PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed July 12, 2006

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **THOMAS NEIL THOMSON**, A Member of the State Bar.	))))))	**02-O-10930; 03-O-02209 (Consolidated)** **OPINION ON REVIEW AND ORDER**

A bankruptcy court issued preliminary and permanent injunctions enjoining a debtor, his agents, representatives and those acting in concert with him from bringing or maintaining any action affecting certain real property. Respondent, Thomas N. Thomson, who was the attorney for the debtor, his brother and a corporation co-owned by the debtor and the brother, commenced an action in state court on behalf of the corporation that adversely affected title to the real property. Respondent then filed and recorded a notice of lis pendens against the property. The bankruptcy court found the debtor, his brother and respondent in contempt of the injunctions and imposed sanctions on respondent in the amount of $46,359.72. Respondent did not report the sanctions order.

Respondent appeals a hearing judge's decision finding him culpable of disobeying a court order, failing to report judicial sanctions, engaging in the unauthorized practice of law and failing to comply with probation conditions. The hearing judge recommended a five-year stayed suspension, a five-year probation, and a four-year actual suspension with conditions, including compliance with Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).[1]

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[1]All further references to "standards" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Upon our independent review (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we adopt the findings and conclusions of the hearing judge with minor modification. However, inasmuch as this is the fifth time that respondent has been disciplined, and his misconduct in the present matter repeats much of the misconduct that gave rise to his prior discipline, we do not believe that the hearing judge's recommended discipline of four years' actual suspension is sufficient to protect the public, the courts and the profession. Instead, we look to *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829 and standard 1.7(b) for guidance, and in so doing, we feel compelled to recommend that respondent be disbarred.

I. FACTS

A. Background

Respondent was admitted to practice in January 1971. He has a record of discipline in four previous matters. Pursuant to Supreme Court Order S039144, effective July 17, 1994, respondent was placed on probation for three years and received a one-year stayed suspension for misconduct in two client matters (*Thomson I*). In one client matter in 1992, the superior court sanctioned respondent $12,667.40 due to his actions in maintaining a quiet title action involving questionable ownership interests of his clients in certain real property. The superior court found respondent's actions were in bad faith, frivolous and intended to cause unnecessary delay. Respondent failed to pay the sanctions or report them to the State Bar. Respondent stipulated to violations of Business and Professions Code sections 6103, 6068, subdivisions (a), (b), and (o)(3),[2] and rule 3-200 of the Rules of Professional Conduct.[3]

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

[3]All further references to "rule" or "rules" are to the Rules of Professional Conduct, unless expressly noted.

In the other client matter, respondent was twice sanctioned by a superior court for failing to appear at two hearings. He failed to timely pay the two sanctions as ordered. Thereafter, on October 13, 1992, the court imposed a further sanction of $1,000 as the result of respondent's pattern of failing to timely pay the two previous monetary sanctions and three other sanctions in unrelated matters. Respondent then failed to pay the October 1992 sanction, or report it to the State Bar. Respondent's multiple failures to comply with the court orders were deemed an aggravating factor in *Thomson I.*

In *Thomson II* (Supreme Court Case No. SO39144), effective March 1997, respondent's probation was extended for two years due to his failure to comply with a probation condition requiring completion of three hours of continuing legal education in law office management by 1995.

In *Thomson III* (Supreme Court Case No. SO59080), also effective March 1997, respondent was placed on probation for two years and received a 30-day actual suspension for commingling funds on multiple occasions between October and December 1993 in violation of rule 4-100(A) and engaging in the unauthorized practice of law in December 1995 in violation of section 6125. Respondent's unauthorized practice occurred when he filed a complaint, initiating a lawsuit in the superior court on behalf of a client while he was suspended from practice for failing to pay his State Bar dues. Respondent was ordered to pay $12,667.40 in restitution.

Finally, in June 2001, pursuant to Supreme Court Order S095884 (*Thomson IV*), respondent was placed on probation for three years and received a two-year stayed suspension for violations of sections 6068, subdivision (k) and 6103 as the result of his failure to pay the restitution ordered in *Thomson III*.

On July 1, 2003, the State Bar filed a Notice of Disciplinary Charges (NDC) in the proceeding we now review, alleging that respondent failed to obey a court order, failed to report judicial sanctions, engaged in the unauthorized practice of law, and failed to comply with probation conditions imposed under Supreme Court orders S039144, S059080, and S095884.

On September 10, 2003, the State Bar filed a second NDC alleging respondent engaged in the unauthorized practice of law in a second matter and committed an additional violation of his probation conditions imposed under Supreme Court order S095884. The matters were consolidated and a two-day trial was held in the hearing department on February 23 and 24, 2004. On August 2, 2004, the hearing judge filed his decision, finding respondent culpable on all charged counts.

