FILED MAY 2, 2007

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **MELINA J. BURNS**, **Member No. 162266**, A Member of the State Bar.	)	**Case No. 04-O-14564; 04-O-14565; 05-O-00442; 05-O-03092; 05-O-03362; 05-O-04511; 05-O-05248; 06-O-10097; 06-O-11719 (Cons.)** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. Introduction

In this default disciplinary matter, respondent **Melina J. Burns** is charged with multiple acts of professional misconduct in nine client matters, including (1) failing to perform services competently; (2) failing to communicate; (3) improperly withdrawing from employment; (4) failing to return unearned fees; (5) improperly accepting compensation from one other than a client; (6) failing to return client file; (7) failing to render an accounting; (8) failing to obey a court order; and (9) seeking to mislead a judge.

The court finds, by clear and convincing evidence that respondent is culpable of 31 of the 34 alleged counts of misconduct. In view of respondent's misconduct, and after considering any and all aggravating and mitigating circumstances surrounding respondent's misconduct, the court recommends, among other things, that respondent be disbarred from the practice of law and be ordered to make restitution.

II. Pertinent Procedural History

A. First Notice of Disciplinary Charges (Case No. 04-O-14565)

On July 22, 2005, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a five-count Notice of Disciplinary Charges (NDC) at her official membership records address. Respondent filed an answer on August 31, 2005.

B. Second Notice of Disciplinary Charges (Case No. 04-O-14564)

On September 12, 2005, the State Bar served and filed a second, four-count, NDC at respondent's official membership records address. Respondent filed an answer on October 24, 2005. On that same date, the court consolidated the first and second NDCs.

At a status conference on December 4, 2006, the court ordered that case Nos. 04-O-14564 and 04-O-14565 be set for trial on January 10, 2007, and also ordered the parties to appear at a pre-trial conference on January 2, 2007. Respondent was served with a copy of the court's status conference order at her official membership address and at an alternative address. Respondent, however, failed to appear at the January 2, 2007 pre-trial conference.

When respondent also failed to appear for trial on January 10, 2007, the State Bar moved for respondent's default in case Nos. 04-O-14564 and 04-O-14565. The court granted the State Bar's motion for default and respondent was enrolled as an inactive member, effective January 13, 2006, under Business and Professions Code, section 6007, subdivision (e).[1] An order of entry of default was sent to respondent's official

[1]All references to section (§) are to Business and Professions Code, unless otherwise indicated.

membership address by certified mail and courtesy copies were also sent by regular mail to two alternative addresses for respondent.

C. Third Notice of Disciplinary Charges (Case Nos. 05-O-00442; 05-O-03092; 05-O-03362; 05-O-04511; 05-O-05248; 06-O-10097; 06-O-11719)

On January 9, 2006, the State Bar file a third, twenty-five count, NDC, and served respondent with that NDC through her then counsel of record, Jerome Fishkin and Lindsay Slatter, at 369 Pine Street, # 627, San Francisco, CA 94104. Despite being given an extension of time in which to file a response to the third NDC, respondent failed to do so.

On the State Bar's motion, respondent's default as to the third NDC was entered on September 20, 2006, and the court ordered that the matter be taken under submission on November 20, 2006. The court further ordered that respondent be enrolled as an inactive member of the State Bar of California, effective September 23, 2006, pursuant to Business and Professions Code, section 6007, subdivision (e). An order of entry of default was sent to respondent's official address by certified mail and a courtesy copy was also sent by regular mail to an alternative address for respondent.

On January 10, 2007, the court consolidated case Nos. 4-O-14564 and 04-O-14565 with case No. 05-O-00442 and its correlated cases, 05-O-03092; 05-O-03362; 05-O-04511; 05-O-05248; 06-O-10097; 06-O-11719 (the 05-O-00442 matter) .

On February 2, 2007, the State Bar filed a brief on culpability and discipline regarding case Nos. 4-O-14564 and 04-O-14565.

On February 6, 2007, the court, on its own motion, vacated the November 20, 2006 submission date in the 05-O-00442 matter, and further ordered that consolidated case Nos. 04-O-014564, 04-O-14565, 05-O-00442, 05-O-03092; 05-O-03362; 05-O-04511; 05-O-05248; 06-O-10097; 06-O-11719 (cons.) be taken under submission on February 6, 2007.

III. Findings of Fact and Conclusions of Law

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

Respondent was admitted to the practice of law in California on December 14, 1992, and has been a member of the State Bar of California at all times since that date.

A. The Haines Matter (Case No. 04-O-14565)

On March 25, 2004, respondent was retained by Reginald Haines (Reginald) to defend his son, Kenneth Haines (Kenneth) in *People v. Kenneth Haines*, case No. FCR214300 FF (Haines criminal case). Respondent informed Reginald that she would charge him a flat fee of $3,000.

