PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

FILED NOVEMBER 09, 2010

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	No. **98-O-03727, 02-O-14682**
	)	
WILLIAM G. WELLS	)	**OPINION AND ORDER**
	)	
Member No. 29392	)	
	)	
A Member of the State Bar.	)	
	)	

This disciplinary proceeding arises from a ten-year dispute between respondent, William G. Wells and his former secretary, Barbara E. Dailey, over the ownership of a parcel of commercial property in Corona, Riverside County, California (the Corona property). Dailey has consistently maintained that she acquired the property as a retirement asset after Wells urged her to do so. Wells repeatedly sued Dailey, asserting a variety of legal theories to establish that he owned the Corona property, but in each instance the court found that Dailey is the sole owner of the property.

Having weathered years of litigation by Wells and having expended thousands of dollars defending her right to the property, Dailey complained to the State Bar, which commenced an investigation and then filed a Notice of Disciplinary Charges (NDC). After extensive pretrial proceedings and a 24-day trial, during which Wells filed approximately 144 motions and pleadings, the hearing judge filed her decision in October 2009. The judge found Wells culpable of six counts of misconduct, including acts of moral turpitude for repeatedly lying under oath

about the Corona property, misappropriating $88,028.89 in settlement proceeds belonging to Dailey and an additional $60,000 security deposit from a tenant of the Corona property, failing to release Dailey's files and to account to her, failing to promptly pay additional funds owed her, and filing an unjust action against her. The hearing judge recommended disbarment.

Wells is challenging all of the hearing judge's factual and legal findings as well as the disciplinary recommendation. In addition, he argues that the hearing judge should have disqualified herself after she heard a witness's testimony when Wells was not in the courtroom and that she committed reversible error by refusing his request for a continuance after the death of his co-counsel.

We exercise de novo review of the record (California Rules of Court, rule 9.12), although our consideration of the evidence is greatly affected by two factors. First, the hearing judge found that much of Wells's testimony lacked credibility because it was "evasive, hostile, and inconsistent and implausible." In contrast, the hearing judge found Dailey's testimony was credible. We give great deference to these credibility determinations because the hearing judge saw and heard the witnesses testify. (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.) Second, numerous trial courts and courts of appeal have found, as a matter of law and equity, that Dailey owns the Corona property. Such civil court determinations are accorded a strong presumption of validity when, as here, they are supported by substantial evidence. (*In the Matter of Temkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321, 328.) "Indeed, individual facts established by such civil court decisions may serve as a 'conclusive legal determination' as to particular facts determined by the civil courts. [citation.]" (*Ibid*.)

Having examined the facts and circumstances in this record, we adopt the hearing judge's disbarment recommendation, which is supported by the applicable standards[1] and decisional law.

I. FINDINGS OF FACT

A. FACTUAL BACKGROUND

Beginning in the early 1960's, Dailey worked as Wells's legal secretary. She had a close working relationship with him and a close personal relationship with his mother, who regarded her as part of the family. Dailey testified that Wells acted as her attorney in the purchase of the Corona property, which he encouraged her to acquire for a modest sum at a tax sale to secure her retirement. The property was a 3.2-acre parcel with commercial improvements, including a dilapidated service station and restaurant. According to the recorded deed prepared by Wells, Dailey acquired title to the Corona property in fee simple on January 29, 1976. He maintains that although the title showed Dailey as the fee owner, she actually held the property in trust for his benefit pursuant to a memorandum of trust.[2] Until 1998, Wells actively managed the Corona property, handling lease negotiations, rent collection, and payment of expenses such as annual property taxes.

