PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **EUGENE ROY SALMONSEN, JR.,** A Member of the State Bar, No. 81079.	**Case Nos.: 15-O-14284, 16-O-11523, 16-O-14868, 16-O-16234-DFM** **DECISION INCLUDING DISBARMENT RECOMMENDATION AND INVOLUNTARY INACTIVE ENROLLMENT ORDER**

INTRODUCTION

Respondent Eugene Roy Salmonsen, Jr. (Respondent) was originally charged here with 23 counts of misconduct, involving four different client matters. Prior to trial commencing, three of the counts were dismissed at the request of the parties. The remaining counts include allegations of willfully violating (1) Business and Professions Code[1] section 6068, subdivision (i) (failure to cooperate in State Bar investigation) [three counts]; (2) section 6068, subdivision (m) (failure to communicate with client) [two counts]; (3) section 6103 (failure to obey court order); (4) section 6106 (moral turpitude – misappropriation); (4) rule 3-110(A) of the Rules of Professional Conduct[2] (failure to act with competence) [three counts]; (5) rule 3-700(D)(1) (failure to release file) [three counts]; (6) rule 3-700(D)(2) (failure to refund unearned fees) [two counts]; (7) rule 4-100(A) (failure to maintain client funds in trust account); and (8) rule 4-100(B)(3) (failure to render accounts of client funds) [four counts].

[1] Unless otherwise noted, all references to section(s) will be to the Business and Professions Code.

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

The court finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed by the State Bar of California on April 25, 2017.

On May 22, 2017, the initial status conference was held in the case. Respondent did not appear at that conference; nor had he filed a response to the NDC. As a result, this court gave the case a trial date of August 8, 2017, but ordered the State Bar to file a motion for entry of Respondent's default if he continued to fail to respond to the NDC. A written order memorializing those orders was filed on May 23, 2017, and served on the parties.

On May 30, 2017, the State Bar filed a motion for entry of Respondent's default based on his continued failure to file a response to the NDC.

On June 13, 2017, Respondent filed an answer to the NDC, denying all of the allegations of misconduct in the NDC. As a result of the filing by Respondent of a response to the NDC, this court issued an order on June 15, 2017, indicating that the motion for entry of default was moot and reiterating the existing pretrial and trial dates set forth in this court's May 23, 2017 order.

On July 14, 2017, Respondent filed a motion to continue the August 8 trial date. On July 19, 2017, the State Bar filed a statement of non-opposition to the motion. A status conference was held on July 28, 2017, at which time a new trial date of October 17, 2017, was scheduled.

On October 16, 2017, the parties filed an extensive stipulation of facts.

Trial was commenced on October 17, 2017. The State Bar was represented at trial by Acting Senior Trial Counsel Alex Hackert and Deputy Trial Counsel Angie Esquivel. Respondent acted as counsel for himself. At the time the matter was called for trial, Respondent indicated on the record that he was admitting to culpability for a number of specific counts, and

the parties then asked for additional time to confer regarding additional undisputed facts and culpability. As a result, the trial was recessed and the parties were ordered to participate in a settlement conference with a designated judge of this court.

On October 18 and 19, 2017, further status conferences were held with the parties regarding their progress in resolving factual and legal issues. On October 19, 2017, a further stipulation regarding undisputed facts was filed.

Trial was commenced on October 24, 2017, for the purpose of receiving the testimony of Respondent's treating psychiatrist. By agreement of the parties, the remaining portion of the trial was completed on October 27, 2017.[3] The parties were given the option of filing closing briefs, but the matter was submitted for decision on October 27, 2017.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's response to the NDC, the extensive stipulations of undisputed facts previously filed by the parties, Respondent's stipulation to culpability for many of the counts, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on June 27, 1978, and has been a member of the State Bar at all relevant times.

Case No. 15-O-14284 (Prieto Matter)

On August 23, 2014, Virginia Prieto hired Respondent to represent her in a probate matter involving a trust in which she was a named beneficiary. It was intended that Respondent would file an action to protect the trust assets and to remove the then current trustee.

[3] The parties also stipulated, and this court agreed, that the length of the trial would be treated as one day for purposes of assessing costs.

Respondent did not have Prieto execute a fee agreement at this meeting. His quoted fee was $5,000, which Prieto paid with two separate checks, on August 24 and 26, 2014.

On September 12, 2014, Respondent sent a demand letter to the trustee.

Between August 26 and November 7, 2014 Prieto made several phone calls to Respondent at his office and cell phone. Prieto did not speak with Respondent, but left messages for him. Prieto asserts that between August 26 and November 7, 2014, Respondent did not return any of her phone calls. Respondent asserts that between September 12, 2014 (the date he sent the demand letter to the trustee) and November 10, 2014 (the date he mailed a copy of the complaint), he had at least two phone conversations with Prieto about the status of the case.

On November 10, 2014, Respondent drafted a letter to Prieto, enclosing a complaint for her verification, along with a fee agreement for her to sign. Respondent mailed the letter but sent it to the wrong address. As a result, Prieto never received the letter.

After November 10, 2014, Respondent did not contact Prieto until after he received the State Bar investigator's initial letter regarding Prieto's complaint against Respondent, sent to Respondent by the investigator on September 25, 2015. Shortly after receiving the investigator's letter, Respondent called Prieto.

On January 7, 2016, Prieto sent a letter to Respondent demanding a refund of the $5,000, paid to Respondent. Although Respondent received this letter, he neither provided Prieto with an accounting of the $5,000 paid to him nor a refund of any portion of the advanced fees.

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." In this count, the State Bar alleges:

> On or about August 23, 2014, Virginia Prieto employed Respondent to perform legal services, namely to represent her in a prospective probate matter by filing an action seeking to protect her beneficial interests in a trust, preserve trust assets and removal of the named trustee, which

> Respondent intentionally, recklessly, or repeatedly failed to perform with competence, in willful violation of Rules of Professional Conduct, rule 3-110(A), by failing to file an action seeking to protect the client's beneficial interests in a trust, preserve trust assets and removal of the named trustee.

The parties have stipulated that Prieto hired Respondent and paid him $5,000 to represent her in a probate matter involving a trust in which she was a named beneficiary, to file an action to protect the trust assets and her beneficial interests therein, and to remove the then current trustee.

His subsequent lack of diligence resulted in none of those goals being accomplished. While Respondent wrote several letters to the trustee, demanding that the trustee provide certain documents and information, no compliance by the trustee was forthcoming. Despite this lack of compliance, no efforts to force compliance were effected by Respondent.

While Respondent drafted a petition in November 2014 to be filed in the probate matter, it was perfunctory at best and, worse, was never filed. The reason why it was never filed was because it needed to be verified by Prieto. In turn, the reason why it was never verified was because Respondent mailed the draft complaint to the wrong address and then made no effort to determine why it had not been executed and returned to him by Prieto until he learned in late September 2015, more than ten months later, of Prieto's complaint to the State Bar.

Respondent was aware of the fact that the principal asset of the trust was real property that was in the process of being liquidated and that the overriding purpose of his retention was to ensure that the assets of the trust were not dissipated. His remarkable lack of diligence in pursuing that objective reflects a reckless failure by him to act with competence and a willful violation of rule 3-110(A). (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979 [attorney failed to perform competently by taking no action towards purpose client retained him to accomplish]; *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 7 [delay of six months in

filing bankruptcy petition is reckless failure to perform]; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 641-642 [delay of over two months in obtaining temporary restraining order to protect client from harassing phone calls was reckless failure to perform].)

