

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos.: 07-O-11846 (07-O-12915;
)	09-O-11107)-DFM
BENJAMIN ROBINSON,)	
)	DECISION INCLUDING
Member No. 107550,)	DISBARMENT RECOMMENDATION
)	AND INVOLUNTARY INACTIVE
A Member of the State Bar.)	ENROLLMENT ORDER

INTRODUCTION

Respondent Benjamin Robinson (Respondent) is charged here with 10 counts of misconduct involving three different clients.¹ The alleged misconduct includes willful violations of Rule 3-110(A) of the Rules of Professional Conduct² [failure to perform with competence] [three counts]; section 6068, subdivision (m) of the Business and Professions Code³ [failure to inform client of significant developments] (two counts); rule 3-700(D)(1) [failure to release file]; section 6104 [appearing for party without authority]; section 6103 [failure to obey court order]; rule 4-100(A) [failure to maintain client funds in trust account]; and section 6106 [moral turpitude-misappropriation]. The court finds that Respondent is culpable of violations of eight of

¹ The Notice of Disciplinary Charges (NDC) actually contains 11 counts. Count 10, however, was dismissed by the court at the request of the parties prior to the commencement of trial.

² Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

³ Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

these counts. In view of Respondent's misconduct and the aggravating factors, the court recommends that Respondent be disbarred from the practice of law.

PERTINENT PROCEDURAL HISTORY

On April 16, 2010, the State Bar filed its NDC in Case Nos. 07-O-12915, 07-O-11846, 09-O-11107. On May 17, 2010, Respondent filed his response to the NDC, admitting only that he had been admitted to the State Bar since January 23, 1983.

On May 19, 2010, the initial status conference was held in the matters. At the status conference on that date, it was ordered that trial would commence on October 5, 2010.

On September 21, 2010, Respondent filed an amended response to the NDC, admitting many of the factual allegations but denying culpability for any misconduct.

A pretrial conference was held on September 27, 2010. In conjunction with that conference, the State Bar asked that Count 10 of the NDC be dismissed. That count was dismissed by the court with prejudice on October 6, 2010.

After trailing for two days because of the court's involvement in two other trials, trial commenced on October 7, 2010, and was completed on October 21, 2010. The matter was then submitted for decision.⁴ The State Bar was represented at trial by Supervising Trial Counsel Kim Anderson. Respondent represented himself throughout the proceeding.

JURISDICTION

Respondent was admitted to the practice of law in California on January 27, 1983, and has been a member of the State Bar at all times since.

⁴ Because the evidentiary hearing in this matter was held in October 2010, the *former* Rules of Procedure of the State Bar of California governed this proceeding in the hearing department. (See Rules Proc. of State Bar (eff. Jan. 1, 2001), Preface, item 1.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the stipulation of facts filed by the parties in this matter, the admissions contained in Respondent's Amended Response to the NDC, and on the documentary and testimonial evidence admitted at trial.

Case No. 07-O-12915 [Yuzu]

In 2006, Jason Yamamoto was the part-owner and president of a business named K-Kitchens, doing business as Yuzu Restaurant (Yuzu).

In February 2006, Ryan McCabe, who had previously worked as a waiter at Yuzu, filed a lawsuit against Yuzu for wrongful termination in a case entitled *McCabe v. Yuzu Restaurant et al.*, Los Angeles Superior Court, case no. BC347740 (*McCabe v. Yuzu*). Yuzu initially hired the firm of Sidley and Austin to represent it in the lawsuit, but subsequently became concerned that it might be too expensive.

In October 2006, Yuzu decided to change counsel in *McCabe v. Yuzu*. Yuzu then entered into a joint retainer agreement with attorney Norman Cousins Sasamori (Sasamori) and Respondent. This agreement was signed by Jason Yamamoto and Ikuko Kumada on behalf of Yuzu. On October 31, 2006, Respondent (but not Sasamori) substituted into the *McCabe v. Yuzu* action on behalf of Yuzu.

Shortly after Respondent appeared in the lawsuit, counsel for plaintiff McCabe filed on November 3, 2006, a Motion to Compel Supplemental Responses to Request for Production of Documents and a Motion to Compel Supplemental Responses to Interrogatories. Both motions were received by Respondent and were set for hearing on January 4, 2007.

On November 21, 2006, Respondent sent a letter to Plaintiff's counsel, acknowledging receipt of the motions to compel and stating that he would be providing supplemental responses

to both the interrogatories and the document requests in December, after he returned from a scheduled vacation.

On January 4, 2007, the Superior Court held a hearing on the Motion to Compel Production and the Motion to Compel Interrogatories. Respondent did not attend the hearing. Nor had he filed any sort of response to or opposition to the motions. The court granted both of plaintiff's motions, ordered Yuzu to provide supplemental responses to both the interrogatories and document requests by January 19, 2007, and imposed sanctions against Yuzu in the amount of \$1,540. The court served notice of its January 4, 2007, order on Respondent, which notice was received by Respondent. Respondent did not tell his client of the order; did not tell the client of its obligation to pay \$1,540 in sanctions; and did not obtain supplemental responses to the discovery requests, as ordered by the court.

On December 15, 2006, McCabe filed and served a Motion to Compel Deposition of Person Most Knowledgeable Regarding Plaintiff's Termination (Motion to Compel PMK Deposition). Respondent received the Motion to Compel PMK Deposition. The motion was scheduled for hearing on February 5, 2007. On that date, Respondent appeared and argued that there had not been a requisite meet-and-confer effort by plaintiff's counsel. The court then ordered the parties to meet and confer in person ("four knees under the table") and continued the hearing until February 9, 2007.

On January 18, 2007, plaintiff's counsel served four new sets of discovery requests on Respondent as counsel for Yuzu. These requests included a second set of form interrogatories, a set of special interrogatories, a new set of requests for production of documents, and a set of requests for admission. Respondent received these discovery requests but failed to file any objections or responses to them within the time for doing so.

On February 9, 2007, Respondent appeared at the scheduled hearing on the motion by plaintiff to compel the deposition of Yuzu's PMK. Plaintiff's counsel was ill and did not attend. Respondent informed the court that an agreement had been reached for a date when the deposition(s) would take place.

Respondent's doctor placed him on disability from February 14, 2007 to March 9, 2007, because of migraine headaches.

On March 2, 2007, plaintiff's counsel filed motions to compel responses to the two sets of interrogatories and the request for documents. In addition, he filed a motion to have admitted all of the requests for admission. All four motions (collectively, March 2, 2007 Discovery Motions) included requests that monetary sanctions be ordered against both Yuzu and Respondent personally. In the moving papers, plaintiff's counsel complained that Yuzu had failed to provide supplemental responses, as ordered by the court on January 4, 2007, and that it had also failed to pay the court-ordered \$1,540 monetary sanctions. The hearing date for all four motions was set for April 26, 2007.

On March 2, 2007, plaintiff's counsel also faxed to Respondent a letter demanding that Yuzu comply with the January 4, 2007 order, including paying the order for monetary sanctions. With this letter, plaintiff's counsel faxed to Respondent additional copies of the prior order and notice of ruling and indicated that motions to enforce the prior order would be filed if Yuzu did not comply by March 8. Respondent did not tell his client of the demand; nor did he make arrangements for the client to comply with the January 4 order.

On March 5, 2007, counsel for plaintiff served on Respondent a second set of request for admission. The statutory deadline for providing responses to the requests was April 9, 2007 (35 days later). During that time period, Respondent neither secured an extension of the deadline nor provided responses from his client to the requests.

On March 9, 2007, plaintiff's counsel served and filed a motion for evidence/issue sanctions and further monetary sanctions against Yuzu for its failure to provide supplemental responses, as required by the court on January 4, 2007. The hearing on this motion was scheduled for April 27, 2007. This motion also requested an award of additional sanctions against both Yuzu and Respondent.

On March 10, 2007, Respondent and Ms. Ikuko Kumada, the manager of Yuzu, appeared at the office of plaintiff's attorney for her scheduled deposition. Once there, they demanded that the deposition be taken through an interpreter. Because no interpreter was present and none could be easily secured, Respondent and the deponent left.

