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STATE BAR COURT  
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THE STATE BAR COURT  
HEARING DEPARTMENT – LOS ANGELES

**PUBLIC MATTER**

In the Matter of	)	Case No. 04-O-14467-RAH
<b>CHERYL A. PODBIELSKI,</b>	)	AMENDED DECISION
Member No. 134570,	)	(correcting filed date)
<u>A Member of the State Bar.</u>	)	

**I. Introduction**

In this default matter, respondent **CHERYL A. PODBIELSKI** is found culpable, by clear and convincing evidence, of misconduct in a single client matter involving improper withdrawal from employment, failure to communicate, and failure to cooperate with the State Bar.

The court recommends, among other things, that respondent be suspended from the practice of law for one year, that execution of said suspension be stayed, and that respondent be actually suspended from the practice of law for 30 days and until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules Proc. of State Bar, rule 205.)

**II. Pertinent Procedural History**

This proceeding was initiated by the Office of the Chief Trial Counsel of the State Bar of California (State Bar). The Notice of Disciplinary Charges (NDC) was properly served and filed on respondent at her official membership records address (official address) on May 26, 2005. (Rules Proc. of State Bar, rule 60.) The mailing was not returned as undeliverable. Respondent did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

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8 In the Matter of  
9 **CHERYL A. PODBIELSKI,**  
10 **Member No. 134570,**  
11 A Member of the State Bar.

Case No. 04-O-14467-RAH

DECISION

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27 did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

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1 The State Bar telephoned respondent at her official membership records number several  
2 times but the number was disconnected.

3 On motion of the State Bar, respondent's default was entered on July 29, 2005.  
4 Respondent was enrolled as an inactive member under Business and Professions Code section  
5 6007(e)<sup>1</sup> on August 1, 2005.

6 Respondent did not participate in the disciplinary proceedings. The court took this matter  
7 under submission on August 31, 2005, following the filing of State Bar's brief on culpability and  
8 discipline.

### 9 III. Findings of Fact and Conclusions of Law

10 All factual allegations of the NDC are deemed admitted upon entry of respondent's  
11 default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State  
12 Bar, rule 200(d)(1)(A).)

#### 13 A. Jurisdiction

14 Respondent was admitted to the practice of law in California on June 14, 1988, and has  
15 been a member of the State Bar of California at all times relevant to this proceeding.

#### 16 B. The Lujan Matter

17 On or about November 25, 2002, Elizabeth Lujan (Ms. Lujan) employed respondent to  
18 represent her and her minor son, Aaron Cervantes, in a personal injury claim arising from an  
19 automobile accident that occurred on or about November 25, 2002. Respondent and Ms. Lujan  
20 agreed that respondent would be compensated by a contingency fee.

21 A year later, on or about November 25, 2003, respondent filed an action with the Los  
22 Angeles County Superior Court on behalf of Ms. Lujan and her son, entitled *Lujan, et al. v.*  
23 *Karnes, et al.*, case No. 03C01827 (Lujan action). On this date, respondent also filed with the  
24 court a petition for appointment of Ms. Lujan as her son's guardian ad litem.

25 Thereafter, respondent did not perform any legal services on behalf of Ms. Lujan or her  
26 son in furtherance of the Lujan action.

27 \_\_\_\_\_  
28 <sup>1</sup>References to section are to the Business and Professions Code, unless otherwise noted.

1           During the period from March through August 2004, Ms. Lujan telephoned respondent  
2 regarding her case, leaving numerous messages for respondent to return her call and provide her  
3 with a case status update. Respondent did not return any of Ms. Lujan's calls or communicate  
4 with her.

5           On August 14, 2004, Ms. Lujan sent respondent a letter asking her to call her and provide  
6 her with a case status update as well as a copy of her entire file. This letter was sent by certified  
7 mail to respondent's official address. The return receipt was signed as received by "David  
8 Aguilar" on August 17, 2004. Respondent received the August 14, 2004 letter but did not  
9 respond. At no time did respondent release Ms. Lujan's file to her.

10           On April 13, 2004, respondent did not appear at a case management conference. As a  
11 result, the court set an order to show cause hearing (OSC) re dismissal and sanctions for July 12,  
12 2004. The court served a notice of the July 12, 2004 OSC to respondent at her official address.  
13 Respondent received the notice.

14           Respondent did not appear at the OSC hearing. The court then set another OSC re  
15 dismissal for failure to prosecute the Lujan action for August 26, 2004. On or about July 12,  
16 2004, the court served a notice of the August 26, 2004 OSC to respondent at her official address.  
17 Respondent received the notice.

