

PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed May 15, 2006

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of

DAVID ERIC BROCKWAY,

A Member of the State Bar.

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**01-O-03470; 01-O-04083;
01-O-04120; 02-O-12367**

OPINION ON REVIEW

On four separate occasions, Asian immigrants, who spoke little or no English, sought the services of respondent, David Eric Brockway, to help them with pressing legal problems. In each instance, respondent accepted several thousand dollars in legal fees and then failed to perform the agreed-upon legal services.

The hearing judge found respondent culpable of 14 counts of misconduct in four client matters, including, inter alia, failure to perform services competently, improper withdrawal from employment, failure to render an accounting, failure to promptly return unearned fees, failure to communicate, and failure to release files. The hearing judge recommended that respondent be actually suspended from the practice of law for one year.

Respondent is appealing the hearing judge’s findings and the discipline recommendation, seeking dismissal of all charges against him. Respondent argues that he had no duty to perform the contemplated services, communicate with his clients or account for unearned fees because in each client matter he entered into a “true retainer” fee agreement that secured only his availability, and not his services. According to respondent, the fees paid by the four clients were “earned upon receipt to ensure my availability to these people for the resolution of a problem that will, in my opinion, arise in the future.” His former clients testified that they hired respondent to

resolve their *immediate* legal concerns, rather than merely to secure his availability for future inchoate problems, and that respondent abandoned their matters to their detriment.

We review the record de novo (*In re Morse* (1995) 11 Cal.4th 184, 207), and in so doing, we adopt the hearing judge's findings and conclusions, as discussed more fully below. We find additional uncharged misconduct as aggravation. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) Based upon all relevant circumstances, as well as the standards¹ and guiding case law, we conclude that the hearing judge's discipline recommendation is insufficient to protect the public, the courts and the profession, and instead we recommend respondent be suspended for five years, stayed, and placed on five years' probation on the condition that he be actually suspended for two years and until he has satisfied the requirements of standard 1.4(c)(ii).

I. BACKGROUND

Respondent was admitted to practice law in October 1977. He has one prior discipline resulting in a three-month actual suspension with two years' probation, effective April 17, 1991, for wilfully misappropriating \$500 from one client and improperly acquiring an adverse interest against a second client. (*Brockway v. State Bar* (1991) 53 Cal.3d 51.)

The State Bar filed a Notice of Disciplinary Charges (NDC) on November 14, 2003, alleging 14 counts of misconduct in four separate client matters (case numbers 01-O-03470; 01-O-04083; 01-O-04120; 02-O-12367). On January 7, 2004, respondent filed a response denying culpability. The parties filed a stipulation as to certain facts on August 13, 2004, which was the last day of the four-day trial. On November 16, 2004, the hearing judge filed a decision finding culpability on all 14 counts, including four violations of rule 3-110(A) of the Rules of

¹This and all further references to "standards" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Professional Conduct² (failure to perform competently), four violations of rule 3-700(A)(2) (improper withdrawal from employment), one violation of Business and Professions Code section 6068, subdivision (m)³ (failure to respond to client inquiries), and two violations of rule 4-100(B)(3) (failure to render an accounting). The hearing judge recommended a two-year stayed suspension, a two-year probation, and a one-year actual suspension. Respondent requested review of this decision on December 15, 2004. The State Bar did not request review but is here seeking disbarment, as it did below.

II. FINDINGS OF FACTS AND CULPABILITY DISCUSSION

A. The Le Matter (Case No. 01-O-03470)

1. Factual Findings

Ly Thi Le (Le) hired respondent to obtain legal immigration status for her daughter-in-law, Tran Truc Ly (Ly), who was living in the United States illegally. At their initial meeting on March 27, 2000, Le paid respondent \$5,800 and signed a contract for legal services, which was written in English. The agreement, entitled “Contract of Hire – Purchase of Availability,” provided that respondent would “represent Tran Truc Ly, in the case of: INS Asylum.” The agreement further provided that Le would pay a “True Retainer Fee” of \$5,800 and that “there will be attorneys’ fees in addition to the Retainer Fee above. . . .[U]nless otherwise denoted, retainer fees are not refunded.” Le, who is Vietnamese, did not speak or read English, but Robert Luu (Luu), an employee of respondent, acted as an interpreter at the meeting and translated the legal services agreement. Le testified that Luu described the “step by step” process respondent would take “in order to ask INS for my [daughter-in-law] to be here.”

²All further references to “rule” or “rules” are to these Rules of Professional Conduct, unless expressly noted.

³Unless otherwise noted, all further references to “section” refer to the Business and Professions Code.

From the outset, respondent recognized that Ly was in grave danger of arrest and deportation. He testified: “[O]f course [Ly] was illegal so she was subject to arrest at any time day or night, with or without a warrant, with or without reasonable cause. She had no papers. She didn’t speak English. She could be turned in by anybody at any time. A bus could be stopped and she could be taken off the bus and immediately be taken into custody.” Nevertheless, respondent did not contact Le or Ly for nearly ten months after he was hired, despite the fact that Le made three telephone calls to inquire about the status of the case. Each time, she left a message asking Luu to call her. Le made 18 more calls between April 2001 and July 2001, and Luu occasionally returned some of those calls.

Frustrated with respondent, Le and Ly sought new counsel, Van Thanh Do, to assist them. It is not clear whether Le and Ly intended to terminate respondent’s services at this point, but on February 7, 2001, Do notified respondent in writing that she had been retained to handle Ly’s immigration matter and she requested Ly’s entire file. Do enclosed a copy of a Notice of Entry of Appearance (INS Form G-8) on behalf of Ly. Do testified she did not receive a response from respondent for several months, and when she ultimately received the file, it consisted of only three pages of a partially-completed asylum application.

In rebuttal, respondent offered into evidence a file purportedly containing his work product for the Ly case, which he testified he prepared prior to receiving the February 7, 2001, letter from Do. This file contained 75 pages of research and a partially-completed asylum application. Also included in this file were copies of Senate Bill 778 and House of Representatives Bill 1615, authorizing certain changes in immigration status. Respondent testified that he delivered Le’s file to Do no later than two or three weeks after he received her request. Of the 75 pages of work product in the file, 35 pages were a computer printout of the interim rule implementing section 1104 of the Legal Immigration Family Equity (LIFE) Act from the Federal Register, volume 66, number 106, dated June 1, 2001, which was four months after

Do sent her request for the file and three months after he testified he delivered the file to her. Also, the federal legislation in this file, Senate Bill 778 and House of Representatives Bill 1615, was dated April 26, 2001, which was almost two and a half months after Do sent her letter to respondent.⁴ Respondent provided no other evidence of services performed on behalf of Ly.

On July 16, 2001, Le requested an accounting in a letter to respondent that was written by an acquaintance. In this letter, she also asked for copies of the immigration documents prepared for Ly and a refund of the \$5,800 fee, noting, "I called you many times, left my number, and you never returned my calls." She further complained: "You missed the deadline of April 30, 2001 for the final filing of forms to get legal status. I could have my [daughter-in-law] on the road to legal status now instead of uncertainty & worry. [Para.] You did nothing and still want to keep my hard earned money for doing nothing." Respondent denied receiving this letter, but the hearing judge found his testimony to be not credible.