On March 20, 2007, plaintiff's counsel faxed to Respondent a letter, warning that he intended to file a motion for contempt against Yuzu unless the monetary sanction award was paid by March 22, 2007. The letter outlined the prior efforts by plaintiff to seek compliance with the court's prior order and was characterized as "one last meet and confer attempt." Once again, Respondent neither informed his client of the demand nor made arrangements for his client to comply with the court's order.

In the March 20, 2007 letter, plaintiff's counsel also complained that Respondent had failed to respond to requests that Ms. Kumada return for her deposition and demanded that the other Yuzu representative, Kazuhisa Akutsu, appear for his scheduled deposition. The letter indicated that, unless Respondent made arrangements for these depositions before March 22, 2007, a motion to compel the depositions of these two individuals would be filed.

On March 29, 2007, plaintiff McCabe filed a Motion for Contempt due to Yuzu's failure to pay sanctions in violation of the January 4, 2007 Order (Motion for Contempt). In addition, he filed a motion to compel the depositions of Ikuko Kumada and Kazuhisa Akutsu, the two Yuzu representatives. The hearings on both motions were scheduled for April 27, 2007.

On April 10, 2007, plaintiff's counsel faxed a letter to Respondent, complaining of Respondent's client's failure to provide responses to the requests for admission and advising that he would file a motion to have the requests be deemed admitted if a response was not provided by April 12. In this letter, plaintiff's counsel also noted the other outstanding discovery requests. Respondent failed to provide responses from his client to the requests for admission by the April 12 deadline.

On April 13, 2007, plaintiff's counsel filed a motion to have plaintiff's second set of requests for admission be deemed admitted. The hearing on the motion was set for May 30, 2007. Respondent received this Motion.

On April 25, 2007, Respondent filed a "Declaration of Benjamin Robinson in Opposition to Plaintiff's Motion to Compel." No other opposition papers to the pending motions were filed. In this declaration, Respondent stated that Yuzu had served on February 1, 2007, supplemental responses to plaintiff's request for production of documents. Respondent attached to his declaration a copy of these supplemental responses. Although the responses were verified on February 1, 2007, by Ms. Kumada, on behalf of Yuzu, none of the supplemental responses actually provide any additional information. Instead, they all read: "Defendant has fully responded to these requests. However, Plaintiff has yet to meet and confer with defendant regarding Supplemental Responses. Defendant suggests the parties meet and confer person to person about these requests." With regard to the motion to compel the depositions of the Yuzu deponents, Respondent stated in his declaration that the court had previously ordered the deposition of Ms. Kumada to be taken on March 10, 2007;⁵ that Ms. Kumada had appeared for her deposition, which did not go forward because of the absence of an interpreter; and that, because of loud comments made by plaintiff's counsel at the scheduled deposition, "Ms. Ikuko

⁵ No such order appears in the court record. Instead, the court indicated that the motion to compel had been mooted by an agreement of the parties.

[sic] was unwilling to return to his office” and that any future deposition needed to be conducted at another “secure” location.

On April 26, 2007, the court conducted a hearing on McCabe’s March 2, 2007 Discovery Motions. Respondent was present at the hearing. After hearing argument on the motion, the court ruled that:

- Yuzu must respond without objection to McCabe’s form Interrogatories, set two, within 21 days;
- Yuzu must respond without objection to McCabe’s document production request, set two, within 21 days;
- Yuzu must respond without objection to McCabe’s special interrogatories, set two, within 21 days;
- All admissions in Plaintiff’s request for admissions, set one, were deemed admitted; and
- Yuzu and Respondent jointly and severally are to pay sanctions in the amount of \$2,410.00 on or before May 29, 2007.

On April 27, 2007, the court conducted hearings on plaintiff’s motions (1) for evidentiary and issue sanctions, (2) to compel the depositions of Ikuko Kumada and Kazuhisa Akutsu, and (3) for contempt. Respondent was present at the hearings. After hearing argument on the motions, the court made the following orders:

- A. The court ordered evidentiary sanctions against Yuzu, prohibiting it from introducing any evidence that plaintiff McCabe’s termination was for any legitimate reason and from introducing any evidence to support any affirmative defense.

- B. The motion to compel the depositions of Ikuko Kumada and Kazuhisa Akutsu was granted, and the depositions were ordered to take place on May 12, 2007, in the office of plaintiff's counsel;
- C. The defendant and Respondent jointly and severally were ordered to pay to plaintiff's counsel by May 29, 2007: \$1,390.00 with regard to the motion for evidentiary sanctions, and \$750.00, with regard to the motion to compel depositions.⁶

Respondent did not tell his client of the evidentiary and monetary sanction orders of April 26 and 27, 2007. Nor did either he or his client pay the monetary sanction awards before the court-ordered deadline of May 29, 2007.

On May 12, 2007, the deponents did not appear for their court-ordered depositions. Instead, on May 15, 2007, Respondent filed an ex parte application to have the deposition dates continued to a later date. At the time of the hearing on that ex parte application, the court ordered the two Yuzu deponents to appear for their depositions and produce all documents responsive to the ancillary document requests on June 2, 2007. This was characterized as giving the defendants "one last opportunity to comply."

On May 29, 2007, plaintiff's counsel faxed a letter to Respondent, complaining of the failure of Respondent and his client to comply with the court's prior discovery orders and notifying him that plaintiff was going to seek on May 30 an expedited hearing on a motion seeking terminating sanctions being filed that same day. In this letter, Respondent was also reminded of his obligation to pay monetary sanctions by the end of that same day.

On May 30, 2007, the court conducted a hearing on plaintiff's motion to have his second set of admissions be deemed admitted. Other than the Declaration in Opposition to Motion to

⁶ The record does not make clear whether the court otherwise ruled on the motion to have Yuzu held in contempt.

Compel, discussed above, Respondent had not filed any specific opposition to the motion. At the hearing, the court granted the plaintiff's motion with regard to many of the requests for admission and ordered Respondent and Yuzu, jointly and severally, to pay monetary sanctions to plaintiff's counsel in the amount of \$1,090.00 by June 29, 2007. Respondent did not subsequently tell his client of this order. Nor did either he or his client pay the monetary sanction award before the court-ordered deadline.

At the hearing on May 30, 2007, plaintiff filed an ex parte request that plaintiff's motion for terminating and monetary sanctions, based on Yuzu's failure to comply with the court's previous orders, be allowed to be filed and heard on an accelerated basis. The court scheduled the hearing on this motion on June 26, 2007,⁷ shortly before the case was scheduled to commence trial on July 2, 2007. In this motion, plaintiff complained that Yuzu had failed to provide the discovery responses ordered by the court on April 26, 2007, notwithstanding numerous demands on Respondent that such responses be provided.

On June 1, 2007, Respondent met with Ms. Kumada in anticipation of her court-ordered deposition the following day. When he asked her about various documents that needed to be produced, she told him that he already had those documents. When he then went out to his car to see if he had the documents, she began to lose confidence in him. Later in the day, a decision was made to terminate Respondent as Yuzu's counsel.

Respondent had made arrangements for Ms. Kumada to meet him on the day of the scheduled deposition before the deposition began. She did not appear for the meeting. Respondent then went to the office of plaintiff's counsel, where the deposition was scheduled to commence at 10:00 a.m., where he waited until 10:20 a.m. When Ms. Kumada had not arrived

⁷ The NDC erroneously alleged that the hearing on this Motion for Terminating Sanctions was set for June 15, 2007, when it was actually set for June 26, 2007. The court did dispose of the case on June 15, 2007, but on other discovery sanction grounds. This decision on June 15 made moot the need for the June 26, 2007 hearing.

by that time, Respondent left the premises to find out what had happened. He indicated to plaintiff's counsel that he would call back with a report.

Shortly after Respondent left, deponents Kumada and Akutsu arrived at plaintiff's counsel's law office, accompanied by attorney Sasamori. They told plaintiff's attorney that they had fired Respondent and that they would not go forward with the depositions. While they were there, Sasamori indicated that he was considering substituting into the case and asked plaintiff's counsel for information regarding its status. Plaintiff's counsel then went through the discovery file, the outstanding discovery, and the discovery orders and sanction orders with Sasamori, with Akutsu and Kumada present. At that time they learned for the first time of the court's prior orders, including the awards for monetary sanctions. Nonetheless, they indicated that they were leaving. No deposition was taken, and no documents were produced.

