

FILED

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SAN FRANCISCO

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STATE BAR COURT

HEARING DEPARTMENT - LOS ANGELES

14 In the Matter of:) Case No. 10-O-05923, 10-O-07529,
) 10-O-07809, 11-O-10865
 15 COLIN C. SWAINSTON,)
 No. 150761,) FIRST AMENDED
 16) NOTICE OF DISCIPLINARY CHARGES
 17 A Member of the State Bar)

NOTICE - FAILURE TO RESPOND!

**IF YOU FAIL TO FILE A WRITTEN ANSWER TO THIS NOTICE
WITHIN 20 DAYS AFTER SERVICE, OR IF YOU FAIL TO APPEAR AT
THE STATE BAR COURT TRIAL:**

- (1) YOUR DEFAULT WILL BE ENTERED;
- (2) YOUR STATUS WILL BE CHANGED TO INACTIVE AND YOU WILL NOT BE PERMITTED TO PRACTICE LAW;
- (3) YOU WILL NOT BE PERMITTED TO PARTICIPATE FURTHER IN THESE PROCEEDINGS UNLESS YOU MAKE A TIMELY MOTION AND THE DEFAULT IS SET ASIDE, AND;
- (4) YOU SHALL BE SUBJECT TO ADDITIONAL DISCIPLINE. SPECIFICALLY, IF YOU FAIL TO TIMELY MOVE TO SET ASIDE OR VACATE YOUR DEFAULT, THIS COURT WILL ENTER AN ORDER RECOMMENDING YOUR DISBARMENT WITHOUT FURTHER HEARING OR PROCEEDING. SEE RULE 5.80 ET SEQ., RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA.

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1 The State Bar of California alleges:

2 JURISDICTION

3 1. Colin C. Swainston ("Respondent") was admitted to the practice of law in the State of
4 California on December 4, 1990, was a member at all times pertinent to these charges, and is
5 currently a member of the State Bar of California.

6 COUNT ONE

7 Case No. 10-O-05923
8 Rules of Professional Conduct, rule 4-100(B)(3)
[Failure to Render Accounts of Client Funds]

9 2. Respondent wilfully violated Rules of Professional Conduct, rule 4-100(B)(3), by
10 failing to render appropriate accounts to a client regarding all funds coming into Respondent's
11 possession, as follows:

12 3. On or about October 1, 2007, Jose Diaz ("Diaz") employed Respondent at an hourly
13 rate to defend him in a lawsuit in the Los Angeles Superior Court, case no. VC047881 (the "Diaz
14 Case"). Diaz paid Respondent a total of \$17,000: \$5,000 for advanced legal fees, \$7,000 in costs
15 for a mandatory arbitration requested by Respondent, and \$5,000 in costs for depositions.

16 4. On or about December 18, 2008, the superior court dismissed the Diaz Case.

17 5. On or about May 4, 2009, Diaz sent a fax to Respondent requesting an accounting for
18 the funds paid by Diaz to Respondent.

19 6. On or about May 11, 2009, Diaz mailed a letter to Respondent asking for a refund of
20 the unused funds Diaz had paid to Respondent. Respondent received the letter.

21 7. On or about July 2, 2009, Respondent refunded \$5,000 to Diaz for the depositions,
22 which were never held.

23 8. On or about, July 14, 2009, Diaz mailed a letter to Respondent requesting an
24 accounting for the remaining funds he had paid to Respondent. Respondent received the letter.

25 9. On or about July 20, 2009, Attorney Armando Galvan mailed a letter to Respondent
26 on behalf of Diaz requesting an accounting for the funds paid by Diaz to Respondent, and a
27 refund of any unused funds. Respondent received the letter.

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1 10. Respondent never provided Diaz with an accounting for the funds paid to him by
2 Diaz.

3 11. By failing to provide an accounting of the Funds paid by Diaz, Respondent failed to
4 render appropriate accounts to a client regarding all funds coming into Respondent's possession.

5 COUNT TWO

6 Case No. 10-O-05923
7 Rules of Professional Conduct, rule 4-100(B)(4)
8 [Failure to Pay Client Funds Promptly]

9 12. Respondent wilfully violated Rules of Professional Conduct, rule 4-100(B)(4), by
10 failing to pay promptly, as requested by a client, any funds in Respondent's possession which the
11 client is entitled to receive, as follows:

12 13. The allegations of Count One are incorporated by reference.

13 14. Respondent never returned to Diaz the \$7,000 paid by Diaz as advanced costs for the
14 arbitration.