Count 2 – Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

In this count, the State Bar alleges:

> Between on or about August 23, 2014 and August 26, 2014, Respondent received advance fees of $5,000 on behalf of client, Virginia Prieto, to represent her in a prospective probate matter by filing an action seeking to protect her beneficial interests in a trust, preserve trust assets and removal of the named trustee. Respondent failed to represent the client as agreed, or to perform any legal services for the client, and therefore earned none of the advanced fees paid. Respondent failed to refund promptly, upon Respondent's termination of employment on or about November 24, 2014 any part of the $5,000 fee to the client, in willful violation of Rules of Professional Conduct, rule 3-700(D)(2).

Rule 3-700(D)(2) provides that an attorney must "promptly refund any part of a fee paid in advance that has not been earned." Respondent has stipulated, and this court finds, that Respondent failed to return fees that were unearned at the time of the termination of his employment, in willful violation of rule 3-700(D)(2).

Count 3 – Rule 4-100(B)(3) [Failure to Render Accounts of Client Funds]

In this count, the State Bar alleges:

> Between on or about August 23, 2014 and August 26, 2014, Respondent received on behalf of Respondent's client, Virginia Prieto, the sum of $5,000 as advanced fees for legal services to be performed. Respondent thereafter failed to render an appropriate accounting to the client regarding those funds upon the termination of Respondent's employment on or about November 24, 2014, in willful violation of the Rules of Professional Conduct, rule 4-100(B)(3).

Rule 4-100(B)(3) requires a member to "maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them[.]" (See also *In the Matter of*

Brockway (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 952 [culpability established for failure to account despite lack of formal demand for accounting].)

Respondent has stipulated, and this court finds, that Respondent failed to provide an accounting to his former client after the termination of his employment, in willful violation of rule 4-100(B)(3).

Count 4 – Section 6068, subd. (m) [Failure to Inform Client of Significant Development]
Count 5 – Section 6068, subd. (m) [Failure to Respond to Client Inquiries]

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."

In count 4, the State Bar alleges:

> Respondent failed to keep Respondent's client, Virginia Prieto, reasonably informed of significant developments in the client's matter in which Respondent had agreed to provide legal services, by failing to inform the client that Respondent's fee agreement was voidable at the client's option because Respondent's fee agreement was not in writing as required by Business and Professions Code section 6148, in willful violation of Business and Professions Code, section 6068(m).

This court finds that the State Bar has failed to provide clear and convincing evidence of any violation by Respondent of the obligation to keep Prieto reasonably advised of significant developments in her matter, as alleged in this count. Accordingly, this count is dismissed with prejudice.

In count 5, the State Bar alleges:

> Respondent failed to respond promptly to seven telephonic reasonable status inquiries made by Respondent's client, Virginia Prieto, between on or about August 26, 2014 and November 7, 2014, that Respondent received in a matter in which Respondent had agreed to provide legal services, in willful violation of Business and Professions Code, section 6068(m).

This court finds that the State Bar has also failed to provide clear and convincing evidence of any violation by Respondent of the obligation to respond to his client's reasonable status inquiries, as alleged in this count. The bills show that Prieto called Respondent's cell phone on two occasions on August 25, 2014, both calls being after normal working hours. She then called Respondent's cell phone number again on August 26, 2014; this time during work hours (3:20 p.m.). The same record shows that Respondent returned her call twice on that day, once at 3:51 p.m. and again at 4:04 p.m. (Ex. 10, p. 9.)

In September 2014, Prieto's phone bill shows that she called Respondent's cell phone on September 2, 2014. The duration of the call was sufficiently short that it does not appear that she even left a message. (Ex. 10, p. 10.) Two weeks later, she made two calls to Respondent's cell phone number on September 16, 2014, at 2:50 p.m. and 2:59 p.m. Once again, the duration of the first call was sufficiently short that it does not appear that she left a message. That deficiency appears to have been corrected by the second call. However, the following month's phone bill makes clear that Respondent sent a text message to Prieto on September 17, 2014, the day after the above calls. (Ex. 11, p. 11) He also had a phone conversation with her on September 25, 2014. (Ex. 11, p. 7.)

In October 2014, Prieto called Respondent's cell phone on only one occasion, on October 23, 2014. (Ex. 12, p. 8.) The short duration of the call would indicate that she again did not leave a message.

The only evidence in the records of a call to Respondent in November 2014 was a call on November 7, 2014, the day after the period in question. Interestingly, this call was to Respondent's office number, rather than to his cell phone. While it is unclear whether Respondent responded by phone to this inquiry, the parties have stipulated that he sent a letter to Prieto on November 10, 2014.

Respondent has persuasively denied not responding to Prieto's requests for status reports during the specified period of time and testified credibly that he talked "at least" twice to Prieto during the subject period of time. Prieto's own records make clear that her accusation that she received no information from Respondent in response to inquiries from August 26 to November 7, 2014, is incorrect and unreliable.

This count is dismissed with prejudice.

Case No. 16-O-11523 (White Matter)

On September 3, 2013 attorney Phillip L. Asiano (Asiano) filed a petition entitled *In the Matter of the Mary B. Cowan Family Revocable Living Trust of 2006 (Porter v. White)* in the San Diego County Superior Court. The petition concerned the actions of Eleanor White (White), the trustee of the trust. White was one of the children of the trust's settlor and a beneficiary of the trust as it was originally created. At issue in the San Diego lawsuit was an amendment to the trust which named White as trustee and substantially altered the distribution of trust assets to substantially favor White over her four siblings, the other beneficiaries of the trust. Also in dispute was White's handling as trustee of the trust's assets, including White's conduct in quitclaiming to herself the main asset of the trust (the settlor's residence) in August 2013. Asiano represented three of White's siblings. The petition sought to determine the validity of the trust amendment and requested a temporary restraining order, preliminary and permanent injunctions, recovery of trust property and removal of White as trustee.

On September 12, 2013, White paid Respondent $1,000 by credit card to appear for an ex parte hearing on a request by Asiano for a temporary restraining order. On the same day, White appeared in person and Respondent appeared telephonically for the hearing. At the hearing, the court ordered the case transferred to the court's probate division.

In November 2013, Respondent assisted White in obtaining a loan for $130,000 against the equity in the settlor's residence. The loan proceeds were to be held in an escrow account after completion of the loan transaction.

On November 20, 2013, White and Respondent executed a letter to the escrow company, authorizing the release of $25,000 of the funds in escrow to Respondent's client trust account at First Bank. It was intended that these funds were to be deposited in the Respondent's client trust account for the purpose of paying his future legal fees.

On December 3, 2013, White, because she was uncomfortable transferring such a large sum of money to Respondent, faxed a letter to escrow company, revoking her authorization to transfer the $25,000 to Respondent's client trust account.

Very soon after White faxed the December 3, 2013 revocation letter to the escrow company, Respondent was notified of White's action. Respondent quickly called White and told her that he could not represent her without the $25,000 being transferred to him for his attorney's fees. On December 4, 2013, White faxed a second letter to the escrow company, re-authorizing the transfer the $25,000 to Respondent's client trust account.

On December 5, 2013, $25,000 of the funds from the loan were wire transferred into Respondent's client trust account at First Bank, at which time there was an existing balance of $8,422.74. After the wire transfer, the daily ending balance in the account was $33,422.74.

