FILED May 23, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case No.: **04-O-12130-RAP;**
	)	**05-J-02623-RAP;**
	)	**05-O-02710-RAP (Consolidated)**
JAMES L. RATHER,	)	
	)	DECISION & ORDER OF INVOLUNTARY
Member No. 102875,	)	INACTIVE ENROLLMENT
	)	
	)	
A Member of the State Bar.	)	

I. INTRODUCTION

In this consolidated disciplinary proceeding, which proceeded by default, Deputy Trial Counsel Gordon L. Grenier appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Respondent JAMES L. RATHER did not appear in person or by counsel. The State Bar urges disbarment. The court agrees even though, as discussed *post*, the State Bar has only proved 12 out of the 26 counts of charged misconduct. Moreover, in light of its disbarment recommendation, the court will order that respondent be involuntarily enrolled as an inactive member of the State Bar of California in accordance with Business and Professions Code section 6007, subdivision (c)(4).[1] (Rules Proc. of State Bar, rule 220(c).)

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

II. PROCEDURAL HISTORY

A. Case Number 04-O-12130-RAP

On May 2, 2005, the State Bar initiated case number 04-O-12130-RAP by filing a notice of disciplinary charges (hereafter NDC) in this court. On April 29, 2005, in accordance with section 6002.1, subdivision (c), the State Bar properly served a copy of that NDC on respondent at his latest address shown on the official membership records of the State Bar (hereafter official address) by certified mail, return receipt requested. That service was deemed complete when mailed even if respondent did not receive it. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108.) Moreover, as a courtesy to respondent, the State Bar also mailed a copy of the NDC to him at an alternative address it had for respondent in its file, which address is on Prosperity Road in Knoxville, Tennessee (hereafter the Prosperity Road address).

Soon thereafter, the United States Postal Service (hereafter Postal Service) returned to the State Bar the copy of the NDC that it mailed to respondent at his official address as undeliverable. The Postal Service, however, did not return as undeliverable or otherwise the copy of the NDC that the State Bar mailed to respondent at the at Prosperity Road address. Accordingly, the court finds that respondent received that copy. (Evid. Code, § 641 [mailbox rule].)

Respondent's response to the NDC was due no later than May 27, 2005. (Rules Proc. of State Bar, rule 103(a).) Respondent, however, never filed a response.

Even though the State Bar fully complied with its duty, under section 6002.1, subdivision (c), to serve respondent with a copy of the NDC, it took, as a courtesy to respondent, a number of steps to contact respondent to make sure that he had actual knowledge of the NDC and the present proceedings. Those additional steps, which were all unsuccessful, are set forth in the

declaration of Deputy Trial Counsel Grenier that is attached to the State Bar's motion for entry of default, which was filed on June 6, 2005.

On June 22, 2005, on the motion of the State Bar, the court filed an order entering respondent's default and, as mandated in section 6007, subdivision (e)(1), placing him on involuntary inactive enrollment. And, on July 8, 2005, the State Bar filed a request for waiver of default hearing and brief on culpability and discipline. Thereafter, the court took case number 04-O-12130-RAP under submission for decision without a hearing. However, on September 26, 2005, the court filed an order vacating that submission and consolidating case number 04-O-12130-RAP with case number 05-J-02623-RAP.

B. Case Number 05-J-02623-RAP

On August 24, 2005, the State Bar initiated case number 05-J-02623-RAP by filing a notice of disciplinary charges (hereafter NDC) in this court. On August 23, 2005, in accordance with section 6002.1, subdivision (c), the State Bar properly served a copy of that NDC on respondent at his official address. That service was deemed complete when mailed even if respondent did not receive it. (§ 6002.1, subd. (c); *Bowles v. State Bar, supra*, 48 Cal.3d at pp. 107-108.) Moreover, as a courtesy to respondent, the State Bar also mailed copies of the NDC in case number 05-J-02623-RAP to him both at the Prosperity Road address and at another alternative address that the State Bar obtained for respondent that was on Northshore Drive in Knoxville, Tennessee (hereafter Northshore Drive Address). Soon thereafter, however, the Postal Service returned, to the State Bar, each of those three copies of the NDC as being undeliverable.

Respondent's response to the NDC was due no later than September 18, 2005. (Rules Proc. of State Bar, rule 103(a).) Respondent, however, never filed a response. And, as noted

ante, the court consolidated case numbers 04-O-12130-RAP and 05-J-02623-RAP in an order filed on September 26, 2005.

On October 14, 2005, on the motion of the State Bar, the court filed an order entering respondent's default and, as mandated in section 6007, subdivision (e)(1), placing him on involuntary inactive enrollment for a second time. Thereafter, the court took case numbers 04-O-12130-RAP and 05-J-02623-RAP under submission for decision without a hearing. However, on January 24, 2006, the court filed an order vacating that submission and temporarily abating the consolidated matter of case numbers 04-O-12130-RAP and 05-J-02623-RAP pending either respondent's appearance or default in case number 05-O-02710-RAP, which the State Bar filed in November 2005.

C. Case Number 05-O-02710-RAP

On November 3, 2005, the State Bar initiated case number 05-O-02710-RAP by filing a notice of disciplinary charges (hereafter NDC) in this court, and in accordance with section 6002.1, subdivision (c), the State Bar properly served a copy of that NDC on respondent at his official address. That service was deemed complete when mailed even if respondent did not receive it. (§ 6002.1, subd. (c); *Bowles v. State Bar*, *supra*, 48 Cal.3d at pp. 107-108.) The Postal Service returned, to the State Bar, that copy of the NDC undelivered.

