PUBLIC MATTER

THE STATE BAR COURT

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **CHARLES J. ROTHBAUM,** **Member No. 54450,** A Member of the State Bar.	**Case Nos.** **02-N-15774; 01-O-04073; 01-O-04311; 01-O-04737; 01-O-04964; 02-O-12276; 02-O-16038; 02-O-15376; 03-O-04161** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. INTRODUCTION

In this disciplinary proceeding, Respondent Charles J. Rothbaum (Respondent) has been charged with multiple acts of serious misconduct, including failing to obey a Supreme Court order, practicing law while on suspension, failing to perform with competence, breaching a client's confidence, failing to avoid adverse interests and failing to refund approximately $57,540 of unearned attorney fees.

The court finds Respondent culpable of the majority of the charges of misconduct. In light of Respondent's culpability, and the serious aggravating factors, the court recommends that Respondent should be disbarred from the practice of law in this State.

II. SIGNIFICANT PROCEDURAL HISTORY

On March 4, 2004, the Office of the Chief Trial Counsel of the State Bar (State Bar) filed its notice of disciplinary charges in State Bar Court Case Nos. 01-O-04073, et al. Respondent filed his response on March 29, 2004. The State Bar's first amended notice of disciplinary charges was filed in State Bar Court Case No. 02-N-15774 on July 1, 2004, and Respondent's prior response filed on March 29, 2004, was deemed sufficient. All cases were consolidated for trial.

The parties' partial stipulation as to facts filed on October 8, 2004, and their two stipulations as to facts filed on October 20, 2004, are hereby approved. Furthermore, the court granted the State

Bar motion to dismiss with prejudice State Bar Court Case No. 1-O-04311.

Trial was held on October 19, 20 and 22, 2004.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the parties' stipulations of facts and the evidence and testimony introduced at trial.

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 13, 1972, and has been a member of the State Bar at all times since.

B. State Bar Court Case No. 02-N-15774 (California Rules of Court, Rule 955)

1. The Supreme Court Order

On October 10, 2001, the Supreme Court of California filed a disciplinary order in case number S099693 (State Bar case number 98-O-00402, et al.). The order became effective on November 9, 2001.

The October 10, 2001 Supreme Court order required Respondent to comply with California Rules of Court, rule 955 (hereinafter "rule 955"), and to perform the acts specified in subdivisions (a) and (c) of that rule with 30 and 40 days, respectively, after the effective date of the order. The deadlines for Respondent to comply with rule 955 subdivisions (a) and (c) expired on December 9, 2001, and December 19, 2001, respectively.

Notice of the October 10, 2001 Supreme Court order was duly and properly served upon Respondent in the manner prescribed by rule 24(a) of the California Rules of Court at the address as maintained by the State Bar in accordance with Business and Professions Code section 6002.1. Respondent acknowledges receipt of the order.

On or about October 31, 2001, Respondent received from a probation deputy of the Probation Unit of the Office of the Chief Trial Counsel of the State Bar of California a letter reminding him of the obligation to comply with rule 955 and enclosing an accurate copy of the Supreme Court Order as well as a form approved by the State Bar Court Executive Committee for reporting compliance with rule 955.

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2. Respondent's non-compliance with subdivision (a) of rule 955

The October 10, 2001 Supreme Court order required that Respondent comply with subdivision (a) of rule 955 no later than December 9, 2001, by notifying in writing all clients and any co-counsel of his suspension, delivering to all clients any papers or other property to which the clients are entitled, refunding any unearned attorney fees, notifying in writing opposing counsel and adverse parties of his suspension, and filing a copy of said notice with the court, agency, or tribunal before which the litigation is pending.[1]

However, as of December 9, 2001, Respondent had not notified in writing all clients of his suspension and had not returned all unearned attorney fees. In particular, as of that date, Respondent was still representing but did not provide written notification to his client Danny J. Rivera.

Furthermore, as of December 9, 2001, Respondent had not refunded unearned attorney fees to the following clients:

a. Respondent had not refunded $840 in unearned fees to Simon Pamplona;

b. Respondent had not refunded $50,000 in unearned fees to Cheryl Givens;

c. Respondent had not refunded $700 in unearned fees to Carmen Castenada;

d. Respondent had not refunded $1,500 in unearned fees to Danny J. Rivera;

e. Respondent had not refunded $4,500 in unearned fees to William and Paula Henry for the representation of their son, Michael Henry.

At the time of trial in this matter, Respondent still had not refunded any portion of these unearned attorney fees to his former clients.

3. Respondent's non-compliance with subdivision (c) of rule 955

The October 10, 2001 Supreme Court order also required Respondent to comply with

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[1]At the time of Respondent's suspension, the form the State Bar Court provided to respondents for a compliance declaration erroneously suggested that the universe of cases subject to rule 955 compliance was measured as of the *effective date* of the Supreme Court order. However, the Supreme Court has ruled that rule 955 compliance is required for all cases pending at the time the Supreme Court order was *filed*. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) To avoid any potential prejudice to Respondent as a result of his possible reliance on the form, the court is using the effective date of the Supreme Court order (i.e., November 9, 2001), to determine the scope of applicable cases for rule 955 compliance.

subdivision (c) of rule 955 no later than December 19, 2001, by filing with the Clerk of the State Bar Court an affidavit showing that he fully complied with those provisions of the Suspension Order regarding rule 955.

On December 4, 2001, Respondent filed a declaration stating he had complied with rule 955. (Exhibit 35.) In particular, on the form declaration provided by the court, Respondent checked the boxes indicating:

a. "As of the effective date, I had no clients."

b. "As of the effective date, I had no papers or other property to which the clients were entitled."

c. "I refunded fees paid any part of which had not been earned." Next to this box, Respondent wrote the following statement, "and have made plans to refund partial fees when I am earning money again in two cases."

d. "As of the effective date, I did not represent any clients in pending litigation."

Respondent's 955 declaration was insufficient for purposes of compliance with rule 955 and it contained false statements. As set forth above, Respondent still had at least one client, Rivera, whom he failed to notify of his suspension. Furthermore, Respondent had not refunded unearned fees in all but "two cases." He still owed $57,540 in attorney fees to at least five clients.

Count One - Business and Professions Code Section 6103[2] (Violation of a Court Order)

Section 6103 provides that it is cause for disbarment or suspension for an attorney to wilfully disobey or violate a court order requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear.

The court finds that there is clear and convincing evidence that Respondent wilfully violated section 6103 based on his failure to obey a Supreme Court disciplinary order to comply with rule 955(a) by failing to notify Rivera of his suspension and by failing to refund unearned fees to Pamplona, Givens, Castaneda, Rivera and the Henrys.

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[2]Unless otherwise noted, all further references to section are to the Business and Professions Code.

Count Two - Section 6106 (Moral Turpitude, Dishonesty or Corruption)

Section 6106 provides that the commission of any act by an attorney involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, constitutes a cause for disbarment or suspension.

Respondent wilfully violated section 6106 by committing an act involving moral turpitude and dishonesty by submitting a 955 declaration containing false statements. Despite his contention to the contrary in his 955 declaration, Respondent had at least one client as of the effective date of the Supreme Court disciplinary order. Furthermore, Respondent did not owe fees to only two clients as he declared, rather he owed unearned fees to at least five clients.