Respondent is appealing the hearing judge's decision, claiming that there is no evidentiary or legal basis for finding that he wilfully violated either the preliminary or permanent injunctions that provide the basis for the section 6103 charge or that he willfully engaged in the unauthorized practice of law. He also contends that the hearing department's recommended discipline is excessive. The State Bar did not request review, but upon its consideration of disciplinary cases that were decided post-trial in this matter, the Bar is now seeking disbarment.

B. Lamanna Matter

1. Findings

For many years, respondent represented Frank and Carlos Lamanna as well as Anniello, Inc. (Anniello), a privately-held corporation co-owned by Frank and Carlos Lamanna.[4] Carlos was the president of Anniello. Respondent was the incorporator of Anniello in 1989 and its designated agent for service of process until 1998.

In January 1987, Frank and Carlos Lamanna became indebted to Security Pacific National Bank (Bank)[5] on a $1,110,000 note, secured by a deed of trust on property located at 8600 South

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[4]Respondent testified at the hearing below that Carlos Lamanna was a shareholder of Anniello, but he was not sure of the remaining ownership of Anniello. However, in various pleadings that he filed in state court, including an ex parte application for a temporary restraining order in a quiet title action on behalf of Anniello, which we discuss *post*, he averred that Frank Lamanna was a co-owner of Anniello. Frank Lamanna's declaration in support of that pleading was consistent with the representations made by respondent in the pleadings.

[5]Bank of America, N. T. & S. A. is successor-in-interest to Security Pacific National Bank.

Sepulveda Boulevard (Sepulveda Property). In October 1993, the Lamannas defaulted on the loan and the Bank filed a Notice of Default. In March 1994, respondent filed a lawsuit against the Bank in Los Angeles County Superior Court on behalf of Frank Lamanna to prevent the non-judicial foreclosure of the Sepulveda Property. In June 1994, before the Bank could foreclose on the Sepulveda Property, Frank Lamanna filed for relief under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the Central District of California, case number 94-33978-GM. The matter was converted to a Chapter 7 proceeding upon motion of the Bank.

In August 1995, the Lamannas and their wives, who shared ownership interests with others in the Sepulveda Property, entered into a general release and settlement agreement (Settlement Agreement) with the Bank resolving various disputed claims relating to the Sepulveda Property and other assets. The Settlement Agreement was complex, 33 pages long, and included, inter alia, an agreement by the Bank not to foreclose on the Sepulveda Property until after October 11, 1995. In exchange, the Lamannas were given an option to purchase the Sepulveda Property by a certain date, and if they did not do so, they agreed to vacate the Sepulveda Property within 90 days of a timely foreclosure by the Bank. The Lamannas also agreed to dismiss a number of other lawsuits against the Bank. They further agreed that the Settlement Agreement would be binding on "their family members, agents, employees, representative officers, directors, subsidiaries, affiliates, assigns, heirs, successors in interest and shareholders." The bankruptcy judge approved the Settlement Agreement in September 1995. One month later, the Lamannas failed to meet a condition of the Settlement Agreement and the Bank foreclosed on the Sepulveda Property on October 26, 1995.

Initially, Frank Lamanna was represented in the bankruptcy proceedings by other counsel, but in February 1996, respondent appeared as counsel of record when he filed a motion to vacate the Settlement Agreement on behalf of Lamanna, which the bankruptcy judge denied on March 28, 1996. Notwithstanding their obligation to vacate the Sepulveda Property, the Lamannas remained in possession after the Bank foreclosed. On April 17, 1996, the Bank filed an unlawful

detainer complaint in Los Angeles Municipal Court of the West Los Angeles Judicial District, and in April 1996, respondent filed an answer to the complaint on behalf of Frank Lamanna. As a result of these actions by the Lamannas, on August 16, 1996, the judge in the bankruptcy proceeding issued a preliminary injunction which ordered as follows:

> "[Frank] Lamanna, his agents, officers, employees and representatives and all persons acting in concert with him, are hereby enjoined from commencing or continuing any judicial, administrative or other action or proceeding, relating to the Settlement Agreement or any dispute, loan or obligation encompassed thereby, including, but not limited to, the real propert[y] located at . . . 8600 South Sepulveda Boulevard, Los Angeles, California, in any court other than this Court . . . ."

Respondent was served with the preliminary injunction and was present at the hearing when it was issued.

In spite of the preliminary injunction, in October 1996 respondent filed a quiet title action with respect to the Sepulveda Property, suing the Bank in Los Angeles County Superior Court on behalf of Anniello (the Anniello Lawsuit). As discussed *ante* at footnote 2, Frank and Carlos Lamanna were co-owners of Anniello, which was a privately-held corporation, and respondent was the initial incorporator and agent for service of process.[6] Carlos Lamanna signed the verified complaint, as president of Anniello, commencing the Anniello Lawsuit.