Respondent's response to the NDC was due no later than November 28, 2005. (Rules Proc. of State Bar, rule 103(a).) Respondent, however, never filed a response.

Even though the State Bar fully complied with its duty to serve respondent with a copy of the NDC at his official address, it did not immediately move for the entry of respondent's default when he failed to timely file a response to the NDC in case number 05-O-02710-RAP. Instead, a State Bar deputy trial counsel, as a courtesy to respondent, commendably took a number of steps to contact respondent about the matter. Those additional steps, which included contacting both

the Tennessee licensing authority and respondent's mother were all unsuccessful, are set forth in the declaration of Deputy Trial Counsel Jean Cha that is attached to the State Bar's motion for entry of default, which was filed on January 5, 2006.

On January 26, 2006, on the motion of the State Bar, the court filed an order entering respondent's default in case number 05-O-02710-RAP and, as mandated in section 6007, subdivision (e)(1), placing him on involuntary inactive enrollment for a third time.

Thereafter, on February 21, 2006, the court filed an order (1) terminating the temporary abatement in consolidated case numbers 04-O-12130-RAP and 05-J-02623-RAP, (2) consolidating case number 05-O-02710-RAP into that consolidated proceeding, and (3) taking the three cases as consolidated under submission for decision without a hearing. The State Bar previously filed, on February 6, 2006, a new request for waiver of default hearing and brief on culpability and discipline in the now three-case consolidated proceeding.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings in case numbers 04-O-121230-RAP and 05-O-02710-RAP are based on: (1) the well-pleaded factual allegations (not the legal contentions) contained in the NDC's in those two cases, which allegations are deemed admitted by the entry of respondent's default in each of those cases (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)); and (2) the facts in this court's official file in those case numbers. But, in case number 05-J-02623-RAP, the court's findings are based on: (1) the certified copy of the public censure imposed on respondent by the Board of Professional Responsibility of the Supreme Court of Tennessee (hereafter the Tennessee Board) on January 27, 2005, of respondent, which is attached as exhibit 1 to the NDC in that case and which this court admits into evidence (§ 6049.1, subd. (d)); and (2) the facts in

this court's official file in that case.[2] Moreover, with respect to case number 05-J-02623-RAP, the court takes judicial notice of the partial copies of the Tennessee Disciplinary Rules and of Tennessee Rules of Professional Conduct that are attached as exhibit 2 to the NDC in case number 05-J-02623-RAP. (Cal. Evid. Code, § 452, subd. (c).)

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 10, 1982, and has been a member of the State Bar since that time.

B. Case Number 04-O-12130-RAP

1. Ciminesi Client Matter (Counts 1 to 6)

In early September 2003, David Ciminesi employed respondent to file a bankruptcy petition for him and his wife and to thereafter represent them in bankruptcy court. Respondent's fee was $3000, which he permitted Ciminesi to pay after the bankruptcy petition was filed. In that same month, Ciminesi paid respondent a total of $700 for bankruptcy court filing fees.

In early October 2003, respondent filed a chapter 13 bankruptcy petition for the Ciminesis in the United States Bankruptcy Court for the Central District of California (Riverside Division). Soon thereafter, the bankruptcy court served respondent with a case commencement deficiency notice informing him that, if he did not cure the deficiencies in the Ciminesis' bankruptcy case filings within 15 days, the court would dismiss their case. Respondent, however, failed to cure the deficiencies. Therefore, on October 23, 2003, the

[2]Even though the factual allegations contained in the NDC in case number 05-J-02623-RAP are also deemed admitted by the entry of respondent's default in that case (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)), the only factual allegation in that NDC is that respondent was publicly censured by the Tennessee Board on January 27, 2005.

bankruptcy court dismissed the Ciminesis' bankruptcy case and precluded them from filing another bankruptcy petition for 180 days (i.e., until May 20, 2004).

On November 15, 2003, respondent told Ciminesi that the bankruptcy petition had been rejected and that they needed to file another petition. A few days later, Ciminesi met with respondent regarding the new bankruptcy petition and paid respondent $3,000 in advanced attorney's fees. Then, on December 10, 2003, respondent requested and Ciminesi paid an additional $1,500 in advanced attorney's fees to complete the filing of the second bankruptcy petition. Thereafter, respondent did not perform any further legal services for Ciminesi. Respondent did not perform any services of value for the Ciminesis. Nor did respondent earn any portion of the $4,500 in advanced fees that Ciminesi paid him.

In March 2004, the State Bar opened a disciplinary investigation with respect to a complaint Ciminesi filed against respondent. On June 23, 2004, a State Bar investigator mailed, to respondent as his official address, a letter asking respondent to respond, in writing, to specific allegations of misconduct involving Ciminesi. Even though he received that letter (Evid. Code, § 641 [mailbox rule]), respondent did not respond to it. Nor did respondent otherwise communicate with the investigator.

Then, on January 6, 2005, and again on February 7, 2005, another State Bar investigator mailed, to respondent at his official address, a letter regarding the Ciminesi client matter. However, the Postal Service returned both of those letters to the State Bar as undeliverable, forwarding address expired.

