dated August 1,

2007 and October 4, 2007, respondent knew or was grossly negligent in not knowing that he had not: (a) sold the Center in February 2006 to Eric; (b) repeatedly tried to refund Mr. Bihary's money to him; (c) "left many voice mails and sent many letters to Mr. Bihary to meet so we could settle the matter"; and (d) given Bihary's file to Eric. Respondent made the misrepresentations, in part, to conceal his misconduct from the State Bar.

2. Conclusions of Law

a. Counts 1, 8, 9 and 10 - Section 6106 (Moral Turpitude/Misrepresentation)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106 as follows:

(1) By misrepresenting to Bihary that: (a) the attorney's fees for the estate would amount to $35,000; (b) an estate tax return would have to be prepared; (c) estate taxes would have to be paid; and (d) it would cost $32,000 to prepare the state tax return and pay the estate taxes (count 1);

(2) By stating in the: (a) First and Final Account that "no compensation has been paid to" him "other than pursuant to a prior court order"; (b) first supplement that he: (1) received $67,000 from Bihary that "covered an offer and compromise for state and federal income taxes, back child support ... estate planning and other services provided to the petitioner"; (2) sold his practice in November 2005; (3) was unable to locate the individual who had purchased his practice; (4) could not verify that the individual had provided all of the services; and (5) refunded the $67,000 received from Bihary; and (c) third supplement that he could not prepare the accounting without communicating with Bihary (count 8);

(3) By stipulating to execute a deed of trust on the San Diego property and give it to

MacGurn to secure the obligation to pay the $67,000 when the property had been lost to foreclosure (count 9); and

(4) By misrepresenting to the State Bar that he: (a) sold the Center in February 2006 to "Eric"; (b) "tried repeatedly to refund Mr. Bihary's money to him"; (c) "left many voice mails and sent many letters to Mr. Bihary to meet so we could settle the matter"; and (d) had given Bihary's file to Eric (count 10).

Accordingly, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

b. Count 2 - Section 6106 (Moral Turpitude/Misappropriation)

There is clear and convincing evidence that respondent violated section 6106 by accepting the $67,000 from Bihary that he was not entitled to receive and for which he provided no services. Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

c. Count 3 - Rule 3-700(A)(2) (Improper Withdrawal from Representation)

Rule 3-700(A)(2) of the Rules of Professional Conduct[4] prohibits an attorney from withdrawing from employment until he has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of a client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) and with other applicable laws and rules.

Respondent constructively terminated his representation of Bihary on April 4, 2006. He relocated the Center without telling Bihary and without providing contact information. He ceased working on the estate. He did not tell Bihary that he was withdrawing from employment. By not informing the client of his intent to withdraw from employment, respondent failed to take

[4] Future references to rule are to the Rules of Professional Conduct.

reasonable steps to avoid reasonably foreseeable prejudice to the client in wilful violation of rule 3-700(A)(2).

d. Count 4 - Rule 4-200 (Illegal Fee)

Rule 4-200(A) prohibits an attorney from entering into an agreement for, charging or collecting an illegal or unconscionable fee.

By charging and collecting $1,500 for advanced attorney fees and costs to probate *Estate of Williams* without court approval, respondent charged and collected an illegal fee in wilful violation of rule 4-200(A).

e. Count 5 - Rule 4-100(A)(Maintaining Client Funds in Trust Account)

Rule 4-100(A) requires, in relevant part, that an attorney place all funds held for the benefit of clients, including advances for costs and expenses, in a client trust account. Respondent deposited the $1,500 check for advanced attorney fees and costs into the Center's general account instead of a CTA in wilful violation of rule 4-100(A).

f. Count 6 - Section 6103 (Violation of Court Order)

In relevant part, section 6103 makes it a cause for disbarment or suspension for an attorney to wilfully disobey or violate a court order requiring him to do or to forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear.