In late 1997, Dailey's relationship with Wells deteriorated when she stopped working for him. By letter dated March 6, 1998, Dailey informed Wells that attorney David Bower now

[1] Unless otherwise noted, all further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

[2] Under former Civil Code section 852, which was applicable at the time Dailey acquired the Corona property, no trust in relation to real property was valid unless created by a written instrument and subscribed by the trustee. Wells could not produce a signed memorandum of trust, but instead offered an *unsigned* document stating: "This memorandum will confirm that Barbara E. Dailey is the nominee and holds title in trust for the [Corona property] including all leases and income, if any, for the benefit of W. G. Wells, or his designee."

represented her in all legal matters involving the Corona property and that she was "withdrawing all authority you may now have or which you may believe you have regarding my personal and business affairs . . . ." She directed Wells to communicate only through Bower and to deliver to Bower within ten days "all records, files, documents or other papers and property, relating to [her] personal and business matters . . . ." Bower followed up with a letter to Wells requesting copies of any contracts executed between Dailey and Wells and demanding an accounting of all financial matters that Wells handled for Dailey, including "all rents, money, profits and losses, and expenses incurred in connection with the management of the [Corona] property . . . ." Wells did not provide any records, documents or an accounting to Bower because he asserted that he had purchased the Corona property and Dailey held title only as a trustee/nominee for him as the "beneficial owner." These statements contradicted Wells's prior statements under oath in various legal proceedings that Dailey had purchased the Corona property, that she was the sole owner of the property and that he had no ownership interest therein. The following is a synopsis of the legal matters involving Dailey and Wells, all of which confirm Dailey as the owner of the Corona property.

1. KOFDARALI LEASE

In March 1997, Dailey, as lessor of the Corona property, entered into a long-term lease with the Kofdarali family, who intended to develop the property as a gas station and convenience store. Wells signed the lease on behalf of Dailey as her attorney. Under the terms of the lease, the Kofdaralis paid $100,000 as a refundable security deposit, with $60,000 to be held in Wells's client trust account (CTA) for the benefit of Dailey and $40,000 to be held in the real estate broker's trust account for the broker's benefit. In the event the Kofdaralis exercised an option to terminate the lease, the $100,000 would be returned to them. Wells placed the $60,000 in his

CTA. Dailey testified that the Kofdaralis were entitled to the return of the security deposit, but Wells never paid the $60,000 to them. As a consequence, Dailey was obligated to pay $60,000 to the Kofdaralis, which she did after she sold the Corona property in May 2005. Wells never provided Dailey with an accounting of the security deposit or the rent received from the Kofdaralis, despite her request that he do so.

2. TEXACO LAWSUIT

In December 1991, Wells filed a complaint for declaratory relief against Texaco in Los Angeles County Superior Court on Dailey's behalf. The complaint alleged that Dailey owned the Corona property and that a controversy had arisen with Texaco over its right to exercise an option to renew the lease of a portion of the Corona property. In July 1992, Wells filed a motion for summary judgment together with a declaration by Dailey attesting that "At all times continuously from January 27, 1976 to date, [Dailey] has been the owner in fee of [the Corona property]." Wells also filed his own declaration under penalty of perjury attesting that "At all times since in or about January 1976 [Wells] has acted as attorney on behalf of plaintiff Dailey in connection with the [Corona property]." Texaco signed a settlement agreement in 1993, which provided, in part, that Texaco had no right, title or interest in the property. Wells signed the settlement agreement as "Attorney for Barbara E. Dailey."

3. SECURITY PACIFIC LAWSUIT

Wells filed a complaint in August 1992 to quiet title and for breach of contract against Security Pacific Bank on behalf of Dailey. The complaint alleged that Dailey was "the sole owner in fee simple of [the Corona property]" and that Security Pacific was claiming an interest in the property adverse to Dailey. Wells signed the complaint as Dailey's attorney.

At trial in Superior Court, Wells was called as a witness by Bank of America (the successor-in-interest to Security Pacific). The bank sought to establish that Wells was the beneficial owner of the Corona property and had not been properly served in the lawsuit as a real-party-in-interest. At trial, the judge asked Wells: "It's your contention that you merely acted as [Dailey's] attorney in connection with the purchase of this property?" Wells responded under oath: "I acted as her attorney in the purchase of the property, yes." He further testified that he was acting as Dailey's attorney when "I arranged with Mr. Pease for him to sell the property to Mrs. Dailey." Wells also testified that he stood to gain nothing from the Security Pacific litigation "[o]ther than as an attorney [for Mrs. Dailey]."[3] Wells was asked: "As between you personally and Ms. Dailey, is she the 100 percent owner of the property?" He responded: "She is." The judge then queried Wells to be sure he clearly understood Wells's testimony: "Mr. Wells, have you at any time had any ownership interest in the subject real property [Corona property]?" Wells responded, "Never."