Finally, in early March 2005, Ciminesi mailed to respondent, at the address respondent had given him, a letter terminating respondent's services and requesting the return of his client file. Even though respondent received that letter (Evid. Code, § 641 [mailbox rule]), respondent

did not return Ciminesi's file. Nor did respondent refund any portion of the $4,500 in unearned fees Ciminesi paid.

Count 1: Failure to Competently Perform (Rules Prof. Conduct, rule 3-110(A))[3]

The State Bar charges that respondent violated rule 3-110(A), which provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence, by (1) failing to correct the deficiencies of the first bankruptcy petition respondent filed on behalf of the Ciminesis, (2) causing the petition to be dismissed, and (3) failing to file a second bankruptcy petition for the Ciminesis. The record clearly establishes that respondent willfully violated rule 3-110(A) as charged. Even if respondent was only negligent in missing the 15-day deadline to correct the deficiencies, he was reckless in not attempting to correct them after the deadline and seeking relief from the dismissal because of his negligence. Moreover, respondent was reckless in never filing a second petition for the Ciminesis.

Count 2: Improper Withdrawal (Rule 3-700(A)(2))

Rule 3-700(A)(2) provides: "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."

The State Bar charges that respondent effectively withdrew from representation of the Ciminesis by failing to complete and file a second bankruptcy petition. However, standing alone, an attorney's failure to provide legal services does not establish that the attorney has withdrawn from representation. (E.g., *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979; see also *Baker v. State Bar* (1989) 49 Cal.3d 804, 816-817, fn.5 [construing rule 3-700(A)(2)'s predecessor].) Whether an attorney's failure to "provide services amounts to an effective

[3] Unless otherwise indicated, all further references to rules are to these State Bar Rules of Professional Conduct.

withdrawal depends on the surrounding circumstances." (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 641.)

In the present case, the allegations in the NDC do not contain sufficient surrounding circumstances to establish by clear and convincing evidence that respondent improperly withdrew (or effectively withdrew) from representation. In fact, the record establishes that Ciminesi terminated respondent's employment in March 2005. Accordingly, no violation of rule 3-700(A)(2) is shown and count 2 is dismissed with prejudice.

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

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to "Promptly refund any part of a fee paid in advance that has not been earned." The record clearly establishes that respondent willfully violated rule 3-700(D)(2) because respondent has not returned any portion of the $4,500 in unearned attorney's fees to Ciminesi and it has been more than a year since Ciminesi terminated respondent employment in March 2005.

Count 4: Failure to Return Client File (Rule 3-700(D)(1))

Rule 3-700(D)(1) requires that, upon termination of employment, an attorney must "Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. 'Client papers and property' includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not." The record clearly establishes that respondent willfully violate rule 3-700(D)(1) because respondent never returned the Ciminesis' client file in accordance with Ciminesi's March 2005 letter.

Count 5: Failure to Cooperate with State Bar (§ 6068, subd. (i))

Section 6068, subdivision (i) requires an attorney "To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. . . ." By failing to respond to the State Bar investigator's June 23, 2004, letter, respondent failed to cooperate with a State Bar disciplinary investigation in willful violation of section 6068, subdivision (i).

Count 6: Failure to Maintain Official Address (§ 6068, subd. (j))

Section 6068, subdivision (j) requires an attorney "To comply with the requirements of Section 6002.1," which requires, inter alia, that every attorney maintain, on the State Bar's official membership records, his or her "current office addresses and telephone number or, if no office is maintained, the address to be used for State Bar purposes . . . ." In light of the fact that the Postal Service returned as undeliverable the State Bar's January 6, 2005, and February 7, 2005, letters to respondent, it is clear that, in willful violation of section 6068, subdivision (j), respondent failed to maintain his current address on the official membership records of the State Bar.

2. Daoud Client Matter (Counts 7 to 10)

In mid-August 2003, Edward Daoud employed respondent to represent him in a tax audit before the Internal Revenue Service (IRS). Daoud paid respondent $1,500 in advanced attorney's fees and signed an IRS form power of attorney authorizing respondent to represent him before the IRS. Respondent told Daoud that he would handle all meetings and communication with the IRS and that Daoud did not have to appear at the meetings.

In mid-November 2003, the IRS sent Daoud a summons to appear before an IRS examining officer on December 29, 2003. In early December 2003, Daoud forwarded the summons to respondent, who then telephoned Daoud. Respondent told Daoud that he would

appear before the IRS officer for Daoud on December 29 and that Daoud did not have to be there. Respondent, however, failed to appear before the IRS on December 29. Moreover, respondent did not perform any further legal services on behalf of Daoud after December 29.

Respondent did not provide any legal services of value to Daoud and did not earn any portion of the $1,500 the Daoud paid to him in advanced attorney's fees. However, respondent never told Daoud that he was withdrawing from employment. Moreover, respondent never refunded any portion of the $1,500 in unearned fees to Daoud.

In June 2004, the State Bar opened a disciplinary investigation with respect to a complaint that Daoud filed against respondent. On September 27, 2004, and again on February 7, 2005, State Bar investigators sent respondent a letter regarding the Daoud matter. However, the Postal Service returned both of those letters to the State Bar as undeliverable.