Throughout Kenneth's representation by respondent, respondent's fees were paid by Reginald. On March 25, 2004, respondent received the sum of $750 as partial payment of the fee from Reginald to represent his son Kenneth. On April 19, 2004, Reginald sent another payment of attorney fees in the sum of $450 to respondent. Thereafter, respondent contacted Reginald, stating that she needed more money. Reginald sent respondent attorney fees in the sum of $1,400. On May 11, 2004, respondent again contacted Reginald requesting $400, the balance of her fees. Reginald provided the balance of $400 to respondent.

However, respondent never obtained Kenneth's written consent authorizing respondent to accept fees for his representation from Reginald or any one other than Kenneth. Nor did respondent ever advise Kenneth in writing that her acceptance of fees from a third party (i.e., Reginald) would not result in any interference with the exercise of respondent's independence of professional judgment in his representation of Kenneth or with the client-lawyer relationship. Additionally, respondent never informed Kenneth in writing that all information she would obtain about him or the matter in the course of

her representation of him would remain in strict confidence (as required by Business and Professions Code section 6068, subdivision (e)).

Between March 25 and April 6, 2004, two or three court dates were scheduled in the Haines criminal case, for which respondent failed to appear. Because of her failure to appear on behalf of Kenneth at the aforementioned scheduled court dates, respondent was terminated by Reginald. Reginald also requested a refund of the $750, which he had previously paid to respondent.

However, on April 9, 2004, respondent contacted Reginald by telephone and convinced him to allow her to continue defending Kenneth. Three days later, by filing a substitution of counsel on Kenneth's behalf respondent became counsel of record.

On April 27, 2004, a bail hearing was scheduled in the Haines criminal case for which respondent failed to appear. A plea hearing was thereafter held on May 13, 2004, at which a sentencing date was scheduled for August 19, 2004. Although, respondent was present at the May 13, 2004 plea hearing and participated in setting the August 19, 2004 sentencing date, she failed to appear at the August 19, 2004 hearing. The court set the matter over until August 26, 2004, and instructed Kenneth to contact respondent.

On August 19, 2004, Kenneth twice telephoned respondent, leaving messages both times informing respondent of the August 26, 2004 court date and requesting that respondent return his calls. One message was left with respondent's secretary and the other was left on respondent's voicemail. Respondent received both of Kenneth's August 19, 2004 messages, but failed to return his telephone calls.

On August 20, 2004, Kenneth placed a total of four more telephone calls at 12:38 p.m., 12:43 p.m., 3:44 p.m., and 3:50 p.m. to respondent. The purpose of these calls was to inform respondent of the next court date. With each of the four calls, Kenneth left a message requesting that respondent call him back. Respondent did not return any of the August 20, 2004 telephone calls.

Although respondent received both of Kenneth's August 19, 2004 messages regarding the August 26, 2004 hearing date, she failed to appear at that hearing. The court then set the matter over for September 13, 2004, and issued an Order to Show Cause (OSC) to address respondent's failure to appear at the August 19 and August 26, 2004 sentencing hearings for Kenneth.

On August 26, 2004, Kenneth placed another telephone call to respondent, and left a message with her secretary. In his message, Kenneth informed respondent of the new court date and requested that respondent return his telephone call. Although respondent received Kenneth's August 26, 2004 message, she did not return the call.

On September 13, 2004, the court relieved respondent as counsel of record for Kenneth and appointed the public defender's office to represent Kenneth.

The court's September 13, 2004 minute order also indicated that it was re-issuing the Order to Show Cause because Alameda County had been unable to serve Kenneth due to time constraints. The Order to Show Cause hearing was set for October 13, 2004.

The court instructed the judicial secretary to contact respondent and to inform her that the OSC hearing was scheduled for October 13, 2004. On September 13, 2004, the judicial secretary had a telephone conversation with respondent, informing her of the October 13, 2004 hearing date.

The Alameda County Sheriff's Office attempted to serve respondent three times. Respondent was aware that the court was attempting to serve the Order to Show Cause and agreed to meet with the sheriff at a predetermined place and time to receive service. However, she was not present when the sheriff arrived.

The court held the Order to Show Cause hearing on October 13, 2004. The court's minute order indicates that the court believed respondent was avoiding service and that the court intended to contact the bar association. The court set the matter over for November 16, 2004. However, on October 14, 2004, the court held the Order to Show Cause hearing with respondent present.