In November 1996, the bankruptcy court judge issued a permanent injunction enjoining Frank and Carlos Lamanna and "their agents" from committing any further breaches of the Settlement Agreement and from "filing any legal action or proceeding in any court of the United States or of the State of California, relating to the Settlement Agreement or any dispute, loan or obligation encompassed thereby, without first obtaining an Order of this Court granting the Lamannas leave to file such an action . . . ." Respondent appeared on behalf of the Lamannas at

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[6]According to respondent's testimony, Anniello operated a restaurant on the Sepulveda Property and according to declarations of Carlos and Frank Lamanna, Anniello owned an interest in the Sepulveda Property since 1993.

the hearing on the permanent injunction and subsequently was served with the court's injunctive order.

Also in November 1996, Frank and Carlos Lamanna were cited for criminal contempt for their failure to comply with a bankruptcy court order compelling them to stipulate to a judgment in the unlawful detainer action. In its order, the bankruptcy court stated: "The court has been involved with one or more of the [Lamannas] since 1991 and is aware of their history of doing any and everything possible to stay in possession of the Sepulveda Property without making any payments to [the Bank] including filing multiple lawsuits to prevent the Bank from taking possession of the Sepulveda Property."[7] Respondent represented both Frank and Carlos in the criminal contempt proceedings.

After the issuance of the permanent injunction and the Lamannas' criminal contempt citations, respondent continued to represent the Lamannas in actively litigating matters relating to the Sepulveda Property. For example, on January 24, 1997, respondent filed an Ex Parte Application for a Temporary Restraining Order and Preliminary Injunction against the Bank, which was denied. In September 1997, respondent recorded a "Notice of Pending Action" (Lis Pendens) with the Los Angeles County Recorder's office with respect to the Sepulveda Property. On December 11, 1997, respondent filed an opposition to the Bank's demurrer in the Anniello Lawsuit. On December 22, 1997, respondent filed a motion for reconsideration of the

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[7]Respondent represented the Lamannas in several matters where the courts have ruled the matters were brought in bad faith. The Los Angeles Superior Court on two occasions ruled Frank and Carlos vexatious litigants under California Code of Civil Procedure section 391, subdivisions (b)(1) and (2). In 1991, the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division, dismissed a bankruptcy petition involving Frank Lamanna because the court was persuaded the matter was brought in bad faith in order to stay various lawsuits pending in California. The Ohio Bankruptcy Court found that respondent and Lamanna "were evasive and less-than-candid in their testimony" and indeed may have committed or assisted in committing a criminal fraud in causing the petition to be filed. It accordingly referred the matter to the United States Attorney as well as to the State Bar of California "for its evaluation and review of Mr. Thomson." The record does not reflect the outcome of these investigations.

order sustaining the demurrer and a request for leave to file a second complaint. On January 8, 1998, respondent filed an opposition to the Bank's motion to expunge the Lis Pendens and declared under penalty of perjury that "[t]here are no injunctive orders by the Bankruptcy Court or any other court of law enjoining, restraining or prohibiting the prosecution of this action by plaintiff."

On January 23, 1998, the bankruptcy court issued an order to show cause directed to the Lamannas and respondent regarding contempt of the injunctions. Five days after the order to show cause was issued, the bankruptcy court filed its Memorandum on Order to Show Cause re Contempt, making numerous findings of fact, including: 1) that respondent was acting as the agent of Frank Lamanna when he filed the Anniello Lawsuit; 2) that respondent was acting in concert with Frank Lamanna and his brother Carlos when respondent filed the Lis Pendens; and 3) that these actions violated the preliminary injunction because they related "to a dispute, loan or obligation encompassed in the settlement agreement concerning the [Sepulveda Property]." Also, because leave of court was not obtained, the judge further found that respondent's recording of the Lis Pendens violated the permanent injunction. Undeterred by the order to show cause, on February 20, 1998, respondent filed a second complaint in the Anniello Lawsuit on behalf of Anniello after the Bank's demurrer to the first complaint was sustained.

In June 1998, the bankruptcy judge found respondent in civil contempt because he, together with Carlos Lamanna, acted as an agent of Frank Lamanna "and acted in concert with him to commence and continue [the Anniello Lawsuit]." The court further found respondent in contempt because, as counsel for Carlos Lamanna and Anniello, he acted as an agent of and in concert with Frank Lamanna in causing the lis pendens to be recorded against the Sepulveda Property after the preliminary and permanent injunctions were issued. Respondent attended the hearing on the contempt order and was served with a copy of the order. Nevertheless, respondent continued to litigate the Anniello Lawsuit until August 1998. The bankruptcy court

ordered respondent to pay the Bank $46,359.72 in attorneys' fees. He did not report the court-ordered sanctions to the State Bar, although he knew of his obligation to do so.