On December 12, 2013, the daily ending balance of Respondent's client trust account was $20,622.74. On December 13, 2013, the daily ending balance of Respondent's client trust account was $15,622.74. That amount remained unchanged until December 19, 2013, when the daily ending balance was $11,622.74. The balance in Respondent's client trust account continued to decrease from that date through February 5, 2014, when the balance dropped to $1,922.74.

On December 17, 2013, Respondent filed White's answer and objections to the first amended petition and appeared in court with White for a case management conference and law and motion hearing. At the hearing, the court ordered that, "Any monies received in the Attorney's Client/Trust account to remain in the account pending further order of the Court." With regard to whether these funds belonging to the trust could be used to pay all of White's legal fees owed to Respondent, the court indicated that it would subsequently rule on what attorney's fees incurred by White were for work benefiting the trust (and thus could be paid with these trust assets) and what attorney's fees were for White's claim to her own distribution under the disputed trust amendment (which could not be paid from trust assets). Finally, the court ordered White to provide an accounting of the trust assets to opposing counsel by February 17, 2014, and ordered that there should be "No distribution of Trust property pending further order of the Court."

At the December 17, 2013 hearing, Respondent agreed to notify Asiano as to how much money from the escrow funds was deposited into his client trust account. On December 31, 2013, when Respondent did not provide Asiano with this information, Asiano sent Respondent a letter and email complaining of Respondent's failure to provide this promised information to Asiano and reiterating his demand for it. Respondent received this letter and email, but did not respond to Asiano.

On January 4, 2014, Asiano served Respondent with several discovery requests, including a set of requests for admissions. Respondent received these discovery requests and on January 17, 2014, reviewed Asiano's discovery requests and forwarded them to White by mail.

On January 15, 2014, Asiano sent Respondent another letter, which addressed, among other subjects, Respondent's ongoing failure to provide Asiano with the amount of money from

the escrow funds that was deposited into Respondent's client trust account. Respondent received this letter, but continued to not respond to Asiano.

On February 20, 2014, Asiano sent Respondent another letter, complaining of Respondent's failure to provide Asiano with the amount of money from the escrow funds that was deposited into Respondent's client trust account. Despite Respondent's receipt of this letter, he did not respond to it.

On February 21, 2014, when the deadline for White's responses to the requests for admissions had passed without any response, Asiano filed a motion seeking to have those requests for admissions be deemed admitted. The hearing of this motion was set for hearing on April 18, 2014. Although Respondent was properly served with the motion, he did not file a written opposition to it because he did not have the information he needed from White to file any opposition.

On February 28, 2014, Asiano filed a motion for an order to show cause for monetary sanctions for White's failure to produce a trust accounting by February 17, 2014, and to remove White as trustee. This motion was also set for hearing on April 18, 2014. Although Respondent was properly served with the motion, he again did not file a written opposition to it because he did not have the information he needed from White to file any opposition.

On March 4, 2014, Respondent provided Asiano with a preliminary accounting, as ordered by the court.

On March 27, 2014, Respondent drove to Lake Forest to meet with White to review Asiano's discovery requests, information concerning an accounting for the trust, and information concerning White's claim for compensation from the trust for her services as caretaker for her mother. He then drafted a response to the request for admissions, which he executed on April 1, 2014, and forwarded to White for review and execution of the required verification.

Respondent did not receive back from White the executed verification of the responses to the requests for admissions until April 18, 2014, the day of the scheduled hearing on Asiano's two motions. Respondent then personally served Asiano with the response to the requests for admission just prior to the start of the hearing. At the hearing on the motion for the requests for admissions to be deemed admitted, Respondent appeared and orally opposed the motion. The court then modified its tentative ruling and denied the motion to deem the requests granted. However, after inquiring of White regarding the circumstances for the late responses, the court granted Asiano's motion for monetary sanctions only and ordered White (and not Respondent) to pay $500 in sanctions to Asiano.

Although Asiano's motion for an order to show cause for monetary sanctions for White's failure to produce a trust accounting by February 17, 2014, had been scheduled for a hearing on April 18, 2014, the law and motion judge to which the motion was assigned continued the motion to April 28, 2014, so the probate judge assigned to the case could rule on the motion.

On April 24, 2014, White sent a letter to Respondent by fax, requesting that he provide her with an accounting of the $25,000 transferred to Respondent's client trust account. She also requested that he refund all unearned fees. Respondent received this letter but did not respond to White.

At the April 28, 2014 hearing on the motion for an order to show cause, Respondent appeared and orally opposed the motion. The judge granted the motion in part and ordered White to pay Asiano $500 in sanctions.

On May 14, 2014, White issued a check for $500 payable to Asiano, for payment of one of the sanction orders.

On May 28, 2014, White wrote another letter to Respondent by fax, informing him that she was terminating his representation and again requesting an accounting of Respondent's fees

and the return of any unearned fees. Respondent received this letter but did not respond to White.

Sometime around May 2014, White and her siblings reached a settlement without the assistance of their respective counsel. The settlement agreement between White and her siblings did not address the $25,000 that Respondent received from the escrow funds.

On June 24, 2014, Respondent issued a check from his client trust account for $500 payable to Asiano, for payment of one of the sanction orders.

Asiano filed a request for dismissal of the pending lawsuit on July 3, 2014.

On October 1, 2014, attorney Su Barry (Barry) wrote to Respondent on behalf of White, demanding that Respondent provide a complete accounting of fees and costs in the White matter, refund all unearned fees, and turn over White's entire client file within 10 days of the letter.

Respondent received Barry's October 1, 2014 letter but did not timely respond to it. Instead, on November 3, 2014, Respondent replied to Barry via email, stating, among other things, that he needed an additional 15 days to respond to the demand. Thereafter, Respondent failed to provide the requested accounting, refund any fees, or turn over the White client file to either Barry or White.

On February 5, 2015, White, acting in pro per, filed a motion in *Porter v. White*, to request that Respondent account for the services rendered to White and return any unearned fees. White served Respondent with her motion. Respondent received the motion, but did not file a response thereto. The motion was assigned to a law and motion judge, instead of the probate judge who heard the case.

White's motion was heard on May 15, 2015, for which Respondent appeared telephonically, at which time the court denied White's motion for failure to timely file a proof of service, and continued the hearing to July 17, 2015. On July 17, 2015, the court denied White's

motion for failure to timely serve the motion. On White's request, the motion was continued to September 25, 2015. Respondent appeared telephonically for the September 25, 2015 motion, at which time the court denied White's motion.

On February 26, 2016, Navy Legal Assistance Attorney Lt. Scott A. Hunter (Hunter) wrote to Respondent on White's behalf, requesting that Respondent provide an accounting and an immediate return of unearned fees. Respondent received this letter. Respondent failed to respond to Hunter's letter, provide the requested accounting, or refund any fees to White.

On April 13, 2016, the State Bar investigator assigned to this matter sent an investigative letter to Respondent, requesting that Respondent respond in writing to the allegations of misconduct being investigated in case No. 16-O-11523.

On June 22, 2016, the investigator sent a follow-up letter to Respondent, regarding his failure to respond to the April 13, 2016 letter. A copy of the April 13, 2016 letter was enclosed with this letter. Respondent received this letter, but did not respond to the investigator.