B. State Bar Court Case No. 01-O-04737 (Pamplona Matter)

On August 10, 2000, Respondent was paid $1,500 to represent Simon Pamplona (Pamplona) in a misdemeanor matter entitled *People v. Pamplona,* Tulare County Superior Court. On the same date, Respondent's assistant, Christina Garcia, gave Pamplona a receipt for $1,500.

On August 14, 2000, Respondent appeared on behalf of Pamplona at the arraignment pursuant to section 977 of the California Penal Code (977 Waiver). Respondent entered a not guilty plea and waived time on behalf of Pamplona. The matter was continued to September 5, 2000 for a pretrial setting conference.

On September 5, 2000, Respondent appeared pursuant to the 977 Waiver on behalf of Pamplona and continued the pretrial setting conference to October 19, 2000.

On October 19, 2000, Respondent failed to appear at the pretrial setting conference although Pamplona was present. The court continued the matter to October 25, 2000.

On October 25, 2000, Respondent appeared but Pamplona did not. The court issued and stayed a bench warrant for Pamplona's arrest. The matter was continued to November 22, 2000.

On November 22, 2000, Respondent appeared on behalf of Pamplona and had the bench warrant recalled. The court ordered that Pamplona remain on his own recognizance. The matter was continued to December 5, 2000.

On December 5, 2000, Respondent and Pamplona did not appear. The court then issued and stayed the bench warrant for Pamplona's arrest. The matter was continued to December 12, 2000.

On December 12, 2000, when Respondent and Pamplona did not appear again, the court lifted the stay and issued a $10,000 bench warrant for Pamplona's arrest.

Respondent did not attempt to recall the bench warrant nor inform Pamplona of the outstanding bench warrant for his arrest. Respondent testified that he was not sure what he did after he failed to appear and stated that he is embarrassed to say that he is not even sure he thought of Pamplona again until he heard about the State Bar complaint submitted by Pamplona.

Sometime between December 12, 2000 and March 12, 2001, Pamplona discovered that there was an outstanding bench warrant and attempted to contact Respondent without any success. Sometime during that same time period, Pamplona hired new counsel Greg Blevins (Blevins).

On March 12, 2001, Greg Blevins appeared on behalf of Pamplona pursuant to a 977 Waiver and had the bench warrant recalled.

Respondent provided no services of value to Pamplona. Respondent did not earn any of the advanced fees paid by Pamplona. In or around August 2001, Respondent told Pamplona that he was entitled to a refund of the $1,500. Thereafter, Respondent made the following payments to Pamplona: $200 on August 24, 2001; $160 on August 29, 2001; and $200 on September 14, 2001.

On or about September 20, 2001, Pamplona called Respondent asking when he should come to Respondent's office to collect the remainder of the $1,500. Respondent stated that he had no money and hung up the telephone.

On or about November 5, 2001, Respondent paid Pamplona $100.

On or about February 25, 2002, having not received the remaining $840, Pamplona sought fee arbitration with the Tulare County Bar Association. Respondent did not appear at the Tulare County Bar Association's arbitration. On February 25, 2002, the arbitrator issued its Findings and Award of the Tulare County Bar Arbitration Panel in *Simon Pamplona vs. Charles Rothbaum* in favor of Pamplona for $840 plus filing fees of $50.

To date, Respondent has not returned any portion of the remaining $840 paid by Pamplona.

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Count One(A) - Rule 3-700(D)(2) of the Rules of Professional Conduct[3] (Failure to Refund Unearned Fees)

Rule 3-700(D)(2) provides, in pertinent part, that an attorney whose employment has terminated shall promptly refund any part of a fee paid in advance that has not been earned. The court finds that there is clear an convincing evidence that Respondent wilfully violated rule 3-700(D)(2) by failing to refund $840 of advance attorney fees paid by Pamplona that was not earned.

However, since the obligation to return unearned fees is part of Respondent's obligations under the more comprehensive rule 3-700(A)(2), of which he has also been found culpable (see below Count One (C)), the court will not find a separate violation of rule 3-700(D)(2) based on the same facts. *(In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 280.) Accordingly, Count One (A) is dismissed with prejudice.

Count One(B) - Rule 3-110(A) (Failure to Perform with Competence)

Rule 3-110(A) provides that an attorney shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. By failing to appear at the December 5, 2000 and December 12, 2000 pretrial conferences, by allowing a bench warrant to be issued against his client and by failing to recall the bench warrant, Respondent recklessly and repeatedly failed to perform legal services with competence.

Count One(C) - Rule 3-700(A)(2) (Improper Withdrawal from Employment)

Rule 3-700(A)(2) provides that a "member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."

By failing to appear at the December 5th and 12th conferences and taking no further action on Pamplona's case, Respondent effectively withdrew from representation. However, Respondent failed to give his client due notice of his intent to withdraw and failed to return unearned fees as required

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[3]Unless otherwise noted, all further references to "rule" are to the Rules of Professional Conduct.

under rule 3-700(D)(2). Accordingly, there is clear and convincing evidence that Respondent wilfully violated rule 3-700(A)(2).

C. State Bar Court Case No. 02-O-11778 (Castaneda Matter)

On or about August 10, 2001, Respondent was retained by Carmen Castaneda (Castaneda) to represent her husband for a fee of $2,500 with $1,500 paid by the time of the preliminary hearing. Respondent did not execute a retainer agreement.

On August 10, 2001, Castaneda paid respondent $300.

On August 13, 2001, Castaneda paid Respondent $400. By August 13, 2001, Respondent received a total of $700 as advanced attorney fees from Castaneda.

On or about August 20, 2001, Castaneda's husband was appointed a public defender.

Sometime between August 20, 2001 and September 20, 2001, Castaneda terminated Respondent's representation of her husband and called Respondent's office on several occasions to request a refund of the advanced attorney fees.

Having not heard from Respondent nor received a refund, on September 20, 2001, Castaneda went to Respondent's office and met with Respondent. At the meeting, Respondent did not return the advanced attorney fees. Instead, Respondent prepared a letter dated September 20, 2001, to Castaneda stating the following:

> I, Charles Rothbaum will pay the amount of $700.00 to Carmen Castaneda after my suspension in March 2002. That money is money that she pays me as a retainer for the case of her boyfriend Cruz Manuel Asevedo [sic]. Case that I never went to court because they couldn't pay for my services.

Respondent provided no services of value to Castaneda. Respondent did not earn any of the advanced attorney fees paid by Castaneda.

To date, Respondent has not provided a refund of the advanced attorney fees to Castaneda.

Count Two - Rule 3-700(D)(2) (Failure to Refund Unearned Fees)

There is clear and convincing evidence that Respondent wilfully violated rule 3-700(D)(2) by failing to refund the $700 in unearned fees paid by Castaneda.

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D. State Bar Court Case Nos. 01-O-04964 and 02-O-11941 (Unauthorized Practice of Law)

1. Failure to Pay 2001 Membership Fee

On August 17, 2001, the California Supreme Court filed a suspension order in case number S099547, effective September 1, 2001, suspending Respondent from the practice of law as a result of Respondent's failure to pay State Bar of California's membership fee.