In his Statement of Decision, the judge rejected the bank's contention that "Mr. Wells may own some interest in the Property" because "the court finds that the testimony of plaintiff [Dailey] and Mr. W. G. Wells convincing that plaintiff [Dailey] is the owner of the Property." Accordingly, the court entered judgment on May 1994 in favor of Dailey and ordered that "Dailey shall recover from defendants . . . $88,029.89." After Wells filed a Motion for Award of Attorney Fees, the court ordered an additional payment of $28,000 in fees. On July 26, 1994,

[3] Wells testified that in addition to being Dailey's attorney, he was the property manager on her behalf. As such, it was his responsibility "to observe the property . . . to see that the taxes were paid, to collect and receive notices, basically to do whatever was necessary on behalf of Ms. Dailey regarding the property." He explained that "Mrs. Dailey is obligated to reimburse us [Wells and his management company] for these [property] taxes."

Bank of America wire-transferred $118,632.73[4] to Wells's CTA in satisfaction of the judgment. On October 26, 1994, Wells transferred $100,000 of the settlement into another CTA, but he never distributed or accounted for any portion of the settlement to Dailey in spite of her attorney's written demand for the funds and Dailey's repeated requests for payment.

4. BOARD OF SUPERVISORS LAWSUIT

In June 1995, the Riverside County Board of Supervisors declared the substandard service station on the Corona property to be a public nuisance and ordered Dailey to abate the condition. In response, Dailey filed a petition for writ of administrative mandate in Riverside County Superior Court alleging that the county had acted beyond its jurisdiction in ordering the erection of an eight-foot fence around the property. In seeking a trial continuance, Wells filed a declaration in November of 1997, attesting that he was "the attorney of record for B. E. Dailey" and that "as the property manager," he had "extensive personal knowledge of the facts" concerning the condition of the service station. Wells failed to appear at trial. On October 29, 1997, the court entered judgment against Dailey and awarded the county costs of suit. Wells did not inform Dailey that he had failed to appear at trial and that judgment had been entered against her. In December 1997, the county filed a motion to recover attorney's fees. When Wells failed to timely oppose the motion, the court awarded fees totaling $19,475 against Dailey. Wells did not notify her of the fee award, which he unsuccessfully appealed. Dailey ultimately paid the attorneys' fees to the county.

In April 1998, after Bower was retained by Dailey, he asked that Wells provide the files in the Board of Supervisors matter and sign a substitution of attorney. Wells did neither,

[4] No evidence was presented to explain who had the right to or was claiming the additional $2,602.84, which is the difference between the $118,632.73 paid by Bank of America and the award of $88,029.89 to Dailey plus the $28,000 in attorneys' fees.

prompting Bower to file a motion in May 1998 to relieve Wells as counsel of record and to require him to provide the files. The court granted the motion, removed Wells as attorney of record and ordered him to provide the litigation files. Wells did not provide the files.

5. FARMERS AND MERCHANTS LAWSUIT

In November 1997, Farmers and Merchants Bank sued Dailey on behalf of W.W. Irwin Company, which was in receivership, for payment of remediation services allegedly owing to Irwin. As Dailey's attorney of record, Wells filed an answer denying liability. He then filed a declaration in February 1998, under penalty of perjury, in opposition to Farmers and Merchants' effort to amend the complaint to name Wells as Dailey's alter ego. In that declaration, Wells attested: "I am not now nor have I ever been the owner of the [Corona] property. Since the early 1980's defendant Barbara Dailey has been the sole and exclusive owner in fee simple." He further attested that "I do not now own nor do I ever recall owning any real property in Riverside [County], Cal . . . . "

After Dailey informed Wells that Bower was now representing her for all matters relating to the Corona property, Bower wrote to Wells on March 9, 1998, asking him to sign a substitution of attorney and provide all documents pertaining to the Farmers and Merchants lawsuit. Wells refused, forcing Bower to obtain a court order on March 24, 1998, removing Wells and directing him to deliver to Bower all documents relating to the lawsuit and the Corona property. Wells did not comply with the order.