On June 26, 2016, the investigator sent Respondent a copy of the April 13 and June 22, 2016 letters to Respondent's current membership records email address. Respondent also received this email, but did not respond to the investigator.

After the instant Notice of Disciplinary Charges was filed, Respondent generated an invoice of his services performed in White's case. However, Respondent has not provided this invoice to White.

Count 6 – Rule 3-110(A) [Failure to Perform with Competence]

In this count, the State Bar alleges:

> On or about September 12, 2013, Eleanor White employed Respondent to perform legal services, namely to represent and defend her actions as trustee in *In the Matter of the Mary B. Cowan Family Revocable Living Trust of 2006 (Porter v. White)* then pending in San Diego County under case number 37-2013-00065282-CU-PT-CTL, as renumbered 37-2013-00067430- PR-TR-CTL, which Respondent intentionally, recklessly, or

repeatedly failed to perform with competence, in willful violation of Rules of Professional Conduct, rule 3-110(A), by:

A. Failing to respond to written discovery requests for admissions by the due date of February 10, 2014;
B. Failing to file a written response to a motion filed on February 21, 2014, which sought, *inter alia*, the imposition of monetary sanctions against his client for failing to respond to written discovery requests for admissions;
C. Failing to provide an accounting regarding trust assets to opposing counsel by the due date of February 17, 2014; and
D. Failing to file a written response to a motion filed on February 28, 2014, which sought, *inter alia,* the imposition of monetary sanctions against his client for failing to provide an accounting regarding trust assets.

At the time this matter was scheduled to commence trial, Respondent stipulated to culpability as alleged in subparagraph C above, but disputed the other allegations of incompetence.

With regard to the remaining allegations of this count, the State Bar failed to provide clear and convincing evidence that any of the deficiencies identified in those allegations resulted from any repeated, intentional, or reckless lack of competence by Respondent. Instead, Respondent's testimony was persuasive and undisputed that each of the above failures resulted from the failure of his client, White, to provide to Respondent the necessary information and cooperation. Given that these failures also resulted in sanctions being ordered by the court only against White, and not Respondent, the superior court appears to have reached the same conclusion.

Count 7 – Rule 3-700(D)(1) [Failure to Release File]

In this count, the State Bar alleges:

Respondent failed to release promptly to Respondent's client, Eleanor White, all of the client's papers and property following the client's written request for the client's file on or about October 1, 2014, in willful violation of Rules of Professional Conduct, rule 3-700(D)(l).

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 has stipulated, and this court finds, that Respondent failed to release his former client's file as alleged in this count, in willful violation of rule 3-700(D)(1).

Count 8 – Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

Prior to the commencement of the trial in this matter, the State Bar asked that this count be dismissed. No objection was made by Respondent to that request. Affirming the court's oral order at that time, this count is dismissed with prejudice.

Count 9 – Rule 4-100(B)(3) [Failure to Render Accounts of Client Funds]

In this count, the State Bar alleges:

> Between on or about September 12, 2013 and December 5, 2013, Respondent received on behalf of Respondent's client, Eleanor White, the sum of $26,000 [sic] as advanced fees for legal services to be performed. Respondent thereafter failed to render an appropriate accounting to the client regarding those funds following the client's request for such accounting on or about April 24, 2014, May 28, 2014, October 1, 2014 and February 26, 2016, in willful violation of the Rules of Professional Conduct, rule 4-100(B)(3).

Respondent has stipulated, and this court finds, that Respondent failed to provide an accounting to his former client after the termination of his employment, in willful violation of rule 4-100(B)(3).

Count 10 – Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]

In this count, the State Bar alleges:

> On or about December 5, 2013, Respondent received on behalf of Respondent's client, Eleanor White, $25,000 in trust funds belonging to White as trustee of the *Mary B. Cowan Family Revocable Living Trust of 2006.* On or about December 5, 2013, $25,000 was wire transferred into Respondent's client trust account at First Bank, account number XXXXXX0827, on behalf of the client. Of this sum, the client was entitled to $25,000. Respondent failed to maintain a balance of $25,000 on behalf of the client in Respondent's client trust account, in willful violation of Rules of Professional Conduct, rule 4-100(A).

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[.]" Under this non-delegable duty, an attorney must maintain these client funds in trust until outstanding balances are settled. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 277-278; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 411; *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 123.)

Respondent has stipulated, and this court finds, that Respondent failed to maintain in his trust account all of the $25,000 received by him on behalf of his client, in willful violation of rule 4-100(A).[4]

Count 11 – Section 6106 [Moral Turpitude – Misappropriation]

In this count, the State Bar alleged in the NDC:

> On or about December 5, 2013, Respondent received on behalf of Respondent's client, Eleanor White, $25,000 in trust funds belonging to White as trustee of the *Mary B. Cowan Family Revocable Living Trust of 2006.* On or about December 5, 2013, $25,000 was wire transferred into Respondent's client trust account at First Bank, account number

[4] However, the conduct underlying this violation is essentially the same as that underlying the finding, below, that Respondent is culpable of the more serious misconduct of committing acts of moral turpitude (misappropriation) in willful violation of section 6106. Accordingly, 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.)

> XXXXXX0827, on behalf of the client. Between on or about December 12, 2013 and February 5, 2014, Respondent dishonestly or grossly negligently misappropriated for Respondent's own purposes approximately $23,097.26 [sic] that Respondent's client was entitled to receive, and thereby committed an act involving moral turpitude, dishonesty or corruption in willful violation of Business and Professions Code, section 6106.

Section 6106 of the Business and Professions Code prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. An attorney's deliberate breach of a fiduciary duty to a client involves moral turpitude as a matter of law. Further, even an attorney's non-deliberate breach of a fiduciary duty to a client involves moral turpitude if the breach occurred as a result of the attorney's gross carelessness and negligence. (*In the Matter of Blum, supra,* 4 Cal. State Bar Ct. Rptr. 403, 410; *In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 208.)

In the absence of client consent, an attorney may not unilaterally withhold entrusted funds even though he may be entitled to reimbursement. (*Most v. State Bar* (1967) 67 Cal.2d 589, 597; *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358.) Withholding and appropriating client funds without client consent clearly supports a finding that an attorney misappropriated funds in violation of section 6106. (*Jackson v. State Bar* (1975) 15 Cal.3d 372, 380-381; see also *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034 [depriving client of rightful and timely access to funds by withholding them without authority represents clear and convincing proof of violation of section 6106].)

The parties have stipulated, and this court finds, that $25,000 of funds belonging to the trust was deposited into Respondent's client trust account (CTA) on December 5, 2013. Because there was already $8,422.74 in the account, the resulting balance of funds in the account at the end of December 5, 2013 was $33,422.74. There were no additional deposits of funds into this CTA during the month of December. On December 12, 2013, the daily ending balance of

Respondent's client trust account was $20,622.74. On December 13, 2013, the daily ending balance of Respondent's client trust account was $15,622.74. That amount remained unchanged until December 19, 2013, when the daily ending balance was $11,622.74. On December 31, 2013, the balance of the CTA was $7,272.74. (Ex. 26, p. 12.) The balance in Respondent's client trust account continued to decrease from that date through February 5, 2014, when the balance dropped to $1,922.74. Because Respondent was never authorized by White to remove any funds from the trust account for his fees, these balances show a misappropriation by Respondent of $23,077.26 of trust funds entrusted to him for safe-keeping.

A review by this court of the transactions resulting in this misappropriation makes clear that this misappropriation was intentional and resulted from multiple acts of moral turpitude.