On August 17, 2001, the State Bar's membership records office properly served a copy of the Supreme Court suspension order on Respondent at his State Bar membership records address. However, Respondent had failed to update his membership records address and he was no longer at the address used by the membership records office.

Between December 2000 and May 2001, the State Bar's membership records office had attempted to send Respondent a copy of his 2001 membership fee statement on at least four occasions, all of which were returned as undeliverable. Then, the State Bar's membership records office located an alternative telephone number for Respondent by conducting an online search for Respondent using a Pac Bell website. On June 13, 2001, the membership records office talked with Respondent's secretary and told his secretary about Respondent's need to pay his membership fee bill.

Respondent does not recall receiving any membership fee statement, but acknowledges that he should have realized there was a problem when he did not pay his fee for 2001. He believes he found out about his inactive status from a friend or while in court in September 2001.

Respondent remained suspended until he paid his fees and was reinstated to active status on September 19, 2001.

2. Practicing Law While Suspended

On September 5, 2001, while Respondent was actually suspended from the practice of law, Respondent appeared in a criminal matter entitled, *People of the State of California vs. Manuel Oliviera,* in the Tulare County Superior Court and represented Oliviera at a pretrial conference. The matter was continued to September 12, 2001.

On September 12, 2001, while Respondent was on suspension from the practice of law, he again appeared with Oliviera at the pretrial conference at which time Oliviera entered a no contest plea to the misdemeanor charges.

On September 6, 2001, while Respondent was suspended from the practice of law, Respondent also appeared in a criminal matter entitled, *People of the State of California vs. Jose Rogelio Calderon,* in the Tulare County Superior Court, Visalia Division, and represented Calderon at a pretrial hearing.

Counts Three and Four - Section 6068(a) (Failure to Comply with Laws)

Section 6125 provides that "no person shall practice law in California unless the person is an active member of the State Bar." Section 6126(b) states that any person who has been suspended from membership from the State Bar and thereafter practices law, advertises or holds himself out as practicing or otherwise entitled to practice law, is guilty of a crime. Finally, section 6068(a) requires all attorneys to support the Constitution and laws of the United States and this state.

By appearing in court on September 5, 6 and 12, 2001, Respondent held himself out as entitled to practice law and actually practiced law when he was not an active member of the State Bar in violation of sections 6125 and 6126, and thereby wilfully violated section 6068(a).

E. State Bar Court Case No. 01-O-04737 (Starr Matter)

On or about April 1, 1999, Respondent was paid $2,500 to represent Mr. Michael Starr in a criminal matter entitled *People of the State of California vs. Michael Starr,* Tulare County Superior Court, Tulare-Pixley Division.

On August 3, 1999, at the arraignment in *People of the State of California vs. Michael Starr,* the District Attorney's office did not file a complaint against Starr and represented to the Superior Court that they had rejected the case.

On or about March 31, 2000, Respondent sent a letter to the Tulare County Sheriff's Department on behalf of Starr regarding the preservation and non-disposal of the items of his personal property which were being stored with the Sheriff's Department.

On August 9, 2000, a felony complaint was filed in Tulare County Superior Court, Tulare-Pixley Division, entitled *People of the State of California v. Michael Garland Starr,* case number CRF-00-62115, for the same charges filed on or about April 1, 1999.

On May 18, 2001, at a hearing on Respondent's motion to dismiss the complaint for violating Starr's speedy trial rights and a motion to suppress for the illegal search and seizure of Starr's

residence, the court granted Respondent's motion to dismiss on the grounds that the prosecutor violated Starr's speedy trial rights.

On or about July 25, 2001, Respondent sent a letter to the court requesting an order releasing Starr's property.

On or about August 2, 2001, the court sent a letter to Respondent advising Respondent that a formal motion for the return of Starr's property had to be served on the District Attorney's office and filed with the court.

After receiving notice from the court, Respondent testified that he dropped the ball on the matter and did not pursue it. Respondent states that he never collected money from Starr to pursue the return of his property after August 2001, and he did not hire another lawyer to pursue the matter for Starr.

A subsequent attorney, David Allen, filed a motion on behalf of Michael Starr to return property legally seized on January 2, 2002. After a hearing on the motion on January 14, 2002, the court granted the motion.

Count Five - Section 6068(m) (Failure to Inform Client of Significant Development)

Section 6068(m) requires an attorney to respond to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services. The State Bar alleges that Respondent wilfully violated section 6068(m) by failing to inform Starr of his pending suspension as required by rule 955 and by failing to inform Starr when he was actually suspended.

However, the State Bar did not offer any evidence to support its allegations. Starr did not testify. There was no testimony as to whether or not there was an attorney-client relationship between Starr and Respondent as of November 9, 2001. There was no evidence as to whether or not Respondent provided Starr with written notice of his suspension. All that was shown is that by January 2, 2002, Starr had another attorney working on his case. Accordingly, based on the limited evidence offered, the court does not find clear and convincing evidence of a violation of section 6068(m) and the case is dismissed with prejudice.

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F. **State Bar Court Case No. 02-O-12276 (Givens Matter)**

On April 1, 2001, Cheryl Givens (Cheryl) was questioned by the Tulare County Sheriff's Department regarding two homicides. The sheriff's department suspected that Cheryl's son Todd Givens (Todd) and his wife, Lacey Givens (Lacey), were involved in the murders.

After being questioned by the sheriff's department, Cheryl contacted her son-in-law, Larry Woods. Woods was a correctional officer. Cheryl told Woods what she knew about the homicides and about Todd and Lacey's involvement. Cheryl talked to Woods because he was a family member. She did not authorize or ask him to repeat to anyone what she told him, including anyone at the sheriff's department. Woods told Cheryl to contact a lawyer before talking with the sheriff's department again.

Without telling Cheryl, Woods told detective Frank Arnold of the Tulare County Sheriff's Department what Cheryl had told him about the homicides. Cheryl did not learn about Woods's disclosure to the detective until the day of her arraignment. Based on this and other information, detective Arnold wanted to question Cheryl further.

On April 2, 2001, based on Woods's advice, Cheryl contacted Respondent. Cheryl called Respondent because he had successfully represented her son Todd in two previous criminal matters. Cheryl told Respondent that the sheriff's department wanted to question her about the homicides and that she wanted Respondent to come with her. They agreed to meet the next day and go to the sheriff's department together.

On April 3, 2001, Cheryl hired and paid Respondent $1,500 in attorney fees to represent her in the criminal matter. On the way to the sheriff's department, Cheryl told Respondent what she knew about the homicides. It was basically the same information that she had already shared with Woods. Cheryl also told Respondent that she had shared the information with Woods. Woods was following Cheryl and Respondent to the sheriff's department in his own car. Cheryl did not expect Respondent to tell the sheriff's department what she told him about the homicides. She wanted Respondent to be with her to protect her rights while she was questioned by the sheriff's department.

When they arrived at the sheriff's department, Respondent told detective Arnold that he wanted to speak with him alone. Respondent and detective Arnold went into a conference room.

Unbeknownst to Respondent, detective Arnold was videotaping their conversation. Respondent started off by stating he was representing both Cheryl and Todd. When detective Arnold asked if there was a conflict, Respondent stated "Well, at this point it's okay, I'm trying to help her and help him. I want to get him in if I can." (Exhibits 26 and 40, at p. 1.)