Between May 13, 2004 and September 13, 2004, respondent failed to perform any legal services on Kenneth's behalf.[2] Additionally, at no time after May 13, 2004, the last day that respondent appeared in court on Kenneth's behalf did respondent refund any portion of the $3,000 fee that she had been paid to represent him. To date, respondent still has not refunded any portion of the advance fees paid to her to represent Kenneth.

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

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence.

By failing to appear at the scheduled hearings between March 25 and April 6, 2004, at the April 27, 2004 bail hearing, at the August 19, 2004 sentencing hearing, and at the August 26, 2006 sentencing hearing in the Haines criminal case, respondent recklessly, and repeatedly failed to perform legal services with competence, in wilful violation of rule 3-110(A).

Count 2: Failure to Respond to Status Inquiries (§6068, Subd. (m))

Section 6068, subdivision (m), provides that it is the duty of any attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

In the instant matter, Kenneth's telephone calls to respondent do not fall under the rubric of section 6068, subdivision (m). The calls made by Kenneth are not status

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[2]It is alleged in paragraph 15, that the criminal court in *People v. Kenneth Haines* relieved respondent as counsel of record for Kenneth on September 13, 2004, and appointed new counsel on that same date. Paragraph 33 of the First NDC states that between May 13, 2004 through October 8, 2004, respondent ceased to perform any legal services on Kenneth's behalf. The paragraph 33 reference to October 8, 2004 appears to be harmless error; the October 8, 2004 date clearly should have been September 13, 2004.

[3]References to rule are to the current Rules of Professional Conduct, unless otherwise noted.

inquiries or requests by Kenneth for information about his case. Rather the converse is true. It is alleged in the NDC that on August 19, 2004, Kenneth, following the court's instruction, telephoned respondent twice to inform respondent of a new court date. On August 20, 2004, Kenneth placed four telephone calls to respondent; the purpose of those calls, like the calls made the previous day, was to inform respondent of the new court date. On August 26, 2006, Kenneth again telephoned respondent to inform respondent of a court date. Thus, Kenneth was not making status inquiries or requesting information of respondent, but rather was providing information to respondent.

Accordingly, as there is no clear and convincing evidence that respondent failed to respond to the reasonable status inquiries of a client, the court dismisses count 2 with prejudice.

Count 3 and 4: Improper Withdrawal From Employment (Rule 3-700(A)(2))and Failure to Return Unearned Fees (Rule 3-700(D)(2))

Rule 3-700(A)(2) provides that a member must 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.

Respondent was retained to represent Kenneth in *People v. Kenneth Haines*. By performing no work on Kenneth's behalf in *People v. Kenneth Haines* between May 13, 2004, and September 13, 2004 (the date on which the court relieved respondent as counsel of record for Kenneth and appointed the public defender's office to represent Kenneth), respondent effectively withdrew from representation of Kenneth and did not inform him that she was withdrawing from employment. She further failed to refund any portion of the $3,000 advance flat fee she had charged for her representation of Kenneth in *People v. Kenneth Haines*. Thus, respondent wilfully failed to take steps to avoid reasonably foreseeable prejudice to her client, in wilful violation of rule 3-700(A)(2).

However, as the court has already found respondent culpable of wilfully violating rule 3-700(A)(2), the court declines to find respondent also culpable of wilfully violating rule 3-700(D)(2) as alleged in count 4. Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund unearned fees. Upon her withdrawal/termination of employment, in May 2004, respondent was obligated to return any unearned portion of the $3,000 fee that she received to represent Kenneth.

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

Because respondent's failure to return unearned fees is encompassed in respondent's improper withdrawal from employment, the court rejects a separate finding of culpability under rule 3-700(D)(2). The court therefore dismisses count 4 with prejudice.

Count 5: Accepting Fees From a Non-Client (Rule 3-310(F))

Rule 3-310(F) provides that a member must not accept compensation for representing a client from one other than the client unless: there is no interference with the member's independence of professional judgment or with the client-lawyer relationship; information relating to the representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and the member obtains the client's informed written consent to accept the fee from the non-client.

Respondent never obtained Kenneth's written consent authorizing respondent to accept fees for his representation from Reginald or any one other than Kenneth.

Thus, respondent's failure to obtain his client's informed written consent to accept the fee for his representation from one other than the client (i.e., Reginald) was clearly and convincingly in violation of rule 3-310(F) .

B. The Taylor Matter (04-O-14564)

On February 23, 2004, Karen Taylor (Taylor) hired respondent to represent her in an employment case alleging unfair labor practices and paid respondent $200 as an advance fee for handling the case. On February 25, 2004, Taylor paid respondent an additional $800 as an advance fee for handling the case. On March 8, 2004, Taylor again paid respondent another $200 as an advance fee for handling the employment case.