Respondent appealed the order finding him in contempt, and in December 1999, the United States Bankruptcy Appellate Panel of the Ninth Circuit affirmed the contempt order. Respondent thereafter appealed to the United States Court of Appeals for the Ninth Circuit, and in November 2001, that court affirmed the contempt order, finding respondent had full knowledge of the injunctions and, as counsel for the Lamannas in the bankruptcy court, he was bound by the injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure. The Ninth Circuit further found that respondent "as counsel for the Debtors, was the Debtor's agent. As such, he was restrained from commencing or continuing any action affecting title to the [Sepulveda] Property." The court concluded respondent violated the injunctions when he filed the Anniello Lawsuit. Respondent did not pursue a further appeal.

2. Discussion

The hearing judge concluded that respondent failed to report judicial sanctions in violation of Business and Professions Code section 6068, subdivision (o)(3) and that he wilfully disobeyed a court order when he filed the Anniello Lawsuit and Lis Pendens in violation of section 6103. Because respondent was on disciplinary probation when he committed these violations, the hearing judge also found respondent culpable of two counts of failing to comply with probation conditions (§ 6068, subd. (k)).

Respondent does not dispute the finding that he failed to report the sanctions imposed by the bankruptcy court and concedes he "has no excuse" for this misconduct. Given respondent's extensive history as a recipient of court-ordered sanctions and his prior discipline for failure to report the sanctions, we are compelled to conclude he wilfully violated section 6068, subdivision (o)(3).

Respondent vigorously disputes that he wilfully disobeyed the orders of the bankruptcy court in violation of section 6103. He argues that the bankruptcy judge was in error when she

found him in contempt of her two injunctive orders, and other than the bankruptcy judge's incorrect findings and conclusions, according to respondent, there is no legal or factual basis for the hearing judge's finding of culpability under section 6103. Respondent further asserts that the hearing judge below improperly applied the doctrine of collateral estoppel in order to arrive at his culpability determination.[8] Based on our independent review of the record, we reject respondent's arguments and find on this record clear and convincing evidence that respondent wilfully violated the bankruptcy court's injunctive orders when he filed the lawsuit and Lis Pendens on behalf of Anniello which affected the title to the Sepulveda Property.

Although respondent was not a signatory to the August 1995 Settlement Agreement, and he did not represent the Lamannas during the negotiations of that agreement, he was well aware of the specifics of the Settlement Agreement as the attorney of record who filed the motion to set aside the agreement well before the issuance of the preliminary injunction. He also represented Frank and Carlos in the criminal contempt proceedings wherein the court sanctioned the Lamannas for their failure to adhere to the terms of the Settlement Agreement.

As a consequence of the Lamannas' unabated litigation efforts involving the Sepulveda Property, the bankruptcy court issued the preliminary injunction. Section 105 of the Bankruptcy Code (11 U.S.C. § 105) authorizes the bankruptcy courts to enjoin proceedings in other forums

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[8]It is not clear from the decision of the hearing judge whether he applied the doctrine of collateral estoppel. However, the hearing judge correctly noted that this may well be an appropriate case in which to apply that doctrine since the standard of proof in civil contempt proceedings in the Ninth Circuit is clear and convincing evidence (*FTC v. Affordable Media* (9th Cir. 1999) 179 F.3d 1228, 1239), and the issue here of the wilful violation of the bankruptcy judge's order is identical to the issue in the contempt proceedings. Respondent was a party to those contempt proceedings and unsuccessfully appealed the contempt order to the Bankruptcy Appellate Panel (Appellate Panel) and to the Ninth Circuit. That decision is now final. Because we find independent evidence in the record that provides clear and convincing support for the hearing judge's culpability determinations, we need not address the applicability of the collateral estoppel doctrine to this case. Moreover, as the hearing judge also noted correctly, at a minimum, the findings of the bankruptcy judge in support of her civil contempt order are entitled to a strong presumption of validity. (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.)

and to enjoin parties from commencing litigation that is inconsistent with a settlement agreement. Indeed, it has been held that the bankruptcy courts have the inherent power to summarily enforce settlement agreements (*In the Matter of Springpark Assocs.* (9th Cir. 1980) 623 F.2d 1377, 1380), including the power to impose sanctions (*In re Rainbow Magazine* (9th Cir. 1996) 77 F.3d 278, 283-285).