Ly did in fact miss the April 30, 2001, filing deadline for an adjustment to her status under the LIFE Act, in part due to respondent's inaction and lack of cooperation with Do. Le sued respondent in Small Claims court for return of the legal fee she paid to respondent. He appealed the judgment, but after he failed to appear, a final judgment was entered on March 28, 2002, awarding \$5,000.00 to Le. Respondent's motion to set aside the judgment was denied, and he then paid the \$5,000.00 to her.

2. Culpability Discussion

Count One: Rule 3-110(A) - failure to perform with competence

The hearing judge found respondent culpable of repeatedly failing to perform legal services competently in violation of rule 3-110(A) because he did not complete or file any documentation in the immigration matter and failed to perform any service of benefit to Ly.

⁴The remaining research in the file referenced the LIFE Act, and was dated December 26, 2000 and January 16, 2001, which was nine months after Le hired respondent.

To find a violation of rule 3-110(A) in this context, we must determine that respondent acted “in reckless disregard of a client’s cause” and not merely that respondent acted negligently. (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 155, fn. 17.) We do indeed find that respondent’s failure to perform was reckless. In view of Ly’s illegal status and her urgent need to remedy her situation, respondent’s most meager and incomplete effort to address the matter after nearly one year constituted a reckless failure to perform. (See, e.g., *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 7 [delay of six months in filing bankruptcy petition, despite need for prompt action to protect clients from creditors, 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 stressful, harassing telephone calls constituted reckless failure to perform].) We do not find convincing respondent’s evidence of work product he purportedly generated in Ly’s case. Most of his research and documentation was dated several months *after* Do sent the request for the file and several weeks *after* he claimed he had delivered the file to Do. The only other research in his file was dated December 26, 2000, and January 16, 2001, which was nine months after Le hired him.

Respondent here argues that he had no obligation to provide *any* services to Ly and that his only duty was to be available to her because the Contract for Hire stated it was for “Purchase of Availability” and described his legal fee as a “True Retainer Fee.” He cites to *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4, wherein the Supreme Court defined a true retainer as “a sum of money paid by a client to secure an attorney’s availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client.” (*Ibid.*)

Even though the fee was designated in the contract as a “True Retainer Fee,” we look beyond this characterization to determine the obligations of the parties. (*In the Matter of Lais*

(Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 923 [characterization of a “non-refundable retaining fee” not determinative]; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757 [fee not a true retainer because no provision to set aside available blocks of time].) Respondent’s engagement agreement did not define the term “True Retainer Fee” and it did not expressly state that the fee was due and payable regardless of whether any professional services were actually rendered. Moreover, although the contract stated it was for “Purchase of Availability,” it did not require that respondent make “any particular provision to allot or set aside blocks of time specifically devoted to pursuing these clients’ claims. . . .” (*In the Matter of Fonte, supra*, 2 Cal. State Bar Ct. Rptr. at p. 757.) The contract also did not set forth a specific period of time when respondent was obligated to turn away other business in order to proceed with the Le matter. (*Ibid.*) To the contrary, respondent testified he had as many as 600-700 client matters in a year.

Generally, an engagement agreement between a client and an attorney is construed as a reasonable client would construe it. (Rest.3d Law Governing Lawyers §38, com. d; see also *Lane v. Wilkins* (1964) 229 Cal.App.2d 315, 323 [in construing contracts between attorneys and clients concerning compensation, construction should be adopted that is most favorable to the client as to the intent of the parties].) Moreover, “it is well established that any ambiguities in attorney-client fee agreements are construed in the client’s favor and against the attorney.” (*In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668, 676; see also *S.E.C. v. Interlink Data Network of Los Angeles, Inc.* (9th Cir. 1996) 77 F.3d 1201, 1205.) Le testified that she understood that the fee she paid to respondent was an advance against his future services for obtaining asylum for Ly. The hearing judge found Le’s testimony credible. We give great deference to this credibility determination. (Rules Proc. of State Bar, rule 305(a); *Franklin v. State Bar* (1986) 41 Cal.3d 700, 780.)

Moreover, the language of the contract supports Le's testimony. It expressly provided that respondent would "represent Tran Truc Ly, in the case of: INS Asylum." Given the urgency and seriousness of the situation, we do not believe a reasonable client would have understood that her payment of \$5,800 merely assured her of respondent's "availability" and did not include respondent's actual performance of services. Furthermore, Le could not read the contract and instead reasonably relied on Luu's "step by step" description of the services respondent would provide. Le's repeated phone calls (numbering in excess of 20), also are consistent with her expectation that respondent would take affirmative steps to rectify Ly's illegal status in a timely manner.

We accordingly reject respondent's argument that he had no obligation under the Contract for Hire to perform any services on behalf of Ly. Rather, we find that respondent had an "obligation to take timely, substantive action on the client's behalf" and he failed to do so. (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 554.) We therefore adopt the hearing judge's finding that respondent wilfully violated rule 3-110(A).

Count Two: Rule 3-700(A)(2) - improper withdrawal from employment

The hearing judge found that by failing to perform services of any benefit to Ly for almost one year and failing to communicate with her during this time, respondent "effectively withdrew from employment." The hearing judge further found that respondent withdrew without taking reasonable steps to avoid foreseeable prejudice to Ly, thereby violating rule 3-700(A)(2). We agree.

Respondent maintains he did not intend to withdraw from Ly's case and was in fact terminated by her. However, an attorney may effectively withdraw from a case without an intent to do so, when the attorney virtually abandons a client and is grossly negligent in communicating with the client. (*Baker v. State Bar* (1989) 49 Cal.3d 804, 816-817, fn. 5 [withdrawal occurs under former rule 2-111(A)(2) when an attorney ceases coming to his office and cannot be

reached by his clients, even absent an intent to withdraw]; *Kapelus v. State Bar* (1987) 44 Cal.3d 179, 187 [violation of former rule 2-111(A)(2) occurs when an attorney ceases to provide services and fails to inform client of adverse decision].)

“It is misconduct for an attorney to wilfully fail to perform the legal services for which he or she has been retained, and to wilfully fail to communicate with a client. If an attorney is essentially withdrawing from employment, he or she is obligated to give due notice to the client [citation].” (*Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126.) Although respondent argues that his strategy was to do nothing in anticipation that the immigration laws might in the future be amended to be more favorable to Ly, “he did not clearly advise her of [his intention to adopt a wait-and-see approach] and obtain her consent to a strategy for handling the case. He neither sought to terminate his employment nor aggressively pursued the matter.” (*In the Matter of Kaplan, supra*, 3 Cal. State Bar Ct. Rptr. at p. 557; see also *Bernstein v. State Bar* (1990) 50 Cal.3d 221, 232.) Not only did respondent fail to communicate with Ly for nearly one year, he did nothing to advance her interests, and she was thereby prejudiced in her ability to file a timely application for asylum under the LIFE Act.

“Whether or not an attorney’s ceasing to provide services amounts to an effective withdrawal depends on the surrounding circumstances. . . .The circumstances, however, were such that time was plainly of the essence to the services requested.” (*In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 641-642.) Under the exigent circumstances presented by the Ly matter, respondent’s failure to timely provide the necessary services constituted an effective withdrawal. (*Ibid.*) We accordingly find that respondent prejudicially withdrew from employment in wilful violation of rule 3-700(A)(2).