At the outset, this court notes that, while there was $8,422.74 in the CTA prior to the deposit of $25,000, Respondent wrote checks, dated December 4 and 5, 2013 and totaling $9,300, against those funds in other client matters. (See Ex. 26, p. 52 [$5,300 check #2310, dated "12/4/13"] and 53 [$4,000 check #2313, dated "12/5/13"].) Those checks were debited against the CTA on December 12 and 19, 2013, respectively. Because the total of those two checks exceeded $8,422.74, the amount of funds previously on deposit in the account, nearly a thousand dollars of the trust's funds were used to cover the second check.

During the remaining days of December 2013, the balance of the trust funds was reduced by an ongoing series of withdrawals by Respondent on his own behalf. Those withdrawals began on the very day that the funds were received, when Respondent wrote a check on the CTA to himself for $7,500. (Ex. 26, p. 52.) A little more than a week later, on December 13, 2013, he wrote a check to himself for $5,000 (*ibid.*), resulting in the daily ending balance of $15,622.74.

As previously noted, the probate court issued an order on December 17, 2013, prohibiting any further trust funds from being disbursed from the CTA, or at all, until further order of the

court. Respondent was in court at the time of this order and was aware of it. He also promised at that time to provide the balance of the account to Asiano. Notwithstanding the court's order and the lack of any authorization from White to disburse any further funds from his CTA, Respondent continued after December 17, 2013, to pay funds from the CTA to himself. On December 20, 2013, he wrote a check on the CTA to himself for $1,750. (Ex. 26, p. 53.) On Christmas Eve, December 24, 2013, he wrote a check to himself for $1,500. (*Ibid.*) On New Year's Eve, December 31, 2013, he wrote a check to himself for $1,100. (*Id.* at p. 56.) As a result, at the end of December 2013, the balance of trust funds remaining in Respondent's CTA was down to $7,272.74.

Moving on to January 2014, the first new money coming into the CTA after the deposit of the $25,000 of trust funds was a deposit of $6,800 on January 6, 2014. On the same day Respondent wrote two checks to himself totaling $11,100 – thereby further reducing the balance of trust funds remaining in his CTA. This process continued until at least February 5, 2014, when the CTA balance had dropped to $1,922.74.

In the absence of client consent, an attorney may not unilaterally withhold entrusted funds even though he may be entitled to reimbursement. (*Brody v. State* Bar (1974) 11 Cal.3d 347, 350, fn. 5; *Most v. State Bar*, *supra*, 67 Cal.2d at p. 597; *Crooks v. State Bar*, *supra*, 3 Cal.3d at p. 358.) Withholding and appropriating client funds without client consent clearly supports a finding that an attorney misappropriated funds in violation of section 6106. (*Jackson v. State Bar*, *supra*, 15 Cal.3d at pp. 380-381; see also *McKnight v. State Bar*, *supra*, 53 Cal.3d at pp. 1033-1034.) Respondent's repeated acts of withdrawing trust funds to use for his own purposes constituted repeated violations of the fiduciary duty he owed to that client and multiple acts of moral turpitude, all in willful violation of section 6106. (*McKnight v. State Bar*, *supra* [attorney who withdrew CTA funds under mistaken belief that client had authorized use of funds

for fees culpable of wilful misappropriation and moral turpitude]; *In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 830 [attorney's willful misappropriation of trust funds usually compels conclusion of moral turpitude].)

Count 12 – Section 6103 [Failure to Obey Court Order]

In this count, the State Bar alleges:

> Respondent disobeyed or violated an order of the court requiring Respondent to do, or forbear, an act connected with or in the course of Respondent's profession, which Respondent ought in good faith do or forbear, by failing to comply with the court's order dated December 17, 2013, which required that Respondent maintain trust funds already deposited into his client trust account pending further order of the court in the case entitled *In the Matter of the Mary B. Cowan Family Revocable Living Trust of 2006 (Porter v. White)* then pending in San Diego County under case number 37-2013-00065282-CU-PT-CTL as renumbered 37-2013-00067430- PR-TR-CTL, in willful violation of Business and Professions Code, section 6103.

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."

Respondent has stipulated, and this court finds, that by failing to maintain in his client trust account all of the $25,000 he had received on behalf of his client, as he was ordered by the court to do on December 17, 2013, Respondent willfully violated section 6103.

Count 13 – Section 6068, subd. (i) [Failure to Cooperate in State Bar Investigation]

Section 6068, subdivision (i), subject to constitutional and statutory privileges, requires attorneys to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against that attorney.

In this count, the State Bar alleges:

> Respondent failed to cooperate and participate in a disciplinary investigation pending against Respondent by failing to provide a

substantive response to the State Bar's letters of letters of April 13, 2016 and June 22, 2016, and email of July 26, 2016, which Respondent received, that requested Respondent's response to the allegations of misconduct being investigated in case number 16-O-11532, in willful violation of Business and Professions Code section 6068(i).

Respondent has stipulated, and this court finds, that by failing to provide a written response to the State Bar, as he was requested to do, Respondent willfully violated section 6068, subdivision (i). (*In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. at p. 644 [attorney may be found culpable of violating § 6068, subd. (i), for failing to respond to State Bar investigator's letter, even if attorney later appears and fully participates in formal disciplinary proceeding].)

Case No. 16-O-14868 (McClane Matter)

On May 2, 2013, Duncan McClane (McClane) hired Respondent to represent him in a dissolution matter entitled *Satori v. McClane*, pending in the Kern County Superior Court, for an initial fee of $2,000. McClane made a cash payment of $2,000 to Respondent on May 2, 2013.

On September 24, 2015, the court entered judgment of dissolution, but reserved judgment on a bifurcated issue of whether McClane was entitled to either reimbursement from Satori, or to an interest in Satori's separate property, due to a tax benefit Satori's separate property estate received as a result of Satori's marriage to McClane. On October 30, 2015, McClane obtained a cashier's check in the amount of $1,500, and subsequently provided that check to Respondent for payment to a tax expert for consultation on the bifurcated issue. On November 16, 2015, Respondent deposited the cashier's check into his CTA.

On December 18, 2015, Respondent issued a check from his CTA to a tax expert for consultation on the bifurcated issue. After reviewing McClane's case with the tax expert, Respondent determined that McClane could not pursue further recovery from Satori on the bifurcated issue.

On August 9, 2016, McClane sent an email to Respondent in which he terminated Respondent's representation and requested that Respondent provide him with a "final detailed bill," his client file, and a refund of the $1,500 paid in October 2015.

Respondent received McClane's email, but did not provide McClane with an accounting of fees and costs or a refund of any fees or costs. Nor did Respondent return McClane's client file. As a result, McClane filed a complaint against Respondent with the State Bar.

On November 9, 2016, a State Bar investigator sent an investigative letter to Respondent at his current membership records address via U.S. Mail, requesting that Respondent respond in writing to the allegations of misconduct being investigated in case no. 16-O-14868.

On February 21, 2017, the investigator sent a follow-up letter to Respondent at his current membership records address via U.S. Mail, and to Respondent's current membership records email address, regarding his failure to respond to the November 9, 2016 letter. Included with that correspondence was a copy of the investigator's November 9, 2016 letter. Respondent received the investigator's correspondence but did not respond to the investigator's requests.