Respondent's argument that he was not named in the injunctive orders and was not subject to the bankruptcy court's jurisdiction misses the point. As explained by the United States Supreme Court, "a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." (*Regal Knitwear Co. v. Nat. Lab. Relations Bd.* (1945) 324 U.S. 9, 14.) Moreover, injunctions in bankruptcy adversary proceedings are governed by rule 65 of the Federal Rules of Civil Procedure, which "is a codification of the common-law rule allowing a non-party to be held in contempt for violating the terms of an injunction when a non-party is legally identified with the defendant. . . ." (*Illinois v. U.S. Dept. of Health and Human Serv.* (7th Cir. 1985) 772 F.2d 329, 332.) Rule 65(d) expressly provides that it is binding upon the attorneys of enjoined parties who have actual notice of the order.[9] (See also *In re D.H. Overmyer Telecasting Co.* (Bankr. N.D. Ohio 1983) 30 B.R. 755.) Thus, the issue here is not whether respondent was *named* in the injunctions, but whether he had *notice* of the court's injunctive orders. (*California v. Campbell* (9th Cir. 1998) 138 F.3d 772, 783.) Without question, respondent had actual knowledge of the restraints imposed by the bankruptcy court pursuant to the preliminary and permanent injunctions.

Respondent also argues, as he did unsuccessfully in the bankruptcy court, the Appellate Panel, the Ninth Circuit and at the hearing below, that he was not in contempt of the injunctive

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[9]Rule 65(d) provides: "Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, *and attorneys* . . . who receive actual notice of the order by personal service or otherwise." (Italics added.)

orders because he filed the quiet title action on behalf of Anniello, which was not named in the injunction or subject to the bankruptcy court's jurisdiction. Each of these courts rejected this argument, and so do we. The bankruptcy judge did not find *Anniello* was subject to the injunctions, but rather *respondent* was bound by them.[10] The bankruptcy judge also explicitly found respondent was acting as an agent of and in concert with the Lamannas in bringing the Anniello Lawsuit. The record here amply supports this finding. We further find that there is clear and convincing evidence in this record to conclude that respondent is culpable of wilful disobedience of the bankruptcy court's injunctive orders in violation of section 6103.

Although we also adopt the hearing judge's conclusion that as a result of the violations of the injunctive orders, respondent is culpable of two probation violations under section 6068. subdivision (k), we deem these violations to be essentially duplicative of the culpability determinations under section 6103 and 6068, subdivision (o)(3). We therefore ascribe no additional weight to these violations for purposes of our discipline analysis. (See *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 76-77 [where the same misconduct forms the basis for a violation of probation as well as original discipline, it is inappropriate to discipline a respondent for both].)

C. Zafran and PESH'A Matters

______1. Findings

On June 24, 2002, the State Bar Membership Billing Services notified respondent that he had not fully paid his membership fees, penalties, or costs and that failure to correct the delinquency by August 24, 2002, would result in the Board of Governors recommending his suspension. Respondent failed to timely pay the outstanding funds, and accordingly, on August

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[10]Parenthetically, Anniello was a closely-held corporation that could only act through its officers, directors, legal representatives and agents. Thus, Anniello was only able to commence and maintain the litigation affecting the Sepulveda Property through the overt, intentional acts of the Lamannas and respondent.

30, 2002, the Supreme Court filed an order suspending him from the practice of law effective September 16, 2002.

On September 13, 2002, respondent filed a motion with the State Bar Court to stay his suspension, but the court did not rule on the motion until October 7, 2002, when it denied the motion. Thus, respondent's suspension commenced on September 16, 2002.[11]

On September 24, 2002, while he was on suspension, respondent wrote a letter on his office letterhead to an insurance adjuster at Lancer Insurance Company in an effort to negotiate a settlement for a client. Respondent asserted in the letter that he was an attorney representing Claudine Zafran, that the insurer's $250 settlement offer was inadequate, and that he should be contacted to negotiate proper payment. Respondent wrote the adjuster again on October 10, 2002, asserting that failure to pay his client's claim would constitute bad faith and that his client would pursue her claim in court if necessary.

On September 17 and 23, 2002, respondent wrote letters on his office letterhead to the president of Greenspan Company Adjusters asserting, inter alia, that he was an attorney representing PESH'A Corporation in its $30,000 claim against Greenspan and that a federal lawsuit would be filed if the matter was not resolved.

In both the Zafran and PESH'A matters, the hearing judge concluded that respondent engaged in the unauthorized practice of law in violation of sections 6125 and 6126 and thereby failed to support the Constitution or laws of the United States or California (§ 6068, subd. (a)). Because respondent was on disciplinary probation when he committed these violations, the hearing judge also found respondent culpable of two counts of failing to comply with probation conditions. (§ 6068, subd. (k).)[12]

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[11]Respondent's suspension continued until October 17, 2002, when he paid his outstanding fees.

[12]Between June 2001 and June 2004, respondent was on disciplinary probation.