After Dailey terminated Wells, he went on the offensive in the Farmers and Merchants case, filing a cross complaint against Dailey on November 20, 1998, for contractual interference and for an injunctive relief. In May 1999, Dailey moved for summary judgment on the issue of whether she was the sole owner in fee simple of the Corona property. Wells opposed the motion.

In his declaration, Wells directly contradicted several material facts he had previously attested to under oath or under penalty of perjury. For example, even though he previously testified that Dailey had purchased the property, Wells attested in his declaration filed in the Farmers and Merchants lawsuit that "Dailey did not purchase the Corona property, I did . . . ." Also, he attested: "I emphatically deny that at the time Dailey took title that she was anything but the title holder as a trustee at all times *subject to an equitable and beneficial interest in myself* . . . ." (Italics added.) Earlier, in the Security Pacific case, he denied under oath that he had any beneficial interest in the property. Also, in the previous Security Pacific, Texaco and County Supervisors lawsuits, Wells attested that his only involvement with the Corona property was as Dailey's attorney and property manager. Wells now claimed in the Farmers and Merchants case that he did not act as Dailey's attorney and that he managed the property on his own behalf. And, in spite of his earlier statements, he now attested that "*I acted in all respects as the owner* prior to the transfer to Garden Gate [a family-owned corporation] *and Ms. Dailey in no way acted as the owner* regarding the Corona property." (Italics added.)

On July 28, 1999, the court granted Dailey's motion for summary judgment and ruled that "Barbara E. Dailey is the 100% sole owner in fee simple of the [Corona] property . . . and that William G. Wells . . . [has] no right, title, interest, or estate, in the Corona Property."

6. GARDEN GATE LAWSUIT

In April 1998, Garden Gate, Inc., a family-owned company and assignee of Wells's purported interest in the Corona property, sued Dailey for breach of contract, quiet title, promissory estoppel, breach of fiduciary duty, and quantum meruit. The lawsuit alleged that Dailey held the Corona property in trust for the benefit of Wells and that she agreed to convey the property to him upon demand. The verified complaint alleged that Wells was "the sole

owner in fee simple title to the [Corona] Property . . . ." This verified pleading directly contradicted his earlier pleadings and statements.

Again, the trial court ruled that Dailey was "the 100% sole owner in fee simple of the [Corona] property . . . and that William G. Wells . . . and GARDEN GATE, INC., and each of them, have no right, title, interest, or estate in the Corona Property." The Garden Gate lawsuit spawned four separate appeals by Wells, each of which was rebuffed by the Court of Appeal. The Court of Appeal's opinion, filed in March, 2001, affirmed the trial court's judgment that Dailey was the sole owner in fee simple of the Corona property and that Wells had "no right, title, interest, or estate in the Corona Property."

7. SHEILA WELLS LAWSUIT

Less than a month after the Court of Appeal's decision in the Garden Gate case, Wells brought another lawsuit against Dailey, again challenging her ownership of the Corona property. This time, he sued in Los Angeles County Superior Court on behalf of his wife, Sheila Wells, claiming she had a 50% community property ownership interest in the Corona property. He then signed and filed an amended complaint containing allegations flatly contradicting his earlier testimony and declarations. These included statements that Wells purchased the property from Robert Pease with community funds, that Dailey had no title or interest in the property to the exclusion of his wife's community property interest, and that since January 1976, his wife had been the owner of a 50% interest in the property and the rents. The trial court sustained Dailey's demurrer under "the doctrine of res judicata, which prevents [Sheila] Wells from asserting that William Wells has or had any legal or beneficial ownership of the subject property." Wells lost the appeal in this case.

B. PROCEDURAL BACKGROUND

In July 2004, the Office of the Chief Trial Counsel (the State Bar) filed an NDC charging Wells with misconduct involving three counts of violating Business and Professions Code section 6106 (moral turpitude),[5] as well as violations of section 6068, subdivision (d) (seeking to mislead judge), rule 3-700(D)(1) of the Rules of Professional Conduct of the State Bar[6] (failure to release client file), rule 4-100(B)(3) (failure to account), rule 4-100(B)(4) (failure to promptly pay or deliver client funds), and section 6068, subdivision (c) (maintaining an unjust action). In her decision, the hearing judge found Wells culpable of six of the eight counts and recommended that Wells be disbarred. Wells filed his request for review on December 11, 2009.