Count 7: Failure to Competently Perform (Rule 3-110(A))

The record does not contain clear and convincing proof that respondent intentionally, recklessly or repeatedly failed to perform legal services with competence in the Daoud matter. The NDC alleges only that respondent failed to appear before the IRS on December 29, 2003, and that respondent did not perform any further legal services for Daoud after December 29, 2003. At most, those allegations, which are deemed admitted by respondent's default, establish that respondent was negligent for not failing to appear on December 29. However, it is well established that negligence, "even that amounting to legal malpractice, does not establish a rule 3-110(A) violation." (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149.) While it is plausible that respondent's failure to perform any further legal services for Daoud was intentional, reckless, or repeated, it is equally plausible under the cursory allegations in the NDC that respondent properly failed to perform

further legal services because Daoud terminated his employment. Accordingly, the court must find the latter. (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1216 [all reasonable doubts must be resolved in attorney's favor]; *In re Aquino* (1989) 49 Cal.3d 1122, 1130 [when equally reasonable inferences may be drawn from a fact, the court must accept the inference that leads to a conclusion of innocence.])

In sum, the record fails to establish by clear and convincing evidence that respondent's failure to perform legal services for Daoud after December 29 was an intentional, reckless, or repeated failure to competently perform legal services. Therefore, no violation of rule 3-110(A) is shown, and count 7 is dismissed with prejudice.

Count 8: Improper Withdrawal (Rule 3-700(A)(2))

The State Bar charges that respondent effectively withdrew from representation of Daoud by failing to appear before the IRS on December 29, 2003, and by failing to perform any further legal services for Daoud. However, as note *ante*, an attorney's failure to provide legal services does not, standing alone, establish that the attorney has withdrawn from representation. In the present case, the allegations in the NDC do not contain sufficient surrounding circumstances to establish by clear and convincing evidence that respondent improperly withdrew (or effectively withdrew) from representation. (See *In the Matter of Bach*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 641.) For example, there is no evidence that respondent failed to communicate with Daoud or that Daoud could not communicate with respondent. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 536 [attorney's complete cessation of work on client's case and attorney's repeated and reckless, if not deliberate, failure to communicate with client established improper withdrawal].) Accordingly, no violation of rule 3-700(A)(2) is shown, and count 8 is dismissed with prejudice.

Count 9: Failure to Refund Unearned Fees (Rule 3-700(D)(2))

The record does not establish how or exactly when respondent's employment ended. Nonetheless, the record establishes that respondent did not appear before the IRS officer in December 2003, that respondent did not earn any portion of the $1,500 in advanced fees that Daoud paid him in the Fall 2003, and that respondent has not returned any portion of those unearned fees to Daoud in the last three years and five months since December 2003. Accordingly, it is clear that respondent willfully violated rule 3-700(D)(2) by failing to return the $1,500 in unearned fees to Daoud.

Count 10: Failure to Maintain Official Address (§ 6068, subd. (j))

The charged violation of section 6068, subdivision (j) in count 10 is duplicative of the charged violation of section 6068, subdivision (j) that the court found in count 6 *ante*. Accordingly, count 10 is dismissed with prejudice.

3. Murphy Client Matter (Counts 11 to 15)

In September 2003, Patrick Murphy employed respondent to represent him in a landlord/tenant dispute with respect to a business lease on property owned by Murphy. Respondent's fee was $3,000. Murphy paid respondent $2,000 in September 2003. And, in October 2003, Murphy paid respondent the remaining $1,000.

In December 2003, Murphy met with respondent and discussed the case and possible arbitration. Several times each month from December 2003 through July 2004, Murphy telephoned respondent and left messages for respondent and sent respondent faxes and e-mails inquiring as to the status of his case. However, respondent failed to respond to any of Murphy's numerous telephone messages, faxes, or e-mails. In fact, the last contact Murphy had with respondent was when they met and discussed Murphy's case in December 2003.

Respondent never scheduled an arbitration hearing or performed any further legal services for Murphy.

Respondent did not provide any legal services of value to Murphy. Nor did respondent earn any portion of the $3,000 in advanced attorney's fees that Murphy paid him in 2003. Respondent never told Murphy that he was withdrawing from employment. Moreover, respondent never refunded any portion of the $3,000 in unearned fees to Murphy.

In September 2004 and again in January and February 2005, a State Bar investigator sent respondent a letter regarding a complaint that Murphy had filed against him. However, the Postal Service returned those three letters to the State Bar as undeliverable.

Count 12: Improper Withdrawal (Rule 3-700(A)(2))[4]

The State Bar charges that respondent effectively withdrew from representation of Murphy by failing to perform any legal services for him after their December 2003 meeting. Even though respondent failed to schedule an arbitration hearing, there is no direct evidence that respondent withdrew from representation. Nonetheless, respondent was grossly negligent in failing to respond Murphy's numerous requests for information from December 2003 through July 2004. That gross negligence strongly suggests withdrawal, if not abandonment. (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 680.) When respondent's complete cessation of services and repeated failure to communicate with Murphy are viewed together, it is clear that respondent effectively, if not intentionally, withdrew from representation and abandoned Murphy. (*In the Matter of Valinoti*, *supra*, 4 Cal. State Bar Ct. Rptr. at pp. 535-536; *In the Matter of Bach*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 641; *In the Matter of Hindin*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 680.)

[4]Because count 12 most aptly addresses respondent's misconduct, the court addresses count 12 before count 11.