2. Discussion

Without question, the communications by respondent on his letterhead stationery, while he was suspended from practice, attempting to settle two matters constituted the unauthorized practice of law. As the Supreme Court explained in *Morgan v. State Bar* (1990) 51 Cal.3d 598, 604: "[W]e conclude that engaging in negotiations with opposing counsel concerning settlement . . . constitutes the practice of law." Moreover, the unauthorized practice of law encompasses the holding out by the attorney that he or she is entitled to practice. (*Bluestein v. State Bar* (1974) 13 Cal.3d 162, 175, fn. 13 [use of term "Of Counsel" on letterhead to describe an unlicenced person constitutes unauthorized practice]; *In re Naney* (1990) 51 Cal.3d 186 [suspended attorney implied to a prospective employer that he was entitled to practice taxation law by using his bar admission date on a resume].) Respondent, however, contends that the facts do not support a finding of wilfulness on his part because he believed his motion requesting a stay "protected him from the claim of unauthorized practice of law with respect to the four letters." Wilfulness for purposes of disciplinary "proceedings is simply a general purpose or willingness to commit an act or to make an omission . . . . [Citations.]" (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309; *Zitny v. State Bar* (1966) 64 Cal.2d 787, 792.) This element is established here because there is clear and convincing evidence that respondent acted purposely when he created the impression he was entitled to represent Zafran and PESH'A as their attorney. Moreover, respondent testified that he understood merely requesting a stay did not actually constitute a stay, and he admitted that he did not believe the stay was even in effect when he wrote the letters on behalf of Zafran and PESH'A.

We accordingly adopt each of the hearing judge's conclusions regarding culpability in these matters but, as in the Lamanna matter, deem the section 6068, subdivision (k) violations to be duplicative of the section 6068, subdivision (a) violations and therefore assign no weight to them for disciplinary purposes.

II. EVIDENCE RE MITIGATION AND AGGRAVATION

A. Mitigation

The hearing judge found no mitigating factors, and properly rejected respondent's claim that he acted in good faith. "In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held *and* reasonable. [Citation.]" (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653, italics added.) To conclude otherwise would reward an attorney for his unreasonable beliefs and "for his ignorance of his ethical responsibilities." (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 427.)

Even if, arguendo, respondent honestly believed he was not subject to the preliminary and permanent injunctions, it was not reasonable for him to do so, particularly since rule 65(d) of the Federal Rules of Civil Procedure makes injunctions binding on the parties to the action and their attorneys. In view of respondent's representation of both Frank and Carlos Lamanna in the bankruptcy proceedings, his attempt to thread the ethical needle by filing a lawsuit and recording a lis pendens in the name of Anniello is unavailing to this court.

B. Aggravation

We agree with the hearing judge's finding in aggravation that respondent's misconduct involved multiple acts of wrongdoing. (Std. 1.2(b)(ii).) Because respondent filed quarterly probation reports indicating he was in compliance with the State Bar Act and Rules of Professional Conduct and failing to disclose the 1998 order finding him in contempt and sanctioning him in the amount of $46,359.72, the hearing judge found that respondent's misconduct was surrounded or followed by bad faith, dishonesty, and concealment. (Std. 1.2(b)(iii).) We agree. The hearing judge also found in aggravation that respondent has not accepted responsibility for his misconduct, and "repeatedly made spurious arguments and rationalizations which showed a lack of appreciation for his misconduct." Respondent has

continued to assert to this court the same baseless arguments rejected by three federal courts and the hearing judge. His truculence is reminiscent of that in *In re Morse, supra*, 11 Cal.4th at p. 209.

Moreover, he continues to demonstrate an utter lack of understanding of the consequences of his misconduct, maintaining that his unlawful practice of law was minor and "hardly a reason for any discipline." "[B]y implying . . . that his misconduct constituted a mere technical lapse, [respondent] evinces a lack of understanding of the gravity of his earlier misdeeds and the import of the State Bar's regulatory functions." (*Conroy v. State Bar* (1990) 51 Cal.3d 799, 806.) We therefore adopt the hearing judge's finding of demonstrated indifference. (Std.1.2(b)(v).)

We also adopt the hearing judge's finding that respondent's four prior instances of discipline constitute a significant aggravating factor. (Std. 1.2(b)(i).) Respondent has been committing misconduct since 1989 and has continuously been on probation and/or before this court since 1993. Respondent received a one-year stayed suspension in 1994 for misconduct occurring between 1989 and 1992 involving two clients. Previously, respondent was sanctioned $12,667.40 under circumstances remarkably similar to those in the instant case due to his bad faith actions in maintaining a frivolous quiet title action that was intended to cause unnecessary delay. In the past, respondent also has failed on numerous occasions to comply with court orders and failed to report court-ordered sanctions in violation of sections 6103 and 6068 subdivisions (a), (b), and (o)(3). In March 1997, respondent's probation was extended for two years due to his failure to comply with a probation condition requiring completion by 1995 of continuing legal education. Also, in March 1997, respondent received a 30-day actual suspension for commingling funds and engaging in the unauthorized practice of law under circumstances very much the same as his unauthorized practice of law in the instant matter. Finally, in June 2001, respondent received a two-year stayed suspension for failing to make

court-ordered restitution imposed in a prior disciplinary proceeding. In fact, he was on probation when he committed the misconduct that is before us now.