18           On August 26, 2004, respondent again failed to appear at the OSC hearing. However,  
19 Ms. Lujan appeared and informed the court that she had lost all contact with respondent and  
20 would be hiring new counsel. The court continued the OSC to September 28, 2004.

21           On September 28, 2004, Ms. Lujan appeared at the OSC hearing with her new attorney,  
22 Robert Gurbuz. Ms. Lujan made an oral motion to substitute attorney Gurbuz as her attorney of  
23 record in place of respondent. The court granted the motion.

24           Some time after November 25, 2003, respondent effectively withdrew from  
25 representation without notifying Ms. Lujan that she had ceased working on her case or of her  
26 intent to withdraw from representation. Respondent took no steps whatsoever to avoid  
27 reasonably foreseeable prejudice to Ms. Lujan.

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1 On October 14, and November 8, 2004, the State Bar wrote to respondent regarding the  
2 Lujan matter, asking respondent to respond in writing to specific allegations of misconduct. The  
3 letters were not returned as undeliverable or for any other reason.

4 Respondent did not respond to the State Bar letters or otherwise communicate with the  
5 State Bar.

6 ***Counts 1 and 3: Improper Withdrawal from Employment (Rules Prof. Conduct, Rule 3-***  
7 ***700(A)(2))<sup>2</sup> and Failure to Return Client File (Rule 3-700(D)(1))***

8 The State Bar proved by clear and convincing evidence that respondent wilfully violated  
9 rule 3-700(A)(2). Rule 3-700(A)(2) states: "A member shall not withdraw from employment  
10 until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the  
11 rights of the client, including giving due notice to the client, allowing time for employment of  
12 other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."

13 By taking no action in the Lujan matter after November 25, 2003, and by failing to appear  
14 at the case management conference in April 2004 and the OSC hearing in July and August 2004,  
15 respondent effectively withdrew from representation of Ms. Lujan and her son and did not inform  
16 Ms. Lujan that she was withdrawing from employment. She further failed to return the client's  
17 file, despite the client's August 2004 written request. Ms. Lujan had to subsequently hire another  
18 attorney to take over the matter since she had completely lost contact with respondent. Thus,  
19 respondent withdrew from employment without taking reasonable steps to avoid reasonably  
20 foreseeable prejudice to her client's rights in wilful violation of rule 3-700(A)(2).

21 However, as the court has already found respondent culpable of wilfully violating rule 3-  
22 700(A)(2), the court declines to find respondent also culpable of wilfully violating rule 3-  
23 700(D)(1) as alleged in count 3. Rule 3-700(D)(1) requires an attorney whose employment has  
24 terminated to promptly release to a client, at the client's request, all the client's papers and  
25 property.

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<sup>2</sup>References to rule are to the current Rules of Professional Conduct, unless otherwise  
noted.

1           The rule prohibiting prejudicial withdrawal from employment, rule 3-700(A)(2), is more  
2 comprehensive than rule 3-700(D)(1). (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State  
3 Bar Ct. Rptr. 269, 280). The rule prohibiting prejudicial withdrawal mandates compliance with  
4 the rule requiring the prompt release of all the client's papers and property. Thus, an attorney's  
5 failure to promptly return papers may be a portion of the conduct disciplinable as a violation of  
6 the rule prohibiting prejudicial withdrawal. (*Ibid.*)

7           Because respondent's failure to return client file is encompassed in respondent's improper  
8 withdrawal from employment, the court rejects a separate finding of culpability under rule 3-  
9 700(D)(1). The court therefore dismisses count 3 with prejudice.<sup>3</sup>

10 ***Count 2: Failure to Communicate (Bus. & Prof. Code, § 6068, Subd. (m))***

11           Section 6068, subdivision (m), provides that it is the duty of an attorney to respond  
12 promptly to reasonable status inquiries of clients with regard to which the attorney has agreed to  
13 provide legal services.

14           By failing to respond to Ms. Lujan's numerous telephone calls and letter from March  
15 through August 2004, respondent failed to respond to a client's reasonable status inquiries in a  
16 matter with regard to which she had agreed to provide legal services, in wilful violation of  
17 section 6068, subdivision (m).

18 ***Count 4: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))***

19           Section 6068, subdivision (i), provides that an attorney must cooperate and participate in  
20 any disciplinary investigation or proceeding pending against the attorney. Respondent failed to  
21 cooperate with the State Bar in wilful violation of section 6068, subdivision (i), by failing to  
22 respond to the State Bar's October and November 2004 letters or participate in the investigation  
23 of the Lujan matter.