During their conversation, detective Arnold also asked Respondent whether he was breaching any "client privilege" by telling Cheryl's version of the story. Respondent responded: "Absolutely not." (Exhibits 26 and 40, at p. 5.)

Respondent basically told detective Arnold everything Cheryl had told him, including that on the night of the homicides Cheryl heard gun shots; Lacey ran into the house; Cheryl heard more shots and went outside; Todd pulled up in his car with two bodies "flopping around" in the trunk; Cheryl ended up driving Todd and Lacey to Hesperia; and the blood in Cheryl's car was Todd's and Lacey's. (Exhibits 26 and 40, at pp. 6-7.)

After Respondent had shared the information with detective Arnold, Respondent stated: "this conversation never happened, right? ... If this ends up in the police report, I'm kind of fucked... We want them apprehended, too. Her son-in-law's obviously had some conversation with some people involved in the investigation apparently. She just doesn't want it to come out of her mouth, so I don't want her to know that I've told you this..." (Exhibits 26 and 40, at p. 8.)

After the conversation between Respondent and detective Arnold, Cheryl was arrested. Respondent never told Cheryl that he told detective Arnold about her, Todd's or Lacey's involvement in the homicide. She never expected nor authorized Respondent to tell detective Arnold about her, Todd's or Lacey's involvement in the homicides.

On April 2 or 3, 2001, Todd and Lacey were arrested in Las Vegas. At Cheryl's request, Respondent agreed to represent her and Todd for $50,000. Shortly thereafter, Respondent also agreed to represent Lacey without an increase in his fee. Rather than having appointed counsel, Todd wanted Respondent to represent Lacey because Todd wanted her to have a "real attorney." (Exhibit 28, at p. 37:14.)

On April 6, 2001, Cheryl paid Respondent an additional $3,500 for attorney fees. On May 11, 2001, Respondent received an additional $25,000 from Cheryl. On June 13, 2001, Cheryl paid

Respondent an additional $20,000 in attorney fees. Cheryl paid a total of $50,000 to have Respondent represent her, Todd and Lacey. Respondent never executed or prepared an attorney fee agreement with Cheryl, Todd or Lacey.

Respondent did have Cheryl, Todd and Lacey each sign a conflict "waiver" on April 23, 2001. (Exhibits C, D and E.) Each waiver provided, among other things, that:

> "I am aware of the facts of the incident charged and do not believe a conflict between the defendants exists... Mr. Rothbaum has discussed Rules of Professional Conduct # 3-310 with me on several occasions and I fully comprehend the issue(s) involved. At no time did Mr. Rothbaum or his investigator, Greg Griffin, attempt to pressure me in any way. I make this decision fully informed and free from duress... I am satisfied with Mr. Rothbaum's representation and have no desire to have the court impose its choice of counsel on me." (Exhibits C, D and E.)

However, Respondent had not fully explained to his clients the potential conflict in having him represent all three of them. Respondent never talked with Lacey at all about the potential conflict. While Lacey was in jail, Respondent's investigator, Greg Griffin, gave her the waiver to sign along with other papers. The waiver was not explained to her before she signed it and she signed it without understanding what it meant. Todd and the court tried to explain to Lacey on numerous occasions what was meant by a "conflict," but she never fully understood it.[4] Todd and Cheryl understood the conflict to relate to the fact that Respondent had previously represented Todd on other criminal matters and was now representing all three of them on the murder and related charges.

At no time prior to signing the waivers did Respondent tell any of his clients about the videotaped conversation he had with detective Arnold prior to Todd and Lacey's arrest. At no time prior to signing the waivers did Todd, Lacey or Cheryl know the substance of Respondent's comments to detective Arnold during the videotaped conversation.

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[4]The highest grade Lacey completed was her sophomore year in high school. She later obtained a GED. Lacey testified that in 2000 she was diagnosed with schizoaffective disorder. When Lacey was arrested she was taking Seroquel, a psychotropic medication. She testified that her medication was taken away in April of 2001 until a competency hearing was held. There was no evidence provided as to when the hearing was held. When she is not on her medication, Lacey states that she is emotional, paranoid and sometimes violent. It affects her thinking and she starts to think people are out to get her.

On April 24, 2001, the day after he had his clients sign the conflict waivers, Respondent signed a stipulation with the State Bar, admitting to culpability in four client matters and agreeing to be actually suspended for 145 days and until he paid over $22,000 in restitution to one of his former clients. (State Bar Court Case Nos. 98-O-00402, et al.) The stipulation was approved by the State Bar Court and filed on May 15, 2001. However, Respondent's actual suspension would not be effective until 30 days after the Supreme Court approved the stipulation and recommended discipline.

Sometime between signing the stipulation with the State Bar and August 17, 2001, Respondent told Cheryl, Todd and Lacey that he was going to be suspended. However, Respondent told Todd and Lacey that his suspension was only going to last a couple of months and he convinced them to appear in pro se in their criminal matters while he was suspended. Respondent stated that as soon as he returned to active status he would continue representing them.

On August 8, 2001, a hearing was held in the Tulare County Superior Court in *People of the State of California vs. Todd Givens, Lacey Givens and Cheryl Givens*. The court stated, "there's clearly a potential for conflict" and appointed an independent counsel for each defendant to discuss the potential conflict of interest. Respondent who was present at the hearing represented to the court that there was no conflict of interest in him representing the three individuals.

After talking with his appointed counsel, Todd understood that a potential conflict existed because he, Lacey and Cheryl might have different defenses. Despite his discussion with appointed counsel, Todd wanted Respondent to still represent him because Respondent had told Todd he could "beat the case and there wouldn't be a conflict." (Exhibit 28, at p. 23:1.)

On August 17, 2001, after Cheryl, Todd and Lacey met with their appointed counsel for purposes of discussing Respondent's potential conflict, all parties appeared again before the Tulare County Superior Court in *People of the State of California vs. Todd Givens, Lacey Givens and Cheryl Givens*. After the court asked Cheryl, Todd and Lacey several questions about the potential conflict of being represented by one lawyer, each said that they still wanted to be represented by Respondent. Accordingly, the court found that there was "a knowing and intelligent and voluntary waiver of the right of having individual counsel." (Exhibit B, at p. 7:17-19.)

On November 4, 2001, Respondent was suspended from the practice of law and Todd and

Lacey appeared in pro se in their criminal matters. During discovery, a copy of the videotaped conversation from the April 2001 interview between Respondent and detective Arnold was provided to Todd by the district attorney's office. This was the first time that Todd, Lacey and Cheryl learned about Respondent's conversation with detective Arnold. All three were angry and felt Respondent had violated their trust.

In or around November 2001, Respondent's representation was terminated.

Respondent provided no services of value to Cheryl, Todd or Lacey, and thus, did not earn any of the $50,000 paid by Cheryl.

To date, Respondent has not refunded any of the $50,000.

Count Six(A) - Section 6068(e) (Failure to Maintain Confidentiality)

Section 6068(e) provides that an attorney must maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. Section 6068(e) is "the most strongly worded duty binding on a California attorney." (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189.) There is clear and convincing evidence that Respondent wilfully violated section 6068(e) by disclosing to detective Arnold the information Cheryl communicated to him in confidence.