Count 14 – Rule 3-110(A) [Failure to Perform with Competence]

Prior to the commencement of the trial in this matter, the State Bar asked that this count be dismissed. No objection was made by Respondent to that request. Affirming the court's oral order at that time, this count is dismissed with prejudice.

Count 15 – Rule 3-700(D)(1) [Failure to Release File]

In this count, the State Bar alleges:

> Respondent failed to release promptly to Respondent's client, Duncan McClane, all of the client's papers and property following the client's written request for the client's file on or about August 9, 2016, in willful violation of Rules of Professional Conduct, rule 3-700(D)(1).

Respondent has stipulated that he did not return his former client's file. However, he disputes having violated rule 3-700(D)(1), contending that he made the file available for the

former client to pick up but that the former client never did so. This testimony was not disputed by any evidence at trial.

The evidence failing to provide clear and convincing evidence of any violation by Respondent of rule 3-700(D)(1), this count is dismissed with prejudice.

Count 16 – Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

Prior to the commencement of the trial in this matter, the State Bar asked that this count be dismissed. No objection was made by Respondent to that request. Affirming the court's oral order at that time, this count is dismissed with prejudice.

Count 17 – Rule 4-100(B)(3) [Failure to Render Accounts of Client Funds]

In this count, the State Bar alleges that Respondent received on from McClane the sum of $1,500 as advanced costs for the retention of a tax expert. Respondent thereafter failed to render an appropriate accounting to McClane regarding those funds upon the termination of Respondent's employment on or about August 9, 2016, in willful violation of the Rules of Professional Conduct, rule 4-100(B)(3).

Respondent has stipulated, and this court finds, that Respondent failed to provide an accounting of those client funds to McClane after the termination of Respondent's employment in August 2016, in willful violation of rule 4-100(B)(3).

Count 18 – Section 6068, subd. (i) [Failure to Cooperate in State Bar Investigation]

In this count, the State Bar alleges:

> Respondent failed to cooperate and participate in a disciplinary investigation pending against Respondent by failing to provide a substantive response to the State Bar's letters of letters of November 9, 2016 and February 21, 2017, which Respondent received, that requested Respondent's response to the allegations of misconduct being investigated in case number 16-O-14868, in willful violation of Business and Professions Code section 6068(i).

Respondent has stipulated, and this court finds, that by failing to provide a written response to the State Bar, as he was requested to do, Respondent willfully violated section 6068, subdivision (i).

Case No. 16-O-16234 (Burtzlaff Matter)

On October 25, 2015, Donna Burtzlaff (Burtzlaff), in her capacity as trustee, hired Respondent to represent her in the administration of her father's estate, who passed away earlier that year. The estate at that time consisted primarily of a living trust. Burtzlaff paid Respondent an initial advanced fee of $10,000 on October 25, 2015.

On or about November 16, 2015, on Burtzlaff's behalf, Respondent wrote a letter to attorney Daniel Quane (Quane), counsel for Burtzlaff's sister, who was a beneficiary of the trust, in which Respondent advised Quane of his representation and that he was in the process of preparing a formal trust accounting.

On April 14, 2016, Burtzlaff sent an email to Respondent, requesting that Respondent provide her with a statement of his fees and costs to date. Respondent received this email but did not respond to Burtzlaff.

On April 21, 2016, Respondent sent Quane a draft accounting of the trust assets.

On June 12, 2016, Burtzlaff sent another email to Respondent in which she requested an itemized statement of his services rendered on her behalf. As justification for her request, she stated that she intended to file "estate taxes" for 2015 within the week and that the time to do so was past due. She requested that he respond promptly because she could not file the taxes without an itemized statement from him.

On June 22, 2016, Respondent emailed Burtzlaff regarding her request for billing statements. In this email, Respondent indicated that he had discussed the matter with Peggy Muse (Muse) (who apparently had an ongoing role in the administration of the trust), who had

indicated to Respondent that Burtzlaff did "not need [his] billing to file taxes and that the trust is not ready for final distribution." Nonetheless, Respondent indicated that he would "of course provide you with an updated billing as soon as possible but it will not be a final billing as the estate is not yet closed." At the conclusion of this email, Respondent reported, "I understand that Peggy is working on your file this afternoon and I will look over that accounting as soon as it is provided to me." (Ex. 41.) Notwithstanding Respondent's assurance, no updated billing statement was provided by Respondent.

On June 27, 2016, Quane wrote to Respondent regarding the draft accounting that Respondent had provided. Quane asserted that the accounting was irregular, inadequate, and not in compliance with the Probate Code. Quane requested a full formal first and annual accounting and billing statements, detailing the services Respondent had provided, within 60 days of the letter.

On July 1, 2016, Respondent's office forwarded Quane's June 27, 2016 letter to Burtzlaff and Muse via email. On July 4, 2016, Burtzlaff responded by email, acknowledging receipt of Quane's letter, asking when and how Respondent intended to respond to the letter, and stating "I do not want this to be dragged out." Burtzlaff requested that Respondent reply to her inquiry that week. (Ex. 43.) Respondent received this email, but did not respond to it. Nor did he respond to Quane's letter, although he disagreed with Quane that the accounting provided needed to be in compliance with the Probate Code.

On July 25, 2016, Muse sent an email to Respondent, asking whether he had followed up on the Quane and Burtzlaff correspondence:

> We have a deadline here. Have you sent this letter to the clients? Have you answered or addressed opposing counsel. I've had a history of 15 years with the Burtzlaff's, they are the type to file complaints. Let's do something on this, please."

(Ex. 44.)

An open copy of this email was sent by Muse to Burtzlaff. Nonetheless, Respondent did not follow-up on the matter as Quane, Muse, and Respondent's client had now requested.

On August 1, 2016, Burtzlaff sent an email to Respondent in which she terminated his employment and requested that Respondent provide her within 10 days with a "cashier's check in the amount of the remaining balance of all retainers received," a detailed accounting of all fees and costs incurred, and the client file. Respondent did not respond to this email and did not provide Burtzlaff with an accounting, a refund of any unearned fees, or the client file. Corroborating the accuracy of Muse's foreboding, a complaint was then made to the State Bar about Respondent.

After terminating Respondent, Burtzlaff hired new counsel to represent her in August 2016, and paid new counsel $5,000 on August 5, 2016. This new counsel was able to complete a first and final accounting of trust assets and to effectuate a distribution of trust assets in September 2016, roughly five weeks later.

On October 26, 2016, a State Bar investigator sent an investigative letter to Respondent at his current membership records address via U.S. mail, requesting that Respondent respond in writing by to the allegations of misconduct in the Burtzlaff matter. On November 15, 2016, the investigator sent a follow-up letter to Respondent at his current membership records address via U.S. Mail, regarding his failure to respond to the October 26, 2016 letter. This letter was not returned to the State Bar by the United States Postal Service. At a later time, when Respondent had not responded to the first two letters, an attorney for the State Bar's Office of Chief Trial Counsel sent Respondent a copy of the investigator's October 26, 2016 letter. Respondent received the copy of investigator's October 26, 2016 letter, as sent by the State Bar's attorney, but did not provide either the attorney or the investigator with a response to the letter.

