PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **ANTHONY DAVID MEDEIROS,** A Member of the State Bar.	**00-O-12248** **OPINION ON REVIEW**

I. INTRODUCTION

The State Bar requests review of a decision recommending that respondent Anthony David Medeiros be actually suspended from the practice of law for three years. Respondent did not file a response to the notice of disciplinary charges (NDC) resulting in the entry of his default. Based on this default, respondent was deemed to have admitted the factual allegations set forth in the NDC and was found culpable of 35 counts of misconduct involving seven client matters. (Rules Proc. of State Bar, rule 200(d)(1)(A); Bus. & Prof. Code, § 6088.) Respondent's misconduct included two instances of failing to deposit client funds into a trust account, four instances of failing to maintain client funds in trust, three instances of failing to promptly pay client funds, three instances of failing to perform competently, three instances of improperly withdrawing from employment, five instances of failing to communicate, two instances of failing to comply with court orders, five instances of misappropriation involving moral turpitude, seven instances of failing to cooperate with the State Bar, and one instance of representing clients with adverse interests.

Respondent was admitted to the practice of law in December 1988 and has no prior record of discipline. His misconduct began in February 2000 and continued through May 2003.

The State Bar argues that respondent should be disbarred. We have independently reviewed the record (Cal. Rules of Court, rule 951.5; Rules Proc. State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), and we agree. The State Bar further requests various modifications to factual findings and legal conclusions. To the extent we agree with the State Bar, the opinion so reflects; otherwise, as more fully discussed below, we adopt the factual and culpability findings of the hearing department as modified, and modify the recommendation regarding discipline.

II. DISCUSSION

A. FACTUAL FINDINGS AND CONCLUSIONS OF LAW[1]

1. The Szeles Matter

In April 1999, Rhonda Sue Szeles employed respondent to represent her in a personal injury action. Respondent settled Szeles' case in February 2000 for $15,000. Although respondent maintained a client trust account at Kings River State Bank (Kings CTA), he deposited the settlement in a non-trust, operations account at the same bank (Kings Operations Account). By the end of March 2000, the balance in the Kings Operations Account fell to $46.56 even though respondent never disbursed funds from the Kings Operations Account to Szeles or anyone on her behalf.

In April 2000, Szeles signed a disbursement authorization agreeing to receive a settlement distribution of $9,234.76 with an additional $1,685.96 to be paid to medical providers and the remainder going to respondent for attorney fees and costs. Even though respondent never deposited any of Szeles' settlement funds into the Kings CTA, he issued a draft from the Kings CTA payable to Szeles in April 2000, which was returned due to insufficient funds. In May 2000 respondent deposited settlement checks from other clients into the Kings CTA and withdrew $10,342.93 in order to purchase a cashier's check payable to Szeles. In September 2000, after

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[1]Upon entry of his default, respondent was deemed to have admitted the factual allegations set forth in the NDC, which alleged 35 counts of misconduct involving seven client matters. (Rules Proc. of State Bar, rule 200(d)(1)(A); Bus. & Prof. Code, § 6088.)

depositing another client's funds into the Kings CTA, respondent paid three medical providers from the Kings CTA totaling $1,685.97. Although the NDC did not allege whether these payments were for Szeles' medical providers, the hearing judge found that they were because the total paid was almost identical to the amount respondent retained for Szeles' medical providers according to the disbursement authorization.[2] We find the hearing judge's inference reasonable and hereby adopt her finding.

On July 18, August 7, 2000, and October 9, 2002, the State Bar wrote to respondent regarding the Szeles matter and requested a written reply which respondent never provided.

The hearing judge concluded that respondent was culpable of: (1) failing to deposit client funds in a trust account in violation of rule 4-100(A) of the Rules of Professional Conduct[3] by depositing Szeles' $15,000 settlement into an operations account rather than a client trust account; (2) failing to maintain client funds in a trust account in violation of rule 4-100(A) by allowing the balance in the Kings Operating Account to fall below $10,920.72 ($1,685.96 [medical bills] + $9,234.76 [client's portion]); (3) moral turpitude in violation of section 6106 of the Business and Professions Code[4] for misappropriating for his own use and benefit $10,874.16 of Szeles' settlement ($10,920.72 - $46.56); (4) moral turpitude in violation of section 6106 for misappropriating $12,028.90 belonging to other clients to pay Szeles and her medical providers; (5) failing to promptly pay client funds in violation of rule 4-100(B)(4) by waiting more than five months after Szeles approved disbursement to pay her medical providers; and (6) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to respond to the State Bar's letters or participate in the investigation of the Szeles matter.