Respondent argues, incorrectly, that he did not violate section 6068(e) because the information Cheryl told him about the homicides was not "confidential" because she already had told Woods the same information. However, the obligation to maintain a client's confidence can attach to information that is known to others. (*In the Matter of Johnson, supra,* 4 Cal. State Bar Ct. Rptr. at p. 189.) Thus, the fact that Cheryl previously shared the same information with Woods, does not mean that Respondent was free to share the information she told him in confidence without her consent.

Likewise, the court rejects Respondent's argument that he was obligated to disclose the information under Evidence Code section 956.5 because Todd was likely to harm someone if not apprehended by the police. Respondent's position is that he disclosed the information to help the police find Todd. Evidence Code section 956.5 relates to the attorney-client privilege and at the time provided: "There is no privilege under this article if the lawyer reasonably believes that disclosure

of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."[5]

Respondent's argument is flawed. First, despite Respondent's representation to the detective, he was not representing Todd at the time he disclosed the information to detective Arnold. Respondent had not even talked to Todd yet. Therefore, Respondent could not have been disclosing the information "to prevent *the client* from committing a criminal act." The confidential information was from his client Cheryl and had nothing to do with her potential criminal acts. Furthermore, Respondent disclosed significantly more information than Todd's whereabouts, including prior actions incriminating Cheryl, Todd and Lacey, that had nothing to do with preventing potential future harm. The court does not find that Respondent was obligated to disclose the information under section 956.5 of the Evidence Code.

Under section 6068(e), the "ethical duty of confidentiality is much broader in scope and covers communications that would not be protected under the evidentiary attorney-client privilege." (*In the Matter of Johnson, supra,* 4 Cal. State Bar Ct. Rptr. at p. 189.) Under the broad concept of "secrets," the obligation includes information told to an attorney in trust, and if disclosed, could be embarrassing or detrimental to the client. (*Id.*)

Cheryl communicated to Respondent the events on the night of the homicides to aid Respondent in effectively representing her. Cheryl trusted Respondent as her attorney and shared the information with him so that Respondent was fully informed of her case and could appropriately counsel her. She did not expect or authorize Respondent to share this information with the sheriff's department. Respondent did not have Cheryl's consent to disclose this information and it is clear that Respondent knew he did not have her consent based on his own admissions to detective Arnold. The disclosure of the information was detrimental to Cheryl's case. By sharing the information Cheryl told Respondent in confidence, Respondent wilfully violated section 6068(e).

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[5]Evidence Code section 956.5 was amended effective July 1, 2004.

Count Six(B) - Section 6068(m) (Failure to Inform Client of Significant Development)

Respondent never told Cheryl about the substantive nature of his April 3,2001 conversation with detective Arnold. During the conversation, Respondent revealed Cheryl's involvement in the events following the homicides. This disclosure was a significant development in Cheryl's case. However, Cheryl did not learn about the disclosure until after Respondent was suspended, and then, only from another source. By failing to inform Cheryl of his disclosures to detective Arnold, Respondent failed to keep a client informed of significant developments in a case in wilful violation of section 6068(m).

Count Six(C) - Rule 3-700(D)(2) - (Failure to Refund Unearned Fees)

Respondent did not earn the $50,000 in attorney fees and has failed to return any portion of the money to Cheryl. Thus, there is clear and convincing evidence that Respondent wilfully violated rule 3-700(D)(2) by failing to promptly refund the $50,000 paid in advance that was not earned.

Count Six(D) - Rule 3-310(B)(2) - (Failure to Avoid Adverse Interests)

Rule 3-310(B)(2) provides that an attorney shall not accept or continue representation of a client without providing written disclosure to the client where the attorney knows or reasonably should know that he: (1) previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and (2) the previous relationship would substantially affect the attorney's representation. "Disclosure" means informing the client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client.

At no time prior to having Todd and Lacey sign the written waivers did Respondent disclose to them orally or in writing that he revealed to detective Arnold information regarding their involvement in the homicides. Respondent's failure to inform his clients of these immensely relevant circumstances and of the actual adverse consequences of his communications to the sheriff's department is a wilful violation of rule 3-310(B)(2).

Count Six(E) - Rule 3-310(C)(2) - (Actual Conflict in Representing Multiple Clients)

Rule 3-310(C)(2) provides that an attorney shall not, without the informed written consent of each client accept or continue representation of more than one client in a matter in which the interests

of the clients actually conflict.

It is clear that Respondent did not obtain the informed written consent of Cheryl, Todd or Lacey prior to representing them based on his failure to disclose all relevant information (i.e., conversation with detective Arnold). At the time that Respondent revealed this information to detective Arnold, he stated that he was doing so because he hoped that it would keep Cheryl out of jail. However, he revealed the information to help Cheryl at the expense of Todd and Lacey, thereby creating an actual conflict. Accordingly, Respondent wilfully violated rule 3-310(C)(2).

G. State Bar Court Case No. 02-O-16038 (Rivera Matter)

On or about May 3, 2000, Respondent agreed to represent Danny J. Rivera (Rivera) in a criminal matter for $3,500. As agreed, if Rivera was not charged within the two years following his arrest on April 21, 2000, Respondent would return the fees paid.

On or about May 3, 2000, Rivera made a partial payment to respondent of $1,500.

On or about May 21, 2001, Rivera went to Respondent's office and was told no charges were filed against him.

On or about May 16, 2002, Rivera went to Respondent's office to determine whether charges were filed against him and, if not, to seek his refund of the $1,500. Upon his arrival at Respondent's office, Rivera discovered that Respondent's office was closed.

On or about June 6, 2002, Rivera sent a letter to Respondent regarding the refund of the unearned fees.

Having not received his refund or heard from Respondent, on or about June 21, 2002, Rivera sent a letter by certified mail, return receipt requested, to Respondent regarding the refund of the unearned fees. The June 21, 2002, letter was addressed to Respondent's former office address at 348 W. Crenshaw Street, Visalia, California 93277. The June 21, 2002, letter was returned "Unclaimed."

On or about November 6, 2002, Rivera sent another letter by certified mail, return receipt requested, to Respondent regarding the refund of the unearned fees. The November 6, 2002, letter was addressed to Respondent at 3311 Sunfish Drive, Suite B, Henderson, Nevada 89014, which was Respondent's address at that time as maintained by the State Bar Membership Records pursuant to section 6002.1. The November 6, 2002, letter was returned with a notation, "Return to Sender

Attempted Not Known."

To date, Respondent has not refunded the $1,500 to Rivera as required pursuant to their agreement.

On or about December 11, 2002, the State Bar opened an investigation pursuant to a complaint filed by Rivera.

On or about May 2, 2003, Lisa Edwards, Senior Investigator of the State Bar, wrote to Respondent regarding the Rivera Matter. The letter was placed in a sealed envelope correctly addressed to Respondent at his official membership record's address at the State Bar at 3311 Sunfish Drive, Suite B, Henderson, Nevada 89014, which was Respondent's address at that time as maintained by the State Bar Membership Records. The letter was properly mailed by first class mail, postage prepaid, by depositing it for collection by the United States Postal Service in the ordinary course of business. On or about May 12, 2003, the United States Postal Service returned the letter to the State Bar with a notation "Return to Sender Attempt Unknown."