15 15. On or about September 29, 2009, Diaz filed a lawsuit against Plaintiff in small claims
16 court, case no. 30-2009-00307048-SC-SC-WJC to recover the \$7,000 in costs. On or about
17 January 21, 2010, Diaz and Respondent filed a stipulation for entry of judgment in the Small
18 Claims Suit whereby Respondent would pay Diaz \$4,000 by April 15, 2010. Respondent never
19 paid Diaz the \$4,000.

20 16. By failing to return Diaz any of the \$7,000 in unused advanced costs, Respondent,
21 failed to pay promptly, as requested by a client, any funds in Respondent's possession which the
22 client is entitled to receive.

23 COUNT THREE

24 Case No. 10-O-05923
25 Business and Professions Code, section 6068(i)
26 [Failure to Cooperate in State Bar Investigation]

27 17. Respondent wilfully violated Business and Professions Code, section 6068(i), by
28 failing to cooperate and participate in a disciplinary investigation pending against Respondent, as
29 follows:

30 18. The allegations of Counts One and Two are incorporated by reference.

1 36. Between in or around November 2006 and in or around November 2009, Guerrero e-
2 mailed Respondent numerous times to get the status of the Guerrero Case. Respondent received
3 the e-mails.

4 37. Respondent never gave Guerrero the status of the Guerrero Case. Respondent never
5 informed Guerrero that he had requested that the court dismiss the Guerrero Case, and he never
6 informed Guerrero that the court had dismissed the Guerrero Case.

7 38. By failing to respond to Guerrero's requests for information on the status of her case,
8 and by failing to notify Guerrero that her case was dismissed, Respondent failed to keep a client
9 reasonably informed of significant developments and respond promptly to reasonable status
10 inquiries of a client in a matter in which Respondent had agreed to provide legal services.

11 COUNT SIX

12 Case No. 10-O-07529
13 Rules of Professional Conduct, rule 4-100(B)(3)
[Failure to Render Accounts of Client Funds]

14 39. Respondent wilfully violated Rules of Professional Conduct, rule 4-100(B)(3), by
15 failing to render appropriate accounts to a client regarding all funds coming into Respondent's
16 possession, as follows:

17 40. The allegations of Counts Four and Five are incorporated by reference.

18 41. Numerous times, including on or about October 16, 2009, and on or about November
19 30, 2009, Guerrero requested that Respondent provide an accounting and refund the \$5,000 in
20 advanced fees. Respondent received Guerrero's requests.

21 42. Respondent never provided Guerrero an accounting for the \$5,000 in advanced fees.

22 43. By failing to provide Guerrero with an accounting upon dismissal of the Guerrero
23 case, or at her request, Respondent failed to render appropriate accounts to a client regarding all
24 funds coming into Respondent's possession.

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1 28, 2011, Respondent requested, and the State Bar granted, an extension of time until July 15,
2 2011 to respond to the allegations raised by Guerrero's complaint.

3 54. On or about July 28, 2011, a State Bar investigator mailed a third letter to Respondent
4 requesting a written response to the allegations raised by Guerrero's complaint. Respondent
5 received the letter.

6 55. Respondent never responded in writing to the allegations raised Guerrero's
7 complaint, or otherwise cooperated in the State Bar investigation of Guerrero's complaint.

8 56. By failing to respond to the allegations raised by Guerrero's complaint, Respondent
9 failed to cooperate and participate in a disciplinary investigation pending against Respondent.

10 COUNT NINE

11 Case No. 10-O-07809
12 Rules of Professional Conduct, rule 4-100(B)(4)
[Failure to Pay Client Funds Promptly]

13 57. Respondent wilfully violated Rules of Professional Conduct, rule 4-100(B)(4), by
14 failing to pay promptly, as requested by a client, any funds in Respondent's possession which the
15 client is entitled to receive, as follows:

16 58. On or about February 15, 2008, Dr. Drew Fenton employed Respondent to handle a
17 property matter. Dr. Fenton gave Respondent a \$25,000 check, which Dr. Fenton had received
18 from liquidating an individual retirement account. Respondent and Fenton agreed that
19 Respondent would negotiate the check, take \$10,000 as advanced legal fees, and return \$15,000
20 to Dr. Fenton.

21 59. Respondent negotiated Dr. Fenton's \$25,000 check and kept all of the money.

22 60. Dr. Fenton contacted Respondent numerous times requesting the \$15,000 balance.
23 Respondent received the requests.

24 61. Respondent never paid any of the \$15,000 balance to Dr. Fenton.