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[2]The amount respondent paid differed by only one cent from the amount respondent retained to pay Szeles' medical providers.

[3]All further references to rules are to these Rules unless otherwise noted.

[4]All further references to sections are to this Code unless otherwise noted.

2. The McKelvey Matter

In January 2000, Michael McKelvey employed respondent to represent him in a personal injury action which resulted in a $15,000 jury award to McKelvey. In April 2001, an insurance company paid $15,000 jointly to McKelvey and respondent which respondent deposited into his Kings CTA. McKelvey's insurance company, Allied, had already paid $2,000 for his medical treatment and claimed a lien against the settlement proceeds which respondent negotiated to $933. Respondent retained $5,000 as fees and in July 2001 distributed $7,860.62 to McKelvey although McKelvey was entitled to $9,067 ($10,000 - $933). Respondent failed to disburse any additional money to McKelvey or make any payments to Allied. Respondent was required to maintain $2,139.38 ($9,067 - $7,860.62 + $933) in the Kings CTA on McKelvey's behalf, but the account balance fell to $550 by September 2001.

In July 2002, Allied notified McKelvey that it would take action to recover the $2,000 paid on his behalf. Between July and September 2002, McKelvey sent a certified letter to respondent and left several voice-mail and in-person messages for respondent to contact him about the payment to Allied. Respondent failed to respond to any of McKelvey's status inquiries. After Allied sued McKelvey for $2,000, McKelvey agreed to make monthly $200 payments and did so until the obligation was satisfied. Thus, McKelvey had to pay an extra $1067 of his own money to Allied ($2000 - $933) because he lost the benefit of the negotiated lien reduction. In total, as a consequence of respondent's misconduct, McKelvey lost $3,206.38 due to respondent's improper retention of $2,139.38 and the additional $1067 he had to pay to Allied.

On October 30, 2002, and February 21, 2003, the State Bar wrote to respondent regarding the McKelvey matter and requested a written reply which respondent did not provide. Although the State Bar hand-delivered the letters to respondent at a meeting in April 2003, he did not respond to the letters during the meeting and failed to provide any written response thereafter.

The hearing judge concluded that respondent was culpable of: (1) failing to promptly pay client funds in violation of rule 4-100(B)(4) by waiting three months to disburse a portion of McKelvey's settlement proceeds and never paying Allied's lien or McKelvey's remaining settlement balance; (2) failing to maintain client funds in a trust account in violation of rule 4-100(A) by allowing the balance in the Kings CTA to fall below $2,139.38; (3) moral turpitude in violation of section 6106 for misappropriating for his own use and benefit $1,589.38 ($2,139.38 - $550) of McKelvey's settlement; (4) failing to communicate in violation of section 6068, subdivision (m), by not responding to McKelvey's inquiries between July and September 2002; and (5) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to respond to the State Bar's letters or participate in the investigation of the McKelvey matter.

The State Bar also alleged that respondent improperly commingled personal funds with those of McKelvey in the Kings CTA in violation of rule 4-100(A) when he deposited three checks drawn on the Medeiros Law Firm Operations Account maintained at West America Bank (West America Operations Account) into the Kings CTA. The first check was deposited on July 2, 2001, in the amount of $3,690.15 with an annotation in the Memo portion of the check "Nagatani-Dutra #98-0272." The second check was deposited on July 16, 2001, in the amount of $8,793.62 with an annotation in the Memo portion of the check "McKelvey-Landis, #99-0599." The third check in the amount of $16,442.35 was deposited July 31, 2001, and had an illegible annotation.

The hearing judge declined to find culpability on this charge noting the possibility that the funds were not respondent's personal funds at all but client funds instead. We agree. The mere fact that funds are deposited into a client trust account from a business operating account does not automatically support a conclusion of commingling in violation of rule 4-100(A), particularly

since reasonable bank charges may be deposited and disputed funds must be deposited.[5] Since the NDC fails to plead that the funds deposited into the Kings CTA were respondent's personal funds, their nature remains unclear. "Because of the lack of evidence presented on this issue, we are left to speculate" which we are unwilling to do. (*In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627, 637 [declining to speculate about evidence of failure to promptly disburse funds from client trust account].) Therefore, we adopt the hearing judge's finding that there is an absence of clear and convincing evidence that respondent commingled personal funds with those of his clients in the Kings CTA and dismiss this charge with prejudice.