On March 11, 2004, Taylor received a written offer from her employer to settle the case. The deadline for acceptance of the settlement offer was in or about the beginning of April 2004.

Sometime in March 2004, Taylor and respondent discussed the settlement offer by telephone. Taylor asked whether respondent had informed the employer that respondent represented Taylor in the employment case. Respondent said that she had not contacted the employer, but would do so. However, respondent did not inform Taylor's employer in March 2004, that she represented Taylor in the employment case.

In March 2004, respondent asked Taylor to fax her a copy of the settlement offer, which Taylor faxed on March 25, 2004. With the copy of the settlement offer, Taylor also faxed a note asking respondent to review the offer and then telephone her to discuss the offer. Respondent received the faxed copy of the settlement offer from Taylor on March 25, 2004. However, respondent did not promptly review the offer or telephone Taylor to discuss it.

In late March 2004, Taylor repeatedly tried to reach respondent by telephone and left messages on respondent's voicemail asking respondent to telephone Taylor about the status of the employment case. Respondent received Taylor's voicemail messages, but did not contact her about the status of the employment case.

On April 2, 2004, respondent allowed the settlement offer to lapse without contacting Taylor's employer.

In April 2004, Taylor repeatedly tried to reach respondent by telephone and left messages on respondent's voicemail asking respondent to telephone her about the status of the employment case. Respondent received the voicemail messages from Taylor, but did not contact Taylor about the status of the employment case.

In late April 2004, respondent informed Taylor that she would not pursue the employment case unless Taylor paid her more money.

In late April 2004, Taylor informed respondent that Taylor was terminating respondent's employment. Taylor also tried to reach respondent by telephone and left a message on respondent's voicemail asking respondent to release Taylor's file. Although, respondent received Taylor's voicemail message in April 2004, asking for the release of her file, it was not until December 2, 2004, that respondent released the file to Taylor.

Although respondent was not entitled to retain any portion of the $1,200 in advance fees she had received from Taylor, respondent did not refund any of portion of the advance fees to Taylor.

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

By failing to inform Taylor's employer that respondent represented Taylor in the employment case, by failing to promptly review the settlement offer and discuss it with Taylor in late March 2004, and by allowing the settlement offer to lapse without contacting Taylor's employer, respondent recklessly and repeatedly failed to perform legal services with competence, in wilful violation of rule 3-110(A).

Count 2: Failure to Respond to Status Inquiries (§6068, Subd. (m))

By failing to promptly respond to the messages Taylor left on respondent's voicemail in late March 2004 and April 2004, requesting that respondent contact Taylor about the status of the employment case, respondent failed to respond promptly to

reasonable status inquires of a client, in a matter in which respondent had agreed to provide legal services, in wilful violation of section 6068, subdivision (m).

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

Rule 3-700(D)(1) requires an attorney whose employment has terminated to promptly release to a client, at the client's request, all the client's papers and property. In late April 2004, Taylor informed respondent that she was terminating respondent's employment and also requested that respondent return the client file to her. However, respondent failed to return the client file to Taylor until December 2, 2004.

Accordingly, the court finds that upon her termination from employment, respondent failed to promptly release Taylor's file, as requested, in wilful violation of rule 3-700(D)(1).

Count 4: Failure to Return Unearned Fees (Rule 3-700(D)(2))

Rule 3-700(D)(2) requires an attorney, whose employment has terminated to promptly refund any part of a fee paid in advance that has not been earned.

When Taylor terminated respondent's employment in late April 2004, respondent was not entitled to retain any portion of the $1,2000 advance attorney fees she had received from Taylor. By failing to refund to Taylor the $1,2000 in unearned attorney fees, respondent wilfully violated rule 3-700(D)(2).

C. The Nudo Matter (05-O-00442)

On April 1, 2004, respondent was retained by Lorenzo Nudo (Nudo) to represent him in an automobile matter. At that time, respondent told Nudo that the work would take one to two weeks to complete. Nudo gave respondent original documents regarding his automobile lien. Nudo also asked respondent to contact the credit union immediately, and to notify him as soon as she had contacted the credit union. Respondent agreed.

On April 1, 2004, respondent quoted Nudo a flat fee of $1,000 for the work, with $400 to be paid in advance and the remaining $600 paid upon completion of the work. On or about April 1, 2004, Nudo paid respondent $400 as an advance fee.

Between April 1 and April 12, 2004, respondent did not contact Nudo. During that time, Nudo called respondent four times for a status report on his case, but she never responded.