II. DISCUSSION

A. CULPABILITY

1. CASE NUMBER 98-O-03727

Count One – Moral Turpitude (Bus. & Prof. Code, § 6106)

Section 6106 prohibits attorneys from committing acts involving moral turpitude, dishonesty, or corruption. We adopt the hearing judge's finding that Wells violated this section because he repeatedly made inconsistent statements about his ownership of the Corona property in pleadings filed in various courts, in sworn testimony and in declarations signed under penalty of perjury. Acts of moral turpitude include omissions, concealment and affirmative misrepresentations, all of which permeated Wells's testimony, declarations and pleadings. (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315.) " 'No distinction can . . . be drawn among

[5] Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

[6] Unless otherwise noted, all further references to "rule(s)" are to the provisions of the Rules of Professional Conduct of the State Bar.

concealment, half-truth, and false statement of fact. [Citation.]' [Citation.]" (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.)

Wells's reliance on former Civil Code section 863[7] to justify his statements under oath in the Security Pacific and Texaco lawsuits that he never had "any ownership interest whatsoever" in the Corona property is inapt. Although the beneficiaries of a trust involving real property take no *legal* estate or interest in the trust property under section 863 (*Lynch v. Cunningham* (1933) 131 Cal.App. 164, 172), " 'the rights of the beneficiary are recognized and protected by the courts of equity, and the beneficiary is considered to be the real owner of the property. [Citation.]' " (*Beyer v. Tahoe Sands Resort* (2005) 129 Cal. App. 4th 1458, 1475); accord, *Allen v. Sutter County Bd. of Equalization* (1983) 139 Cal.App.3d 887, 890 ["section 863 does not negate the fundamental basis of a trust – that it conveys an equitable interest [to the beneficiaries] in the trust estate"].) Almost a century ago, the Supreme Court construed section 863, and in so doing, the Court rejected the argument that a beneficiary of a trust involving real property had no estate or interest in the property. (*Title Ins. & Trust Co. v. Duffill* (1923) 191 Cal. 629, 647-648.) Rather, the Court found that the beneficiary's interest in the property was an equitable estate and this estate "is regarded by equity as the real ownership . . . ." (*Id.* at p. 648.)

It was clearly a misrepresentation, when Wells was asked under oath, if he had *any* interest in the Corona property, and he did not disclose the existence of the purported trust or his beneficial interest therein. In view of the law construing Civil Code section 863, Wells's

[7] Former Civil Code section 863 stated: "Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property but may enforce the performance of the trust." (Civ. Code, § 863, enacted 1872 and repealed by Stats. 2986, Ch. 820, § 5, eff. July 1, 1987.) This repealed statute was in effect when Dailey obtained legal title to the Corona property.

reliance on that statute to justify his nondisclosure was not in good faith because it was both unreasonable and dishonest. (*In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, 662 [good faith defense is not applicable unless belief is reasonable *and* honest].)

Moreover, Wells's misrepresentations were not confined to ownership of the Corona property. He repeatedly made dishonest statements under oath about whether or not he was Dailey's attorney; who purchased the property from Robert Pease; if he was acting as property manager on Dailey's behalf; whether he or Dailey was ultimately responsible for payment of the property taxes; and who was entitled to receive rents from the property. These misstatements were not the result of mere carelessness or a good faith belief in the statutory construction of Civil Code section 863. Rather, he made the misrepresentations to secure an advantage and further his own interests.

Count Two – Seeking to Mislead Judge (§ 6068, subd. (d))

Section 6068, subdivision (d), makes it a duty of an attorney never to seek to mislead a judge by an artifice or false statement of fact or law. The State Bar alleged the same facts in support of count two as in count one. The State Bar does not contest the hearing judge's dismissal with prejudice of this count as duplicative, which we adopt.

Count Three – Moral Turpitude Misappropriation (§ 6106)

The hearing judge found that Wells violated section 6106 because he misappropriated monies received on Dailey's behalf related to the Corona property. We agree.