III. DEGREE OF DISCIPLINE

Respondent asserts that the four-year actual suspension the hearing judge recommended is excessive and should be reduced to, at most, two months. The State Bar requested a two-year actual suspension at trial and did not request review in this matter. However, because of recent opinions issued after respondent filed his opening brief, the State Bar has reconsidered its position and now seeks respondent's disbarment. Although we discourage the practice of requesting, in a responsive brief, review of issues not raised by the appellant, our duty to conduct de novo review authorizes us to increase the discipline if we deem it appropriate regardless of whether the State Bar appealed. (*In re Morse, supra,* 11 Cal.4th 184, 207; *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.)

The primary purposes of disciplinary proceedings are the protection of the public, the courts and the legal profession, the maintenance of high professional standards by attorneys, and the preservation of public confidence in the legal profession. (Std. 1.3.) In determining the recommended degree of discipline, we consider the standards, which serve as guidelines entitled to great weight, as well as prior decisions imposing discipline based on similar facts. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) When there are two or more acts of misconduct, the disciplinary sanction shall be the most severe sanction applicable. (Std. 1.6(a).) Standard 2.6 applies to all of respondent's misconduct and provides for sanctions ranging from suspension to disbarment depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline.

Central to our disciplinary analysis is standard 1.7(b), which, because of respondent's extensive record of prior discipline, must be considered in conjunction with standard 2.6. If an attorney has two or more prior offenses, standard 1.7(b) provides for "disbarment unless the most compelling mitigating circumstances clearly predominate." However, rather than apply

standard 1.7(b) rigidly, we "consider the facts underlying the various [prior disciplinary] proceedings in arriving at the appropriate discipline." (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507.) When there is a repetition of offenses for which an attorney has previously been disciplined that "demonstrates a pattern of professional misconduct," the Supreme Court and this court have found disbarment is appropriate under standard 1.7(b). (*Morgan v. State Bar, supra,* 51 Cal.3d 598, 607; *In the Matter of Shalant, supra,* 4 Cal. State Bar Ct. Rptr. 829.)

When viewed in its totality, respondent's current offenses plainly echo his prior record of discipline and provide "a disturbing repetitive theme." (*In the Matter of Shalant, supra,* 4 Cal. State Bar Ct. Rptr. at p. 841). The actions for which respondent was disciplined in 1994, 1997, and 2001 all involved a continued disregard of court orders. Rather than comply with several court orders requiring him to pay sanctions and with multiple Supreme Court orders suspending his right to practice law and requiring him to comply with conditions of probation, respondent, instead, has simply ignored them. Respondent persisted in such misconduct when he defied two bankruptcy court injunctions. We also note that respondent's failure to report court-ordered sanctions and unauthorized practice of law are repeat offenses for which he was previously disciplined in 1994 and 1997.

The State Bar relies on several cases in support of its argument that respondent should be disbarred. Most recent is the case of *In the Matter of Shalant, supra,* 4 Cal. State Bar Ct. Rptr. 829, where we applied standard 1.7(b) and recommended disbarment of an attorney who had been disciplined four times previously. We found Shalant culpable of committing an act involving moral turpitude and collecting an illegal fee which was aggravated by client harm and Shalant's indifference toward rectification. Shalant was previously disciplined for trust account violations, failure to perform competently and to communicate with clients, improper communication with represented parties, and violation of a court order. The centerpiece of our analysis in *Shalant* was the attorney's prior record of discipline, contrary to respondent's claim that "The 'common thread' argument [was] hardly the reason for the discipline ultimately

handed out in *Shalant*." (*Id*. at p. 841.) Because Shalant's repeated misconduct was tempered by only minimal mitigation in the form of community service, we applied standard 1.7(b) and recommended disbarment. (*Id*. at pp. 841-842.) The Supreme Court adopted our recommendation and, effective January 13, 2006, Shalant was disbarred by order of the Supreme Court.

In *In the Matter of Hunter*, *supra*, 3 Cal. State Bar Ct. Rptr. 63, we recommended disbarment of an attorney who had been disciplined once before for trust account violations and the unauthorized practice of law. Thereafter, the attorney failed to perform competently or to communicate with four clients and violated conditions of his disciplinary probation by failing to file his first quarterly report, failing to communicate with his probation monitor, and failing to notify the probation department of his change of address. We found no mitigating circumstances to counter the attorney's multiple acts of misconduct, failure to cooperate with the State Bar, significant harm to a client and significant harm to the administration of justice. In applying standard 1.7(b), we observed that the attorney committed misconduct in 1985, 1987, 1988, 1991, and 1992 and that the matters under review represented the attorney's second and third disciplinary matters. Because the attorney's misconduct reflected his disdain for the rule of law and his inability to conform his conduct to the most basic duties of an attorney, we concluded that disbarment was appropriate. Because the risk of future misconduct was so great, the attorney was not a good candidate for probation and/or suspension. (*Id*. at p. 79.)