When Respondent called plaintiff's counsel later that morning, after seeking to locate the deponents, he was informed that the deponents had arrived and were still there. By the time he returned to the deposition location, they had left.

On June 5, 2007, plaintiff's counsel filed an ex parte application and a motion to compel the depositions of Ikuko Kumada and Kazuhisa Akutsu and for terminating/issue and evidence sanctions, which the court set for hearing on shortened notice on June 15, 2007. The motion was grounded, in part, on the fact that Ikuko Kumada and Kazuhisa Akutsu did not appear for their court ordered depositions on June 2, 2007. Respondent appeared at the June 5, 2007 hearing on the ex parte application. The court set the hearing for June 15, 2007, and set a deadline of noon, June 14, 2007, for the filing of any opposition.

On June 6, 2007, Respondent filed an Ex Parte Application for An Order Shortening Time to Serve and File Notice of Motion and Motion to Set Aside Orders Regarding Discovery Previously Issued by This Court. In this motion, Respondent included a declaration attacking the

procedural appropriateness of plaintiff's motion to compel, filed in November 2006. As part of this declaration, Respondent represented to the court that "because of health reasons I was away from my office from November 22, 2006 to January 22, 2007."⁸ On June 6, 2007, after a hearing on the ex parte request, the court issued a minute order denying it.

On June 7, 2007, Respondent filed a second Ex Parte Application for An Order Shortening Time to Serve and File Notice of Motion and Motion to Set Aside Orders Regarding Discovery Previously Issued by This Court. This proposed motion and accompanying declaration by Respondent included a more extensive attack on the legal sufficiency of the discovery motions that had previously been filed and ruled on by the court, without any oppositions having been filed to those motions by Respondent. With regard to the November motion, seeking supplemental answers to form interrogatories, Respondent now stated that he had served supplemental answers to some of those interrogatories on November 28, 2006, although he was also stating at various other locations in his declaration that he was either on vacation after November 22 or that he was physically not able to work at that time due to his migraine headaches. No explanation is given why he did not file oppositions to the various motions. On June 7, 2007, the court issued a minute order denying the June 7, 2007 Ex Parte Application.

As previously noted, the court set a deadline of noon, June 14, 2007, for the filing of any opposition to plaintiff's motion for terminating sanctions. Respondent did not file any opposition papers prior to that deadline. Instead, on June 15, 2007, the day of the scheduled hearing, Respondent filed a Declaration of Benjamin Robinson in Support of Defendant's Opposition to Plaintiff Ryan McCabe's Notice of Motion and Motion to Compel the Depositions

⁸ This representation to the court is inconsistent with the billing statement prepared by Respondent and submitted to Yuzu for payment. In it, Respondent represented that he had worked on the Yuzu matter on November 22, 24, 26, and 27.

of Ikuko Kumada and Kazuhisa Akutsu and Request for Terminating and Monetary Sanctions, or in the Alternative Evidence/Issue Sanctions and Monetary Sanctions Against Defendants, And Their Attorney of Record For Failing to Comply With This Court's Order to Show Up and Give Depositions and Produce Documents. The declaration included a request that he be awarded monetary sanctions of \$3,806.00 for having to file an opposition to the plaintiff's motion. In this declaration, Respondent attacked the factual accuracy of several of the declarations that had been attached to some of the prior motions to compel that had previously been granted by the court, without any opposition being filed by Respondent or his client. In this declaration, Respondent noted that he had received an email on June 5, 2007, informing him that Yuzu intended to replace him with another attorney but that no steps had yet been perfected to substitute into the action another lawyer. As a result, Respondent noted, he was still counsel of record in the matter and was, therefore, obligated to file an appearance.⁹

On June 15, 2007, the court held a hearing on plaintiff's motion for terminating sanctions. Respondent was present. At the conclusion of the hearing, the court granted plaintiff McCabe's motion for terminating sanctions, struck Yuzu's Answer, and entered a default against Yuzu. Monetary sanctions were ordered against Yuzu, but not Respondent. A formal order to that effect was filed by the court on June 27, 2007.

On June 16, 2007, Jason Yamamoto made the first of a number of requests that Respondent make the Yuzu file available for review by another attorney, who was considering substituting into the case during the 180-day period during which it would be possible to seek relief from the default. This attorney, Samuel Steinberg, also made numerous requests to Respondent to be given access to the file. Respondent repeatedly failed to release the file or

⁹ This view was reiterated by Jason Yamamoto, the owner and president of Yuzu, who indicated during his testimony in this proceeding that it was his understanding and expectation that Respondent would represent Yuzu in conjunction with opposing the plaintiff's motion heard on June 15.

make it available for review. Eventually Steinberg elected to forego working on the case. Then, in September 2007, Yuzu arranged with the Lewis, Brisbois law firm to seek relief from the default decision. When that law firm sought to secure the file from Respondent, he again failed to release it. He initially demanded as a condition of releasing the file that the client pay for the cost of him reproducing a copy of it for his own retention. It was not until October 2007, that Respondent turned over the entire file.

Count 1 – Rule 3-110(A) [Failure to Perform with Competence]

Rule 3-110(A) provides that an attorney “shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” Respondent’s repeated failures to respond appropriately to the many motions and orders to compel, discussed above, leading to repeated sanction orders being entered against his client, constituted repeated and reckless failures by him to act with competence, in willful violation of rule 3-110(A).

Count 2 - Section 6068, Subd. (m) [Failure to Inform Client of Significant Development]

Section 6068, subdivision (m) of the Business and Professions Code obligates an attorney to “respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.” Respondent repeatedly failed to inform his client that the court had entered adverse discovery orders against it, including orders requiring the client to pay monetary sanctions and depriving the client of the ability to defend the allegations being made against it. These failures by Respondent to keep the client advised of significant developments in the *McCabe* matter, constituted a willful violation by him of his duties under section 6068, subdivision (m).

Count 3 – Rule 3-700(D)(1) [Failure to Release File]

Rule 3-700(D)(1) provides: “A member whose employment has ended shall: (1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client’s papers and property. ‘Client papers and property’ includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert’s reports, and other items reasonably necessary to the client’s representation, whether the client has paid for them or not [.]” Respondent was requested repeatedly by the client to release his file on the McCabe lawsuit, so that it could be reviewed by possible successor counsel during the 180-day period for setting aside the default judgment. Respondent repeatedly failed to release the file promptly, but instead only released it after a delay of many several months. This conduct by Respondent constituted a willful violation by him of his obligations under rule 3-700(D)(1).

Count 4 –Section 6104 [Appearing for Party without Authority]

Section 6104 of the Business and Professions Code prohibits an attorney from willfully or corruptly appearing without authority as an attorney for a party to an action or proceeding. The NDC charges that Respondent’s appearance at the June 15, 2007 hearing was after he had been terminated by the client and was without authority. That allegation, however, was not substantiated by the evidence at trial. Instead, Mr. Yamamoto testified that, while Yuzu was making arrangements for Respondent to be substituted out of the action, it was understood by the client on June 15, 2007, that Respondent was still representing Yuzu. In addition, this court notes that the motion being heard on June 15, 2007, requested that sanctions be awarded personally against Respondent, as well as his client. Under such circumstances, Respondent was entitled, and arguably required, to appear. (See also Rule 3-700(A).)

This count is dismissed with prejudice.

Case No. 07-O-11846 (Pollard)

On September 7, 2004, Sampson Pollard hired Respondent to represent him in an employment matter against the County of Los Angeles. Mr. Pollard paid Respondent \$10,000 as an advance fee for Respondent's legal services.

On October 6, 2004, Mr. Pollard paid Respondent \$5,000 for deposition costs, filing fees and other costs. Those funds were deposited into Respondent's client trust account on October 7, 2004.