Count Seven(A) - Rule 3-700(D)(2) (Failure to Refund Unearned Fees)

The court finds that there is clear and convincing evidence that Respondent wilfully violated rule 3-700(D)(2) by failing to refund to Rivera the $1,500 attorney fees paid in advance that had not been earned.

Count Seven(B) - Section 6068(j) (Failure to Update Membership Address)

Section 6068(j) requires an attorney to comply with section 6002.1, which section provides that an attorney shall, among other things, maintain a current office address with the membership records office of the State Bar and notify the membership records office of any change within 30 days. From at least November 6, 2002 until to May 2, 2003, the address Respondent had on file with the membership records office of the State Bar was not a valid address at which he was receiving mail. Accordingly, Respondent failed to properly update his address in wilful violation of section 6068(j).

Count Seven(C) - Section 6068(m) (Failure to Inform Client of Significant Developments)

By failing to inform Rivera that he was closing his office and failing to provide Rivera with a current address at which he could be reached, Respondent wilfully failed to keep a client reasonably informed of significant developments in a matter in violation of section 6068(m).

H. **State Bar Court Case No. 02-O-15376 (Henry Matter)**

On October 6, 2000, Paula and Mike Henry paid respondent $4,500 to represent their son, Michael Henry (Henry) in *People v. Mike James Henry,* involving a twenty-five-count complaint (Henry First Case). On November 14, 2000, Respondent represented Henry in the Henry First Case preliminary hearing.

On May 17, 2001, the Tulare County District Attorney's Office filed *People v. Mike James Henry,* involving a four-count complaint (Henry Second Case).

Respondent attended two court appearances on behalf of Henry. During the second appearance, in or around June 2001, Respondent stated to the court that he was not going to represent Henry and that he would be willing to give his money back. Respondent did not provide any services of value to Henry and did not earn any of the advanced fees paid by Henry's parents.

On or about July 26, 2001, Respondent sent Henry's parents a $1,300 check issued from CMA Cash Management Account, check number 135. The check was returned unpaid due to insufficient funds.

To date, Respondent has not refunded any portion of the $4,500.

Count Nine - Rule 3-700(D)(2) (Failure to Refund Unearned Fees)

Respondent wilfully violated rule 3-700(D)(2) by failing to refund promptly the $4,500 attorney fees paid by Paula and Mike Henry that was not earned.

I. **State Bar Court Case No. 03-O-04161 (Probation Violations)**

As set forth above, by order dated October 10, 2001, the Supreme Court suspended Respondent for three (3) years and until he provided proof satisfactory to the State Bar Court of his rehabilitation, 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; and until he made restitution to Michael Dearing in the amount of $22,448, plus 10% interest, and furnished satisfactory proof thereof to the Office of Probation, but stayed the execution of the suspension on the condition that Respondent comply with all terms of probation, including an actual suspension of 145 days and until restitution is paid to Michael Dearing. The order was effective November 9, 2001.

As additional terms of probation, Respondent was ordered to do the following: (1) submit

written quarterly reports to the Probation Unit on each January 10, April 10, July 10, and October 10 of the period of probation; (2) submit evidence to the Probation Unit of psychiatric or psychological help/treatment from a duly licensed psychiatrist, psychologist, or clinical social worker at a minimum of once per month; (3) to report to the Membership Records Office of the State Bar and to the Probation Unit, within ten days of all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code; (4) within the one year of the effective date of the discipline herein, to provide to the Probation Unit satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session; and (5) within one year of the effective date of the discipline herein, to submit to the Probation Unit satisfactory evidence of completion of no less than six hours of Minimum Continuing Legal Education (MCLE) approved coursed in law office management, attorney client relations and/or general legal ethics separate from any MCLE requirement.

On October 22, 2002, the State Bar Court granted Respondent's motion to extend the time to complete Ethics School and the six hours of MCLE for one year.[6] Accordingly, Respondent had until November 9, 2003 to complete these requirements.

To date, Respondent has not submitted to the Probation Unit his quarterly reports with accompanying psychiatric or psychological help/treatment from a duly licensed psychiatrist, psychologist, or clinical social worker at a minimum of once per month for the following reporting periods: January 10, April 10, July 10 and October 10 of 2003; and January 10, April 10, July 10 and October 10 of 2004.

To date, Respondent has not provided to the Probation Unit proof of taking and passing the State Bar Ethics School. Likewise, Respondent has not provided to the Probation Unit satisfactory evidence of completion of no less than six hours of MCLE in law office management, attorney client relations and/or general legal ethics.

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[6]Pursuant to Evidence Code section 452(d), the court takes judicial notice of Respondent's motion and the court's ruling.

Count Ten - Section 6068(k) - (Failure to Comply with Conditions of Probation)

Section 6068(k) requires an attorney to comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

By failing to submit his quarterly reports, evidence of psychiatric or psychological help from a duly licensed provider and proof of Ethics School and the required hours of MCLE to the Probation Unit, Respondent failed to comply with all conditions attached to his disciplinary probation in wilful violation of section 6068(k).

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

The parties must show any circumstances in mitigation or aggravation by clear and convincing evidence. (Standards 1.2(b) and (e), Rules of Procedure of the State Bar of California, tit. IV, Standards for Attorney Sanctions for Professional Misconduct, ("standards").)

A. Aggravating Circumstances

1. Prior record of discipline

Respondent has a prior record of discipline. (Standard 1.2(b)(i).) On October 10, 2001, the Supreme Court of California filed a disciplinary order in case number S099693 (State Bar case number 98-O-00402, et al.), suspending Respondent from the practice of law for three year and until he provided proof of his rehabilitation, fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii), and until he made specified restitution to Michael Dearing, execution stayed, and placing him on probation for five years subject to the conditions of probation, including an actual suspension of 145 days and until he made the specified restitution. The order became effective on November 9, 2001.

In that matter, Respondent was found culpable of misconduct between 1997-2000 in four client matters, including failing to respond to client inquiries, failing to perform with competence and failing to return unearned fees. In aggravation, the court considered the harm to Respondent's clients and his multiple acts of misconduct. In mitigation, Respondent was given credit for having no prior record of discipline, and extreme emotional and family problems.

2. Multiple acts of wrongdoing

Respondent's misconduct evidences multiple acts of wrongdoing. (standard 1.2(b)(ii).) In

addition to the serious violations regarding his 955 declaration, Respondent has been found culpable in nine client matters of various acts of misconduct, including failing to perform with competence, failing to return unearned fees, failing to avoid adverse interests and breaching a client's confidence.

3. Significant harm to clients

Respondent's misconduct significantly harmed his clients. (Standard 1.2(b)(iv).) Respondent owes over $80,000 in attorney fees to at least six former clients. One client, Michael Dearing, has been waiting for a refund of $22,448 plus interest for over six years. These are the same funds that Respondent agreed to repay in his prior disciplinary record, but has failed to make any payment towards since that time, demonstrating indifference toward rectification of or atonement for his misconduct. (Standard 1.2(b)(v).)

The potential and actual harm Respondent caused to his clients in the Givens matter should not be understated. Respondent's indefensible misconduct in the Givens matter gravely jeopardized his clients' criminal cases and compromised their defenses. Respondent also wasted judicial resources by failing to fully disclose the relevant circumstances surrounding his actual conflict to his clients and by forcing the court to appoint counsel to talk with Respondent's clients.