3. The Davis Matter

In June 2000, Nikki L. Davis employed respondent to represent her in a personal injury action. Respondent settled Davis' case in May 2002 for $10,001 but deposited the settlement in the West America Operations Account. Respondent received $2,500 as fees and in June 2002 paid Davis $2,171.33 as an estimated disbursement pending negotiation of outstanding medical liens. Thereafter respondent did not disburse any more funds to Davis or to anyone on her behalf. Although respondent was required to maintain at least $5,329.67 on Davis' behalf, by late June 2002, the West America Operations Account was overdrawn by $232.65.

Between June through September 2002, Davis called respondent on several occasions to determine when she would receive the remainder of her settlement and her file. Despite leaving messages for respondent, he did not return her calls. Prior to September 2002, respondent moved offices but did not inform Davis. Davis obtained respondent's new telephone number on her

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[5]Rule 4-100(A) provides in 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, . . . No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows: [¶] (1) Funds reasonably sufficient to pay bank charges. [¶] (2) . . . However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved."

own and finally was able to contact him in September 2002 regarding the remainder of her settlement proceeds. In response to her inquiry, respondent told her to "get her money from him the best way she knew how."

On October 30, 2002, and February 21, 2003, the State Bar wrote to respondent regarding the Davis matter and requested a written reply which respondent did not provide. Although the State Bar hand-delivered the letters to respondent at a meeting in April 2003, he did not respond to the letters during the meeting and failed to provide any written response thereafter.

The hearing judge concluded that respondent was culpable of: (1) failing to deposit client funds in a trust account in violation of rule 4-100(A) by depositing Davis' $10,001 settlement into an operations account rather than a client trust account; (2) failing to maintain client funds in a trust account in violation of rule 4-100(A) by allowing the balance in the West America Operations Account to become overdrawn by $232.65; (3) moral turpitude in violation of section 6106 for misappropriating for his own use and benefit $5,330.00 of Davis' settlement;[6] (4) failing to communicate in violation of section 6068, subdivision (m), by not responding to Davis' inquiries or notifying her of his office change; and (5) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to respond to the State Bar's letters or participate in the investigation of the Davis matter.

4. The Heugly Matter

In December 1998, Kathryn Heugly employed respondent to represent her in a personal injury action. Respondent settled Heugly's case in March 2001 for $21,000, deposited the settlement in the Kings CTA and retained $5,000 as fees. Although Respondent was required to maintain $16,000 on Heugly's behalf, the Kings CTA balance fell to $5,989.93 at the end of March 2001. Respondent paid Heugly $9,999.27 in July 2001 and thereafter was required to

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[6]The NDC asserts that the amount misappropriated is $5,328.67 and the hearing judge concluded respondent misappropriated $5,330.00. We find the amount misappropriated to be $5,329.67 ($10,001.00 - $2,500.00 - $2,171.33).

maintain $6,000.73 in the Kings CTA on Heugly's behalf. The account balance fell to $550 by September 2001 even though respondent had not disbursed additional funds from the Kings CTA to Heugley or anyone on her behalf at that time. Two insurance companies, BC Life and Health (BC Life) and Mercury Insurance Company (Mercury) had paid some of Heugly's medical bills in the amounts of $3,253.27 and $1,898.06, respectively, and respondent was aware of their intent to obtain reimbursement from the settlement. Despite this, respondent did not pay any of the money owed to BC Life and failed to pay Mercury until December 2001 after Mercury sued Heugly for reimbursement.

On December 17, 2002, and February 21, 2003, the State Bar wrote to respondent regarding the Heugly matter and requested a written reply. Although the State Bar hand-delivered the letters to respondent at a meeting in April 2003, he did not respond to the letters during the meeting and failed to provide any written response thereafter. The hearing judge concluded that respondent was culpable of: (1) failing to maintain client funds in a trust account in violation of rule 4-100(A) by allowing the balance in the Kings CTA to fall below $5,450.73;[7] (2) moral turpitude in violation of section 6106 for misappropriating for his own use and benefit $5,450.73 of Heugly's settlement ($6,000.73 - $550); (3) failing to promptly pay client funds in violation of rule 4-100(B)(4) by waiting nine months to pay Mercury and never paying BC Life; and (4) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to respond to the State Bar's letters or participate in the investigation of the Heugly matter.

The State Bar also alleged respondent engaged in a course of conduct involving moral turpitude by repeatedly misappropriating client funds. In support of such allegations the State Bar erroneously incorporated by reference six other counts. Three of the referenced counts are

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[7]This amount is erroneous. Respondent was required to maintain $16,000 in the Kings CTA after he withdrew his fees and $6,000.73 after he made a disbursement to Heugly in July 2001.

not included in the NDC and the remaining referenced counts do not allege misappropriation. The hearing judge dismissed this charge with prejudice finding it duplicative of the culpability findings of violating section 6106 stemming from respondent's misappropriations. The State Bar does not challenge the hearing judge's decision and we adopt the hearing judge's dismissal.