25 62. By failing to give Dr. Fenton the \$15,000 balance from the check as agreed,
26 Respondent failed to pay promptly, as requested by a client, any funds in Respondent's
27 possession which the client is entitled to receive.

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1 81. On or about January 26, 2011, Torrijos filed an appeal in the Torrijos case. The court
2 scheduled the trial in the appeal for March 10, 2011 and notified Torrijos.

3 82. Between in or about February 2011 and on or about March 8, 2011, Torrijos called
4 Respondent numerous times informing him of the trial date of the appeal, and requesting that
5 Respondent contact him to discuss the appeal. Each time Torrijos called Respondent, he left
6 Respondent a message asking that he return the call. Respondent received the messages.

7 83. Between in or about February 2011 and on or about March 8, 2011, Torrijos sent
8 Respondent numerous e-mail messages to inform him of the trial date of the appeal. Respondent
9 received the e-mails.

10 84. Respondent never responded to any of Torrijos's telephone calls or e-mails.

11 85. By failing to respond to Torrijos's telephone calls and e-mails regarding the appeal,
12 Respondent failed to respond promptly to reasonable status inquiries of a client in a matter in
13 which Respondent had agreed to provide legal services.

14 COUNT THIRTEEN

15 Case No. 11-O-10865
16 Rules of Professional Conduct, rule 3-110(A)
[Failure to Perform with Competence]

17 86. Respondent wilfully violated Rules of Professional Conduct, rule 3-110(A), by
18 intentionally, recklessly, or repeatedly failing to perform legal services with competence, as
19 follows:

20 87. The allegations of Count Twelve are incorporated by reference.

21 88. Respondent did not appear in court for the Torrijos appeal. On or about March 10,
22 2011, the court dismissed the Torrijos appeal because Respondent failed to appear.

23 89. By failing to communicate with Torrijos regarding the Torrijos appeal, and failing to
24 appear in court for the Torrijos appeal, Respondent intentionally, recklessly, or repeatedly failed
25 to perform legal services with competence.

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COUNT FOURTEEN

Case No. 11-O-10865
Rules of Professional Conduct, rule 3-700(D)(2)
[Failure to Refund Unearned Fees]

90. Respondent wilfully violated Rules of Professional Conduct, rule 3-700(D)(2), by failing to refund promptly any part of a fee paid in advance that has not been earned, as follows:

91. The allegations of Counts Twelve and Thirteen are incorporated by reference.

92. Respondent never performed any work of value on Torrijos behalf. Respondent never earned any of the \$1,500 in advanced fees paid to him by Torrijos. Respondent never refunded any of the \$1,500 in advanced fees paid by Torrijos.

93. By failing to refund the \$1,500 in unearned advanced fees to Torrijos, Respondent failed to refund promptly any part of a fee paid in advance that has not been earned.

COUNT FIFTEEN

Case No. 11-O-10865
Business and Professions Code, section 6068(i)
[Failure to Cooperate in State Bar Investigation]

94. Respondent wilfully violated Business and Professions Code, section 6068(i), by failing to cooperate and participate in a disciplinary investigation pending against Respondent, as follows:

95. The allegations of Counts Twelve, Thirteen and Fourteen are incorporated by reference.

96. On or about January 25, 2011, Torrijos submitted a complaint regarding Respondent to the State Bar.

97. On or about May 6, 2011, a State Bar investigator mailed a letter to Respondent requesting a written response to allegations raised by Torrijos's complaint. Respondent received the letter.

98. On or about June 14, 2011, a State Bar investigator mailed a second letter to Respondent requesting a written response to allegations raised by Torrijos's complaint. Respondent received the letter.

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1 99. On or about June 23, 2011, a State Bar investigator sent an e-mail message to
2 Respondent asking Respondent to contact her regarding Torrijos's complaint. On or about June
3 28, 2011, Respondent requested, and the State Bar granted, an extension of time until July 15,
4 2011 to respond to the allegations raised by Torrijos's complaint.

5 100. Respondent never responded in writing to the allegations raised Torrijos's
6 complaint, or otherwise cooperated in the State Bar investigation of Torrijos's complaint.

7 101. By failing to respond to the allegations raised by Torrijos's complaint,
8 Respondent failed to cooperate and participate in a disciplinary investigation pending against
9 Respondent.