Count 19 – Rule 3-110(A) [Failure to Perform with Competence]

In this count, the State Bar alleges:

> On or about October 25, 2015, Donna Burtzlaff employed Respondent to perform legal services, namely to represent her in a probate matter involving the administration of her father's estate, which Respondent intentionally, recklessly, or repeatedly failed to perform with competence, in willful violation of Rules of Professional Conduct, rule 3-110(A), by:
>
> A. Failing to provide the client with an itemized statement of his fees and costs at any time between April 2016 and July 2016, to enable the client to file 2015 estate tax returns;
> B. Failing to respond to opposing counsel's written request to provide a first and annual accounting with billing statements detailing services rendered;
> C. Failing to provide opposing counsel with a first and annual accounting with billing statements detailing services rendered at any time during the course of the representation of the client; and
> D. Failing to take any other action on the client's behalf to advance the client's legal interests and effectively abandoning the client on or about [July 2016].[5]

There is confusion regarding the degree to which Respondent has stipulated to culpability with regard to three of the four components of this count. On October 17, 2017, in open court, Respondent clearly stipulated to culpability as alleged in subparagraphs A and B. It is also clear from the oral transcript of the proceeding that day that the parties agreed to amend the date in subparagraph D, but it is unclear whether Respondent was stipulating to culpability at that time for subparagraph C or D. He clearly was not stipulating to culpability for both. In its closing brief, the State Bar asserts that Respondent stipulated to subparagraphs A and D, but indicates that Respondent was disputing culpability for subparagraph B and C.

There appears to be no dispute or uncertainty that Respondent has stipulated to culpability of a willful violation of rule 3-110(A) as alleged in subparagraph A above; the evidence supporting that allegation is clear and convincing; and this court so finds.

With regard to the remaining allegations of this count, the court finds as follows:

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[5] Prior to the commencement of trial, the parties agreed to amend the date in this paragraph from "October 21, 2015" to "July 2016."

With regard to the allegations of subparagraphs B and C, Respondent had prepared a draft accounting, which was provided to attorney Quane in April 2016. While Quane complained that this accounting was deficient, the nature of any deficiencies is unknown to this court and is disputed, at least in part, by Respondent. Respondent, however, had committed to Quane to provide a final accounting and, in his June 22, 2016 email, indicated that Peggy Muse was working on it but had not yet finalized it. Quane, in his letter of June 27, 2016, gave Respondent 60 days to prepare and forward a revised accounting, together with his billing statements. He did not request any response by Respondent to his letter in the interim. (Ex. 42.) That 60-day period for preparing and responding to Quane's demand would have extended into the latter-part of August 2016. Weeks prior to the expiration of that deadline, however, Respondent was terminated on August 1, 2016, as the attorney for Burtzlaff. This ended any further ability or authority of Respondent to respond on Burtzlaff's behalf to Quane's demands. Whether Muse had completed the accounting prior to August 1, 2016, is unknown. If the accounting was still in the process of being prepared by Muse, the individual apparently charged with its preparation, on August 1, 2016, it cannot be concluded that Respondent's failure to forward the finalized accounting to the opposing attorney prior to his termination without advance notice and weeks prior to the deadline for providing the accounting represented some act of incompetence on his part, less alone one that was reckless, intentional or repeated.

According, the allegations of violations of rule 3-110(A) set forth in subparagraphs B and C of Count 19 are dismissed with prejudice.

Turning to subparagraph D, this court concludes that the evidence, including Respondent's own testimony, provides clear and convincing evidence of a willful violation of rule 3-110(A), as alleged in that subparagraph. During his trial testimony, Respondent recounted that he essentially abandoned the Burtzlaff matter after July 1, 2016, despite the entreaties of

both Burtzlaff and Muse for prompt action, both in responding to the Quane demands and the need for billing information to prepare tax returns. Such ongoing and unjustified indifference and lack of attention to the needs and concerns of his client constituted intentional, reckless and repeated failure by him to act with competence, in willful violation of rule 3-110(A). (*Guzzetta v. State Bar*, *supra*, 43 Cal.3d at p. 979 [attorney failed to perform competently by taking no action towards purpose client retained him to accomplish]).)

Count 20 – Rule 3-700(D)(1) [Failure to Release File]

In this count, the State Bar alleges:

> Respondent failed to release promptly to Respondent's client, Donna Burtzlaff, all of the client's papers and property following the client's written request for the client's file on or about August 1, 2016, in willful violation of Rules of Professional Conduct, rule 3-700(D)(l).

Respondent has stipulated, and this court finds, that Respondent failed to release his former client's file after being requested to do so, in willful violation of rule 3-700(D)(1).

Count 21 – Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

In this count, the State Bar alleges:

> On or about October 25, 2015, Respondent received advance fees of $10,000 on behalf of client, Donna Burtzlaff, to represent her probate matter [sic] involving the administration of her father's estate. Respondent failed to represent the client as agreed, or to perform any legal services for the client, and therefore earned none of the advanced fees paid. Respondent failed to refund promptly, upon Respondent's termination of employment on or about August 1, 2016 any part of the $10,000 fee to the client, in willful violation of Rules of Professional Conduct, rule 3-700(D)(2).

Respondent has stipulated, and this court finds, that Respondent failed to return some fees, albeit less than $10,000, that were unearned at the time of the termination of his employment, in willful violation of rule 3-700(D)(2).

Count 22 – Rule 4-100(B)(3) [Failure to Render Accounts of Client Funds

In this count, the State Bar alleges:

On or about October 25, 2015, Respondent received on behalf of Respondent's client, Donna Burtzlaff, the sum of $10,000 as advanced fees for legal services to be performed. Respondent thereafter failed to render an appropriate accounting to the client regarding those funds upon the termination of Respondent's employment on or about August 1, 2016, in willful violation of the Rules of Professional Conduct, rule 4-100(B)(3).

Respondent has stipulated, and this court finds, that Respondent failed to provide an accounting to his former client after the termination of his employment in 2016, in willful violation of rule 4-100(B)(3).

Count 23 – Section 6068, subd. (i) [Failure to Cooperate in State Bar Investigation]

In this count, the State Bar alleges:

Respondent failed to cooperate and participate in a disciplinary investigation pending against Respondent by failing to provide a substantive response to the State Bar's letters of letters of October 26, 2016 and November 15, 2016, which Respondent received, that requested Respondent's response to the allegations of misconduct being investigated in case number 16-O-16234, in willful violation of Business and Professions Code section 6068(i).

Respondent has stipulated, and this court finds, that by failing to provide a written response to the State Bar, as he was requested to do, Respondent willfully violated section 6068, subdivision (i).

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct,[6] std. 1.5.) The court finds the following with respect to aggravating circumstances.

Prior Discipline

Respondent has been disciplined on two prior occasions, both disciplines consisting of a private reproval.

[6] All further references to standard(s) or std. are to this source.

On March 24, 2004, this court filed an order of private reproval in case Nos. 02-O-11390, 03-O-01404, 03-O-01421, and 03-O-02548. Respondent's stipulated misconduct consisted of a violation of rule 3-110(A) [failure to act with competence] in 1999, a violation of rule 3-700(D)(2) [failure to return unearned fees] in 2001; and two violations of rule 4-100(B)(3) [failure to render accounts of client funds] in 2003.

More than seven years later, on August 15, 2011, this court issued a private reproval in case No. 10-O-5374. Respondent stipulated in that matter to violations of section 6103 [failure to comply with court order] and section 6068, subdivision (o)(3) [failure to report judicial sanctions].

This history of two prior disciplines is an aggravating factor. (Std. 1.5(a).)