In the Security Pacific case, the court ordered in 1994 that "Dailey shall recover from [the defendants] $88,029.89." The bank transferred $118,632.73 to Wells's CTA in satisfaction of the judgment, but Wells never distributed any portion of the funds to Dailey. Wells claims he used them to compensate himself for attorney fees and out-of-pocket costs. However, Dailey did

not agree to the withholding of these funds and, in fact, requested that Wells distribute the $88,029.89 to her. 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.) Accordingly, we find that Wells violated section 6106. (*Jackson v. State Bar* (1975) 15 Cal.3d 372, 380-381 [withholding and appropriating client funds without client consent clearly supports finding that attorney misappropriated funds in violation of § 6106]; *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 § 6106].)

Wells also never distributed to Dailey or the Kofdaralis the $60,000 security deposit he held in trust. He admits he kept the security deposit and claims he used it to offset the value of stocks and money that he alleged Dailey converted.[8] No provision of the lease with the Kofdaralis permitted Wells to retain the security deposit to satisfy his own personal claims. Wells simply was not authorized or entitled to unilaterally withhold the entrusted funds even if he thought he was entitled to reimbursement. (*Most v. State Bar, supra,* 67 Cal.2d at p. 597; *Crooks v. State Bar, supra,* 3 Cal.3d at p. 358.) We find that Wells willfully misappropriated the $60,000 deposit in violation of section 6106.

Count Four – Failure to Release Client Files (Rule 3-700(D)(1))

We adopt the hearing judge's finding that Wells failed to promptly release Dailey's files upon request in violation of rule 3-700(D)(1). Despite Dailey's repeated requests for her files and court orders directing Wells to deliver them to her, he refused to do so.

[8] Wells did not prevail against Dailey in his claims for conversion in Superior Court.

Count Five – Failure to Provide Accounting (Rule 4-100(B)(3))

We adopt the hearing judge's finding that Wells failed to render an appropriate accounting to Dailey in violation of rule 4-100(B)(3). Although Dailey frequently requested an accounting of funds Wells held on her behalf, he never provided one.

Count Six – Failure to Promptly Pay or Deliver (Rule 4-100(B)(4))

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, as requested by the client, any funds in the attorney's possession which the client is entitled to receive. In April 1997, Dailey's attorney demanded that Wells provide all funds paid in satisfaction of the judgment in the Security Pacific matter and the $60,000 security deposit, plus interest, received under the Kofdarali lease. The hearing judge found that Wells's failure to disburse any of the requested funds constituted a violation of this rule, and we agree. However, since we rely on the fact that he failed to disburse these same funds to Dailey and the Kofdaralis as a basis for culpability in count three, we dismiss this charge with prejudice as duplicative.

2. CASE NUMBER 02-O-14682

Count Seven – Maintaining an Unjust Action (§ 6068, subd. (c))

Section 6068, subdivision (c), states that it is the duty of an attorney "to counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just . . . ." We adopt the hearing judge's finding that Wells violated this section when he brought a lawsuit in his wife's name challenging Dailey's ownership of the Corona property shortly after the Court of Appeal determined that Wells had "no right, title, interest, or estate in the Corona Property." In the absence of his ownership of the Corona property, it was frivolous for Wells to litigate his wife's community property interest in that property. (*In the Matter of Scott* (Review Dept. 2002)

4 Cal. State Bar Ct. Rptr. 446, 457 [cause of action based on allegations that attorney knows he cannot prove is patently frivolous and unjust and violates § 6068, subd. (c)].)

Count Eight – Moral Turpitude (§ 6106)

The State Bar alleged the same facts in count eight as in count seven to support the charge that Wells committed an act involving moral turpitude. The State Bar does not contest the hearing judge's dismissal with prejudice of this count as duplicative, and we adopt it.

B. ADDITIONAL CONTENTIONS ON REVIEW

We consider three contentions by Wells, which he argues warrant dismissal of this case.