On appeal the State Bar asserts that the amount respondent misappropriated in the Heugly matter is actually $10,010.07 instead of the $5,450.73 as found by the hearing judge and as alleged in the NDC. We agree with the hearing judge, based on the following computation: $21,000 settlement minus $5000 attorneys fees equals $16,000, minus $9,999.27 distributed to Hugely, for a balance of $6,000.73. Since there was only $550 remaining in the trust account, the misappropriation equals $5,450.73 ($6,000.73 minus $550).

5. The Brinson Matter

In July 2000, Andria Brinson employed respondent to represent her in a personal injury action. Respondent filed a complaint on behalf of Brinson and in February 2002 opposing counsel propounded discovery and served requests for admission, interrogatories and a demand for inspection of documents. After respondent failed to respond to the propounded discovery, opposing counsel filed a motion to compel which respondent did not oppose. The trial court granted the motion, ordering respondent to provide responses to the discovery and imposing $1,840 in sanctions against respondent and Brinson. Respondent did not provide the outstanding discovery responses or pay the sanctions, causing opposing counsel to file a motion for terminating sanctions and monetary sanctions. Although respondent did not file a response to the motion, the trial court denied the motion for terminating sanctions but imposed $1,955 in additional monetary sanctions against respondent and Brinson.[8] A notice of entry of order was served on June 19, 2002. Respondent did not pay the sanctions and by September 2002,

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[8]Meanwhile, on May 7, 2002, due to an emergency, respondent left Brinson's deposition before it was completed and never rescheduled it. On May 23, 2002, respondent sent a settlement offer in the amount of $15,000 which the defendant rejected.

opposing counsel filed a motion for terminating, issue, evidentiary, and monetary sanctions. Respondent did not file a response to the motion, and the trial court granted the motion, dismissing Brinson's action with prejudice and imposing $3,910 in additional monetary sanctions against respondent and Brinson. A notice of entry of order was served on October 2, 2002. Respondent again failed to pay the sanctions.

Respondent did not perform any further legal work for Brinson after May 23, 2002. Although opposing counsel sent a settlement offer in the amount of $8,001 in June 2002, respondent did not communicate the offer to Brinson. Respondent also did not inform Brinson that opposing counsel propounded discovery, that opposing counsel filed three separate motions, that sanctions were imposed repeatedly, that her case was dismissed, or that respondent moved his office. Respondent also did not return Brinson's telephone calls in September 2002 regarding her case status.

On February 20 and March 21, 2003, the State Bar wrote to respondent regarding the Brinson matter and requested a written reply. Although the State Bar hand-delivered the letters to respondent at a meeting in April 2003, he did not respond to the letters during the meeting and failed to provide any written response thereafter.

The hearing judge concluded that respondent was culpable of: (1) intentionally, recklessly, and repeatedly failing to perform legal services in a competent manner in violation of rule 3-110(A) by not responding to the discovery requests, not completing the deposition and not responding to motions which resulted in dismissal of the case;[9] (2) improperly withdrawing from employment in violation of rule 3-700(A)(2) by not performing any legal work after May 23,

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[9]We note that the NDC does not state that respondent had notice of the filed motions. Since the general rule is that all intendments and presumptions are indulged to support a lower court order, we presume that the trial judge did consider proper service of the various motions and that respondent had notice of them before the court entered orders regarding discovery, dismissal, and sanctions. (*In the Matter of Navarro* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 192, 197, fn. 4; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal § 349, pp. 394-396.)

2002; (3) failing to communicate in violation of section 6068, subdivision (m), by not responding to Brinson's inquiries or notifying her of his office change, the settlement offer, the motions, the court orders, or the case dismissal; (4) disobeying court orders in violation of section 6103 for not complying with the discovery order imposing $1,840 in sanctions and the subsequent orders imposing $1,955 and $3,910 in sanctions;[10] and (5) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to respond to the State Bar's letters or participate in the investigation of the Brinson matter.

6. The Magpayo Matter

In June 2001 Benjamin and Myra Magpayo employed respondent to represent them in a personal injury action. Respondent filed a complaint on their behalf but thereafter failed to file a proof of service or negotiate settlement. After filing the complaint respondent took no further action to pursue the case and ceased performing legal services for the Magpayos. Between May and September 2002, Mr. Magpayo called respondent's office serval times leaving messages for respondent to return the call with a status update on the case. Respondent did not return the telephone calls. In November 2002, Mr. Magpayo discovered respondent's telephone number was disconnected. Respondent did not inform the Magpayos that he moved his office and changed telephone numbers. In March 2003, Mrs. Magpayo sent respondent letters requesting him to sign and return an enclosed substitution of attorney form. Respondent did not respond to the letters.