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26           <sup>3</sup>In its brief on culpability, the State Bar requested that respondent be found culpable of  
27 violating rule 3-110(A). (Brief, p. 6: 5-7.) Adequacy of notice is an essential element of due  
28 process. (See *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163.)  
Where the NDC failed to charge respondent with such a violation, respondent cannot be found  
culpable of an uncharged violation.

1 **IV. Mitigating and Aggravating Circumstances**

2 **A. Mitigation**

3 No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds.  
4 for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)<sup>4</sup> However, respondent has no prior  
5 disciplinary record in 15 years of practice at the time of her misconduct in 2003, which is a  
6 significant mitigating factor. "Absence of a prior disciplinary record is an important mitigating  
7 circumstance when an attorney has practiced for a significant period of time." (*In re Young*  
8 (1989) 49 Cal.3d 257, 269.)

9 **B. Aggravation**

10 There are several aggravating factors. (Std. 1.2(b).)

11 Respondent committed multiple acts of wrongdoing. (Std 1.2(b)(ii).) She failed to  
12 perform services competently, failed to return client file and failed to communicate with her  
13 client.

14 Respondent harmed her clients by causing substantial delay in the Lujan action, resulting  
15 in three OSC hearings and Ms. Lujan having to hire a substituting attorney.<sup>5</sup> (Std. 1.2(b)(iv).)

16 Respondent's failure to participate in this disciplinary matter before the entry of her  
17 default is also a serious aggravating factor. (Std. 1.2(b)(vi).)

18 **V. Discussion**

19 The purpose of disciplinary proceedings is not to punish the attorney, but to protect the  
20 public, to preserve public confidence in the profession and to maintain the highest possible  
21 professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper*  
22 *v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

23 \_\_\_\_\_  
24 <sup>4</sup>All further references to standards are to this source.

25 <sup>5</sup>The State Bar's argument in its brief on culpability that Lujan incurred additional  
26 expense in hiring new counsel is not supported by any clear and convincing evidence. In default  
27 proceedings, uncharged facts cannot be relied on as evidence of aggravating circumstances  
28 because the respondent is not fairly apprised that additional uncharged facts will be used against  
her. (*In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585.) Therefore,  
the court declines to find, as an aggravating factor, that Lujan was harmed economically.

1 Respondent's misconduct involved one client matter. The standards provide a broad  
2 range of sanctions ranging from reproof to disbarment, depending upon the gravity of the  
3 offenses and the harm to the client. (Stds. 1.6, 2.4(b), 2.6 and 2.10.)

4 The standards, however, are only guidelines and do not mandate the discipline to be  
5 imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-  
6 251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid  
7 standards." (*Id.* at p. 251.)

8 The State Bar urges one year stayed suspension and 90 days actual suspension. In support  
9 of its recommended discipline, the State Bar cited several cases, including *In the Matter of*  
10 *Sullivan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608, *In the Matter of Aulakh* (Review  
11 Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, and *In the Matter of Kopinski* (Review Dept. 1994) 2  
12 Cal. State Bar Ct. Rptr. 716.

13 The court finds that the misconduct found in *Sullivan* and *Aulakh* is more serious than  
14 that of respondent and that *Kopinski* is more analogous to this matter.

15 In *Sullivan*, the attorney was actually suspended for 60 days for his misconduct in four  
16 client matters (failure to perform services, failure to communicate, failure to forward a client file,  
17 and significant harm to two clients – their actions were dismissed). He had practiced law without  
18 discipline for over 21 years and recognized his misconduct. Unlike *Sullivan*, respondent's client  
19 did not lose her cause of action and respondent's misconduct involved one client matter.

20 In *Aulakh*, the attorney was given a one-year stayed suspension and three-year probation,  
21 including 45 days actual suspension and restitution, for his misconduct in a single client matter,  
22 where he failed to perform legal services competently, improperly withdrew from employment  
23 while his client was incarcerated, failed to refund unearned fees and failed to render an  
24 accounting to the client. In mitigation, he had 20 years of discipline-free practice preceding his  
25 misconduct. In aggravation, he significantly harmed his client by leaving him stranded in jail for  
26 10 days and was very uncooperative during the disciplinary proceeding. Unlike *Aulakh*,  
27 respondent's client was not incarcerated and no trust accounting violation was involved.

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1           In *Kopinski*, where the attorney failed to communicate with two clients, failed to  
2 relinquish their files promptly, improperly withdrew from employment, he was suspended for six  
3 months, stayed, with two years probation and no actual suspension. While the attorney's  
4 misconduct in *Kopinski* is similar to that of respondent, the attorney did not default in the  
5 proceeding.