On December 17, 2004, Respondent filed a lawsuit in the Central District of the United States District Court against the County of Los Angeles (county) entitled *Sampson Pollard v. County of Los Angeles, et al.*, case no CIV 04-10314 ABC, (*Pollard v. LA*). On December 17, 2004, Respondent disbursed \$150.00 of Pollard's funds to the United States District Court to pay the filing fee for *Pollard v. LA*.

On May 16, 2005, the federal court set December 15, 2005, as the discovery cut-off date, and properly served Respondent with notice of the cut-off date. A trial date of April 18, 2006, was also scheduled. Respondent received notice of these dates.

The county thereafter served requests for admission on plaintiff. Plaintiff's answers to these requests for admissions were due on August 17, 2005. No responses were served by Respondent on his client's behalf by that deadline.

On August 24, 2005, Respondent was put on notice by counsel for the defendant County of Los Angeles that the requests for admission were deemed admitted due to plaintiff's failure to provide timely responses.

On December 15, 2005, the county filed and served a Motion for Summary Judgment (1st MSJ). This motion was based in large part on the requests for admissions that had previously been deemed admitted.

On December 29, 2005, Respondent filed an ex parte application for an order extending the time for plaintiff to file an opposition to the summary judgment motion. On January 3, 2006, the court granted Respondent's request to continue the 1st MSJ hearing and ordered the parties to meet and confer in order to agree to a new briefing schedule.

On January 12, 2006, the parties to the *Pollard* action stipulated to continuing the hearing on the summary judgment motion from January 9, 2006 until March 6, 2006. The court entered an order to that effect on the same date.

On February 6, 2006, Respondent filed a motion on behalf of plaintiff to withdraw or amend his prior admission. The motion was originally scheduled to be heard on February 27, 2006, but was subsequently rescheduled by the court to be heard on March 7, 2006.

On February 13, 2006, Mr. Pollard gave Respondent an additional \$2,500 for "court costs."

On February 22, 2006, Respondent served opposition papers on plaintiff's behalf to the pending MSJ.

On February 24, 2006, Respondent served notices for nine (9) depositions, even though the cut-off of discovery had previously occurred. No prior depositions had been noticed or taken by Respondent in the action up to that date.

On February 27, 2006, Respondent filed a second ex parte motion to continue the hearing of the motion for summary judgment, based on the continued pendency of the February 6 motion to be relieved from the prior admissions. The county promptly objected to this requested continuance, noting the dilatory practices of Respondent. On February 28, 2006, the court issued an order criticizing Respondent's handling of the case but nonetheless granting the requested continuance. As stated by the court in that order, "While the court is loathe to reward Plaintiff for his neglect, the Court nevertheless believes it will benefit from continuing this matter until

the magistrate judge rules on Plaintiff's motion to amend or withdraw admissions." The hearing was put over until April 3, 2006.

On March 7, 2006, the magistrate judge allowed plaintiff to withdraw his admissions and re-opened discovery for forty-five (45) days for the defendant county only.

As a consequence of that decision, the court, on March 15, struck the county's pending 1st MSJ and vacated the existing trial date. On April 3, 2006, a new trial date of November 7, 2006, was set by the court.

Respondent's doctor placed him on disability from May 30, 2006 to July 3, 2006. His doctor released him to return to work on July 5, 2006.

On June 19, 2006, the county filed a second Motion for Summary Judgment (2nd MSJ). The hearing on the 2nd MSJ was set for July 17, 2006.

Pollard's response to the 2nd MSJ was due on July 3, 2006. Respondent did not file a response to the county's 2nd MSJ on or before July 3, 2006. Instead, on July 5, 2006, Respondent filed a motion to continue the hearing on the county's 2nd MSJ.

By order dated July 13, 2006, and docketed and entered July 14, 2006, the court granted Respondent's motion to continue the hearing on the county's 2nd MSJ until July 31, 2006. The court ordered Respondent to file Plaintiff Pollard's opposition to the county's 2nd MSJ by July 17, 2006. In this order, the court was extremely critical of Respondent's dilatory conduct, including waiting until after the deadlines for filing an opposition to the MSJ had passed before seeking a continuance of the deadlines:

Moreover, the Court came very close indeed to denying Plaintiff's counsel's latest Ex Parte Application. Nevertheless, the Court does not believe that the client should suffer an extreme sanction for the misdeeds of his counsel, at least not at this point. Accordingly, the Court CONTINUES the hearing date for Defendants' motion for summary judgment to Monday, July 31, 2006, at 10:00 a.m. No further extensions shall be granted. Plaintiff's opposition must be filed by Monday, July 17, 2006. . . .

Plaintiff is admonished that failure to timely comply with the Court's July 17, 2006 deadline will result in an order granting Defendants' motion for summary judgment without further delay. Furthermore, Plaintiff's counsel is ORDERED to present this Order to his client so that Plaintiff himself is aware of the perilous position in which he has been placed due to his counsel's conduct. The Court warns Plaintiff and his counsel in no uncertain terms that further misconduct or neglect by Plaintiff's counsel will result in the most serious of sanctions – namely the granting of Defendants' motion for summary judgment.

The Court has also considered Plaintiff's utterly meritless request for additional discovery and for additional time to file a motion to compel depositions. This request is DENIED. The discovery cut-off in this case has long since passed. Plaintiff cites no reason whatsoever to re-open discovery at this late stage.

Finally, the Court GRANTS Defendants' request for sanctions. The Court ORDERS Plaintiff's counsel to personally pay all costs and fees incurred by Defendants in responding to Plaintiff's Ex Parte Application.

Respondent did not file an opposition to the summary judgment motion by the July 17, 2006 deadline. Instead, on July 17, 2006, Respondent filed another ex parte application to continue the hearing on the county's 2nd MSJ, and a request that the court compel the depositions of nine county employees.

On July 24, 2006, the court denied Respondent's ex parte application to continue the hearing on the county's 2nd MSJ. In a lengthy minute order, the court set out in detail its unhappiness with Respondent's conduct and the reasons for its denial of this latest request for an additional postponement of any resolution of the pending summary judgment motion. Included within the order were the following comments:

The instant Ex Parte seeks the exact same relief that Plaintiff sought in his ex parte of July 7, 2006, which the Court granted in part and denied in part in its July 14 Order.

In that Order, the court granted Plaintiff an extension until July 17 to file an opposition to Defendants' Motion for Summary Judgment, and continued the hearing for that motion to July 31. The Court noted its disapproval of counsel's inaction and its reluctance to grant Plaintiff's request, but did so in order to avoid causing the client to suffer an extreme sanction due to counsel's neglect. Moreover, the Court admonished Plaintiff in no uncertain terms that no further extensions would be granted, and warned Plaintiff that his failure to file his opposition by July 17 would result in an order granting Defendant's summary judgment motion without further delay. Despite these warnings,

Plaintiff's only submission on July 17 was the instant Ex Parte, once again seeking an extension to oppose Defendant's summary judgment motion and to file a discovery motion past the cut-off date.

...

Plaintiff's Ex Parte falls well short of showing good cause. The Court finds that Plaintiff's counsel's actions with regard to opposing Defendants' summary judgment motion were sorely lacking in diligence. Counsel makes no attempt to explain what might have happened between July 14 and July 17 to possibly excuse his complete disregard of the Court's July 14 order requiring his opposition to be filed by July 17. Rather, this latest Ex Parte merely elaborates on events that occurred prior to his previous ex parte application. Although some of those events are unfortunate, they fail to provide good cause for yet another extension. In other respects, the instant Ex Parte merely recapitulates Plaintiff's contention that his busy caseload justifies an extension. The Court was not persuaded before, and is not persuaded now, that Plaintiff is able to devote some attention to his other cases, yet unable to address the potentially case-dispositive motion pending in this matter, especially given the Court's warning that no further extensions would be granted. Further, it is particularly inconceivable that Plaintiff's counsel chose to prepare the present Ex Parte application – including a lengthy declaration from counsel and a number of exhibits- rather than any substantive opposition to the pending motion for summary judgment. This is further inexplicable in light of the fact that on February 22, 2006, Plaintiff already filed papers in opposition to the summary judgment motion pending at that time. Although that motion was later stricken when the magistrate judge granted Plaintiff's motion to withdraw certain admissions upon which Defendant's motion was, in part, based, the fact that Plaintiff had already prepared an opposition earlier in the case tends to show that he would have been sufficiently well-grounded in the facts and issues in the case to prepare some kind of substantive opposition to the current summary judgment motion. . . .