Moreover, it is clear that respondent willfully violated rule 3-700(A)(2) because respondent withdrew without giving Murphy proper notice and because respondent never refunded the $3,000 in unearned fees to Murphy after he withdrew, as required under rule 3-700(D)(2). Respondent has not returned any of portion of the $3,000 to Murphy and it has been almost two years since Murphy last asked respondent about his case in July 2004.

Count 11: Failure to Competently Perform (Rule 3-110(A))

The court declines to find a rule 3-110(A) violation under count 11 because the record establishes only that respondent stopped performing legal services for Murphy (as opposed to performing some legal services incompetently) and because the court has relied on respondent's cessation of legal services for Murphy to establish respondent's culpability for improper withdrawal and abandonment in violation of rule 3-700(A)(2) in count 12 *ante*. To rely on respondent's cessation of work again to establish an intentional, reckless, or repeated failure to competently perform legal services in violation of rule 3-110(A) would be duplicative and unnecessary. (Cf. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 43.) It is generally inappropriate to find duplicative violations because "the appropriate level of discipline for an act of misconduct does not depend upon how many rules of professional conduct or statutes proscribe the misconduct. [Citation.]" (*In the Matter of Torres, supra*, 4 Cal. State Bar Ct. Rptr. at p. 148.)

Moreover, respondent's improper withdraw and abandonment of Murphy in willful violation of rule 3-700(A)(2) more appropriately addresses respondent's misconduct. Moreover still, a violation of rule 3-700(A)(2) generally supports a greater level of discipline than does a violation of rule 3-110(A) (failure to competently perform). In sum, count 11 is dismissed with prejudice.

Count 13: Failure to Refund Unearned Fees (Rule 3-700(D)(2))

Similarly, the court declines to find that respondent willfully violated rule 3-700(D)(2). Because the court relied on respondent's failure to refund the $3,000 in unearned fees as a basis for finding a violation of rule 3-700(A)(2) in count 12 *ante* (which more appropriately addresses respondent's misconduct), it would be duplicative and improper for the court to again rely on that same misconduct to find a violation of rule 3-700(D)(2). In fact, rule 3-700(A)(2) expressly incorporates rule 3-700(D)(2). (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 280-281.) Accordingly, count 13 is dismissed with prejudice.

Count 14: Failure to Communicate (§ 6068, subd. (m))

Similarly, the court declines to find that respondent willfully violated section 6068, subdivision (m), which requires that attorneys respond to reasonable status inquiries of their clients and to keep their clients reasonably informed of significant developments in their matters. Because the court relied on respondent's failures to respond to Murphy's status inquires and to notify Murphy of his withdrawal from representation to find respondent culpable of violating rule 3-700(A)(2) in count 12 *ante*, it would be duplicative and improper for the court to again rely on that same misconduct to find a violation of section 6068, subdivision (m). (Cf. *In the Matter of Aguiluz, supra*, 2 Cal. State Bar Ct. Rptr. at p. 43.) Accordingly, count 14 is dismissed with prejudice.

Count 15: Failure to Maintain Official Address (§ 6068, subd. (j))

The charged violation of section 6068, subdivision (j) in count 15 is duplicative of the charged violation of section 6068, subdivision (j) that the court found in count 6 *ante*. Accordingly, count 15 is dismissed with prejudice.

C. Case Number 05-J-02623-RAP

Under California section 6049.1, an attorney's formal record of discipline in another state is conclusive evidence that the attorney is culpable of professional misconduct in California unless, as a matter of law, the attorney's misconduct in the other state would not warrant discipline in this state (§ 6049.1, subd. (b)(2)) or unless the proceedings in the other state lacked fundamental constitutional protection (§ 6049.1, subd. (b)(3)). Moreover, unless it is apparent from the face of the record, the attorney bears the burden of establishing that his or her misconduct in the other state does not warrant discipline in California and that the proceeding in the other state lacked fundamental constitutional protection. (§ 6049.1, subd. (b).) Because respondent defaulted in this proceeding, there is no evidence on either of these issues. Accordingly, the primary issues now before this court are what California rule and statutory violations, if any, have been established by the record in the Tennessee disciplinary proceeding (§ 6049.1, subd. (a)) and the appropriate level of discipline, if any, to impose on respondent in California (§ 6049.1, subd. (b)(1)).[5]

Other than an introductory sentence, the complete text of the Tennessee public censure of respondent is as follows.

> Mr. Rather was employed as a Tennessee in-house attorney for an estate planning company out of Louisiana called, Mid-South Planning, which provides living trust documents to elderly consumers. These documents include a durable power of attorney, the revocable living trust, a living will, etc. Mr. Rather prepares the documents. The sales person also sells annuities to the customers. The salesperson sold such package to Ms. Robertson's mother, who suffers from Alzheimer's Disease. An associate of Mid-South visits the customer in his/her home, signs the customer up for documents and then returns them to the customer to be notarized. The customer then writes a check to Mid-South for approximately $1,800. The customer never meets with Mr. Rather. The

[5]The degree of discipline in a disciplinary proceeding based on an attorney's record of discipline in another state, such as the present one, is independently determined by the State Bar Court in the same manner as all other disciplinary proceedings. (*In the Matter of Jenkins* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 157, 163-164.) Unlike some states, California does not defer to the degree of discipline imposed by the sister state. (*Ibid*.)