Although not discussed by either party, we find instructive the cases of *Morgan v. State Bar*, *supra*, 51 Cal.3d 598, and *Barnum v. State Bar* (1990) 52 Cal.3d 104 (*Barnum*). The attorney in *Morgan* had four prior disciplinary proceedings for misconduct involving misappropriations, the unauthorized practice of law, settling cases without authorization, failing to perform competently, and failing to communicate with a client. The attorney was before the court for again engaging in the unauthorized practice of law and obtaining a pecuniary interest adverse to a client. Observing that "this is the *second* time that [the attorney] has been found

culpable of practicing law while under suspension," the Supreme Court concluded that "[the attorney's] behavior demonstrates a pattern of professional misconduct and an indifference to this court's disciplinary orders." (*Id*. at p. 607, original italics.) Since the attorney's character evidence and community service did not constitute compelling mitigating circumstances, the court applied standard 1.7(b) and disbarred the attorney. (*Id*. at pp. 607-608.)

In the *Barnum* case, the Supreme Court disbarred an attorney, finding that the risk of recurrence of professional misconduct was high and the attorney was not a good candidate for suspension and/or probation after he collected an unconscionable fee, disobeyed court orders compelling him to return the fee, and failed to cooperate with the State Bar's investigation. The attorney previously had been disciplined for failing to perform competently and failing to return unearned fees. He was then suspended for failing to timely pass the Professional Responsibility Examination. Thereafter, his probation was revoked and he was actually suspended for one year after failing to file probation reports. No mitigating circumstances were found and the court was greatly concerned with the attorney's wilful violation of court orders stating that "[o]ther than outright deceit, it is difficult to imagine conduct in the course of legal representation more unbefitting an attorney." (*Id*. at p. 112.) The Supreme Court observed that the attorney appeared unwilling or unable to learn from past professional mistakes because he repeated the same misconduct that gave rise to the prior disciplinary proceeding and because no compelling mitigating circumstances existed to preclude application of standard 1.7(b). (*Id*. at pp. 111, 113.) Following the holding in *Barnum*, we consider the risk of recurrence of professional misconduct is high and therefore conclude that respondent is not a good candidate for probation or suspension.

We find the decision in *Arm v. State Bar* (1990) 50 Cal.3d 763, distinguishable. In *Arm,* the Supreme Court declined to apply standard 1.7(b) and disbar an attorney who had been disciplined three times previously because "compelling mitigating circumstances clearly predominate[d]." (*Id*. at p. 779.) The attorney had commingled funds and committed an act of

moral turpitude when he misled a court about an impending suspension from practice. The court found these acts of misconduct "quite different from the [prior misconduct]." (*Id.* at p. 780.) The attorney had been previously disciplined for giving false information to a police officer, accepting employment adverse to a former client without consent, filing a false declaration, and improperly entering into a business transaction with a client. The Supreme court thus rejected the State Bar's position that a "common thread" existed between the misconduct in the matter before the Court and the prior three disciplinary proceedings. We accordingly consider *Arm* inapplicable to this proceeding since no mitigating circumstances exist in respondent's case and because respondent's present misconduct is a repetition of prior ethical transgressions for which he has been previously disciplined.

IV. RECOMMENDATION

This matter represents respondent's fifth disciplinary proceeding. He has been continuously on probation since 1994, yet he has repeatedly violated court orders, failed to report court sanctions, and engaged in the unauthorized practice of law. Aggravating circumstances abound, untempered by any mitigating circumstances. Respondent has demonstrated no meaningful appreciation of his ethical responsibilities and has established himself as unsuitable to practice law and not amenable to efforts at reform. We therefore recommend that respondent Thomas Neil Thomson be disbarred and his name stricken from the roll of attorneys.

We further recommend that respondent be ordered to comply with the provisions of California Rules of Court, rule 955 and to perform the acts specified in paragraphs (a) and (c) of that rule within 30 and 40 days respectively, after the effective date of the Supreme Court's order in this matter.

We further recommend that 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.

ORDER OF INACTIVE ENROLLMENT

Pursuant to the provisions of Business and Professions Code section 6007, subdivision (c)(4) and Rules of Procedure of the State Bar, rule 220(c), respondent is ordered enrolled inactive upon personal service of this opinion or three days after service by mail, whichever is earlier.

EPSTEIN, J.

We concur:

STOVITZ, P. J.

WATAI., J.

Case No. 02-O-10930, 03-O-02209 (Cons.)

In the Matter of

THOMAS NEIL THOMSON

Hearing Judge

Hon. Robert M. Talcott

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