On April 12, 2004, Nudo wrote to respondent and requested a status report on his case. Respondent received the letter; however, she failed to reply. On June 18, 2004, not having heard from respondent, Nudo wrote her another letter, which he sent by certified mail. In the letter, he terminated respondent's legal services, and requested a refund and the return of his original documents. Respondent failed to reply or to refund the unearned fees or return Nudo's original documents.

Respondent failed to perform any legal services on behalf of Nudo.

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

By failing to perform any legal services on behalf of Nudo, respondent recklessly failed to perform legal services with competence, in wilful violation of rule 3-110(A).

Count 2: Failure to Respond to Status Inquiries (§6068, Subd. (m))

By failing to respond to Nudo's telephone calls requesting a status report on his case and by failing to reply to Nudo's April 12, 2004 letter,[4] wherein he requested a status report on his case, respondent failed to respond to reasonable status inquires of a client, in a matter in which respondent had agreed to provide legal services, in wilful violation of section 6068, subdivision (m).

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

Respondent wilfully violated rule 3-700(D)(1) by failing to return Nudo's original documents to him, after Nudo terminated respondent's legal services in his June 18, 2004 letter to respondent, and also requested in that same letter that respondent return his original documents.

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[4]The NDC also alleged that by failing to reply to Nudo's June 18, 2004 letter, respondent failed to respond to a reasonable status inquiry. However, the June 18, 2004 letter was a letter terminating respondent's legal services; it was not a letter making a status inquiry.

Count 4: Failure to Return Unearned Fees (Rule 3-700(D)(2))

Respondent earned no portion of the $400 advance fee that Nudo had paid her, because she failed to perform any legal services on Nudo's behalf, prior to her employment being terminated by Nudo. By failing to return to her client the $400 in unearned fees, respondent failed to refund a fee paid in advance that was not earned in wilful violation of rule 3-700(D)(2) .

D. The Bostick Matter (05-O-03092)

On March 25, 2004, Fran Bostick (Bostick) employed respondent via the telephone to represent her in a worker's compensation and job injury matter. Respondent quoted Bostick a flat fee of $1,000 for the representation. During that March 25, 2007 phone conversation,

Bostick told respondent that the matter was urgent, and time sensitive; Bostick also sent respondent a detailed letter that day about the matter with the names of potential witnesses. Respondent received the letter.

On April 2, 2004, Bostick paid respondent $500; and on April 17, 2004, Bostick paid respondent the remaining $500, for a total of $1,000.

Although she never met respondent in person, Bostick sent respondent her medical records and other documents, which she had received relating to her worker's compensation matter.

On one occasion, in early May 2004, respondent telephoned Bostick. Respondent informed Bostick that respondent was working on a letter on Bostick's behalf and would send it to her. However, respondent never sent such a letter to Bostick. In fact, respondent performed no legal services for Bostick.

From June 2004 to August 2004, Bostick telephoned respondent on numerous occasions to inquire about the status of the case and left messages for respondent on her voicemail. Respondent received the messages, but never responded to them. In late August 2004, Bostick called respondent and left another voicemail message, informing

respondent that she was going to be hospitalized and have surgery for the job injury she had sustained. Bostick stated that she needed to speak with respondent right away. Although respondent received the message, she failed to reply.

After her surgery in late August 2004, Bostick again telephoned respondent's office and spoke with a member of respondent's staff. At that time, Bostick left the message that she was terminating respondent's representation, and also requested a full refund of the unearned attorney fees and the return of her client file. Respondent received the message, but never replied to it. Nor did respondent ever return the client file or refund any portion of the attorney fees.

Count 5: Failure to Perform Competently (Rule 3-110(A))

By performing no legal services regarding Bostick's worker's compensation and job injury case, respondent recklessly failed to perform legal services with competence, in wilful violation of rule 3-110(A).

Count 6: Failure to Respond to Status Inquiries (§6068, Subd. (m))

By failing to respond to Bostick's telephone messages from June to August 2004, respondent failed to respond promptly to reasonable status inquires of a client in a matter in which respondent had agreed to provide legal services, in wilful violation of section 6068, subdivision (m).

Count 7: Failure to Return Client File (Rule 3-700(D)(1))

Respondent wilfully violated rule 3-700(D)(1) by failing to return the client file to Bostick when Bostick left a message for respondent, which respondent received, wherein Bostick terminated respondent's employment and also requested that respondent return the client file to her.

Count 8: Failure to Return Unearned Fees (Rule 3-700(D)(2))

After her services were terminated, respondent retained the $1,000 advance fee she was paid to work on Bostick's case, although she had performed no legal services for Bostick. Accordingly, respondent did not return an unearned fee in wilful violation of rule 3-700(D)(2).