> customers sign these documents often unaware of their effect upon prior documents signed by the elderly customers. Mr. Rather is paid by Mid-South.
>
> Mr. Rather has thereby violated DR 3-101(A) and 3-102(A), as well as RPC 5.5. By the aforementioned facts, James L. Rather has violated the Code of Professional Responsibility and should be censured for these violations.

Tennessee Disciplinary Rule 3-101(A) and Tennessee Rule of Professional Conduct 5.5 each provide that an attorney must not aid a nonattorneys in the unauthorized practice of law. Tennessee Disciplinary Rule 3-102(A) provides that an attorney must not share legal fees with a nonattorneys. California rule 1-300(A) is substantially identical to Tennessee Disciplinary Rule 3-101(A) and Tennessee Rule of Professional Conduct 5.5. And California rule 1-320(A) is substantially identical to Tennessee Disciplinary Rule 3-102(A). Accordingly, the record clearly establishes that respondent is culpable, as charged, of willfully violating California rules 1-300(A) and 1-320(A).[6] (§ 6049.1, subd. (a).) However, the record fails to establish the nature and extent of those violations.

The California Bar did not proffer into evidence a copy of the formal complaint in the Tennessee proceeding. Even though that formal pleading and other Tennessee documents and transcripts might contain significant facts regarding respondent's misconduct and even though those additional facts might significantly effect this court's determination as to the appropriate level of discipline (see, generally, *In the Matter of Torres, supra,* 4 Cal. State Bar Ct. Rptr. at p. 147 & fn. 11), it would be inappropriate for the court to sua sponte set the matter for trial and direct the State Bar to introduce a copies of all relevant Tennessee pleadings,

[6]The State Bar charges in the NDC and alleges in its brief of discipline that respondent's culpability as determined by Tennessee indicates and establishes that respondent is culpable of violating California section 6068, subdivision (m) (failure to communicate) and California rules 3-110(A) (failure to competently perform) and 3-310(F) (adverse interest). The State Bar, however, has not provided, any explanation, analysis, or authority to support those charges, and the court is unaware of any. Accordingly, those three charges are dismissed with prejudice.

documents, and transcripts into evidence (*In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888, 892). Instead, it is the duty of this court to determine and "recommend only that degree of discipline, if any, which is warranted by the evidence presented" by the California Bar. (*In the Matter of Bouyer*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 892.) As it has been presented in this proceeding, the Tennessee public censure adds little, if anything, to the level of discipline in this proceeding.[7]

D. Case Number 05-O-02710-RAP -- Nutt Client Matter (Counts 1 to 6)

In November 2002, Gregory Nutt employed respondent to represent him in bankruptcy and to negotiate some business tax matters. At that time, Nutt paid respondent $1,000 in attorney's fees. In addition, Nutt gave respondent $200 for filing costs and $5,000 in trust for paying the taxes respondent agreed to negotiate.

On May 5, 2003, respondent filed a chapter 7 bankruptcy petition for Nutt and Nutt's wife in the United States Bankruptcy Court for the Central District of California, Southern Division (Santa Ana). On September 2, 2003, Nutt received an order granting the discharge in the Nutts' bankruptcy case. Then, on November 4, 2003, Nutt received notification from the bankruptcy trustee that the Nutts' bankruptcy proceeding was an asset case, which was contrary to Nutt's understanding. Nutt immediately telephoned respondent, and respondent assured Nutt that he would take care of it. Thereafter, respondent contacted Attorney Reem J. Bello, who was counsel to the bankruptcy trustee, to negotiate the matter.

On March 16, 2004, Attorney Bello filed with the bankruptcy court and served on respondent a motion to compel the Nutts to vacate and surrender all property of the bankruptcy estate to the bankruptcy trustee. The motion was set for a hearing on April 21, 2004. Even

[7]The State Bar even admits as much in footnote 1 on page 1 of the request for waiver of default hearing and waiver of brief on culpability and discipline that it filed on October 17, 2005, in case number 05-J-02623-RAP.

though he never told Nutt about the motion, respondent appeared at the April 21 hearing and negotiated a settlement for the Nutts with Attorney Bello. That same day, respondent sent Bello a letter confirming that the Nutts would sign the settlement agreement, which Bello had prepared. Respondent, however, never told Nutt about the hearing or the settlement. In fact, respondent's letter to Bello on April 21 was the last communication that anyone involved in the Nutts' bankruptcy received from respondent.

On May 24, 2004, Attorney Bello mailed a letter to respondent at the address listed on respondent's letterhead, which was also his official address. Bello sent that letter as a follow-up to two voicemail messages that she had left for respondent at the telephone number listed on respondent's letterhead, which was the same telephone number listed on the documents that respondent filed in the Nutts' bankruptcy proceeding. In her letter, Bello noted that the settlement agreement had not yet been signed by the Nutts and stated that, if the settlement agreement was not executed by the end of that week, the trustee would again have to seek relief from the bankruptcy court. Even though respondent received Bello's letter (Evid. Code, § 641 [mailbox rule]), respondent failed to respond to it.