Count Three: Section 6068, subdivision (m) - failure to respond to client inquiries

In view of Le's testimony and her letter of July 16, 2001, which establish that she called respondent's office frequently to check on the status of her daughter-in-law's case, and that most of these calls were not returned, we agree with the hearing judge's conclusion that respondent wilfully violated section 6068, subdivision (m).⁵ However, because culpability for this violation is based on the same facts that support our culpability determinations for rule 3-110(A) and rule 3-700(A)(2), we give no additional weight in determining the appropriate discipline. The appropriate level of discipline does not depend on how many rules of professional misconduct or statutes proscribe the same misconduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.)

Count Four: Rule 4-100(B)(3) - failure to render an accounting

Respondent argues on appeal that he had no obligation to account for the \$5,800 fee he received from Le, again asserting it was a true retainer and therefore earned and accounted for upon receipt. As we discussed above, we find that Le paid the money as an advance against future services and not as a true retainer. As such, the accounting requirements of rule 4-100(B)(3) apply. (*In the Matter of Fonte, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 757-758.) Respondent's testimony that he did not receive Le's letter requesting an accounting was deemed not credible by the hearing judge, and we again give great deference to this credibility determination. (Rules Proc. of State Bar, rule 305(a); *Franklin v. State Bar, supra*, 41 Cal.3d at p. 780.) Furthermore, the obligation to "render appropriate accounts to the client" found in rule 4-100(B)(3) does not require as a predicate that the client demand such an accounting. We

⁵We are deeply troubled by respondent's attitude towards his responsibility to respond to reasonable status inquiries. In his brief on appeal, he stated "it really isn't necessary that every hysterical phone call from an annoying, molesting nut case of a difficult non-client concerned with 'her child' be taken"

therefore find respondent wilfully violated rule 4-100(B)(3) because he failed to render an accounting to Le or Ly.

B. The Chen Matter (Case No. 01-O-04083)

1. Factual Findings

On September 13, 2000, You Zhong Chen (Chen) met with respondent's interpreter, Luu, who presented Chen with a "Contract for Hire,"⁶ which Chen signed. The contract was in English, although Chen did not speak or read English, and Luu did not explain or translate the contract. The next day, September 14, 2000, Chen met with respondent and Luu. Chen spoke to respondent in Mandarin Chinese, utilizing Luu as a translator. He advised respondent of his grave concerns about six traffic violations he had been cited for on September 8, 2000, while driving a bus in Arizona for a tour operator. Chen emphasized that the citations were "a very big problem" because they could result in traffic points on his driving record and the loss of his California driver's license. Chen testified: "I very clearly spoke to [respondent through Luu] and said the main thing that I want is I don't want any points because then I wouldn't have any work to do." Respondent testified Chen never told him about his concern with the traffic points.

Chen paid respondent \$4,500 at the September 14th meeting. That was the last time Chen had any face-to-face communication with respondent. At the time he paid the money, Chen asked Luu why the legal fee was so high and was told that it would cover respondent's travel and living expenses while he was in Arizona taking care of Chen's traffic violations.⁷

⁶The Contract for Hire was identical in form to the contract described, *ante*, in the Le matter, and as such, it stated that it was for "Purchase of Availability" and that the \$4,500 was a "True Retainer Fee."

⁷The decision of the hearing judge misstates Chen's testimony as questioning the reason for the \$210 he paid to cover the *cost* of the traffic ticket. In fact, Chen questioned the high *fee* charged by respondent. In his opening brief, respondent characterized the judge's *de minimus* error as "either an intentional lie or the hallucination of a very ill person."

Respondent testified that he traveled to Arizona the very next day, which was Friday, September 15, 2000, ten days before Chen was scheduled to appear in traffic court, and spoke to the court clerk, who advised him that he should pay the bail. He further testified: "I then returned to California, bought a postal money order and mailed the ticket money to the Court [on Monday, September 18, 2000] with a cover letter and a brief message to the clerk. And that took care of the matter as far as I was concerned for Mr. Chen." Respondent provided no evidence of his travel to Arizona or his expenses incurred while he was there.

Approximately six months later, Chen was driving for another tour bus company when he learned his California driver's license was suspended due to his violations in Arizona. Chen was surprised and upset because he thought respondent had resolved his Arizona citations favorably. Chen immediately called respondent's office and talked to Luu. Respondent then called the clerk of the traffic court in Arizona and asked if it were possible for Chen to go to traffic school in order to expunge the prior traffic citations, but he was advised it was too late. Chen thus lost his job and was unemployed for the six months while his license was suspended. During this period, Chen testified he repeatedly called Luu, who either avoided his calls or hung up on him. Chen then followed up with a letter, dated July 27, 2001, addressed to Luu and "the attorneys" complaining that "we had come to an agreement that if I paid you \$4,500, you would get rid of the points of the ticket. After I paid \$4,500 to you, you didn't do anything, just told me to pay the \$210 ticket fine." Respondent responded to the July 27 letter stating: "My original understanding was that you wanted your ticket to be taken care of without going back to Arizona. Frankly, I didn't know that Arizona ticket points would go against your California license."

On April 11, 2002, Chen and respondent participated in a mediation over their fee dispute, which resulted in a written settlement agreement. By its terms, respondent agreed to refund \$2,500 to Chen, and Chen agreed to withdraw his complaint to the State Bar against respondent

2. Culpability Discussion

Count Five: Rule 3-110(A) - failure to perform with competence

We adopt the hearing judge's finding that respondent is culpable of violating rule 3-110(A) by failing to perform legal services competently. We agree with the hearing judge that respondent's testimony is highly suspect that he traveled to Arizona the day after he was retained by Chen merely to talk to the traffic court clerk in order to determine the best course of action, which was to pay the traffic fine of \$210. The only evidence of any work performed on behalf of Chen is the postal order for payment of the fine, mailed from California and accompanied by a transmittal letter, dated September 18, 2000, addressed to the Arizona Justice Court stating: "Please find enclosed the citation and the money order for Mr. Chen. . . . I hope this will take care of the matter." There was no reference in this transmittal letter to his supposed meeting and discussion with the court clerk on the previous Friday, September 15. Nor did respondent recount any trip to Arizona or provide any documentation of his travels in his letter to Chen of August 23, 2001, responding to Chen's written demand that respondent provide "evidence of your effort toward my case."

Even if we were to adopt respondent's version of the facts, we would find a wilful violation of rule 3-110(A). Respondent concedes that Chen hired him "to take care of [Chen's] Arizona concerns, without [Chen] going to Arizona."⁸ Respondent further acknowledges that Chen hired him "to do his professional best in regard to Mr. Chen's problems in Arizona. . . ." Respondent admits that when he accepted Chen's case, respondent did not know about the relationship of Arizona and California motor vehicle laws and their effect on Chen's status as a

⁸Respondent's admission that the funds were paid for the performance of legal services vitiates his claim that the fee he received from Chen was a "true retainer." Indeed, it is inconceivable that Chen would have paid respondent \$4,500 to do no more than what Chen himself could have accomplished by simply mailing a check for \$210 to the traffic court to pay the fine. We thus find that the \$4,500 fee was an advance payment against future services. (*In the Matter of Fonte, supra*, 2 Cal. State Bar Ct. Rptr. at p. 757.)

licensed driver in California. Yet he did not research the law or do any investigation. Instead, respondent asserts that he immediately traveled to Arizona and, on the basis of information respondent received from a court clerk, simply paid the traffic fine, thereby compromising Chen's right to appeal the citations. As we explained in *In the Matter of Kaplan, supra*, 3 Cal. State Bar Ct. Rptr. at p. 557 with respect to an attorney's failure to properly investigate an assault and battery case: "The matter thus required timely and substantive action, which it did not receive from respondent. Although he took some steps, he did little to advance [his client's] interests. . . ." Respondent failed to make even the most "meager efforts to investigate the matter." (*Ibid.*) If respondent had conducted even a modest investigation, he would have learned what he admittedly did not know and what Chen feared most: by paying the fine in Arizona, rather than contesting the matter, Chen's traffic citation in Arizona would cause him to lose his California driver's license and ultimately his job.