1. ATTORNEY-CLIENT RELATIONSHIP WITH DAILEY

Wells contends that we do not have "subject matter jurisdiction" to hear this case because he was not acting as an attorney when he engaged in the alleged misconduct. In concluding that Wells was acting as an attorney, we look to his own statements and conduct, which are consistent with Dailey's understanding that Wells was her attorney in all legal matters relating to the Corona property. Wells repeatedly stated under oath that he was Dailey's attorney. For example, in his declaration filed in 1992 in the Texaco case, he attested: "At all times since in or about January 1976 your declarant [Wells] has acted as attorney on behalf of plaintiff Dailey in connection with the [Corona property]." Wells formally appeared on Dailey's behalf and filed numerous pleadings as her attorney of record in the various lawsuits involving the property. In each of these lawsuits, he represented Dailey in her *individual* capacity as owner of the Corona property rather than as trustee of the purported trust. Finally, Wells held himself out as Dailey's attorney to third parties. In correspondence on his legal letterhead to the Riverside Planning Department, he stated: "[T]his office represents B. E. Dailey, owner of the [Corona] property

involved in this conditional use permit." We thus reject his assertion that he and Dailey had no attorney-client relationship as disingenuous at best.

2. DENIAL OF CONTINUANCE OF TRIAL

Wells contends that the hearing judge committed reversible error when she denied his motion to continue the proceedings after his co-counsel died unexpectedly during the trial. There is " '[a] strong rule against unnecessary delay [which] is essential to ensure that the public will be protected by the prompt discipline of erring practitioners . . . .[Citations.]' " (*Hawk v. State Bar* (1988) 45 Cal.3d 589, 597.) Denial of the continuance constitutes reversible error only if Wells establishes that the hearing judge abused her discretion and that he suffered specific prejudice. (See *Morales v. State Bar* (1988) 44 Cal.3d 1037, 1046.) We find neither abuse of discretion nor prejudice. The trial had already proceeded for almost a year and had been continued seven or eight times when Wells's co-counsel died. Over the entire year at trial, Wells appeared as his own co-counsel and actively participated in his defense, posing evidentiary objections and making oral motions. He therefore was able to continue with the trial, as he was familiar with the facts and the law relevant to his case. Furthermore, the hearing judge set the trial to resume two and one-half months after his co-counsel's death in order to afford Wells time to obtain new counsel, yet he did not do so.

3. DISQUALIFICATION OF HEARING JUDGE

We reject Wells's argument that the hearing judge became disqualified during trial because "[she] obtained personal knowledge of evidentiary facts from [witness] Gerald Siegel . . . ." After a three day hiatus, the trial resumed on April 24, 2009, but Wells failed to appear and the State Bar made a motion to enter his default, which the hearing judge denied. The trial then proceeded without Wells and the State Bar began its direct examination of Siegel.

However, once the hearing judge determined that Wells might not have received adequate notice of the April 24th trial date, she terminated the hearing and struck Siegel's testimony.

Wells then appeared during the remaining five days of trial, which occurred between May 4 and May 19, 2009, yet he never sought to disqualify the hearing judge because of Siegel's April 24th testimony. Wells was required to do so within ten days after first learning of Siegel's testimony. (Rules Proc. of State Bar, rule 106(e)(1)(i).) Instead, he raises the issue for the first time on appeal and therefore has waived his right to assert disqualification of the hearing judge. (*Develop-Amatic Engineering v. Republic Mortgage Co*. (1970) 12 Cal.App.3d 143, 150 [disqualification deemed waived because party did not assert it at earliest practicable opportunity].) Moreover, Wells suffered no cognizable harm because the hearing judge struck Siegel's April 24th testimony, and he was recalled by the State Bar on May 19, 2009, when he testified to the same facts in Wells's presence.

C. MITIGATION

We find one factor in mitigation: Wells was admitted to the practice of law in the State of California on January 14, 1959. He practiced for approximately 35 years without discipline before committing the misconduct in this matter beginning in 1994, when he misappropriated the Security Pacific settlement. We consider the absence of prior discipline over a long period of time to be a significant mitigating factor. (Std. 1.2(e)(i); *Boehme v. State Bar* (1988) 47 Cal.3d 448, 452-453, 455 [22 years of practice without prior discipline important mitigating circumstance].)