E. The William/McCroey Matter (05-O-03362)

On April 4, 2005, respondent was employed by Bernadette Williams (Williams) to represent her minor son, Edric McCroey (McCroey), in two criminal matters. Williams paid respondent $1,500 by credit card as an advance attorney fee at that time.

The first court appearance on McCroey's case was scheduled for April 5, 2005. Although respondent was aware of the scheduled court date when she accepted fees for the representation, she was two hours late and rescheduled the court date to May 26, 2005 at 2:00 p.m, without prior notice to Williams or McCroey.

On May 26, 2005, at 12:30 p.m., respondent left a message for Williams at her home telephone number, informing Williams that respondent was not available for the court appearance that afternoon. In her phone message, respondent also said that she would also not be available for another court appearance that she had previously scheduled and reset that previously scheduled date for June 23, 2005. Beyond rescheduling the court appearances, respondent did no substantive work on the cases.

On June 2, 2005, Williams telephoned respondent to discuss the status of McCroey's cases. Respondent told Williams to call respondent's secretary to schedule an appointment. Williams made the appointment for June 9, 2005, at 5:30 p.m.

When Williams met with respondent on June 9, 2005, respondent requested the payment of additional fees. Williams then asked for an itemized accounting of the funds that had been used to date or, in the alternative, for a refund. Respondent refused, became agitated, and left the office. Respondent never provided the accounting, nor did she refund any unearned fees.

Count 9: Failure to Perform Competently (Rule 3-110(A))

By repeatedly failing to perform the legal services for which she was retained in McCroey's two criminal cases, other than to reschedule court appearances, respondent repeatedly failed to competently perform the legal services for which she was employed, in wilful violation of rule 3-110(A).

Count 10: Failure to Render Accounts (Rule 4-100(B)(3))

Rule 4-100(B)(3) provides that a member must maintain records of all funds of a client in the member's possession and render appropriate accounts to the client.

By failing to provide Williams with an accounting, as Williams requested of respondent on June 9, 2005, respondent failed to render appropriate accountings to a client regarding all funds, securities and other properties of the client coming into respondent's possession, in wilful violation of rule 4-100(B)(3).

Count 11: Failure to Return Unearned Fees (Rule 3-700(D)(2))

Respondent, who had performed no substantive work in the criminal matters involving Williams' minor son, wilfully violated rule 3-700(D)(2) by failing to return any portion of the $1,500 in unearned fees.

F. The Campbell Matter (05-O-04511)

In August 2004, respondent was employed by James and Flora Campbell (the Campbells) to represent them in a property boundary dispute. At that time, respondent quoted them a flat fee of $3,000 for the work. On August 20, 2004, the Campbells paid respondent $3,000 in cash as an advance fee for the representation.

On August 9, 2004, respondent filed a civil complaint on the Campbells' behalf, in the matter entitled *Jim Campbell and Flora Campbell v. John E. Stephens, et al.*, Contra Costa Superior Court Docket No. C04-01429 (the Campbell case). Respondent, however, failed to timely file the required proofs of service[5] with the court. Therefore,

[5]In paragraphs 55 and 56 of the the NDC, it is stated that respondent failed to file the "proofs of service of the complaint" with the court. Technically, the proof of service is a for the summons, which must be accompanied by the complaint. (See, Code Civ.

on December 7, 2004, the court ordered that respondent be sanctioned in the amount of $250, to be paid by January 7, 2005 (the first sanction order). Respondent had notice of the first sanction order.

On December 27, 2004, respondent appeared in court, and was reminded by the court that the sanctions had to be paid by January 7, 2005. Nonetheless, respondent failed to comply with the first sanction order in a timely manner.

On March 2, 2005, respondent appeared in court, and still had not filed the required proofs of service. Accordingly, the court ordered that she be sanctioned an additional $250, to be paid by April 1, 2005 (the second sanction order). However, respondent failed to comply with the second sanction order in a timely manner, in that she did not pay the sanctions until April 5, 2005. Respondent also did not file the required proofs of service until May 9 and May 13, 2005.

On June 8, 2005, respondent appeared at a case management conference in the Campbell case, but had not filed a case management conference statement as required. Accordingly, on that date, the court ordered that respondent be sanctioned (the CMC sanctions) in the amount of $250, to be paid by July 8, 2005, for her failure to file the requisite case management conference statement. Respondent had notice of the sanction order, but failed to pay the CMC sanctions at any time.

Without performing any legal services on behalf of the Campbells, respondent filed a dismissal of the entire Campbell case, without prejudice, on August 18, 2005.

Count 12: Failure to Perform Competently (Rule 3-110(A))

By failing to file the proofs of service of the summons and complaint in a timely manner, by failing to file the case management statement, and by failing to perform any legal services on behalf of the Campbells, respondent recklessly and repeatedly failed to perform legal services with competence, in wilful violation of rule 3-110(A).