Count Six: Rule 3-700(A)(2) - improper withdrawal from employment

After Chen paid \$4,500 to respondent, he did not hear from him again. Yet, much to Chen's surprise and chagrin, his California driver's license was suspended six months later. It was only then, in response to Chen's repeated phone calls, that respondent called the Arizona traffic court clerk to ask about traffic school. By that time, it was too late for any corrective action. The circumstances in the Chen matter clearly required swift action by respondent, which he failed to take. "[T]ime was plainly of the essence to the services requested." (*In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 641- 642.) Respondent thus effectively abandoned Chen and wilfully violated rule 3-700(A)(2) because he failed to communicate with Chen or take timely steps to protect foreseeable harm to Chen's interests. (*Walker v. State Bar* (1989) 49 Cal.3d 1107, 1117 [gross carelessness in failing to communicate or attend to needs of client is sufficient to establish abandonment]; *Kapelus v. State Bar, supra*, 44 Cal.3d at p. 187.)

Count Seven: Rule 4-100(B)(3) - failure to render an accounting

Respondent concedes he did not render an accounting to Chen, but he argues that no such accounting is due since his fee was a true retainer. We have already addressed the issue of true retainer fees in footnote 8, *ante*, finding that the \$4,500 fee paid by Chen was an advance payment for future services rather than a true retainer. Accordingly, the accounting requirements of rule 4-100(B)(3) apply, and respondent violated them by failing to account to Chen. (*In the Matter of Fonte, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 757-758.)

Count Eight: Section 6090.5, subdivision (a)(2) - withdrawal of State Bar complaint

Section 6090.5, subdivision (a)(2) prohibits an attorney from seeking an agreement by a complainant to withdraw a disciplinary complaint pending against the attorney with the State Bar. We agree with the hearing judge that respondent violated section 6090.5, subdivision (a)(2) when he entered into a Settlement Agreement with Chen on April 11, 2002, which provided that Chen “agreed to settle [their fee] dispute and to withdraw the complaint pending before the State Bar, all in accordance with the terms of this Agreement.”

C. The Sun Matter (Case No. 01-O-04120)

1. Factual Findings

Rui Fang Sun (Sun) first met with respondent’s interpreter, Luu, on August 31, 2000, to discuss a matter involving an alleged rapist. Sun spoke Mandarin Chinese, but she did not speak or read English. Respondent was not at that meeting, although Sun asked to meet with him. Luu told her respondent was too busy. Sun met with respondent several weeks later, which was the only time they met during the entire time that he represented her.⁹

Sun testified that at the August 31st meeting, Luu advised her that respondent could assist her with the criminal investigation, so the rapist would be sent to jail, and that she could obtain

⁹Sun met with respondent one more time in August 2002, when she collected the refund of the fees she had paid to him.

\$200,000 in “reparations” against the rapist for the injuries she sustained. Sun further testified that Luu told her respondent would “help me find a very famous doctor to check me out. . . .” Respondent testified that Sun retained him merely to facilitate the filing of a criminal complaint and assess the viability of a civil suit. The hearing judge found Luu and respondent’s testimony not to be credible, and Sun’s testimony to be credible. We give deference to this determination.

At the meeting on August 31, 2000, Sun signed a “Contract of Hire - Purchase of Availability,”¹⁰ that was written in English, and she agreed to pay respondent a total of \$5,000, which she did in four installments between August 31, 2000, and November 13, 2000. According to the Contract of Hire, respondent would “represent Sun in the case of: Rui Fang Sun vs [the alleged rapist].”¹¹

Sun testified that during the two-year period after her first meeting with Luu, respondent never asked her to obtain a psychological or medical evaluation and never advised her she would have to pay for a medical exam. She further testified respondent essentially “wasted my time and he cheated me ” because he did not find a doctor for her and did nothing to assist with the criminal matter or the civil case. Respondent testified that during the 18 months following his retention by Sun, he spent about two hundred hours on her case, including contacting the sheriff’s investigators, attempting to schedule a polygraph test and arranging for treatment at a free clinic, but Sun refused to take a polygraph test or sign a medical release. Luu testified that Sun called and spoke with him frequently. However, there is no documentary or other evidence in the record of any work performed on behalf of Sun.

¹⁰Luu signed the Contract of Hire on behalf of respondent . The contract is identical in form to the contracts discussed *ante*, in the Le and Chen matters.

¹¹There is no evidence in the record of a conviction of Sun’s alleged attacker for rape or assault. While the absence of such evidence is not relevant to our analysis of the duties owed by respondent to Sun, under the circumstances, we decline to identify the alleged perpetrator.

Frustrated with respondent's inaction, on January 17, 2002, Sun sent a letter, which was prepared by a friend, stating: "During the time I met you Robert Luu at the law office, I was promised that I have a case against [the alleged attacker] and be awarded \$200,000.00 in compensation. I repeatedly communicated with you for refund to my best ability, and I even tried to contact with [respondent], but so far nothing was accomplished and the fee of \$5,000.00 was a waste." Respondent responded five months later, on May 2, 2002, sending her a letter and enclosing a check for \$4,000. He also enclosed a document entitled "Acknowledgment and Receipt" containing the following language: "I hereby release attorney David E. Brockway, and his Law Firm, from any and all liabilities" and a notification to the State Bar for her signature withdrawing her complaint. He requested in his letter that she sign the notification "only if you wish to withdraw your complaint." Sun did not cash the check at that time because she felt she was entitled to a refund of her entire \$5,000 payment. There is no evidence that Sun signed the letter withdrawing her complaint from the State Bar, but she did sign the Acknowledgment and Receipt on July 9, 2002, and respondent refunded the additional \$1,000 by a check issued the same date. Sun then negotiated both checks.

2. Culpability Discussion

Count Nine: Rule 3-110(A) - failure to perform with competence

The hearing judge found respondent culpable of violating rule 3-110(A) for his failure to perform competently on behalf of Sun. Respondent testified that he performed approximately 200 hours of work in the Sun matter, but the hearing judge found this testimony to be "self-serving." Other than Luu's testimony about his numerous conversations with Sun concerning the emotional effects of her trauma, there is no evidence in the record, such as file notes, work product or other documentation, to establish that any work was performed on behalf of Sun. Even if Luu assumed the task of listening to Sun's complaints, it was respondent's duty to take substantive action on her behalf. Respondent met with Sun just once to discuss her case during

the almost two years he represented her. The hearing judge found Sun's testimony about respondent's inaction to be credible, and her testimony was corroborated by her letter to respondent, dated January 17, 2002, stating: "I was promised that I have a case against [the alleged rapist] and be awarded of \$200,000.00 in compensation. . . . [N]othing was accomplished and the fee of \$5,000.00 was a waste." The hearing judge found that respondent performed no work on behalf of Sun and provided no service of benefit to her. We adopt this finding and conclude that respondent wilfully violated rule 3-110(A).