By failing to file the court-ordered accounting of all funds received for any purpose regarding *Estate of Williams*, respondent wilfully disobeyed a court order in wilful violation of section 6103.

g. Count 7 - Section 6106 (Moral Turpitude/Dishonesty)

There is clear and convincing evidence that respondent violated section 6106 by causing the inventory and appraisal, First and Final Account and first supplement to be filed under penalty of perjury when he knew that Bihary neither signed nor authorized his signature to be

affixed to the pleadings. Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

B. Case no. 06-O-15198 (The Harrod Matter)

1. Facts

On July 12, 2004, Charles L. Harrod (Charles) hired respondent to probate the estate of his deceased spouse, Catherine Harrod (Catherine). Respondent charged Charles $1,000 in advanced attorney fees and costs to open the probate. Charles prepared and gave respondent a check for $1,000 payable to the Center.

On July 15, 2004, Charles met respondent at the Center and signed and dated a pleading entitled "Duties and Liabilities of Personal Representative" and a petition for probate.

On September 13, 2004, respondent filed the petition for probate in the matter entitled *In the Estate of Catherine Harrod*, San Diego Superior Court case no. PN 28084.

During a December 3, 2004, meeting, respondent told Charles that: the remaining balance of advanced attorney fees and costs was $10,000; respondent was entitled to receive the $10,000 at that time; and Charles had to pay that amount for respondent to continue representing him. Charles prepared and gave respondent a check for $10,000 payable to respondent.

At the time that respondent told Charles that respondent was entitled to receive the remaining balance of his attorney fees and costs of $l0,000, respondent knew or was grossly negligent in not knowing that the statement was false because the court had not approved payment of that amount.

On December 13, 2004, Charles signed and dated an inventory and appraisal for *Estate of Harrod* listing an appraised value of $398,782.37. It included:

a. a checking account described as decedent's separate property valued at $145,768.73;

b. a Schwab account described as community property valued at $53,013.64; and

c. a savings account described as decedent's separate property valued at $200,000.

The inventory and appraisal prepared by respondent contained the following errors: the Schwab account was held in joint tenancy, not as community property; and the savings account did not exist.

Respondent told Charles that the savings account had to be included to reflect the value of the residence where Charles and Catherine resided before her death that was held in joint tenancy. The property held in joint tenancy should not have been included in the estate and, as such, the value of the estate was $145,768.73.

On April 10, 2005, Charles met with respondent to sign a Form 1041 for the estate's tax return. This was the last time that Charles met with or spoke to respondent. Because Charles did not hear from respondent thereafter, Charles assumed that *Estate of Harrod* had been probated and closed.

On February 22, 2006, respondent filed the inventory and appraisal in *Estate of Harrod* that Charles signed and dated on December 13, 2004. Respondent caused the date that Charles had signed and dated the pleading to be changed from December 13, 2004 to December 13, 2005 without the knowledge or authorization of Charles.

At the time that he filed the inventory and appraisal, respondent knew or was grossly negligent in not knowing that Charles neither changed the date nor authorized the date to be changed.

On March 13, 2006, respondent filed a "First and Final Account and Report of Executor; and Petition for Settlement, Allowance of Commission and Fees, and Final Distribution" (First and Final Account) in *Estate of Harrod*. Respondent caused the accounting to bear the simulated signature of Charles under penalty of perjury. Charles did not sign nor authorize his signature to be affixed to the accounting.

The First and Final Account stated that: (a) the value of the estate was $398,728.37 in cash; and (b) "[no compensation has been paid to" respondent "other than pursuant to a prior court order." It also sought authorization to pay $10,000 to respondent "in discharge of the statutory attorney fees." The court set a hearing for the First and Final Account for April 7, 2006. Respondent received notice of the hearing served by the court.

At the time that he prepared and filed the First and Final Account, respondent knew or was grossly negligent in not knowing that he had received $11,000 in advanced attorney fees and costs to file *Estate of Harrod* without court approval of the court.

On April 4, 2006, respondent changed his official membership address from the Center, which was located in Oceanside, California 92054, to a post office box in San Diego, California.