B. <u>Mitigating Circumstances</u>

1. Extreme Emotional, Personal and Financial Difficulties

Respondent contends that he was suffering from extreme financial, personal and emotional difficulties, including depression, which caused or underlain the acts of misconduct. (Standard 1.2(e)(iv).) In support of his contention, Respondent offered his own brief and vague testimony and the testimony of Luis Velosa, M.D.

Respondent testified that beginning in 1998 his life started to unravel. His marriage of approximately nine years was over and he went through a divorce and custody fight. He was ordered to pay about $3,000 a month in spousal and child support. He also had to pay the mortgage on his house. Respondent also was gambling. Respondent started to have severe financial problems. By 2001, Respondent was unable to pay rent for his office and had to work out of his home. By the end of 2001, Respondent could not cover the mortgage on his home and lost it in January 2002. Starting around his suspension in November 2001, Respondent would occasionally smoke marijuana. He

stopped after he was jumped and attacked with a knife in 2003.

As for gambling, Respondent does not think he has a current problem. He testified that currently he does not have any money so he has no ability to gamble at the present time. He admitted that he would have concerns about his ability to control gambling if he started to practice law again and make money. He also acknowledged that if he did not gamble in the past he probably would have been able to pay the restitution from his prior disciplinary order and return to the practice of law. However, he does not think gambling has impacted his practice. Respondent claims that the last time he gambled was on football games around December 2003 and January 2004.

Respondent also claims that he was suffering from severe emotional problems at the time of his misconduct. In his words, by 1998, he was "a mess." As part of his prior discipline, Respondent received mitigating credit for both "emotional/physical difficulties" and "family problems."[7] (Exhibit 41, at p. 3.) As part of the stipulated discipline, Respondent agreed to obtain psychiatric or psychological treatment from a licensed provider at least once a month for the five years of his probation. The stipulation was signed on April 24, 2001.

It is unclear the extent and nature of treatment, if any, Respondent received from April 2001 to January 2004. Respondent failed to provide any specific evidence other than his vague testimony on the issue. The court has attempted to piece together Respondent's treatment history from the statements made by Dr. Velosa and the expert witness offered by the State Bar, Ronald H. Roberts, Ph.D.

It appears that Respondent was first treated by Dr. Edward Bjerk, a psychiatrist, around 1998. He was placed on Paxil and apparently his condition improved. However, sometime thereafter, Respondent stopped receiving treatment and taking the medication. Then, around November of 2002, Respondent claims he started his mental health treatment again by seeing a psychiatrist and a clinical

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[7]Unfortunately, the prior record of discipline fails to set forth any facts to support these mitigating circumstances. Accordingly, the court has little understanding of the scope and nature of the problems. More importantly, in light of Respondent's present testimony about the ongoing nature of his problems since 1998, the court is at a loss as to how Respondent was able to receive mitigation by showing that in May 2001 he was rehabilitated and "no longer suffers from such difficulties." (Standard 1.2(e)(iv).)

social worker at Tulare County Mental Health. Respondent contends that he had three visits in late 2002. There is no evidence as to the nature or extent of this treatment. The next treatment Respondent received appears to have been in late 2003 and early 2004 from Cynthia Simonian, a licensed clinical social worker. He saw her for a total of about six visits. She recommended that Respondent obtain medication and that is when he went to Dr. Velosa.

Dr. Velosa is a psychiatrist, certified to practice in California since 1978. Velosa has testified in court and offered his psychiatric opinion on more than 100 occasions. Prior to treating Respondent, Velosa was appointed to testify in at least one case in which Respondent was counsel and he generally knew Respondent from the legal community. Velosa did not charge Respondent for treatment.

Velosa testified that he first met with Respondent for treatment on January 22, 2004. The first visit lasted one hour and a half. Based on that visit, Velosa diagnosed Respondent with major severe depression and pathological gambling. The diagnosis was based on the 1 ½ hour interview and no formal psychological testing. Velosa prescribed Paxil for the depression and Wellbutrin for the gambling. Respondent had requested Paxil because he had been on it before and felt it worked. Velosa saw Respondent three more times for medication management and those visits lasted 15-20 minutes each. Respondent does not see Velosa for counseling.

In Velosa's opinion, Respondent has been suffering from episodic illnesses of major depression dating back to 1999. After Respondent received some treatment in 1999, he "bounced back." Velosa did not have any records regarding Respondent's diagnosis or treatment from Dr. Bjerk in the late 1990s, and thus, his diagnosis was based on Respondent's self-reporting. Velosa believes that Respondent's depression surfaced again in November 2001 when he began to exhibit classic symptoms of helplessness, hopelessness and a sense of impending doom. In Velosa's opinion the depression continued until Respondent came to see him in January of 2004. Velosa stated that, in general, people with severe depression may have difficulty with even the basic activities of daily living. When asked whether Respondent's intellect is currently impaired to the point where it would be difficult for him to practice law, Velosa stated:

> "I don't think so. Not at all. Mr. Rothbaum, I always – even in his lowest time, I believed that his cognitive abilities were preserved. He was depressed enough that he was not able to even do the normal routine, but it was more of a lack of energy. There

is not any basic damage or any basic impairment in his intellectual abilities or the professional abilities. He has them there." (Exhibit A, at pp. 17-18.)

As for the pathological gambling, Velosa believes that after seven months on Wellbutrin it is working because Respondent does not have "the urge anymore." (Exhibit A, at p. 17:10.) Velosa believes that they are on the "right track." (*Id.*) Respondent has never received any counseling or attended any type of support group to address a gambling addiction.

The State Bar offered the testimony of Ronald H. Roberts, Ph.D., a licensed psychologist since 1984. On September 22, 2004, Roberts performed a clinical examination of Respondent, which took the better part of the day. In preparation for his examination, Roberts reviewed Velosa's records and his deposition taken July 19, 2004; the records from Cynthia Simonian, LC.S.W., from 2003-2004; and Respondent's prior disciplinary record and the current charges. Roberts also administered psychological testing on Respondent: the Minnesota Muliphasic Personality Inventory - 2 (MMPI-2) and the Rorschach Psychodiagnostic Test.

In Roberts's opinion, Respondent warrants the diagnosis of a personality disorder that is mixed in nature. Diagnostically, his condition is considered a personality disorder not otherwise specified with traits of oppositionalism. Roberts also found that Respondent demonstrates signs of a pathological gambling disorder. However, the results of Roberts's testing do not warrant a finding that Respondent currently warrants a diagnosis of a clinically significant depression. While Roberts found that Respondent may have warranted such a diagnosis in the late 1990s or early 2000, Roberts believed that there was no way to verify that diagnosis now since no clinical records from that period were produced to support such a finding. Roberts acknowledges that Respondent probably was suffering from some level of depression at that time, but in his opinion the severity of that depression could not be determined without supporting documentation. Roberts also found that Respondent continues to have problems with impulse controls based on his recent gambling and substance abuse.

However, in Roberts's opinion, there was never a time in Respondent's mental health history that he lacked sufficient cognitive ability to know the difference between right and wrong. There is no evidence that Respondent ever lacked mental competency. There is nothing in Roberts's diagnosis or in Respondent's condition that would have "caused" Respondent to engage in the misconduct at

issue here.