On June 9, 2004, Bello sent a second letter to respondent. In her second letter, Bello stated that she was writing because respondent had not responded to the four voicemail messages that she left for him in the prior weeks and because he did not respond to her first letter. Bello further stated that, if she did not receive the settlement agreement signed by the Nutts, the trustee would be forced to seek relief, including sanctions against the Nutts, from the bankruptcy court. Even though he received Bello's second letter (Evid. Code, § 641), respondent failed to respond to it.

On August 6, 2004, Nutt received a motion to compel the Nutts to vacate and surrender all property of the estate to the trustee. Nutt immediately, but unsuccessfully attempted to reach

respondent by telephone at the telephone number respondent had given him. Thereafter, over the period of a week, Nutt left several voicemail messages for respondent requesting a return call. But Nutt never received a response from respondent.

On August 12, 2004, Nutt employed Attorney Richard Clements. That same day, Attorney Clements sent respondent a letter advising respondent that, if he did not immediately contacted Clements or Nutt, Clements would take over the representation of Nutts. Even though respondent received Clements's letter (Evid. Code, § 641), respondent failed to respond to it.

Respondent never communicated with Nutt after November 2003. Moreover, respondent did not negotiate or pay any taxes for Nutt. What is more, respondent never returned the $5,000 that Nutt gave him in trust. Instead, respondent converted the $5,000 for his own use and purpose.

In June 2005 and again in July 2005, a State Bar investigator sent respondent a letter regarding a complaint that Nutt had filed against him. However, the Postal Service returned both of those letters to the State Bar as undeliverable.

Count 1: Failure to Competently Perform (Rule 3-110(A))

The record clearly establishes that respondent willfully violated rule 3-110(A) by failing to finalize the settlement agreement with the Nutts and by failing to cooperate with Attorney Bello regarding the settlement. In May and June 2004, Bello left respondent multiple voicemail and messages regarding the settlement agreement. And, in each of those months, Bello sent respondent a letter seeking his cooperation. Then, in August 2004, Nutt left respondent multiple voicemail messages, and Attorney Clement sent respondent a letter. Yet, in face of these reminders and knowing that time was of the essence, respondent still failed to finalize the settlement or cooperate with Bello for about four months (i.e., from April 21, 2004, until Attorney Clement took over in August 2004). Accordingly, it is clear that respondent's failures

to finalize the settlement and to cooperate with Bello were both intentional and repeated and, therefore, violated rule 3-110(A).

Count 2 & 3: Failure to Communicate (§ 6068, subd. (m))

The record clearly establishes that respondent willfully violated section 6068, subdivision (m) as charged in count 2 by failing to respond to the multiple voicemail messages that Nutt left for him in August 2004. The record also clearly establishes that respondent willfully violated section 6068, subdivision (m) as charged in count 3 by failing to tell Nutt (1) about the trustee's March 16, 2004, motion to compel the Nutts to vacate and surrender property of the estate and (2) about the settlement that he reached with Attorney Bello at the April 21, 2004, hearing.

Count 4: Improper Withdrawal (Rule 3-700(A)(2))

The record fails to establishes by clear and convincing evidence that respondent withdrew from employment as charged in court 4. Moreover, the record establishes that Nutt effectively terminated respondent's employment on August 12, 2004, when Nutt retained Attorney Clements, and Attorney Clements sent respondent a letter. Accordingly, count 4 is dismissed with prejudice.

Count 5: Moral Turpitude (§ 6106)

The record clearly establishes that respondent willfully violated section 6106's proscription against acts involving moral turpitude, dishonesty, or corruption as charged in count 5 by misappropriating for his own use and benefit the $5,000 that Nutt gave to him to hold in trust and to use to pay taxes.[8]

[8]In its February 6, 2006, brief on culpability, the State Bar erroneously asserts, without any supporting citation to the record, that respondent owes Nutt $6,000. The record establishes and the NDC in case number 05-O-02710-RAP alleges only that respondent owes Nutt $5,000.

Count 6: Failure to Maintain Official Address (§ 6068, subd. (j))

The charged violation of section 6068, subdivision (j) in count 6 is duplicative of the charged violation of section 6068, subdivision (j) that the court found *ante* in count 6 in case number 04-O-12130-RAP. Accordingly, this count 6 is dismissed with prejudice.

IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravating Circumstances

The State Bar has the burden of proving all aggravating circumstances by clear and convincing evidence. (Std. 1.2(b); *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 932-933.)

1. Multiple Acts of Misconduct

The fact that respondent has been found culpable on 12 counts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

2. Significant Client Harm

Respondent's misconduct has clearly caused significant client harm. (Std. 1.2(b)(iv).) At a minimum, Nutt has been harmed by respondent's misappropriation of $5,000, and Ciminesi, Daoud, and Murphy have each been harmed by respondent's wrongful retention of the unearned fees that they each paid him in advance.

3. Indifference Towards Rectification of Misconduct

In light of the fact that the court has relied upon respondent's misappropriation and wrongful retention of unearned fees to find client-harm aggravation under standard 1.2(b)(iv), it would be duplicative and improper to find aggravation, under standard 1.2(b)(v), based on respondent's failure to make restitution or to return the unearned fees. (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63.)

There is no assertion, much less a charge, that respondent failed to earn the $1,000 in attorney's fees that Nutt paid him in November 2002.