On April 4, 2006, respondent: (a) ceased to work on *Estate of Harrod*; (b) vacated the Center without providing Charles with his new address; (c) permitted the Center's telephone number to be disconnected without providing Charles his new telephone number; and (d) ceased to communicate with Charles. Accordingly, respondent constructively terminated his representation of Charles.

On April 7, 2006, the court continued the hearing on the First and Final Account for *Estate of Harrod* to May 12, 2006 to permit respondent to correct errors in the pleadings. Respondent received notice of the errors and of the new hearing date from the court.

On May 12, 2006, the court continued the hearing on the First and Final Account for *Estate of Harrod* to June 23, 2006 to permit respondent to correct errors in the pleadings. Respondent received notice of the errors and of the new hearing date from the court.

On June 23, 2006, the court continued the hearing on the First and Final Account for *Estate of Harrod* to August 4, 2006 and ordered respondent to appear regarding the errors in the pleadings. Respondent received notice of the errors and of the new hearing date from the court.

On August 4, 2006, respondent failed to appear for the hearing on the First and Final Account. The court issued a citation to Charles to appear on September 15, 2006 regarding his failure to perform his duties as executor. Charles received the citation.

On August 15, 2006, Charles went to the Center without an appointment to meet with respondent. Charles saw that the office was vacant except for scattered boxes and clutter visible through the windows. Another tenant in the complex told Charles that respondent had vacated the office "months before."

On August 17, 2006, Charles hired attorney Patricia L. Andel to represent him in *Estate of Harrod*. They appeared at the September 15, 2006, hearing. On September 28, 2006, Andel substituted into *Estate of Harrod* as the attorney of record for Charles in place of respondent.

On December 13, 2006, Andel filed a "Waiver of Account on First and Final Report of Executor ... " stating that the correct appraised value of the estate was $145,768.73, not the $398,782.37 listed by respondent; and the total statutory compensation due to the attorneys was $5,373.06.

At the time that he filed the inventory and appraisal and the First and Final Account, respondent knew or was grossly negligent in not knowing that Charles neither: (a) changed nor authorized the date to be changed on the inventory and appraisal; nor (b) signed or authorized his signature to be affixed to the First and Final Account. Respondent committed the dishonesty, in part, to conceal his misconduct from the court.

2. Conclusions of Law

a. Count 11 - Rule 3-700(A)(2) (Improper Withdrawal from Representation)

Respondent constructively terminated his representation of Charles Harrod on April 4, 2006. He relocated the Center without telling Charles and without providing contact information. He ceased working on the estate. He did not tell Charles that he was withdrawing

from employment. By not informing the client of his intent to withdraw from employment, respondent failed to take reasonable steps to avoid reasonably foreseeable prejudice to the client in wilful violation of rule 3-700(A)(2).

b. Count 12 - Rule 4-200 (Illegal Fee)

By charging and collecting $11,000 for advanced attorney fees (less the advanced costs) to probate *Estate of Harrod* without court approval, respondent charged and collected an illegal fee in wilful violation of rule 4-200(A).

c. Counts 13 and 15 - Section 6106 (Moral Turpitude/Misrepresentation)

There is clear and convincing evidence that respondent violated section 6106 as follows:

(1) By knowingly or grossly negligently misrepresenting to Charles that respondent was entitled to received the remaining balance of his attorney fees and costs of $10,000 on December 3, 2004 (count 13); and

(2) By causing the: (a) inventory and appraisal to be filed when he knew that Charles neither changed nor authorized the date to be changed; and (b) First and Final Account to be filed under penalty of perjury when he knew that Charles neither signed nor authorized his signature to be affixed to it (count 15).

Accordingly, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

d. Count 14 - Section 6106 (Moral Turpitude/Dishonesty)

There is clear and convincing evidence that respondent violated section 6106 by misrepresenting to the court that "no compensation has been paid to" respondent in the First and Final Account when he had received $11,000 in advanced attorney fees and costs. Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct[5], std. 1.2(b).)