Count Ten: Rule 3-700(A)(2) - improper withdrawal from employment

The hearing judge further found that respondent's failure to perform any service of benefit to Sun and his failure to communicate with her for more than 18 months constituted an impermissible withdrawal under rule 3-700(A)(2). We agree. "Gross carelessness and negligence in failing to communicate with clients or to attend to their needs may suffice" to establish that an attorney has improperly withdrawn from employment. (*Walker v. State Bar, supra*, 49 Cal.3d at p. 1117.) Indeed, "[t]he requirement of rule 2-111(A)(2) [now rule 3-700(A)(2)] that requires an attorney to take steps to avoid prejudice to his client prior to withdrawing . . . may reasonably be construed to apply when an attorney ceases to provide services, even absent formation of an intent to withdraw as counsel for the client." (*Baker v. State Bar, supra*, 49 Cal.3d at pp. 816-817, fn. 5.) There is no evidence respondent did anything to pursue the civil suit or facilitate the criminal investigation or perform any other service of consequence, and he failed to communicate the fact of his inaction to her. We therefore find respondent, in essence, abandoned Sun, and accordingly he is culpable of wilfully violating rule 3-700(A)(2). (*In the Matter of Kaplan, supra*, 3 Cal. State Bar Ct. Rptr. at p. 554.)

Count Eleven: Rule 3-700(D)(2) - failure to refund unearned fees

We adopt the hearing judge's conclusion that respondent failed to refund unearned fees promptly in violation of rule 3-700(D)(2). We find that the fee that Sun paid respondent

pursuant to the Contract of Hire was an advance against future services and was not a true retainer, as respondent asserts, for the reasons discussed in the Le matter, *ante*. Respondent's own testimony of the "two hundred hours" of service he purportedly provided confirms that he did not believe that his fee was intended merely to secure his availability, but instead was intended as an advance for future services. Accordingly, respondent was obligated to promptly return the unearned, advance fee. (*In the Matter of Lais, supra*, 3 Cal. State Bar Ct. Rptr. at p. 923.)

Sun repeatedly requested a refund of the \$5,000 fee from August through November of 2000, but it was only after January 2002, when Sun wrote to him and stated in her letter that she intended to refer the matter to the State Bar, that he finally agreed to return the fee. Even then, respondent waited six months, until July 2002, to refund the fee in full.¹² This six-month delay constituted a wilful violation of rule 3-700(D)(2). (*In the Matter of Lais, supra*, 3 Cal. State Bar Ct. Rptr. at p. 923 [two and one-half month delay in returning unearned fee violated rule 3-700(D)(2)].)

D. The Zhao Matter (Case No. 02-O-12367)

1. Factual Findings

Li Zhao (Zhao) and her husband, Qiang Liu (Liu) owned a small Chinese herb business. They received letters from the United States Department of Justice, Immigration and Naturalization Service (INS), dated April 25, 2000, advising them that their Petitions for Nonimmigrant Worker Status had been denied. Zhao and Liu had 30 days to appeal, and Zhao immediately sought the help of respondent, whom she met on April 28, 2000. At the initial meeting, which also was attended by the interpreter, Luu, Zhao advised respondent of the urgent need to immediately appeal the denial of her L1 visa renewal. Zhao, who signed a "Contract of

¹²Respondent improperly conditioned the return of the fees upon Sun's signing a document entitled "Acknowledgment and Receipt" which released respondent "and his Law Firm, from any and all liabilities." We discuss this act of overreaching as aggravation, *post*.

Hire: Purchase of Availability”¹³ at the initial meeting, gave respondent a check for \$6,500, believing that the fee was to take care of “my L1 appeal and my husband’s and myself’s legal status changes.” (The Contract of Hire referenced the case as an “L1 INS Appeal.”) Zhao and her husband spoke Chinese, and they had a very limited ability to speak or read English. However, Luu did not translate the contract for Zhao.

Respondent clearly understood the urgency of Zhao’s situation. He testified: “Zhao’s status had expired and the INS had determined that she should be removed from the United States and she had been ordered to appear at the INS for deportation.” In spite of her precarious situation, respondent testified that he told Zhao that she and her husband were not eligible for legal status and that she should wait a year or two in order to prove to the INS her herb business was “a going concern” and profitable.¹⁴ Respondent said he would then “resubmit the application kind of going through the back door rather than an appeal to a proper authority with the INS.” The hearing judge found this testimony was not believable.

Almost one year later, in February or March of 2001, after respondent had taken no action, Zhao requested the return of her files. She followed up with a letter on April 10, 2001, which was written by a friend pursuant to her instructions, demanding a refund of the \$6,500 fee and the return of her “papers.” In the letter, she complained that respondent failed to provide any evidence that he had done any work on her or her husband’s behalf. She wrote: “You and Mr. [Luu] not only have misled us. You and Mr. [Luu] have also failed to refund my money and all papers timely.”

¹³The Contract for Hire was in English and the same form as respondent used in the other three matters discussed *ante*.

¹⁴Respondent testified that the L1 status was available for individuals who were “in a managerial position of a foreign country operating a branch organization for the United States.” According to respondent, it is essential the organization “employs at least five citizens or permanent residents and essentially makes a profit.”

Frustrated and fearful of possible deportation, Zhao hired another attorney, Frank Carleo. On April 15, 2001, Carleo wrote to respondent demanding the return of the \$6,500 and the entire file for Zhao and her husband Liu.¹⁵ In the letter, Carleo stated that Zhao and Liu “signed a contract to have you represent them in their appeal and to otherwise apply, on their behalf for permanent residence status. You asked for them to pay a retainer of \$6,500. They immediately gave you the requested sum. [Para.] The appeal had to be filed within 30 days. From April 28, 2000, they heard nothing regarding your efforts. They contacted your offices many times asking if there was anything more for them to do. They could never reach anyone to discuss the progress of their appeal. . . . It was not until March of 2001 that they learned that you had not filed anything. Ms. Zhao and her husband Mr. Liu have been severely prejudiced by your inaction. They are now out-of-status and subject to incarceration at any time by the INS!”

When respondent finally returned the file in late April of 2001, it contained nothing but the papers that Zhao initially had given to respondent. Ultimately, Zhao and her husband sued respondent for the return of the fee and for other damages. On June 4, 2002, respondent paid \$12,500 by cashier’s check issued to Carleo in settlement of the suit.

2. Culpability Discussion

Count Twelve: Rule 3-110(A) - failure to perform with competence

The hearing judge found respondent culpable of violating rule 3-110(A) by failing to file any papers or take any action on Zhao’s behalf with respect to her appeal in the immigration matter. We agree. Additionally, we find that respondent’s failure to perform was reckless given the urgency of the situation and the grave consequences attendant to Zhao’s loss of status as an immigrant. We find respondent’s explanation highly implausible that he intended to build a case for Zhao and her husband over a one- to two-year period so that he could “resubmit the application kind of going through the back door rather than an appeal to a proper authority”

¹⁵Carleo sent a second, identical letter on April 25, 2001.