4. Failure to Cooperate

Respondent's failure to participate in this disciplinary proceeding before the entry of his default is an aggravating factor. (Std. 1.2(b)(vi).) However, contrary to the State Bar's assertion, it warrants little weight in aggravation because the conduct relied on for this aggravating factor closely equals the misconduct relied on to find respondent culpable of violating section 6068, subdivision (i) and to enter his default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

B. Mitigating Circumstances

Just like the State Bar has the burden of proving all aggravating circumstances by clear and convincing evidence, respondent has the burden to prove all mitigating circumstances by clear and convincing evidence. (Std. 1.2(b).) As the State Bar aptly notes, even though respondent does not have a prior record of discipline in California since his admission to practice in this state in 1982, there is no evidence in the record indicating, much less establishing by clear and convincing evidence, that respondent practiced law in this state before 2003, which is when he began committing the misconduct found in this proceeding. Accordingly, the court is unable to give respondent mitigating credit for not having a prior record of discipline.

V. DISCUSSION ON DISCIPLINE

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Ba*r (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Even though the standards are not be applied in a talismanic fashion, they are to be followed unless there is a compelling

reason that justifies not do so. (*In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291; .) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylo*r (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for respondent's misconduct is found in standard 2.2(a). That standard provides that a willful misappropriation of entrusted funds shall result in disbarment unless the amount of funds misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case the attorney shall be actually suspended for at least one year. However, the one-year minimum is "not an inflexible mandate." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38.)

Not every misappropriation that is technically willful is equally culpable. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367.) The Supreme Court has differentiated between mere negligent misappropriations unaccompanied by acts of deceit or other aggravating factors and willful misappropriations where a client's money is taken by the attorney through acts of deception or with an intent to deprive. (*Edwards v. State Bar, supra*, 52 Cal.3d at p. 38.) In doing so the Supreme Court has held that even though disbarment is the usual form of discipline for willful misappropriation, it "would rarely, if ever, be an appropriate discipline for an attorney whose only misconduct was a single act of negligent misappropriation, unaccompanied by acts of deceit or other aggravating factors." (Ibid.)

Even though there are cases in which the Supreme Court has disbarred an attorney for a single misappropriation (e.g., *Grim v. State Bar* (1991) 53 Cal.3d 21; *Kelly v. State Bar* (1988)

45 Cal.3d 649, 657; *Chang v. State Bar* (1989) 49 Cal.3d 114), there are more recent review department cases in which disbarment was neither recommended by the State Bar Court nor imposed by the Supreme Court. (E.g., *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 595-596 [attorney negligently misappropriated $50,000 and deliberately misappropriated $29,875.89, and case involved other serious misconduct and aggravation, including no restitution]; *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364 [attorney either negligently or deliberately misappropriated $20,000, and case involved other serious misconduct and aggravation, including no restitution]).

Respondent's misappropriation of the $5,000 that Nutt gave to him to hold in trust was not the result of carelessness or mistake; it was a deliberate act of conversion of trust funds for his own use, benefit, and purposes, which clearly involved moral turpitude and dishonesty. Moreover, the record strongly suggests that respondent misappropriated the $5,000 with the intent to permanently deprive Nutt of it. Accordingly, it is clear that respondent's misappropriation of that $5,000 is of the most immoral and dishonest nature.

Furthermore, respondent's misappropriation of the $5,000 is not the only misconduct involving money found against respondent in this consolidated proceeding. Respondent is also culpable of collecting a combined total of $9,000 in advanced attorney's fees three client matters (i.e., $4,500 in the Ciminesi matter, $1,500 in the Daoud matter, and $3,000 in the Murphy matter) in which he failed to perform services of any value and failing to return any portion of that sum. This misconduct strongly suggests an *ongoing* disregard for the rights of his clients. (*Aronin v. State Bar, supra,* 52 Cal.3d at p. 291.) What is more, respondent's wrongful retention of the unearned fees in each of those matters has been for such an extended period of time that they each approach the practical appropriation of client property. (*In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 465.) These facts counsel against departing from the

disbarment provided for in standard 2.2(a). They are also strong evidence that respondent's misconduct is the result of serious problems, not aberrational conduct.

"Surely the legal profession is more than a 'mere money-getting trade' [citation]; it at least requires the rendition of services for any payment received. 'Taking money for services not performed or not to be performed is close to the crime of obtaining money by false pretenses. . . .' " (*Hulland v. State Bar* (1972) 8 Cal.3d 440, 449.)

Finally, not only does the record fail to establish compelling mitigation that clearly predominates over the found misappropriation, the record does not contain evidence of *any* mitigating circumstance. Accordingly, the court concludes that the record does not contain any reason, much less a compelling reason, to depart from disbarment under standard 2.2(a). (*In re Silverton, supra,* 36 Cal.4th at p. 91; *Aronin v. State Bar, supra,* 52 Cal.3d at p. 291.)

VI. DISCIPLINE RECOMMENDATION

The court recommends that James L. Rather be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

VII. RULE 955 & COSTS

The court further recommends that Rather be ordered to comply with the provisions of California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

The court further recommends 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.

VIII. ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that James L. Rather be involuntary enrolled as an inactive member of the State Bar of California effective three calendar days after the service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)). Unless otherwise ordered by the State Bar Court or the Supreme Court, Rather's involuntary inactive enrollment under this order will terminate, without the necessity of further court order, on the effective date of the Supreme Court order in this matter.

Dated: May 22, 2006.

RICHARD A. PLATEL
Judge of the State Bar Court