Proc., §§413.10-413.40.) However, such technical error is de minimis and constitutes harmless error.

Count 13: Failure to Obey Court Order (§6103)

Section 6103 requires attorneys to obey court orders and provides that the wilful disobedience or violation of such orders constitutes cause for disbarment or suspension.

By failing to pay the CMC sanction order imposed against her and of which she had knowledge, respondent wilfully disobeyed and violated a court order requiring her to do an act connected with or in the course of her profession, which she ought to have done in good faith, in wilful violation of section 6103.

Count 14: Failure to Return Unearned Fees (Rule 3-700(D)(2))

In August 2004, respondent was employed by the Campbells to represent them in the Campbell case. Without performing any legal services on the Campbells' behalf, respondent filed a dismissal of the entire Campbell case on August 18, 2005, thereby terminating her employment in that matter. When she terminated her employment, respondent was obligated to refund the unearned advance fees she had received. By failing to refund the $3,000 in unearned advance fees to the Campbells, respondent wilfully violated rule 3-700(D)(2).

G. The Harrison Matter (05-O-05248)

On June 25, 2003, respondent was employed by Leon Harrison (Harrison) to represent him in a wrongful termination matter. Respondent quoted Harrison a flat fee of $5,000 to prepare and file a complaint, and to work out a settlement on his behalf. On that same date, Harrison paid respondent $5,000 by check as an advance fee. Thereafter, respondent contacted Harrison and told him that she needed an additional $300 for a filing fee, which Harrison paid by check on July 5, 2003.

A few days later, at respondent's request, Harrison provided respondent a letter which included the names of people at his place of employment to whom she should send the complaint, a copy of the company telephone directory with certain names highlighted, and an explanation about the roles of the people, whose names he had highlighted in the company directory.

Harrison heard nothing further from respondent, and began to call her and leave messages for her numerous times in September and October 2003. None of his calls were returned. However, in late October 2003, respondent e-mailed Harrison a draft of the complaint. Harrison immediately reviewed the draft and instructed respondent to file the complaint as soon as possible. Respondent received the instructions.

Harrison again heard nothing from respondent. In mid to late November 2003, Harrison began to leave numerous telephone messages for respondent inquiring about the status of his case. On one occasion, he telephoned, sent respondent a fax and an e-mail on the same day. Respondent received the messages, but failed to respond to any of them.

In late November 2003, Harrison wrote the State Bar of California to complain about respondent's lack of communication and failure to file his complaint. The State Bar, in turn, notified respondent of Harrison's complaint. Respondent finally filed a civil complaint on Harrison's behalf on December 23, 2003, in the matter entitled *Harrison v. Comcast,* Alameda County Court Docket No. RG03133389 (the first Harrison state case).

In February 2004, the defense moved to remove the first Harrison state case to federal court. Respondent filed no response, and the case was removed, in the matter entitled *Harrison v. Comcast,* Northern US District Court Case No. 3:04-CV-00788-VRW (the first Harrison federal case). Respondent received notice that the case had been removed, but failed to inform Harrison, who learned of the removal in a conversation with another attorney.

From December 2003 until February 24, 2004, respondent again failed to contact Harrison, despite receiving several telephone messages from him during that time. Finally, on February 24, 2004, respondent met with Harrison and apologized for her failure to communicate with him. She promised him that she would devote whatever time was necessary to prosecute his case and would move to amend his complaint. Respondent also told Harrison that additional attorney fees might be required in his case; Harrison told respondent that was acceptable, but he needed an accounting regarding the

funds he had already paid. Respondent agreed to provide the accounting. Based on respondent's assurances, Harrison requested that the State Bar dismiss his complaint, which the State Bar did. However, respondent never provided the accounting to Harrison.

On June 4, 2004, the defendant in the first Harrison federal case moved the court to reassign the case. Respondent filed no response, and the case was reassigned.

On June 24, 2004, the federal court filed a court order setting a case management conference in the case for July 14, 2004. Respondent received notice of the appearance, but failed to attend, or to inform Harrison that she had missed the appearance. As a result of respondent's failure to attend the case management conference, the court dismissed the first federal Harrison case without prejudice. The court also imposed sanctions against Harrison, in the amount of $665 for respondent's failure to attend the July 14, 2004 case management conference. However, respondent never informed Harrison about the sanctions, nor did she ever pay the sanctions. Moreover, respondent never informed Harrison that his first federal case had been dismissed.