Count Thirteen: Rule 3-700(A)(2) - improper withdrawal from employment

The hearing judge found that respondent's failure to perform any service of benefit to Zhao and his failure to inform her that he had basically abandoned her appeal was a violation of rule 3-700(A)(2). We agree. (*Walker v. State Bar, supra*, 49 Cal.3d at p. 1117; *Baker v. State Bar, supra*, 49 Cal.3d at pp. 816-817, fn. 5.) The 30-day time period needed to perfect Zhao's appeal required a rapid response. Respondent's failure to take action for one year under these circumstances constituted an effective withdrawal under rule 3-700(A)(2). (*In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 641-642.)

Count Fourteen: Rule 3-700(D)(1) - failing to return client file¹⁶

The hearing judge found that respondent failed to promptly release Zhao's file. We adopt this finding. Zhao made several verbal requests for the return of her "papers," but it was only after she and her new attorney, Carleo, followed up with three letters demanding the return of her file that respondent finally complied. By waiting at least two months to send Zhao's files to her attorney, respondent willfully violated rule 3-700(D)(1). (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 377.)

III. DISCIPLINE

The primary purpose of these disciplinary proceedings is not to punish but to protect the public, the courts, and the legal profession. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856.) No fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Rather, we determine the appropriate discipline in light of all relevant circumstances, including aggravating and mitigating circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

¹⁶The hearing judge noted in her decision that the NDC incorrectly numbered this count as "Thirteen" rather than "Fourteen." Her decision also inadvertently mislabeled Count Fourteen as "Failure to Accounts [sic] of Client." However, the hearing judge's analysis clearly addresses the substance of respondent's failure to timely return Zhao's file.

A. Aggravation

We adopt all of the hearing judge's findings in aggravation, and also find acts of moral turpitude as uncharged misconduct constituting additional aggravation.¹⁷

Respondent has one prior record of discipline. (Std. 1.2(b)(i).) Effective April 1991, respondent was actually suspended for three months, with conditions, for wilfully misappropriating \$500 from a client in 1981 and for acquiring an adverse interest against a client by accepting a quitclaim deed in 1982. (*Brockway v. State Bar, supra*, 53 Cal.3d 51, 58-59, 64-65, 67 (*Brockway I*)). Although the gravamen of respondent's prior misconduct differs from the present misconduct, there are areas of common concern. The hearing judge found respondent to be not credible, and we also consider much of his testimony to be inherently improbable. So, too, the Supreme Court made the same finding in *Brockway I* (*id.* at p. 58), characterizing his testimony as "artful and hard to believe." (*Id.* at p. 66.) Also, in *Brockway I*, respondent utilized an ambiguous retainer agreement with an incarcerated criminal defendant of questionable competence and failed to disclose the nature of the adverse property interest he was acquiring from the defendant. (*Id.* at pp. 65, 67.) To some extent these facts mimic the misconduct in the instant case, and we accordingly ascribe moderate weight in aggravation because of respondent's prior discipline.

Respondent committed multiple acts of wrongdoing. (Std. 1.2(b)(ii).) He is culpable of 14 counts of misconduct in four client matters. The State Bar argues this amounted to a pattern of client abandonment. We disagree. Only the most serious instances of repeated misconduct over a prolonged period of time have been considered as evidence of a "pattern of misconduct."

¹⁷Although evidence of uncharged misconduct may not be used as an independent ground for discipline, it may be considered in aggravation where appropriate. Here, the evidence of overreaching came from respondent's own testimony and that of the witnesses. (*Edwards v. State Bar, supra*, 52 Cal.3d at pp. 35-36.)

(*Young v. State Bar* (1990) 50 Cal.3d 1204, 1217; *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074, 1079-1080.)

We agree with the hearing judge's finding that respondent significantly harmed his clients (std. 1.2(b)(iv)), because two clients were required to hire new counsel to recover fees and obtain their files and one client lost his job due to respondent's failure to perform. Indeed, all four of respondent's clients sought his professional help to remedy serious, pressing problems. Respondent not only failed to make himself available to these clients, but his inaction exacerbated their desperate situations.

Respondent has made no attempt to atone for the consequences of his misconduct. (Std. 1.2(b)(v).) His demonstrated indifference towards the plight of his clients is nothing less than astonishing. For example, in his Opening Brief, respondent questions the relevance and import of Chen's loss of employment: "As far as Chen's job, well that is the way the cookie crumbles. Also what difference does Chen's 'concerns' have on this case?" (See also footnote 5 *ante.*)¹⁸ In fact, respondent repeatedly has attempted "to shunt the responsibility for his misconduct onto others, including the very victims of that misconduct." (*Bernstein v. State Bar, supra*, 50 Cal.3d 221, 232.) Accordingly, we assign substantial weight in aggravation to respondent's indifference and failure to atone for his misconduct.

We find additional uncharged misconduct in aggravation as the result of respondent's overreaching of his clients, constituting acts of moral turpitude in violation of section 6106. (Std. 1.2(b)(iii).) Knowing of his clients' English language limitations, respondent nevertheless used technical legalese in his engagement agreements, such as the term "true retainer," in an effort to exempt himself from providing any service of consequence to them. Furthermore,

¹⁸Respondent's Opening Brief also contains comments that show disrespect towards the hearing judge. For example, he states: "[I]f the judge weren't so undereducated, inexperienced and ignorant of how real attorneys conduct their profession in an ethical manner, and was of course anything but arrogant, biased and unthinking; then a more correct finding of the fact and/or opinion would have been forthcoming."

respondent required one client to withdraw his complaint to the State Bar as a condition of settlement, and another was required to sign a release as a condition of settlement, releasing respondent from all legal liability.¹⁹ ““The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed . . . is in a superior position to exert unique influence over the dependent party.”” (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Respondent’s exploitation of his superior knowledge and position of trust to the detriment of his vulnerable clients clearly constituted moral turpitude within the meaning of section 6106. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 244.)

B. Mitigation

Respondent presented the testimony of one character witness, Rebecca Elayache. The testimony of this witness does not constitute a broad range of references from the legal and general communities. (See *In the Matter of Myrdall, supra*, 3 Cal. State Bar Ct. Rptr. 363, 387 [three attorneys and three clients do not constitute a broad range of references from legal and general communities].) Moreover, the witness had only limited knowledge of the disciplinary issues in this proceeding. The hearing judge assigned “minimal weight” to respondent’s evidence. (Std. 1.2(e)(vi)). We assign no weight in mitigation, as it was respondent’s burden to establish mitigating circumstances by clear and convincing evidence, which he failed to do. (Std. 1.2(e); *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 311.)

C. Level of Discipline

In determining the appropriate level of discipline, we look to the applicable standards and case law for guidance. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Although the standards

¹⁹Respondent sent an “Acknowledgment and Receipt” with the refund of Sun’s \$4,000, which provided: “I hereby release attorney David E. Brockway, and the Law Firm, from any and all liabilities.” Sun thought she was merely signing a receipt for the money. Parenthetically, a release of all liabilities may well violate rule 3-400(A).

are not binding, they are to be afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” [Citation.]” (*In re Silverton* (2005) 36 Cal.4th 81, 91.) The hearing judge considered as applicable standards 1.6, 1.7(a), 2.2(b), 2.4(b), 2.6, and 2.10.²⁰ Based on our additional finding of moral turpitude as the result of respondent’s overreaching, we add standard 2.3 to the discipline equation.²¹ Thus, standards 2.3 and 2.6, providing for suspension or disbarment, are the most relevant to this case.