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[10]The NDC does not indicate whether entry of the initial sanctions order for $1,840 was ever served. Although the NDC does not explicitly establish that respondent had notice of the initial sanctions order, when a judge rules on a motion taken under submission, the clerk is required to notify the parties of the ruling or order. (Cal. Rules of Court, rule 309.) It is presumed that official duties have been regularly performed unless the party against whom the presumption operates proves otherwise. (Evid. Code, §§ 606, 660, 664; *In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) In the absence of any evidence to the contrary, we find that respondent received notice of the initial sanctions order.

On January 24 and February 21, 2003, the State Bar wrote to respondent regarding the Magpayo matter and requested a written reply. Although the State Bar hand-delivered the letters to respondent at a meeting in April 2003, he did not respond to the letters during the meeting and failed to provide any written response thereafter.

The hearing judge concluded that respondent was culpable of: (1) recklessly failing to perform legal services in a competent manner in violation of rule 3-110(A) by not filing a proof of service, negotiating settlement or taking any further steps to pursue the case after filing the complaint; (2) improperly withdrawing from employment in violation of rule 3-700(A)(2) by not performing any legal work after filing the complaint and failing to sign and return a substitution of attorney; (3) failing to communicate in violation of section 6068, subdivision (m), by not responding to the Magpayos' inquiries or notifying them of his office change; and (4) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to respond to the State Bar's letters or participate in the investigation of the Magpayo matter.

7. The Reyes Matter

In March 2001, Albert Reyes employed respondent to represent him in a personal injury action arising from an automobile accident. Respondent also agreed to represent Reyes' girlfriend, Corina Rios, who was a passenger at the time of the accident. Reyes and Rios had potentially conflicting interests in the litigation, but respondent did not obtain their written consent when he accepted representation of both. Respondent filed a complaint on behalf of Reyes and Rios, and in November 2001 opposing counsel propounded discovery and served interrogatories, a demand for inspection of documents, and a notice of deposition of Reyes and Rios. Although Reyes and Rios provided responses to the interrogatories, respondent did not provide them to the defendant. After already receiving an extension, respondent requested a second continuance of the depositions of Reyes and Rios in March 2002, but opposing counsel refused. Thereafter respondent failed to produce documents or Reyes and Rios for their

depositions. Opposing counsel filed motions to compel which respondent did not oppose, and on May 13, 2002, the trial court filed an order granting the motions, ordering plaintiffs to appear for a deposition and respond to discovery and imposing $450 in sanctions against plaintiffs and/or their attorneys. Respondent appeared at the plaintiffs' depositions in May 2002 but thereafter ceased performing legal work.

The court sent notice of a status conference set for October 9, 2002, at which respondent did not appear. The court set a case management conference for January 23, 2003, at which respondent did not appear. The court also issued an order to show cause (OSC) to respondent regarding possible dismissal for failure to file proof of service as to a specific defendant. According to local court rule 3-102B.3,[11] respondent should have filed a response five days before the hearing, but respondent did not file a response or the necessary proof of service. Thereafter the court issued a second OSC regarding dismissal and set hearing for May 7, 2003. As with the prior OSC, respondent failed to file a response five days before the hearing. Furthermore, he failed to attend the OSC hearing. Although respondent did not file a substitution of attorney or formally withdraw from the case, the court ordered Reyes to appear on May 29, 2003. Reyes appeared at the hearing and the court granted him additional time to obtain new counsel.

Respondent did not inform Reyes of opposing counsel's discovery motions, the discovery and sanctions order, the orders to show cause, or the move of respondent's office. Reyes learned in February 2003 that respondent's telephone was disconnected when he called respondent to

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[11]In accordance with Evidence Code section 452, subdivision (e), we take judicial notice of the Superior Court of San Joaquin County, Local Rules, rule 3-102B which states as follows: "[¶] . . . [¶] 3. Written response to orders to show cause must be filed five (5) court days in advance of the hearing. [¶] 4. If a written response to an order to show cause is filed before the hearing, NO appearance will be required. Counsel will not be penalized for nonappearance if a written response is on file (i.e., increase of sanctions or less weight given to reasons for non-compliance). All communications regarding orders to show cause shall be in writing, not by telephone. . . ."

determine the status of the case. At that time Reyes also learned that respondent's address was no longer valid when a letter he sent to respondent's Hanford, California, address via certified mail was returned as undeliverable.