The Court will not accommodate counsel further or reward his neglect of his obligations both to this Court and to his client. . . .

On the same date, July 24, 2006, the court granted the county's 2nd MSJ in a separate order. In that order, the attorneys for the county were ordered to submit an entry of judgment.

Respondent did not tell plaintiff Pollard, or his wife,¹⁰ that he had failed to secure an extension of the time to respond to the summary judgment motion; that he had failed to file an opposition to that motion; or that the summary judgment motion had been decided against Pollard by the court. Instead, Respondent continued to allow his client to believe that the court

¹⁰ Pollard was physically and emotionally impaired throughout this time. As a result, he was routinely accompanied and assisted in all of his dealings with Respondent by his wife.

had not ruled on the motion and that an opposition could still be filed in August.¹¹ Respondent, aided by Pollard and his wife, then spent considerable time during the latter part of July and early part of August putting together a package of materials to file in opposition to the summary judgment motion, even though the motion had already been decided against Pollard. It was not until the Pollards checked on the status of the action via the internet in late October/early November of 2006 that they discovered that judgment had been entered against them. Up until that time, Respondent had continued to tell them that he had still not heard from the court regarding how the motion was being decided.

While Respondent and the Pollards were still working on putting together an opposition to the summary judgment motion, on August 2, 2006, the court issued a minute order noting that it had received a proposed judgment and ordering that Plaintiff file any objections to the Proposed Order of Judgment no later than August 11, 2006.

On August 11, 2006, Respondent filed a significant package of materials with the federal court in opposition to the summary judgment motion. These materials went far beyond merely making objections to the form of the judgment, but instead represented the type of documents that should have been filed before the July 17 deadline expired.¹² The materials included a Memorandum of Points and Authorities in Opposition to Defendant's Statement of Uncontroverted Facts and Conclusions of Law; a Statement of Genuine Issues in Opposition to Motion for Summary Judgment; a Declaration of Benjamin Robinson in Support of Objection to

¹¹ Indicative of Respondent's chicanery is the fact that the declaration signed by Pollard on July 30, 2006, was captioned "Declaration of Sampson S. Pollard in Opposition to Motion for Summary Judgment". In contrast, Respondent's declaration was captioned "Declaration of Benjamin Robinson in Support of Objection to Defendant's Proposed Order of Judgment." (Emphasis added.)

¹² Respondent's testimony that he only prepared these documents in response to the court's August 2 order, allowing objections to be made to the form of the judgment, is belied by the fact that the documents were being prepared even before the August 2 order was issued. Plaintiff's declaration was actually executed in late July.

Defendant's Proposed Order of Judgment; Memorandum of Points and Authorities; Plaintiff's Evidentiary Objections to the Declarations of John Wicker, Faith San Diego and Sabra White; a Declaration of Sampson S. Pollard in Opposition to Motion for Summary Judgment; and a Declaration of Benjamin Robinson and Exhibits in Opposition to Defendant's Motion for Summary Judgment.

On August 21, 2006, the court issued an order rejecting Plaintiff's objections to the proposed order:

"Plaintiff's objection to Defendant's proposed order is unavailing, as it does not address the contents of the proposed order itself, but rather invites the Court to revisit the proceedings leading up to the Court's grant of summary judgment as unopposed. Plaintiff's papers simply do not demonstrate that his repeated failure to comply with Court deadlines was the result of inadvertence or excusable neglect, and are insufficient to move the Court to grant Plaintiff relief from its order granting summary judgment in Defendant's favor."

On October 18, 2006, the court entered formal judgment in favor of the County of Los Angeles and against plaintiff Pollard.

Count 5 – Rule 3-110(A) [Failure to Perform with Competence]

As previously noted, rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to act with competence. As reflected in the comments, quoted above, of Judge Audrey Collins, the judge of the U.S. District Court handling the *Pollard* matter, Respondent repeatedly failed to act with competence in failing to file an opposition to the defendant's motion for summary judgment and persisted in his failure to do so even after being warned about the consequences of any such continued failure. Such conduct by Respondent constituted a willful violation by him of rule 3-110(A).

Count 6 – Section 6103 [Failure to Obey Court Order]

Section 6103 provides, in pertinent part: "A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his

profession, which he ought in good faith to do or forbear, . . . constitute causes for disbarment or suspension.”

By order dated July 13, 2006, the court granted Respondent’s motion to continue the hearing on the county’s second motion for summary judgment until July 31, 2006, and agreed to extend to July 17 the deadline for Plaintiff to file an opposition to the motion. At the same time, the court warned that no further extensions of time would be granted and that a failure by plaintiff to file a timely opposition would result in the summary judgment motion being promptly granted.

In that same order, the court specifically ordered Respondent to “present this Order to his client so that Plaintiff himself is aware of the perilous position in which he has been placed due to his counsel’s conduct.” Respondent failed to present this order to the client so that Pollard would have an opportunity to read the court’s comments. Nor did Respondent even tell the client of the order. It was not until after Respondent had been terminated as counsel for Pollard in November 2006 that the Pollards first saw the court’s order.

Respondent’s conduct constituted a willful violation by him of both the court’s order and of the standard of professional conduct set forth in section 6103.

Count 7 - Section 6068, Subd. (m) [Failure to Inform Client of Significant Development]

Respondent failed at numerous times during the handling of this case to keep his client advised of the significant developments in it. Most significantly, he failed to tell Pollard of the fact that Respondent had failed to secure the second extension of time to respond to the second summary judgment motion; that he had failed to file an opposition to that motion; and that the summary judgment motion had been decided against Pollard by the court. Instead, Respondent continued to allow and cause his client to believe that the court had not ruled on the motion and that an opposition could still be timely filed in August. It was not until the Pollards checked on

the status of the action in late October/early November of 2006 that they discovered that the summary judgment motion had previously been decided against plaintiff Pollard and that a formal judgment had now been entered against him.

Respondent's failure to keep his client advised on these obviously significant developments in the *Pollard* action constituted willful and repeated violations by him of his duty under section 6068, subdivision (m).

Count 8 – Rule 4-100(A)] [Failure to Maintain Client Funds in Trust Account]

Rule 4-100(A) provides in pertinent part, “All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled ‘Trust Account,’ ‘Client’s Funds Account’ or words of similar import[.]”

Respondent was paid \$5,000 by Pollard on October 6, 2004, for deposition costs, filing fees, and other costs. The payment was deposited by him into his client trust account (CTA) on October 7, 2004.

Before the deposit of the Pollard funds into the CTA on October 7, the balance of the account was overdrawn, having a negative balance of [-\$299.96]. On November 3, 2004 (the last day on the monthly bank statement for the month in which the Pollard money was deposited), the balance of the CTA was \$372.07. During that month, the account was reduced to a negative balance on several occasions. None of the withdrawals from the account were for costs or expenses related to Pollard.

Respondent acknowledged during the trial that he had failed to maintain the Pollard money in his CTA. Instead, he testified that he had withdrawn the funds from the account and placed them into a safe deposit box, based on security concerns regarding a former girlfriend.

Respondent's failure to maintain the funds of his client in an appropriately titled bank account constituted a willful violation by him of his duty under rule 4-100(A).¹³

Count 9 – Section 6106 [Moral Turpitude – Misappropriation]

Section 6106 of the Business and Professions Code prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. While moral turpitude generally requires a certain level of intent, guilty knowledge, or willfulness, a finding of gross negligence will support such a charge where an attorney's fiduciary obligations, particularly trust account duties, are involved. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.)

As previously noted, Respondent deposited the \$5,000 cost advance paid to him by Pollard on October 6, 2004, into his CTA. Within a month of that deposit, the balance of the account was overdrawn. On November 3, 2004, the balance of the account was \$372.07. None of the withdrawals from the account were for costs or expenses related to Pollard.