Our discipline analysis is tempered by the decisional law, and a review of similar cases leads us to conclude that greater discipline than the one-year actual suspension recommended by the hearing judge is required under the circumstances presented here. The range of discipline imposed in cases focusing on client abandonment and failure to communicate is extremely broad, ranging from six months’ actual suspension to disbarment. In recommending one year actual suspension, the hearing judge considered *In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. 631 and *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73. These

²⁰Standard 1.6 provides when there are two or more acts of professional misconduct in a single proceeding, the sanction imposed will be the more severe of the applicable standards.

Standard 1.7(a) provides that a greater degree of discipline should be imposed than was imposed in a prior disciplinary proceeding.

Standard 2.2(b) provides for a 90-day actual suspension for a violation of rule 4-100 not involving a wilful misappropriation.

Standard 2.4(b) provides failure to perform services not demonstrating a pattern of misconduct or culpability of a member of wilfully failing to communicate with a client shall result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6 provides for suspension or disbarment, depending on the gravity of the offense, for violations of section 6068, subdivisions (i) and (m).

Standard 2.10 provides reproof or suspension, depending on the gravity, for all other violations of the Business and Professions Code and rules not specifically addressed in the standards.

²¹Standard 2.3 provides in relevant part: “Culpability of a member of an act of moral turpitude . . . shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member’s acts within the practice of law.”

cases, however, involved less serious misconduct than that which occurred here. In the case of *In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. 631, we recommended nine months' actual suspension where the attorney abandoned two clients, who suffered only modest harm as the result of the attorney's inattention. In *In the Matter of Peterson, supra*, 1 Cal. State Bar Ct. Rptr. 73, we recommended one year's actual suspension where the attorney abandoned three clients and the consequences of the attorney's inattention were not serious. (See also, *Lester v. State Bar* (1976) 17 Cal.3d 547 [four instances of abandonment, six months' actual suspension]; *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269 [one-year actual suspension for failure to perform and improper withdrawal in one client matter, plus an act involving dishonesty and moral turpitude and a prior record of serious, but dissimilar, misconduct].)

Generally, where four to six clients have been abandoned or suffered from incompetent representation, the discipline has included an actual suspension of two years. (cf. *Martin v. State Bar* (1978) 20 Cal.3d 717 [six instances of abandonment resulting in one year actual suspension].) Of the cases imposing two years' actual suspension, we consider as particularly apt the cases of *Bernstein v. State Bar, supra*, 50 Cal.3d 221, *Nizinski v. State Bar* (1975) 14 Cal.3d 587 and *In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220.

In *Bernstein v. State Bar, supra*, 50 Cal.3d 221, the Supreme Court imposed a five-year stayed suspension and five years' probation on the condition of two years' actual suspension, plus payment of restitution due to the attorney's failure to perform, return files and refund unearned fees to five clients in three separate matters. Many of Bernstein's clients were vulnerable, as were those of respondent. In one instance, Bernstein told one of his students in a class where he was a part-time instructor, that he was a highly sophisticated appellate practitioner. (*Id.* at p. 225.) The student borrowed \$2,500 to pay Bernstein to represent him in an appeal. Bernstein then failed to prosecute the appeal or respond to the student's inquiries.

After he was fired, Bernstein refused to return the \$2,500 fee or the student's file, and as a consequence, the student was unable to hire another attorney.

In a second matter, another student of Bernstein and the student's husband hired him to represent them in litigation involving an automobile lease. (*Bernstein v. State Bar, supra*, 50 Cal.3d at p. 226.) They paid \$1,500 as advanced fees, but after Bernstein took no action, two default judgments were entered against them and they were required to pay the judgments, one of which was for the leasing company's attorney's fees. Their bank accounts were levied and their wages garnished. Bernstein refused to return the legal fees when the student demanded them. In a third matter, Bernstein was hired by an immigrant, who paid him \$2,500 to obtain permanent residency status for himself and his wife. (*Id.* at p. 227.) Bernstein took no action, would not respond to client inquiries, and as a consequence, the clients were forced to hire a notary in Mexico, who obtained legal residency status for them. As in the instant case, Bernstein attempted to exempt himself from responsibility by hiding behind his retainer agreement, which referred to his corporate law firm and not to himself individually. The Supreme Court rejected this, stating "he cannot rely on the corporate veil to cloak his own professional lapses." (*Id.* at p. 231.) There was significant aggravation because the attorney failed to cooperate with the State Bar, was indifferent to the consequences of his misconduct, and lacked candor. Bernstein, like respondent, had a prior discipline resulting in thirty days' actual suspension for misappropriation of a client's funds, and there was no mitigation evidence .

In *Nizinski v. State Bar, supra*, 14 Cal.3d 587, the Supreme Court imposed two years' actual suspension and until restitution was made, where an attorney failed to perform on behalf of four clients, several of whom were unsophisticated and at least one of whom did not speak English well. In one matter, Nizinski failed to prosecute a criminal appeal after he was paid a \$1,000 fee by the client, who was incarcerated. (*Id.* at p. 589.) Nizinski never returned the fee. In a second matter, two individuals retained him and gave him \$500 plus a ten percent contingency to represent them in a will contest. (*Id.* at p. 591.) Nizinski took no action on the

clients' behalf in spite of repeated assurances to them that he was taking care of everything. (*Ibid.*) Instead, he claimed that the \$500 was paid to represent the son of one of the clients, which was untrue. In another matter, Nizinski failed to pursue a criminal appeal on behalf of a client, and it was dismissed for want of prosecution. (*Id.* at p. 592.) The defendant's mother then paid Nizinski \$500 to institute a habeas corpus proceeding. (*Ibid.*) Nizinski used the money for his own purposes and took no further action. The defendant ultimately was deported to Mexico. In addition, Nizinski was found culpable of acts of moral turpitude for knowingly misrepresenting to his clients the status of their cases, and in two instances, of accepting the clients' funds without using them for their intended purpose. Nizinski had a prior 30-day suspension involving failure to perform competently and making misrepresentations to his clients and the State Bar.

In the case of *In the Matter of Bailey, supra*, 4 Cal. State Bar Ct. Rptr. 220, which was a default proceeding, the attorney was found culpable of abandonment and improper withdrawal in four client matters, as well as failure to perform competently, return files and respond to client inquiries. In one client matter, Bailey collected an illegal probate fee of \$1,500 and demanded an additional fee to complete the probate, which Bailey never accomplished. (*Id.* at p. 224.) In a second probate matter, Bailey failed to prevent secured creditors from foreclosing on real property due to her inaction. (*Ibid.*) In yet another probate matter, Bailey collected \$4,000 in advanced fees and then failed to provide any service, forcing the client to probate the estate herself. (*Id.* at pp. 224- 225.) In the fourth matter, Bailey collected an advance fee of \$1,990, then made several errors in the disposition of assets. (*Id.* at p. 225.) She demanded additional fees to correct the errors, then failed to take any action. Other than absence of a prior discipline, there was no mitigation. Aggravation included client harm, multiple acts of wrongdoing and lack of cooperation with the State Bar. Bailey received a five-year stayed suspension with two years' actual suspension and until restitution was paid. (*Id.* at p. 230; see also, *Bledsoe v. State Bar, supra*, 52 Cal.3d 1074 [two years' actual suspension where attorney with no prior record found

culpable of failing to perform on behalf of four clients, failing to communicate, failing to forward a client file and refund unearned fees, withdrawing without notice, and failing to cooperate with the State Bar].)