On May 9 and 30, 2003, the State Bar wrote to respondent regarding the Reyes matter and requested a written reply which respondent failed to provide.

The hearing judge concluded that respondent was culpable of: (1) intentionally, recklessly, and repeatedly failing to perform legal services in a competent manner in violation of rule 3-110(A) by not responding to discovery, not appearing at scheduled court hearings, not responding to discovery motions, and not filing a proof of service; (2) improperly withdrawing from employment in violation of rule 3-700(A)(2) by not performing any legal work after March 2002 when he requested a continuance for the deposition; (3) failing to communicate in violation of section 6068, subdivision (m), by not responding to Reyes' telephone calls regarding case status or notifying him of his office move, the discovery motions, the court orders, or the hearing dates of the orders to show cause; (4) disobeying court orders in violation of section 6103 for not complying with the discovery order imposing $450 in sanctions and not filing responses to the OSC's; (5) accepting representation of more than one client in a matter in which the interests of the clients potentially conflict in violation of rule 3-310(C)(1) by accepting representation of Reyes and Rios without obtaining informed written consent from Rios; and (6) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to respond to the State Bar's letters or participate in the investigation of the Reyes matter.

We agree with the hearing judge that respondent violated rule 3-700(A)(2).[12] However, there is no evidence supporting the hearing judge's finding that respondent failed to respond to Reyes' telephone calls since the NDC alleges Reyes attempted only one telephone call which was

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[12]The judge found March 2002 as the date that respondent ceased providing legal representation of Reyes and Rios, but the NDC alleges that "[r]espondent ceased performing legal work after May 2002 when he appeared at the plaintiffs' deposition. . . ."

never completed due to the fact that respondent's telephone number had been disconnected. We agree with the hearing judge's remaining findings in support of respondent's wilful violation of section 6068, subdivision (m).

Finally, respondent's failure to comply with the discovery order imposing a $450 sanction supports a finding that respondent wilfully violated section 6103. However, we do not agree that respondent's failure to file responses to the OSCs supports a finding that he disobeyed court orders since the NDC does not allege that the OSCs ordered respondent to file responses. As in the Brinson matter, the NDC does not explicitly establish that respondent had notice of the sanctions order, but based on the discussion, *supra*, we do not find this deficiency fatal. Additionally, we clarify that respondent violated rule 3-310(C)(1) by failing to obtain informed written consent from Reyes as well as Rios. In all other respects, we adopt the findings of the hearing judge regarding the Reyes matter.

B. LEVEL OF DISCIPLINE

1. Mitigating and Aggravating Circumstances

The hearing judge found as a mitigating factor respondent's lack of a disciplinary record in twelve years of practice prior to his misconduct. (Std. 1.2(e)(i), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct [hereafter "stds."].) We adopt the hearing judge's finding that respondent's absence of prior discipline is a mitigating factor but modify it and find that respondent had just over eleven years of practice before the inception of misconduct in February 2000.

In aggravation, the hearing judge found that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct since he did not pay any court sanctions, and did not return funds to three clients. We adopt the hearing judge's findings in aggravation except for the finding that respondent's failure to pay court sanctions evidences his indifference toward rectification or atonement. This conduct forms the basis of respondent's

culpability for violations of section 6103 and it is duplicative to rely on the same conduct to support a separate finding in aggravation. Respondent's lack of remorse is best reflected in his response to Davis' request for her money when he told her to get her money from him the best way she knew how, which is clear and convincing evidence of respondent's indifferent attitude, as is his refusal to return moneys owing to other clients.

The hearing judge also found substantial client harm since two clients were sued by insurance companies, three clients were still owed over $11,000, and two clients were ordered to pay sanctions. The hearing judge concluded that because respondent failed to comply with various court orders, the trial courts exhausted additional resources and incurred additional expense to conduct further hearings which in turn harmed the efficient administration of justice. Again, we agree with this finding. We also adopt the hearing judge's finding that respondent's failure to participate in the disciplinary proceeding prior to the entry of his default constituted a serious aggravating factor.