Respondent seeks to account for the Pollard money by stating that he withdrew the funds from the account and placed them for safekeeping into a safe deposit box. That testimony is completely belied by a review of the deposits and withdrawals from the CTA for the period from October 6, 2004 to November 3, 2004. Respondent's testimony lacked candor and was given with knowledge by him of its falsity.

¹³ Respondent argued at trial that he had previously been disciplined for his decision to safeguard client funds by keeping them in a safe deposit box. (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602.) That issue becomes moot, however, because of this court's conclusion (below) that his claim of safeguarding the funds in a safe deposit box lacked candor and that Respondent actually misappropriated the money. That misconduct was not the subject of any prior discipline. Because the conduct underlying this rule 4-100(A) violation is encompassed within the finding that Respondent is culpable of the more serious misconduct of committing acts of moral turpitude (misappropriation), the court finds no need to assess any additional discipline as a consequence of it. (See *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.)

A review of the account shows that there was no withdrawal by Respondent of the \$5,000 Pollard deposit on behalf of Pollard, either at one time or cumulatively, before the account balance had reached zero (and below) in mid-October.¹⁴ From October 7 until October 18, the only funds contained in the CTA were the Pollard funds. Those Pollard funds were routinely being used to pay Respondent's personal expenses and/or to make payments to Respondent's other clients. By way of example, the Pollard funds were used to fund: a payment to Diane Cobb of \$2,000; a \$681.25 payment to Respondent's secretary;¹⁵ a payment of \$731.03 to a Mercedes dealership; a \$150 payment to Jose Comacho (for research on another matter); a \$100 check for parking; a \$63.52 check to Ralph's; and a \$127.76 check to Costco. As made clear by the accounting subsequently prepared by Respondent and offered by him into evidence (Exh. AB), none of these expenses were for costs associated with the Pollard matter.

“[A]n attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation. [Citation.]” (*Baca v. State Bar* (1990) 52 Cal.3d 294, 304.) Respondent's use of the Pollard funds to pay personal expenses and to pay other clients constituted acts of moral turpitude and a willful violation by him of section 6106. (*In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 829-830 [attorney's willful misappropriation of trust funds usually compels conclusion of moral turpitude].) Taking the money of one client to pay another is still theft. (*Codiga v. State Bar* (1978) 20 Cal.3d 788, 793 [moral turpitude established without regard to motive or personal gain].)¹⁶

¹⁴ This conclusion is also true if one accepts the statement in Respondent's billing statement that he had previously paid \$2,000 to Carrie Harper for her work on the account and that he was entitled to immediately reduce the balance of the account owed to the Pollards to \$3,000. This statement in Respondent's billing statement, however, was not credible.

¹⁵ Respondent's accounting rules out the possibility that this payment was for costs incurred on the Pollard matter.

¹⁶ The NDC also alleges that Respondent misappropriated the \$2,500 advanced by Pollard as court costs. The evidence regarding the handling or mishandling of that money, however, was not clear and convincing.

Case No. 09-O-11107 (Jacobs)

Tracy Jacobs (Jacobs) is the daughter of Dorothy A. Thomas (Mrs. Thomas), who died on May 15, 2005. At the time of Mrs. Thomas' death, she was married to and living with Charles Thomas (Thomas), who was not Jacobs' biological father.

Approximately one month before her death, Mrs. Thomas executed a quitclaim deed, conveying to Jacobs whatever interest Mrs. Thomas had in the home in which she and Mr. Thomas were living. The quitclaim deed inaccurately identified Mrs. Thomas as being "an unmarried woman." Four days later, on April 18, 2005, Mrs. Thomas executed a will, which included a provision naming Jacobs as the proposed executor. The two beneficiaries of the estate were Jacobs (75%) and Thomas (25%).

On June 20, 2005, a letter was sent by an attorney for Thomas to Jacobs, indicating that the attorney had been retained to represent Thomas with respect to his interests in Mrs. Thomas's estate. This letter also indicated that the attorney was investigating whether there was any basis to set aside the quitclaim deed, informed Jacobs that Thomas intended to remain in the home, and demanded that no immediate attempts be made to sell the home.

On June 25, 2005, Jacobs hired Respondent to perform services related to the estate of her deceased mother, Dorothy Thomas. Jacobs paid Respondent \$10,000 for his services. The fee agreement stated that Respondent was hired to perform services outside of the probate in the estate of Dorothy Thomas.

On July 6, 2005, Thomas filed a lawsuit in Superior Court, naming Jacobs as a defendant. The lawsuit contained allegations of fraud, undue influence, misrepresentation, and coercion against Jacobs; contested the validity of the quitclaim deed; claimed a life estate in the home on behalf of Thomas; sought to quiet title and/or impose a constructive trust on the real property; asked that the will be annulled; and sought monetary damages against Jacobs.

On about July 14, 2005, Mr. Thomas recorded a lis pendens against the title of the Thomas' residence.

On August 4, 2005, after Respondent became aware of the lawsuit, he wrote a letter to Thomas's attorney, contesting the factual and legal basis for the lawsuit and lis pendens; informing the attorney that Thomas was interfering with Jacobs' ability to go forward with a potential sale of the property to an interested purchaser; and offering to meet to seek to resolve differences. During this same period of time, Respondent was actively investigating the merits of his client's position, including contacting the nurse attending Mrs. Thomas and various other potential witnesses.

On August 11, 2005, after numerous telephone conferences between Respondent and Thomas's attorney, Thomas withdrew the lis pendens he had recorded.

On August 25, 2005, after numerous additional telephone conferences between Respondent and Thomas's attorney, Thomas dismissed the lawsuit he had filed.¹⁷ On this same day, August 25, 2005, Respondent filed a Petition for Probate of Will and for Letters Testamentary re: The Estate of Thomas, Dorothy A., decedent, in the Los Angeles Superior Court, case no. BP093878 (Petition). The petition stated that the estimated value of the estate was \$200,000.

On August 31, 2005, Respondent caused a Notice regarding the Petition to be published in the Metropolitan News. Respondent paid Metropolitan News \$500, on Jacobs' behalf, for publishing the Notice.

¹⁷ After Respondent had succeeded in getting the lawsuit against Jacobs dismissed and the lis pendens removed, Jacobs was able to go forward and sell the home that was conveyed to her by the quitclaim deed. This transaction was completed by mid-September 2005. Thomas vacated the home in order to allow it to be sold without delay.

On September 2, 2005, Respondent filed a Notice of Petition to Administer Estate on behalf of Jacobs. On September 26, 2005, the Superior Court appointed Jacobs as executor of Dorothy Thomas's estate and ordered that she post a bond in the amount of \$50,000.

Beginning in the month of July, Respondent was working with Jacobs to determine what assets were subject to the will or otherwise belonged to Jacobs. On July 19, 2005, Respondent sent a letter to Kinecta Federal Credit Union, requesting Statements of Account for the period of January 2004 through January 2005. Account statements were subsequently produced for the period from January 1, 2004 through May 31, 2005. Although the value of these accounts as of January 1, 2004 was over \$250,000, two checks totaling \$195,000 had been paid from the principal IRA Money Market account during that January, reducing the cumulative value of all of the bank accounts down to approximately \$70,000. By the date of Mrs. Thomas's death, the cumulative balance of the accounts was less than \$30,000. On several of the accounts, Jacobs was listed on the account as the "Beneficiary." Respondent then followed up with the bank to determine why \$195,000 had been withdrawn from the bank account in January 2004. He subsequently received documents showing that Mrs. Thomas had withdrawn the funds herself.

The only other potential assets of the estate were some furniture in the home where Thomas was living and two cars that had been driven by the Thomases.

In March 2006, Respondent wrote to Thomas's attorney to notify Thomas that Jacobs was claiming an interest in furnishings previously contained in the Thomas' home and in the two cars (a 1996 Tahoe and a 2001 Jaguar). The attorney wrote back on April 5, 2006, to state that title to both cars had been held in joint tenancy, thus transferring ownership directly to Thomas on the death of Mrs. Thomas; and that the furniture had been purchased by Thomas during the marriage and was "rightfully his." The letter also made clear that Thomas had "no intention of turning these items over to [Respondent's] client."