6           An analogous case is *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct.  
7 Rptr. 476. There, the attorney who had no prior record in 13 years of practice defaulted and was  
8 suspended for one year, stayed, placed on probation for one year, with 30 days of actual  
9 suspension, for abandoning one client and failing to cooperate with the State Bar. In aggravation,  
10 the attorney's misconduct caused harm to his client, the administrator of a decedent's estate, and  
11 to the estate's beneficiary. As a result of his actions, respondent's client was forced to hire  
12 another attorney to complete the probate and a third party incurred additional financial burden.  
13 Similarly, respondent abandoned one client matter, the client had to hire another attorney to  
14 substitute in place of respondent and respondent did not participate in this proceeding.

15           Failing to appear and participate in this hearing shows that respondent comprehends  
16 neither the seriousness of the charges against her nor her duty as an officer of the court to  
17 participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.)  
18 Her failure to participate in this proceeding leaves the court without information about the  
19 underlying cause of respondent's misconduct or of any mitigating circumstances surrounding her  
20 misconduct.

21           In recommending discipline, the "paramount concern is protection of the public, the  
22 courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.)  
23 However, the State Bar's recommendation of 90 days of actual suspension is excessive. In view  
24 of respondent's misconduct, the case law, the aggravating evidence, and the compelling  
25 mitigating factor that she had no prior record of discipline in her 15 years of practice, the court  
26 concludes that placing respondent on an actual suspension for 30 days would be appropriate to  
27 protect the public and to preserve public confidence in the profession.

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1 **VI. Recommended Discipline**

2 Accordingly, the court hereby recommends that respondent **CHERYL A. PODBIELSKI**  
3 be suspended from the practice of law for one year, that said suspension be stayed, and that  
4 respondent be actually suspended from the practice of law for 30 days and until she files and the  
5 State Bar Court grants a motion to terminate her actual suspension. (Rules Proc. of State Bar,  
6 rule 205.)

7 It is also recommended that respondent be ordered to comply with any probation  
8 conditions hereinafter imposed by the State Bar Court as a condition for terminating her actual  
9 suspension. (Rules Proc. of State Bar, rule 205(g).)

10 It is also recommended that if respondent is actually suspended for two years or more, she  
11 will remain actually suspended until she has shown proof satisfactory to the State Bar Court of  
12 her rehabilitation, fitness to practice, and learning and ability in the general law pursuant to  
13 standard 1.4(c)(ii).

14 It is further recommended that respondent take and pass the Multistate Professional  
15 Responsibility Examination within one year after the effective date of this order or during the  
16 period of her actual suspension, whichever is longer. (See *Segretti v. State Bar* (1976) 15 Cal.3d  
17 878, 891, fn. 8.)

18 If respondent remains actually suspended for 90 days or more, it is further recommended  
19 that respondent be ordered to comply with California Rules of Court, rule 955, and perform the  
20 acts specified in subdivisions (a) and (c) of that rule, within 120 and 130 days, respectively, from  
21 the effective date of the Supreme Court order herein. Wilful failure to comply with the  
22 provisions of rule 955 may result in revocation of probation; suspension; disbarment; denial of  
23 reinstatement; conviction of contempt; or criminal conviction.

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VII. Costs

The court recommends that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10, and paid in accordance with section 6140.7.

Dated: November 22, 2005

  
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**RICHARD A. HONN**  
Judge of the State Bar Court

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

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on November 22, 2005, I deposited a true copy of the following document(s):

**DECISION**

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

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

**CHERYL A PODBIELSKI  
ATTORNEY AT LAW  
4455 TORRANCE BLVD #415  
TORRANCE, CA 90503 4335**

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

**Jean Cha, Enforcement, Los Angeles**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **November 22, 2005**.



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**Milagro del R. Salmeron**  
Case Administrator  
State Bar Court

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

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on November 28, 2005, I deposited a true copy of the following document(s):

**AMENDED DECISION (correcting filed date)**

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

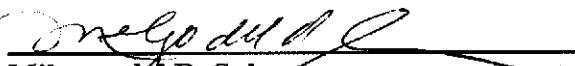
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**CHERYL A PODBIELSKI**  
**ATTORNEY AT LAW**  
**4455 TORRANCE BLVD #415**  
**TORRANCE, CA 90503 - 4335**

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

**Jean Cha, Enforcement, Los Angeles**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **November 28, 2005**.

  
**Milagro del R. Salmeron**  
Case Administrator  
State Bar Court