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed clients and the administration of justice. (Std. 1.2(b)(iv).) Bihary and Charles Harrod had to obtain other counsel. Charles was cited by the probate court. Due to respondent's misconduct in both estate matters, the court had to hold additional proceedings.

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) He has demonstrated his contemptuous attitude toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the court to participate therein, a serious aggravating factor. (Std. 1.2(b)(vi); *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 104, 109.)

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors.

C. Discussion

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

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[5]Future references to standard or std. are to this source.

Cooper v. State Bar (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).) Prior discipline is not a requisite for disbarment. (Std. 1.7(c).)

Standards 2.2(a) and (b), 2.3, 2.6(b), 2.7 and 2.10 apply in this matter. The most severe sanction is found at standard 2.2(a) which recommends disbarment for wilful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is one year actual suspension.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Respondent has been found culpable in two client matters of violating sections 6106 (nine counts) and 6103 (one count) and rules 3-700(A)(2) (two counts), 4-200 (two counts) and 4-100(A) (one count).

The State Bar recommends disbarment. Based upon the standards, the court agrees. The amount misappropriated is not insignificantly small and the most compelling mitigating circumstances do not clearly predominate.

The court also recommends that respondent be ordered to make restitution as set forth below for the amounts that he misappropriated or obtained as illegal fees.[6] "Restitution is fundamental to the goal of rehabilitation." (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1094.) Restitution is a method of protecting the public and rehabilitating errant attorneys because it forces an attorney to confront the harm caused by his misconduct in concrete terms. (*Id.* at p. 1093.)

Lesser discipline than disbarment is not warranted because there are no extenuating circumstances that clearly predominate in this case and the amount misappropriated is not insignificantly small. The serious and unexplained nature of the misconduct; the lack of participation in these proceedings; as well as the self-interest and dishonesty underlying respondent's actions suggest that he is capable of future wrongdoing and raise concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. Having considered the evidence, the standards and other relevant law, the court believes that disbarment is the only adequate means of protecting the public from further wrongdoing by respondent. Accordingly, the court so recommends.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent **PAUL JAY MESSER** be DISBARRED from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

It is recommended that respondent make restitution to the following clients within 30 days following the effective date of the Supreme Court order in this matter or within 30 days

[6] Under rule 291 of the Rules of Procedure, effective January 1, 2007, (1) respondent must reimburse the Client Security Fund (CSF) to the extent that the misconduct found in the proceeding results in the payment of funds pursuant to section 6140.5; and (2) unless otherwise ordered by the Supreme Court or unless relief has been granted under these rules, any reimbursement so ordered must be paid within 30 days following the effective date of the final disciplinary order or within 30 days following the CSF payment, whichever is later.

following the Client Security Fund payment, whichever is later (Rules Proc. of State Bar, rule 291):

1. to Nicklas Bihary in the amount of $1,500 plus 10% interest per annum from May 12, 2005 (or to the Client Security Fund to the extent of any payment from the fund to Nicklas Bihary, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
2. to Nicklas Bihary as administrator of *Estate of Claire Williams*, San Diego Superior Court case no. PN28592, in the amount of $67,000 plus 10% interest per annum from June 23, 2005 (or to the Client Security Fund to the extent of any payment from the fund to Nicklas Bihary as administrator of *Estate of Claire Williams*, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
3. to Charles Harrod in the amount of $1,000 plus 10% interest per annum from July 12, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Charles Harrod, plus interest and costs, in accordance with Business and Professions Code section 6140.5); and
4. to Charles Harrod in the amount of $10,000 plus 10% interest per annum from December 3, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Charles Harrod, plus interest and costs, in accordance with Business and Professions Code section 6140.5)

Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

It is also recommended that the Supreme Court order respondent to comply with rule 9.20, paragraph (a), of the California Rules of Court within 30 calendar days of the effective date

of the Supreme Court order in the present proceeding, and to file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.

VI. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VII. ORDER REGARDING INACTIVE ENROLLMENT

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

Dated: June _____, 2009

RICHARD A. HONN
Judge of the State Bar Court