At the end of June 2006, Jacobs wrote directly to Thomas, complaining that he had changed title to the cars to himself. She also itemized the six items of household furnishings that she felt belonged to her. There is no indication that her letter caused Thomas to soften his position. Thereafter, in September 2006, Respondent took steps to determine from the DMV whether title had previously been held in the name of both Thomas and Mrs. Thomas. Verification of that fact was obtained for the Chevy Tahoe. No information was received for the Jaguar.

On January 2, 2007, Jacobs sent a letter to Respondent terminating his employment. In it she stated that she no longer had the desire or energy to pursue the case involving Charles Thomas. After talking with Respondent, however, she rescinded the termination of the relationship.

As noted, when the court appointed Jacobs as executor, it ordered that she post a bond in the amount of \$50,000. She did not do so. As a result, formal letters testamentary had never been issued by the court. On September 19, 2007, the Superior Court issued an order requiring Respondent to appear at an OSC to explain why the bond ordered on September 26, 2005, had not been filed and why letters testamentary were not yet issued.

On November 13, 2007, the court called the OSC hearing, but then continued the hearing.

On January 28, 2008, Respondent filed a motion to reduce the bond amount to \$35,000, stating that the value of the estate was now determined to be valued at approximately that amount, rather than the original \$200,000 figure. On March 4, 2008, the court granted Respondent's motion to reduce the bond amount, and continued the OSC until April 15, 2008. The matter was then unilaterally continued again, with a note in the file indicating that the matter may go off calendar if letters testamentary have issued.

At some point in mid-2008, Respondent paid for the required bond, using his own funds. On June 23, 2008, Jacob's appointment as executor was re-affirmed by the Superior Court. When proof of the required bond was filed with the court on June 29, 2008, formal letters testamentary were issued. On that same day, the OSC citation was taken off calendar by the court. There is no evidence that any OSC has since been issued.

Count 11 – Rule 3-110(A) [Failure to Perform with Competence]

The NDC alleges that, "By not filing the bond or documents that allowed the clerk of the court to file Letters Testamentary until July 29, 2008, Respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence."

The evidence presented by the State Bar fails to provide clear and convincing evidence to support any conclusion that Respondent's conduct represents any intentional, reckless or repeated departure by him from the standards of competence. This showing requires that the evidence must be " 'so clear as to leave no substantial doubt' " and " 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " (*Sheehan v. Sullivan* (1899) 126 Cal. 189, 193.) Moreover, all reasonable doubts must be resolved in Respondent's favor, and when equally reasonable inferences may be drawn from the stipulated facts, we accept those inferences that lead to a conclusion of innocence. (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1216.)

Respondent's retention was to handle matters outside of the probate. For this he was paid an initial \$10,000 fee and a subsequent \$5,000. His billing statement documents that his time and expenses incurred well-exceeded that figure. The work he did in handling the dispute with Thomas over the house was exceptional.

It was not Respondent who was ordered to pay the cost of the executor's bond; it was Jacobs. It is undisputed that she did not do so prior to July 2008. It was only when Respondent used his own funds to pay the cost of the bond that any letters testamentary were issued.

Jacobs' testimony that she expected, and Respondent agreed, that he would pay for the bond was not convincing. Given the many obvious factual inaccuracies in her testimony and claims of lack of knowledge, her credibility as a witness was extraordinarily poor. Moreover, it is clear from her actions and inaction over the last several years that she has little or no interest in spending time or money pursuing a probate estate with few, if any, assets, and for which she holds only a partial claim. She was explicit in this lack of interest in her letter terminating Respondent as her attorney in January 2007. It has also been reflected in her lack of any specific directions to him to go forward with the estate, and in her specific directions to him at various times to not do anything.

Nor is the evidence clear and convincing that delaying the issuance of the letters testamentary did anything other than save Respondent's client (or him) the cost of several years of additional bond premiums. Since the letters testamentary were issued, there is no evidence that any assets have been located or distributed, or that Jacobs has been delayed in receiving distribution of any particular asset.

Nor can it be concluded by this court that the delay in issuing the letters testamentary has caused any injury to the court. It was the recorded intent of the probate court to take off calendar the OSC once the letters testamentary were issued and that is precisely what it did. There is no evidence of any unhappiness or subsequent OSC issued by the court since July 2008, even though the probate matter appears to remain open.

While it would clearly have been better if Respondent had been successful in motivating his client to expedite the resolution of the very small probate estate, his failure and/or omission to do so does not rise to the level of being a reason for discipline under rule 3-110(A).

This count is dismissed with prejudice.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)¹⁸ The court finds the following with regard to aggravating factors.

Prior Discipline

Respondent has a record of two prior disciplinary matters. (Std. 1.2(b)(i).) On September 30, 1998, the Supreme Court ordered Respondent suspended from the practice of law for two years; the execution of that suspension was stayed; and he was placed on probation for one year on conditions including that he be actually suspended for 60 days in Supreme Court matter S070822 (S. B. C. No. 90-O-15061; 95-O-12536). Discipline was imposed as a result of Respondent's violations of: (1) rule 4-100(B)(3) [failing to render proper accounts of all client funds coming into his possession]; (2) rule 3-700(D)(2) [failing to promptly refund unearned fees]; and (3) section 6068, subdivision (c) [maintaining an unjust small claims action against a client]. In mitigation, Respondent cooperated with the State Bar in the investigation and proceedings in one matter. (Std. 1.2(e)(v).) In aggravation, Respondent failed to cooperate in another matter (std. 1.2(b)(vi)); the court found uncharged violations of section 6068, subdivision (d) and section 6106 (std. 1.2(b)(iii)); Respondent was found culpable of multiple acts of misconduct (std. 1.2(b)(ii)); and Respondent demonstrated a lack of insight into his misconduct.

¹⁸ All further references to standard(s) or std. are to this source.

On December 2, 2010, the Review Department of the State Bar Court filed an Opinion in State Bar Court case nos. 05-O-03475; 05-O-04281.¹⁹ In that matter, the Review Department recommended to the Supreme Court that Respondent be suspended from the practice of law for three years; that execution of that suspension be stayed; and that he be placed on probation for three years on conditions including that he be suspended from the practice of law for a minimum of the first two years of his probation, and he will remain suspended until he provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law before his suspension will be terminated. This recommendation is based on the Review Department's findings that Respondent violated: rule 4-100(A) for improperly using client trust account funds; section 6106 for misappropriating funds of someone to whom he owed a fiduciary duty; rule 4-100(A) by commingling his personal funds in his client trust account and issuing checks on his client trust account for personal purposes; section 6106 by issuing checks with knowledge that his client trust account might have insufficient funds and disregarding the ethical rules governing use of his client trust account; rule 3-110(A) by repeatedly and recklessly failing to file a client complaint; rule 3-700(D)(2) for failing to promptly return an unearned fee; rule 4-100(B)(4) by failing to refund advanced costs upon his client's request; section 6068, subdivision (i) for failing to cooperate with a State Bar investigation; and section 6068, subdivision (l) for failing to comply with an agreement in lieu of discipline. In mitigation, the Review Department gave Respondent minimal mitigating credit for entering into a partial stipulation with the State Bar before trial (but the court discounted this, as Respondent failed to cooperate with the

¹⁹ Since the trial in this current proceeding, an Opinion was issued by the Review Department on December 2, 2010, in Respondent's second disciplinary matter. That Opinion, which includes findings of misconduct and a recommendation of actual suspension for a minimum of two years, is not yet final. This court, however, takes judicial notice of the Opinion, as it is considered a prior record of discipline. (Rules Proc. of State Bar, former rule 216(a).) The court has independently obtained a copy of this Opinion and directs the Clerk to mark this Opinion as part of State Bar Exhibit 132 and to include this Opinion as part of the record that is transmitted to the Supreme Court.

investigation). In aggravation, the Review Department found that Respondent has a prior record of misconduct (std. 1.2(b)(i)); he engaged in multiple acts of wrongdoing (std. 1.2(b)(ii)); his misconduct significantly harmed a client (std. 1.2(b)(iv)); and Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct (std. 1.2(b)(v)).