Roberts also has several concerns about Velosa's analysis and findings. Roberts expressed concerns about possible bias on the part of Velosa based on Velosa having worked with Respondent in the past on a professional basis and based on Velosa's decision to treat Respondent for free even though Respondent was receiving funds for treatment from a victims assistance fund.

While the court is sympathetic to the problems Respondent is struggling to overcome, little weight is given to his emotional, personal and financial difficulties in mitigation for a number of reasons. First, there is not clear and convincing evidence that these problems were "directly responsible" for Respondent's serious misconduct. (Standard 1.2(e)(iv).) As testified to by Respondent's own expert, even at his lowest time, Respondent's cognitive abilities were preserved. Although he may have been depressed enough that he was not able to perform certain normal routines, it was more of a lack of energy than any cognitive abilities. However, Respondent's misconduct is not limited to a failure to perform certain basic tasks, but instead includes certain overt actions of misrepresentation and concealment.

In addition, as noted above, Velosa's assessment is weakened by the fact that his evaluation occurred at least several years after the misconduct and was based primarily on Respondent's self-reporting. As noted by Roberts, it is difficult to determine the extent and nature of Respondent's problems in 2001-2003 without any psychological records from that time. There also are concerns with Velosa's diagnosis based on the appearance of bias as result of his former professional relationship with Respondent.

Finally, the court finds that there is not clear and convincing evidence that Respondent "no longer suffers from such difficulties or disabilities." (Standard 1.2(e)(iv).) As for his mental health, the court is troubled by the fact that as recently as April 2001 Respondent entered into a stipulation with the State Bar that provided for mitigation based on apparently the same factors, including a finding that Respondent no longer suffered from his problems. Despite this finding and Respondent's agreement to continue to obtain treatment, Respondent stopped his treatment and medication. As a result, Respondent found himself struggling again and returned to treatment for a mere six sessions with Simonian in 2003-2004. Although Respondent has been on medication since January 2004, he

has received no counseling since early 2004. As a result of his history of reoccurring problems with depression, the court finds that this is not a sufficient sustained period of recovery.

As for his gambling problems, Respondent has never sought psychological treatment or a formalized support group to address his problems. Respondent is now taking Wellbutrin and Velosa stated that Respondent was on the "right track." However, Respondent testified that he does not gamble now because he does not have the money, but admits that if he were to obtain his license and make money it may become an issue. Thus, the court finds that there is not clear and convincing evidence that Respondent no longer suffers from his pathological gambling disorder.

"That evidence of psychological difficulty will not always warrant reduced discipline, is evidenced by many Supreme Court decisions." (*In the Matter of Brazil* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679, 688, citing *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029; *In re Vaughn* (1985) 38 Cal.3d 614, 619.) For the reasons set forth above, the evidence offered falls short of entitling Respondent to any significant mitigation.

2. Cooperation with the State Bar

In mitigation, the court considers that Respondent entered into three extensive stipulations with the State Bar. (Standard 1.2(e)(v).)

3. Character Evidence

Joseph Altschule, an attorney since 1974, provided favorable character testimony of Respondent. Altschule met Respondent in law school in 1969 and have been friends ever since. He testified that Respondent is honest and has integrity. Altschule stated that Respondent always has been unconventional and different, but at his core, Respondent is honest. Altschule also stated that Respondent is one of the finest trial lawyers he knows and discussed several of Respondent's successful cases. Altschule was aware of Respondent's emotional, personal and financial problems. Respondent talked with Altschule about Respondent's problems with the State Bar and expressed remorse.

The court gives very little weight in mitigation to Altschule's testimony as it is neither an "extraordinary demonstration of good character" nor attested to by a "wide range of references." (Standard 1.2(e)(vi).)

V. LEVEL OF DISCIPLINE

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.) Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Standard 1.6(a).)

In the instant case, the discipline recommended by the standards ranges from reproval to disbarment. (Standards 2.3, 2.6 and 2.10.) The most severe sanction is found at standard 2.3 which recommends actual suspension or disbarment for culpability of an act of moral turpitude, fraud, intentional dishonesty or of concealment of a material fact from a court, client or other person, depending on 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 attorney's acts within the practice of law. The standards, however, are guidelines from which the court may deviate in fashioning the most appropriate discipline considering all the proven facts and circumstances of a given matter. (*In re Young* (1989) 49 Cal.3d 257, 267 (fn. 11); *Howard v. State Bar* (1990) 51 Cal.3d 215.) They are "not mandatory 'sentences' imposed in a blind or mechanical manner." (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

Further, Respondent's wilful failure to comply with rule 955 is extremely serious misconduct for which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116,131; rule 955(d), Cal. Rules of Court.) Disbarment has been consistently imposed by the Supreme Court as the sanction for noncompliance with rule 955. (*Id.*; *Lydon v. State Bar* (1988) 45 Cal.3d 1188; *Powers v. State Bar* (1988) 44 Cal.3d at p. 342.)

Respondent offers mitigation in an attempt to avoid the disgrace and embarrassment of disbarment. The State Bar seeks Respondent's disbarment. The court agrees with the State Bar's recommendation.

Having considered the facts and the law, the court does not believe that a departure from the usual discipline of disbarment in cases of this nature is merited. (*Bercovich v. State Bar, supra,* 50 Cal.3d 116,131; *Dahlman v. State Bar* (1990) 50 Cal.3d 1088; *Lydon v. State Bar, supra,* 45 Cal.3d 1181; rule 955(d), Cal. Rules of Court.) In addition to the rule 955 violations, Respondent has been found culpable of serious misconduct involving nine additional clients. Respondent's misconduct started in 1997 with his prior record of discipline and continues to the present with his ongoing probation violations. Following his 2001 discipline, Respondent was given a chance to address his problems and comply with his professional obligations. Instead, almost immediately after signing the prior discipline stipulation, Respondent engaged in further serious misconduct, including breaching a client's confidence, concealing material information from other clients, making misrepresentations on his 955 declaration and failing to comply with his probation conditions. Respondent has demonstrated an unwillingness to comply with the professional obligations and rules of court imposed on California attorneys although he has been given the opportunity to do so.

The court concludes that a lengthy period of actual suspension is inadequate to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. The "public is therefore at great risk unless Respondent is required to successfully complete a reinstatement proceeding before again being allowed to practice law in this state." (*In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 830.) Accordingly, disbarment is recommended.

VI. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent CHARLES J. ROTHBAUM be DISBARRED from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

It is also recommended that the Supreme Court order respondent to comply with rule 955, paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.

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VII. COSTS

The court recommends that costs be awarded to the State Bar pursuant to section 6086.10, and that those costs be payable in accordance with section 6140.7.

VIII. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that Respondent be transferred to involuntary inactive enrollment status pursuant to section 6007(c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: January 26, 2005

JOANN M. REMKE
Judge of the State Bar Court

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 San Francisco, on January 26, 2005, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

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 San Francisco, California, addressed as follows:

CHARLES JEROME ROTHBAUM
C/O LUKE & BARRON
632 WEST OAK STREET
VISALIA CA 93291

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

WONDER LIANG, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **January 26, 2005**.

Bernadette C. O. Molina
Case Administrator
State Bar Court