D. AGGRAVATION

We adopt the hearing judge's findings in aggravation: (1) Wells committed multiple acts of misconduct (std. 1.2(b)(ii)); (2) he caused significant client harm by forcing Dailey to pay a

$60,000 security deposit from her own funds and forcing her to defend herself against his litigation vendetta (std. 1.2(b)(iv)); (3) he displayed indifference toward rectification for his misconduct by failing to acknowledge any wrongdoing or refund any of the funds he misappropriated (std. 1.2(b)(v)); and (4) he displayed a lack of candor and cooperation throughout these proceedings (std. 1.2(b)(vi)).

III. LEVEL OF DISCIPLINE

In recommending the appropriate degree of discipline, we first review the applicable standards, which are considered guidelines to encourage consistency. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090.) Standard 1.6(a) provides that when two or more acts of professional misconduct are found, the sanction imposed shall be the most severe of the applicable sanctions. We therefore consider standard 2.2(a), which calls for disbarment when an attorney misappropriates entrusted funds unless the amount of funds is insignificantly small or the most compelling mitigating circumstances clearly predominate.[9] Wells misappropriated approximately $148,000, which is a significant amount. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367-1368 [misappropriation of $1,355.75 considered significant].) Wells also failed to established that the "most compelling mitigating circumstances clearly predominate . . . ." (Std. 2.2(a).) Although his history without prior discipline is entitled to significant weight, the multiple and serious circumstances in aggravation outweigh the mitigation evidence.

Our review of relevant case law confirms that the facts of this case fit squarely within the parameters warranting disbarment. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067 [attorney misappropriated $29,000 from law firm and lied about it, disbarment imposed despite more than

[9] Standards 2.3, 2.6(a), and 2.10 also apply to Wells's misconduct and set forth discipline ranging from reproval to disbarment.

10 years of practice without discipline]; *Weber v. State Bar* (1988) 47 Cal.3d 492 [attorney misappropriated over $24,000 and attempted to conceal the theft, displayed contempt for State Bar proceeding and lack of remorse, disbarment appropriate despite 13 years of practice without discipline]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511 [attorney misappropriated $40,000 which was aggravated by client harm and uncharged misconduct, disbarment appropriate despite 15 years of practice with no prior discipline, restitution, remorse, good character, cooperation and community service].)

We conclude from Wells's lack of remorse and failure to appreciate the serious nature of his misconduct that probationary supervision would not adequately protect the public against future wrongdoing. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016 [where attorney had no prior discipline in 25 years of practice, disbarment appropriate for misappropriating $1,116 and unwillingness to acknowledge serious nature of misconduct].) Wells engaged in a ten-year vendetta against Dailey. He continues the same relentless tactics in this court, filing 144 motions, almost all of which were denied as unmeritorious. His course of conduct "reflects a seeming unwillingness even to consider the appropriateness of his . . . interpretation [of the facts or the law] or to acknowledge that at some point his position was meritless or even wrong to any extent. Put simply, [Wells] went beyond tenacity to truculence." (*In re Morse*, (1995) 11 Cal.4th 184, 209.) Such abuse of process and lack of remorse is sufficient to recommend disbarment. (See *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179 [disbarment appropriate where attorney showed no remorse for his serious abuse of judicial system by repeatedly filing frivolous motions and appeals for over a decade].)

IV. RECOMMENDATION

We recommend that William G. Wells, State Bar number 29392, be disbarred and his name be stricken from the roll of attorneys. We recommend that he make restitution to Barbara E. Dailey in the following amounts: $88,029.89 plus 10 percent interest per annum from July 26, 1994, and $60,000 plus 10 percent interest per annum from March 10, 1997. To the extent the Client Security Fund pays Barbara E. Dailey, Wells shall reimburse the Client Security Fund in accordance with section 6140.5.

We further recommend that Wells be ordered to comply with the requirements of rule 9.20 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, we recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable both as provided in section 6140.7 of that code and as a money judgment.

V. ORDER OF INACTIVE ENROLLMENT

The hearing department ordered Wells involuntarily enrolled as an inactive member of the State Bar as required by section 6007, subdivision (c)(4), and Rules of Procedure of the State Bar, rule 220(c). The involuntary inactive enrollment became effective on October 30, 2009, and Wells has been inactive since that time and will remain on involuntary inactive enrollment pending the final disposition of this proceeding.

EPSTEIN, J.

We concur:

REMKE, P. J.

PURCELL, J.