Multiple Acts of Misconduct

Respondent has been found culpable of eight counts of misconduct in the present proceeding. The existence of such multiple acts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

Significant Harm

Respondent's misconduct significantly harmed his clients. (Std. 1.2(b)(iv).) Yazu was substantially injured by Respondent's misconduct, including by being subjected to repeated sanctions orders, including obligations to pay monetary sanctions. Respondent's failure to file an opposition to a motion for summary judgment led to a judgment being entered by the court against Pollard based in large part on the fact that the motion was deemed unopposed.²⁰ Finally, Respondent misappropriated \$4,850 of the money advanced to him by Pollard.

Lack of Insight and Remorse

Respondent fails to demonstrate any realistic recognition of or remorse for his wrongdoings and instead continues to assert that his clients and others are responsible for his misconduct. (Std. 1.2(b)(v).) "The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his

²⁰ The court does not find that Pollard's suicide in 2010 was proximately caused by the misconduct of Respondent. While the testimony of his widow was emotional and heart-felt, the evidence falls far short of being clear and convincing.

culpability. [Citation.]” (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.)

Lack of Candor

Respondent displayed a lack of candor with this court during his testimony in this matter. Such a lack of honesty with this court is a substantial aggravating factor. (Std. 1.2(b)(vi); *In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 791-2); *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282-3.)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The court finds the following with regard to mitigating factors.

Cooperation

Respondent did not admit culpability in the matter but entered into an extensive stipulation of facts, thereby assisting the State Bar in the prosecution of the case. For such conduct, Respondent is entitled to some mitigation. (Std. 1.2(e)(v); see also *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [credit for stipulating to facts but “very limited” where culpability is denied].)

Character Evidence/Community Service

Respondent called two witnesses, both existing clients, to attest to his good character. These two witnesses do not constitute “a wide range of references in the legal and general communities . . . who are aware of the full extent of the member’s misconduct.” (Std. 1.2(e)(vi).) Neither of these witnesses was a lawyer or a judge, and neither had any knowledge of the current charges against Respondent. While the court accords Respondent some nominal mitigation

credit for this evidence, it is not significant. (*In the Matter of Riordan, supra*, 5 Cal. State Bar Ct. Rptr. at p. 50; *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476-477; *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at p. 190; *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 359.)

One of the two witnesses, the pastor of Respondent's church, described Respondent's significant pro bono efforts on behalf of his church, including serving on its board and providing pro bono legal services to it. The court does find this work by Respondent to be a more significant mitigating factor.

Disability

Respondent argued that he should receive mitigation credit due to the fact that he was experiencing migraine headaches at times during the time that his misconduct was occurring. The court declines to give any more than very minimal mitigation credit for this contention. Respondent offered no expert testimony to establish that his disability or migraine problems were directly responsible for his misconduct, and the court does not find that they were. (Std. 1.2(e)(iv).) Moreover, there is no evidence that Respondent's migraine problems have been resolved. (*In the Matter of Deierling* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 552, 560.)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (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 Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and

uniform application of disciplinary measures.” (*In re Silvertown* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

The State Bar contends that disbarment of Respondent is called for by both the case law and the standards and that such is necessary to protect both the public and the profession. This court agrees.

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.

The most severe sanction here is found at standard 2.2(a) which recommends disbarment for willful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is a one-year actual suspension. The amount of money misappropriated by Respondent was not insignificantly small; nor are there compelling mitigating circumstances.

In addition, standard 1.7(b) provides that if an attorney is found culpable of misconduct in any proceeding and the member has a record of two prior impositions of discipline, the degree of discipline to be imposed in the current proceeding must be disbarment, unless the most compelling mitigating circumstances clearly predominate.

Turning to the case law, misappropriation of client funds has long been viewed by the courts as a particularly serious ethical violation. Misappropriation breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1035; *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) The Supreme Court has consistently stated that misappropriation generally warrants disbarment in the absence of clearly mitigating circumstances. (*Kelly v. State Bar, supra*, 45 Cal.3d at p. 656; *Waysman v. State Bar* (1986) 41 Cal.3d 452, 457; *Cain v. State Bar* (1979) 25 Cal.3d 956, 961.) The Supreme Court has imposed disbarment on attorneys with no prior record of discipline in cases involving a single misappropriation. (See, e.g., *In re Abbott* (1977) 19 Cal.3d 249 [taking of \$29,500, showing of manic-depressive condition, prognosis uncertain].) In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, an attorney with over 11 years of practice and no prior record of discipline was disbarred for misappropriating approximately \$29,000 in law firm funds over an 8-month period. In *Chang v. State Bar* (1989) 49 Cal.3d 114, an attorney misappropriated almost \$7,900 from his law firm, coincident with his termination by that firm, and was disbarred. (See also *In the Matter of Blum, supra*, 3 Cal. State Bar Ct. Rptr. 170 [no prior record of discipline, misappropriation of approximately \$55,000 from a single client]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 511 [misappropriation of nearly \$40,000, misled client for a year, no prior discipline].)

In addition to Respondent's intentional misappropriation of the funds of his client for personal reasons, his dishonesty with the court about that misappropriation and his demonstrated

disregard for his obligations to his clients and the courts causes this court to be significantly concerned that his misconduct will continue in the future. Under the circumstances of this case, the protection of both the public and the profession dictate that an order of disbarment be imposed.

Respondent argues that his second discipline should bar discipline for certain counts, relying on the decision in *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602. Respondent contends that his misconduct here has previously been addressed in the currently pending, but not yet final, second disciplinary proceeding. He contends that the charges here could and/or were addressed in that prior pending disciplinary proceeding and that no additional discipline should be imposed here.

This court disagrees. There is no overlap between the misconduct found in the second disciplinary proceeding and that found here. Respondent was not previously prosecuted for the misconduct found in this proceeding. Furthermore, even though Respondent may have been previously disciplined for his decision to safeguard client funds in another matter by keeping such funds in a safe deposit box, that matter involved another client, not the client involved in this matter. In addition, the court in this case: (1) did not find Respondent's testimony truthful in this matter regarding Respondent's placement of Pollard's funds in a safe deposit box for safekeeping; and (2) is not assessing additional discipline as a consequence of Respondent's violation of rule 4-100(A) in the Pollard matter.

Furthermore, Respondent has completely misconstrued the holding in *Sklar* which provides that the aggravating force of prior discipline is generally diminished if the misconduct underlying it occurred during the same period of time as the misconduct in the present proceeding. In such cases, in recommending discipline, the court considers "the totality of the findings in the two cases to determine what the discipline would have been had all the charged

misconduct in this period been brought as one case.” (*In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.) To the extent that the conduct in this matter is contemporaneous with that in Respondent’s second prior disciplinary matter, *Sklar* is applicable in this case.

Nevertheless, even applying *Sklar* in this matter, the court finds that the appropriate discipline recommendation is disbarment. Indeed, even if Respondent’s second prior disciplinary matter was not considered at all by the court in recommending discipline, the court would still find the appropriate discipline recommendation to be disbarment in this matter.²¹

RECOMMENDATION

Disbarment

The court recommends that respondent **Benjamin Robinson**, State Bar No. 107550, be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

Restitution

It is recommended that **Benjamin Robinson** make restitution to the estate of Sampson Pollard in the amount of \$4,850.00, plus 10% interest per annum from October 15, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Sampson Pollard or the estate of Sampson Pollard, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnish satisfactory proof thereof to the State Bar’s Office of Probation. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and(d).

²¹ Furthermore, whether the Supreme Court adopts or modifies (including lowering) the recommended discipline in State Bar Court case nos. 05-O-03475; 05-O-04281 (Respondent’s second prior disciplinary matter), this court still recommends disbarment in this matter.

California Rules of Court, Rule 9.20

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

Costs

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

ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **Benjamin Robinson**, State Bar No. 107550, be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 5.111(D)(1) [former rule 220(c)].)²²

Dated: January 19, 2011

DONALD F. MILES
Judge of the State Bar Court

²² Only active members of the State Bar may lawfully practice law in California. (Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to practice law, or to even hold himself or herself out as entitled to practice law. (Bus. & Prof. Code, § 6126, subd. (b).) Moreover, an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Ibid.*; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)