The State Bar here asks for disbarment even though it did not appeal the hearing judge's decision. There are a number of cases where client inattention and/or abandonment have resulted in disbarment, but these cases generally have involved more instances of misconduct, such that the behavior was characterized as a habitual disregard of clients' interests or a pattern of misconduct under standard 2.4(a).²² (See e.g., *In re Billings* (1990) 50 Cal.3d 358 [disbarment for 18 matters involving abandonment resulting in serious harm to clients, practicing law while on suspension and conviction for misdemeanor drunk driving resulting in grave injuries to a passenger]; *Farnham v. State Bar* (1988) 47 Cal.3d 429 [seven instances of abandonment with prior disciplinary record, disbarment]; *Slaten v. State Bar* (1988) 46 Cal.3d 48 [disbarment because failed to perform for seven clients, commingled funds, advised client to act in violation of law and had an extensive discipline record]; *McMorris v. State Bar* (1983) 35 Cal.3d 77 [disbarment for habitual failure to perform in seven matters involving five clients, with two prior suspensions for the same misconduct]; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416 [disbarment for 16 counts of misconduct in nine client matters and one non-client matter for failing to perform competently, to return a client's file promptly, to respond to client inquiries, and to notify clients of significant developments, plus commingling funds and an act of moral turpitude for issuing checks on account with insufficient funds, aggravated by prior six-month suspension for the same misconduct, multiple acts of misconduct, significant harm to clients and indifference toward rectification]; cf. *Pineda v. State Bar* (1989) 49 Cal.3d 753 [although a common pattern of failure to perform, communicate and refund unearned fees, plus

²²Standard 2.4(a) provides: "Culpability of a member of a pattern of wilfully failing to perform services demonstrating the member's abandonment of the causes in which he or she was retained shall result in disbarment."

misconduct involving misrepresentation and misappropriation in seven client matters, only two years' actual suspension warranted because of strong mitigative evidence].) As discussed *ante*, we do not find on this record clear and convincing evidence of a pattern of abandonment or habitual disregard of clients' interests mandating disbarment under standard 2.4(a).

We recommended disbarment in *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, which involved misconduct in only three client matters, including the unauthorized practice of law, failure to keep clients reasonably informed of significant developments, failure to refund unearned fees and an act of moral turpitude arising from appearing on behalf of a client and using a pre-signed verification without the client's authority. However, our primary concern in that case was the attorney's failure to comply with the terms and conditions of his criminal probation by disobeying two child support orders and his failure to participate in his two disciplinary proceedings. We thus concluded Taylor was not a good candidate for suspension and/or probation because of his "disdain and contempt for the orderly process and rule of law [that] clearly demonstrate that the risk of future misconduct is great." (*Id.* at p. 581.) In contrast, respondent participated in the hearing below and in this appeal.²³ His single prior record of discipline was remote in time, although his prior conduct is suggestive to some extent of the misconduct of concern here.

In considering the appropriate discipline, we find respondent's overreaching of his clients to be of serious concern. But it does not approach the grievous lack of client fidelity that occurred in *In the Matter of Brimberry*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 405, where we

²³We agree with the State Bar that respondent's participation in these proceedings is marred by his testimony below, which the hearing judge found to a large extent was not credible, as well as his brief on appeal, which the State Bar asserts demonstrates a "manifest disrespect for the courts." Respondent's brief does indeed contain several unfounded and inflammatory statements, but we already have assigned weight in aggravation to these statements in finding respondent is indifferent towards rectification and is unwilling to atone for his misconduct. (Std.1.2(b)(v).)

recommended disbarment for an attorney who affirmatively disregarded her clients' instructions and "became an advocate against her client, unabashedly disregarding her clients' instructions in order to maximize her fees." Indeed, in *Brimberry*, we found the attorney's actions to be "reprehensible, corrupt, [and] dishonest" (*Id.* at p. 393.)

Nor do respondent's actions approach the attorney's overreaching in *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, wherein we recommended disbarment for an attorney who "made a habit of ignoring his clients and their interests. . . ." (*Id.* at p. 346.) We found Phillips culpable of overreaching of several clients who "were of modest means and apparently modest education" (*Id.* at p. 346.) In two matters, Phillips attempted to settle cases without client authority, and in one matter without having met the client. He also filed a lawsuit on behalf of former clients against their wishes, spoke to his clients rudely and hung up on them, and ignored their correspondence and telephone calls and those of other counsel. (*Ibid.*) Looking at the facts as a whole, we were compelled in *Phillips* to conclude that the attorney had demonstrated "clear disrespect for his clients and a nearly complete lack of appreciation for his professional obligations." (*Ibid.*) In all, Phillips was culpable in seven separate matters involving five clients and two former clients of repeatedly and intentionally failing to perform services competently, failing to return files, charging an illegal fee, failing to return unearned fees, sharing fees with a non-lawyer, and forming a law partnership with a non-lawyer. (*Id.* at p. 345.) In aggravation, we found Phillips' misconduct was surrounded by considerable dishonesty and concealment and that he "demonstrated a willingness to disregard the truth whenever the need arises" (*Id.* at p. 346.)

Based on the unique facts of the instant case, and looking to the decisional law and the standards for guidance, we are persuaded that disbarment is too severe and is unnecessary to protect the public and the courts. Nevertheless, respondent's abandonment of his clients, together with his overreaching, militates in favor of a longer period of actual suspension than the one year recommended by the hearing judge. We accordingly recommend a five-year

suspension, stayed, and a five-year period of probation on the condition of two years' actual suspension and until respondent satisfies the requirements of standard 1.4(c)(ii), which will carry with it the condition that respondent establish his rehabilitation, fitness to practice and learning and ability in the general law before being allowed to commence practice again. This requirement serves the important goal of public protection, especially necessary in this case in view of the absence of any recognition by respondent of the seriousness of his misconduct.

IV. RECOMMENDATION

We recommend that respondent David Eric Brockway be suspended from the practice of law in the State of California for five years, that execution of that suspension be stayed, and that respondent be placed on probation for five years on the following conditions:

1. That respondent be actually suspended from the practice of law in the State of California during the first two years of probation and until respondent shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.
3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.
4. Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

- (a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and
- (b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

- 5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.
- 6. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)
- 7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for five years will be satisfied, and the suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 955

We further recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in paragraphs (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.

VII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

EPSTEIN, J.

We concur:

STOVITZ, P. J.

WATAI, J.

**Case Nos. 01-O-03470, 01-O-04083,
01-O-04120, 02-O-12367**

In the Matter of

DAVID ERIC BROCKWAY

Hearing Judge

Hon. Joann M. Remke

_____ *Counsel for the Parties*

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