10 **NOTICE - INACTIVE ENROLLMENT!**

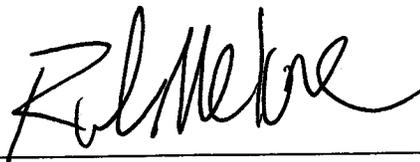
11 **YOU ARE HEREBY FURTHER NOTIFIED THAT IF THE STATE BAR**
12 **COURT FINDS, PURSUANT TO BUSINESS AND PROFESSIONS CODE**
13 **SECTION 6007(c), THAT YOUR CONDUCT POSES A SUBSTANTIAL**
14 **THREAT OF HARM TO THE INTERESTS OF YOUR CLIENTS OR TO**
15 **THE PUBLIC, YOU MAY BE INVOLUNTARILY ENROLLED AS AN**
16 **INACTIVE MEMBER OF THE STATE BAR. YOUR INACTIVE**
17 **ENROLLMENT WOULD BE IN ADDITION TO ANY DISCIPLINE**
18 **RECOMMENDED BY THE COURT.**

19 **NOTICE - COST ASSESSMENT!**

20 **IN THE EVENT THESE PROCEDURES RESULT IN PUBLIC**
21 **DISCIPLINE, YOU MAY BE SUBJECT TO THE PAYMENT OF COSTS**
22 **INCURRED BY THE STATE BAR IN THE INVESTIGATION, HEARING**
23 **AND REVIEW OF THIS MATTER PURSUANT TO BUSINESS AND**
24 **PROFESSIONS CODE SECTION 6086.10.**

25 Respectfully submitted,

26 THE STATE BAR OF CALIFORNIA
27 OFFICE OF THE CHIEF TRIAL COUNSEL

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DATED: September 16, 2011

By: _____

Robert J. Melone
Acting Deputy Trial Counsel

DECLARATION OF SERVICE

by
U.S. FIRST-CLASS MAIL / U.S. CERTIFIED MAIL / OVERNIGHT DELIVERY / FACSIMILE-ELECTRONIC TRANSMISSION

CASE NUMBER(s): 10-0-05923 et al.

I, the undersigned, am over the age of eighteen (18) years and not a party to the within action, whose business address and place of employment is the State Bar of California, 1149 South Hill Street, Los Angeles, California 90015, declare that:

- on the date shown below, I caused to be served a true copy of the within document described as follows:

NOTICE OF DISCIPLINARY CHARGES

By U.S. First-Class Mail: (CCP §§ 1013 and 1013(a))
- in accordance with the practice of the State Bar of California for collection and processing of mail, I deposited or placed for collection and mailing in the City and County of Los Angeles.

By U.S. Certified Mail: (CCP §§ 1013 and 1013(a))

By Overnight Delivery: (CCP §§ 1013(c) and 1013(d))
- I am readily familiar with the State Bar of California's practice for collection and processing of correspondence for overnight delivery by the United Parcel Service ("UPS").

By Fax Transmission: (CCP §§ 1013(e) and 1013(f))
Based on agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed herein below. No error was reported by the fax machine that I used. The original record of the fax transmission is retained on file and available upon request.

By Electronic Service: (CCP § 1010.6)
Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the person(s) at the electronic addresses listed herein below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

(for U.S. First-Class Mail) in a sealed envelope placed for collection and mailing at Los Angeles, addressed to: (see below)

(for Certified Mail) in a sealed envelope placed for collection and mailing as certified mail, return receipt requested,
Article No.: 7196 9008 9111 0444 1968 at Los Angeles, addressed to: (see below)

(for Overnight Delivery) together with a copy of this declaration, in an envelope, or package designated by UPS,
Tracking No.: addressed to: (see below)

Table with 4 columns: Person Served, Business-Residential Address, Fax Number, Courtesy Copy to. Row 1: Colin C. Swainston, Law Office of Colin C Swainston, 4911 Warner Ave Ste 218, Huntington Beach, CA 92649.

via inter-office mail regularly processed and maintained by the State Bar of California addressed to:

N/A

I am readily familiar with the State Bar of California's practice for collection and processing of correspondence for mailing with the United States Postal Service, and overnight delivery by the United Parcel Service ("UPS"). In the ordinary course of the State Bar of California's practice, correspondence collected and processed by the State Bar of California would be deposited with the United States Postal Service that same day, and for overnight delivery, deposited with delivery fees paid or provided for, with UPS that same day.

I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date on the envelope or package is more than one day after date of deposit for mailing contained in the affidavit.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed at Los Angeles, California, on the date shown below.

DATED: September 19, 2011

SIGNED:

Handwritten signature of Kim Wimbish and printed name KIM WIMBISH, Declarant.