2. Pattern of Misconduct

The hearing judge found respondent committed multiple acts of wrongdoing but declined to find that respondent's three client abandonments between 2001 to 2003 and four misappropriations between 2000 to 2002 constituted a pattern of misconduct. Although respondent's misconduct could be viewed as a pattern under guiding case law (e.g., *Lebbos v. State Bar* (1991) 53 Cal.3d 37; *Coombs v. State Bar* (1989) 49 Cal.3d 679; *Levin v. State Bar* (1989) 47 Cal.3d 1140; *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr.1), we think it is more apt to characterize his misconduct as a habitual disregard of his clients' interests, and accordingly find this to be an aggravating factor. (*Farnham v. State Bar* (1988) 47 Cal.3d 429 [wilfully failing to perform, misrepresenting case status, failing to communicate and failing to return unearned fees involving seven clients demonstrated habitual

disregard of clients' interests]; *Simmons v. State Bar* (1970) 2 Cal.3d 719 [abandonment of three clients evidenced habitual disregard of client interests].)

3. Appropriate Discipline

In determining the degree of discipline to recommend, we consider the standards, which serve as guidelines, as well as prior decisions imposing discipline based on similar facts. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) On this record, several standards would require respondent's disbarment or suspension. (See stds. 2.2(a), 2.3, and 2.6.) Since the standards are recognized as guidelines, it is not mandatory for us to recommend respondent's suspension or disbarment. Instead, we first review the analysis of the hearing judge as well as relevant case law for additional guidance in order to best achieve the purpose of disciplinary proceedings which is to protect the public, preserve public confidence in the profession and maintain the highest possible standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

After reviewing relevant case law, the hearing judge acknowledged that respondent could be disbarred for his misdeeds but did not find respondent's misconduct comparable to that in cases involving disbarment. Because respondent had paid his clients a substantial portion of their settlement proceeds, the hearing judge concluded that respondent's misappropriations did not appear to be the result of intentional dishonesty or corruption, but rather, the result of his gross negligence without acts of deception. As a result, the hearing judge recommended respondent be actually suspended from the practice of law for three years and until he makes restitution.

The State Bar argues that the facts support a finding that respondent's misappropriations were intentional rather than the result of gross negligence. We agree. Although not every misappropriation which is technically wilful is equally culpable (see *Waysman v. State Bar* (1986) 41 Cal.3d 452, 459), and evil intent is not required for a finding of wilful

misappropriation (*Murray v. State Bar* (1985) 40 Cal.3d 575, 581-582), several facts lead us to conclude that respondent acted intentionally rather than negligently.

Respondent misappropriated $45,282.91 in settlement funds involving at least five different clients beginning in February 2000 with Szeles and ending in June 2002 with Davis. Due to the extensiveness and frequency of the misappropriations, we do not believe these instances were isolated or aberrational. In order to pay Szeles the amount he misappropriated, respondent deposited funds of other clients into his trust account and knowingly used those funds to pay Szeles. Depositing client funds into a trust account in order to repay the misappropriated funds of another client evidences intent. There can be no innocent mistake or misunderstanding when engaging in this type of conduct. Respondent allowed third parties to file civil actions against McKelvey and Heugly to recover on liens in their matters and refused to accede to Davis' legitimate request for the balance of her settlement funds, advising her to try to get her money from him the best way she knew how. Moreover, respondent moved his law office and changed his telephone number without informing his clients and failed to return inquiries from McKelvey and Davis allowing him to avoid explaining his failure to provide the funds owed to them. Although respondent had a reasonable opportunity to explain the circumstances of these misappropriations either through correspondence or personally when a State Bar investigator visited him, he failed to do so. For these reasons we conclude that respondent deliberately misappropriated the settlement proceeds and did not take them unintentionally through gross neglect.

On this record it is evident that respondent repeatedly disregarded his clients' interests by wilfully failing to perform services competently, failing and refusing to communicate, and in some cases abandoning his clients altogether. Such "habitual disregard by an attorney of the interests of his or her clients combined with failure to communicate with such clients constitute acts of moral turpitude justifying disbarment." (*McMorris v. State Bar* (1983) 35 Cal.3d 77, 85.)

In cases involving similar habitual or pattern-type misconduct in which the attorneys had no prior disciplinary record, discipline less than disbarment has been the exception, occurring in those cases involving significantly more mitigation than is present here. (*In the Matter of Collins, supra*, 2 Cal. State Bar Ct. Rptr. at p. 15.) Thus, respondent's discipline-free record would not necessarily preclude disbarment. (*In the Matter of Hindin* (1997) 3 Cal. State Bar Ct. Rptr. 657 [habitual disregard of client interests warrants disbarment despite absence of prior discipline in over 14 years of practice].)