Multiple Acts of Misconduct

Respondent's has been found culpable of multiple acts of misconduct. This is also an aggravating factor. (Std. 1.5(b).)

Significant Harm

Respondent's misconduct significantly harmed his client. (Std. 1.5(j).) He also continues to retain the funds he misappropriated from White, although he may be entitled to at least a portion of it as earned attorney's fees. In addition, Burtzlaff was forced to hire another attorney to complete the trust and estate work that she had hired Respondent to handle. (*In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73, 79 [counsel's abandonment harmed clients because they had to hire new counsel to finish outstanding matters].)

Failure to Make Restitution

Respondent has still failed to make restitution to his former clients of the unearned fees previously advanced to him by the clients. This is an aggravating circumstance. (Std. 1.5(m).

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with regard to mitigating factors.

Cooperation

Respondent entered into an extensive stipulation of facts and freely admitted most of the violations in this case, for which conduct Respondent is entitled to considerable mitigation. (Std. 1.6(e); see also *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [where appropriate, more extensive weight in mitigation is accorded those who admit to culpability as well as facts].)

Character Evidence/Community Service

Respondent presented good character testimony from six witnesses, including an attorney and several former clients, regarding Respondent's good character and his considerable personal and pro bono legal efforts on behalf of individuals recovering from substance abuse issues.[7] In addition, this court received evidence, including a Certificate of Appreciation issued to Respondent by the City of Los Angeles in 2010, regarding Respondent's long-standing and extensive volunteer work at the Felicity House in Los Angeles. This evidence of extensive community service, coupled with more limited but positive evidence of good character, is also a mitigating factor. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785; *Rose v. State Bar* (1989) 49 Cal.3d 646, 665 ["strong mitigation"]; *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117, 126; *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297, 305 [10-15 hours per month of volunteer community and church work counseling people in

[7] All of the declarants indicated an awareness of the charges currently pending against Respondent.

crisis.]; *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158.)

Emotional Difficulties

Extreme emotional difficulties may be considered mitigating where it is established by expert testimony that they were responsible for the attorney's misconduct. (Std. 1.6(d); *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.)

Respondent testified to family problems that distracted him from his duties and obligations as an attorney, including the termination of his marriage in 2012-2013 and the health issues of his parents in 2013. In addition, he presented both his own testimony and the testimony of his treating psychiatrist regarding his long-standing problems with depression and ADHD.

The evidence offered by Respondent regarding the emotional difficulties he had in the past did not provide clear and convincing evidence that his problems are a significant mitigating factor here. The evidence was not persuasive that there was the required nexus between Respondent's emotional problems and all of his misconduct. Nor was there sufficient evidence for this court to conclude that the emotional and physical problems suffered by Respondent in the past have now been satisfactorily resolved. (Std. 1.6(d).)

Dr. Shaulov, Respondent's treating psychiatrist, testified to treating Respondent or depression and ADHD from September 2011 until July 16, 2014, when Respondent "abruptly stopped coming for treatment." It was not until July 2017, after the charges had been filed in this matter and shortly before the scheduled trial, that Respondent returned to Dr. Shaulov for assessment and treatment.

While Dr. Shaulov opined that Respondent's problems with depression and ADHD would have caused or contributed to his lack of attention to his clients, that testimony does not

explain his conscious and repeated actions in misappropriating the funds of his client in late 2013 and early 2014 – when he was still in the course of being treated by the doctor.

Moreover, Respondent's history of seeking medical attention for his problems raises considerable doubt about whether the doctor's current treatment of Respondent's emotional and physical problems provides some assurance that the risk of future misconduct has been sufficiently abated. Although Respondent had been diagnosed and treated for his problems, he discontinued that treatment when his depression got worse – not better. Further, he did not go back for treatment despite the fact that he was receiving complaints from his clients and disciplinary inquiries from the State Bar. Instead, it was months after the current matters had been filed and scheduled to go to trial that he finally went back to his prior therapist – and even now he acknowledges being unwilling to take all of the medicine that is recommended by that therapist.

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this 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.) The court then looks to the decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As the Review Department noted more than two decades ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be

followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) 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; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.7(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 applicable to the misconduct here is standard 2.1(a) which recommends disbarment for intentional or dishonest misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate.

Misappropriation of client funds has long been viewed as a particularly serious ethical violation. It 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*, *supra*, 53 Cal.3d at p. 1035; *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) Respondent's misconduct consisted of a series of individual misappropriations of funds belonging to his client, perpetrated over the course of several months. Whether viewed individually or cumulatively, the amount of money misappropriated by Respondent cannot be concluded to be "insignificantly small."

Nor is there compelling mitigation in the current situation. Respondent's misappropriation of the trust's funds did not result from gross negligence on his part or from his failure to supervise the conduct of others. Instead, his misappropriation of the money was intentional, repeated, and eventually in violation of a specific court order prohibiting any

disbursement of the funds unless authorized in advance by the court. Respondent has provided no reasonable explanation for why he was misusing the funds in the account and he has made no effort to rectify the situation.

Turning to the case law, misappropriation of client funds has long been viewed by the courts as a particularly serious ethical violation. 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 even 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]; *Kennedy v. State Bar* (1989) 48 Cal.3d 610 [disbarment for misappropriation in excess of $10,000 from multiple clients and failure to return files with no prior misconduct in eight years]; and *Kelly v. State Bar*, *supra*, 45 Cal.3d 649 [disbarment for misappropriation of $20,000 and failure to account with no prior discipline in seven years].)

Here, Respondent was culpable of numerous acts of intentional misappropriation, misappropriating more than $23,000. Under such circumstances, it is this court's conclusion that

a disbarment recommendation is both appropriate and necessary to protect the profession and the public.

RECOMMENDED DISCIPLINE

Disbarment

The court recommends that respondent **Eugene Roy Salmonsen, Jr.**, State Bar Number 81079, 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 also recommended that Respondent be ordered to make restitution to the Mary B. Cowan Family Revocable Living Trust of 2006 in the amount of $23,077.74, plus 10 percent interest per year from February 5, 2014 (or to the Client Security Fund to the extent of any payment from the fund to the Mary B. Cowan Family Revocable Living Trust of 2006 or Eleanor White, plus interest and costs, in accordance with Business and Professions Code section 6140.5).

California Rules of Court, Rule 9.20

The court further 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 in this matter.[8]

[8] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is also, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

Costs

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. Respondent must also reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds, and such payment is enforceable as provided under Business and Professions Code section 6140.5.

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **Eugene Roy Salmonsen, Jr.**, State Bar Number 81079, 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).)[9]

Dated: January 19, 2018.

DONALD F. MILES
Judge of the State Bar Court

[9] An inactive member of the State Bar of California cannot lawfully practice law in this state. (Bus. & Prof. Code, § 6126, subd. (b); see also Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been disbarred to practice law, to attempt to practice law, or to even hold himself or herself out as entitled to practice law. (*Ibid.*) Moreover, an attorney who has been 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. (*Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on January 19, 2018, I deposited a true copy of the following document(s):

DECISION INCLUDING DISBARMENT RECOMMENDATION
AND INVOLUNTARY INACTIVE ENROLLMENT ORDER

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

EUGENE ROY SALMONSEN JR
3415 S SEPULVEDA BLVD STE 560
LOS ANGELES, CA 90034

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

ALEX J. HACKERT, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on January 19, 2018.

Louisa Ayrapetyan
Case Administrator
State Bar Court