Even absent a finding that respondent habitually disregarded his clients' interests, our review of relevant case law suggests that the extensive number of respondent's offenses combined with his substantive misappropriations support a recommendation of disbarment. In *Baca v. State Bar* (1990) 52 Cal.3d 294, disbarment was ordered where, in two client matters, an attorney misappropriated $120, converted $2,200 of attorney's fees, failed to refund unearned fees, failed to promptly pay client funds, failed to competently perform, failed to comply with a court order, and failed to cooperate with the State Bar's investigation. The attorney had no prior incidents of discipline in nine years of practice but failed to participate in the underlying proceeding and his misconduct caused significant harm.

In *Chang v. State Bar* (1989) 49 Cal.3d 114, an attorney was disbarred after he failed to render an accounting, failed to deposit client funds in trust, failed to promptly pay client funds, misrepresented facts to a client and a state bar investigator, and misappropriated $7,898.44 involving a single client matter. Although the attorney had no prior incidents of discipline in almost eight years of practice, he showed no contrition, displayed a lack of candor, and significantly harmed his client. In ordering disbarment, the Supreme Court found that respondent's misappropriation was significant and observed that "misappropriation of a client's funds is a grievous breach of an attorney's professional ethics . . . [which] endangers the confidence of the public at large in the legal profession. In all but the most exceptional of cases,

we must impose the harshest discipline for such a breach in order to safeguard the citizenry from unethical practitioners. [Citations]." (*Id.* at p. 128.)

In *Cooper v. State Bar* (1987) 43 Cal.3d 1016, an attorney was ordered disbarred after committing misconduct in six client matters involving misappropriation of $1,116, entering into a business transaction with a client, failing to perform, failing to return client property, and improperly withdrawing from representation. The attorney had no prior record in over 23 years of practice but displayed unwillingness to acknowledge the serious nature of his misconduct. Furthermore, the Supreme Court doubted that supervised probation would adequately protect the public against future acts of misconduct because respondent maintained no office, used the office of a nonlawyer as a mailing address, and claimed not to have access to the files of clients he was currently representing.

In those cases where disbarment was not recommended for misconduct involving substantive misappropriations combined with extensive additional ethical misconduct, significant mitigation existed. (See *Baker v. State Bar* (1989) 49 Cal.3d 804 [one year actual suspension imposed where attorney suffering from severe cocaine and alcohol addiction misappropriated several thousand dollars from ten clients, combined with failing to perform, failing to refund unearned fees and improper withdrawal]; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676 [three-year actual suspension imposed on attorney who misappropriated thousands of dollars, failed to perform and abandoned several clients, some of which occurred while she was suffering from extreme emotional difficulties].)

Respondent committed 35 incidents of misconduct ranging from trust account violations, failing to competently perform, failing to communicate with clients resulting in abandonment, failing to cooperate with the State Bar's investigations, representing clients with conflicting interests, failing to comply with court orders, and misappropriating $45,282.91 in client funds. Unfortunately, respondent's misconduct affected seven of his clients, resulting in the dismissal

with prejudice of one client's matter, the imposition of sanctions totaling $8,155 against two clients, and the loss of $11,571.72 in client funds for three clients. Furthermore, respondent failed to participate in the underlying proceeding and showed no contrition, flagrantly telling a client to get her money from him the best way she knew how. No significant mitigating factor exists, save for respondent's lack of prior discipline, which is far outweighed by the aggravating factors found. Furthermore, from this record we can glean no assurance that the public will be protected against future acts of misconduct. For these reasons we conclude that in the absence of compelling mitigating circumstances, respondent's substantive misappropriations and his habitual disregard for the interests of his clients warrant disbarment.

III. RECOMMENDATION

We therefore recommend that respondent ANTHONY DAVID MEDEIROS be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys licensed to practice. We further recommend that he be ordered to comply with the provisions of rule 955 of the California Rules of Court and 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's order in this matter. We further recommend that the State Bar be awarded costs pursuant to section 6086.10 of the Business and Professions Code and that such costs be payable in accordance with section 6140.7 of the Business and Professions Code.

IV. ORDER OF INACTIVE ENROLLMENT

In view of our disbarment recommendation, it is ordered that respondent be enrolled as an inactive member of the State Bar. (Bus. & Prof. Code, § 6007, subd. (c)(4).) The inactive enrollment is effective three days after service of this opinion. (Rules Proc. of State Bar, rule 220(c).)

EPSTEIN, J.

We Concur:

STOVITZ, P.J.

WATAI, J.

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. 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 July 21, 2005, I deposited a true copy of the following document(s):

OPINION ON REVIEW, FILED JULY 21, 2005.

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

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

Anthony D. Medeiros
P.O. Box 727
Fresno, CA 93712

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

Allen Blumenthal, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **July 21, 2005**.

Shemainee Carranza

Shemainee Carranza
Case Administrator
State Bar Court