Without informing Harrison, respondent then filed a second complaint on his behalf in Alameda County Superior Court in November 2004, in the matter entitled *Harrison v. Comcast,* Alameda County Court Docket No. RGO4171468 (the second Harrison state case). On November 16, 2004, the defendant again filed a notice of removal to federal court; respondent once again failed to respond. The case was removed, and entitled *Harrison v. Comcast,* Northern US District Court Docket No. 3:04:cv-04880-VRW (the second Harrison federal case).

From February 24, 2004 to December 2004, Harrison left several messages for respondent. Although respondent received the messages, which Harrison had left for her, she failed to respond.

On December 29, 2004, respondent filed his second complaint against respondent with the State Bar. In that complaint, Harrison stated, among other things, that he did not

know what was going on in his case and that respondent never provided him with an accounting of the funds that he had paid her.

On January 11, 2005, a State Bar complaint analyst wrote to respondent about Harrison's second complaint. On February 2, 2005, respondent sent a reply to the State Bar wherein she provided a purported accounting, which was also dated dated February 2, 2005, and which bore the handwritten note "proof only" at the top. Respondent never provided this "accounting" or any other accounting to Harrison, despite his demand.

On February 5, 2005, Harrison wrote a letter to Judge Vaughn Walker, the judge assigned to the second Harrison federal case. Harrison informed the court that he had complained about respondent to the State Bar and requested that the court not dismiss his civil case until he had an opportunity to hire another lawyer. On February 9, 2005, Judge Walker issued an order which specifically stated, "Burns is reminded that she is counsel of record for [Harrison], and until such time as the court grants a motion to withdraw or receives a notice of substitution of counsel, she is required to comply with the Court's rules and orders, including attendance at the case management conference scheduled for on or about March 22, 2005." Judge Walker further ordered respondent to initiate the telephone case management conference. Both parties were also required to cooperate in the preparation of a joint case management conference statement. However, respondent failed to initiate the court conference or to participate in the preparation of a joint statement.

On March 9, 2005, respondent sought and obtained a continuance of the case management conference until April 12, 2005. The defendant filed a case management conference statement on April 5, 2005. But, respondent never filed one on Harrison's behalf.

On April 12, 2005, the case management conference was held in the second Harrison federal case, and all the parties attended, including respondent. At that time, a

discovery deposition cut-off date was set for July 29, 2005. Respondent agreed to that date.

Thereafter, the defendant served a notice to take Harrison's deposition on July 20, 2005. Respondent, who received the notice, wrote to Harrison stating that she would require an additional $2,000 to continue representing him.

On June 30, 2005, respondent and Harrison had a telephone conversation in which Harrison reiterated his request that respondent provide him with an accounting of the funds that he had already paid her. He also requested that respondent provide a time line for the legal work to be done for the additional fees and also provide a list of topics that would be covered in the deposition.

Respondent failed to appear at Harrison's July 20, 2005 deposition; nor did respondent notify Harrison, opposing counsel, or the court that she would not appear at the deposition. Thus, when Harrison appeared for his deposition, it went forward without his attorney of record present. Although respondent failed to provide any further legal services in the case, she did not file a motion to withdraw.

After respondent failed to appear at his deposition, Harrison consulted the services of a paralegal and prepared a pro se request to have respondent removed as counsel. The request was filed in early August 2005. Thus at Harrison's request, respondent was removed as counsel of record.

Count 15: Failure to Perform Competently (Rule 3-110(A))

Respondent recklessly and repeatedly failed to perform legal services with competence, in wilful violation of rule 3-110(A) by: (1) failing to file pleadings and documents on Harrison's behalf, including, failing to file responses to the defendant's motions to remove both the first and second Harrison state cases to federal court and failing to file a case management conference statement in the second Harrison federal case; (2) failing to attend the case management conferences in both the first and second Harrison federal cases; and (3) failing to attend Harrison's deposition or to notify

Harrison, opposing counsel or the court that she would not appear on Harrison's behalf at his deposition.

Count 16 and 17: Failure to Respond to Status Inquiries and to Inform Client of Significant Developments (§6068, Subd. (m))

By clear and convincing evidence, respondent wilfully violated section 6068, subdivision (m), in that she failed to respond to Harrison's reasonable status inquires and failed to keep her client reasonably informed of significant developments: (1) by not responding to Harrison's numerous status inquiries, including those messages left for respondent in September, October, and November 2003, and those left by Harrison for respondent from February 24 to December 2004; (2) by not informing Harrison that his first state case had been removed to federal court; (3) by not advising Harrison that she did not attend the case management conference in the first Harrison federal case and that as a result of her failure to attend that case management conference, the first Harrison federal case was dismissed and sanctions were imposed against Harrison in the amount of $665; and (4) by not advising Harrison that she filed the second state case.

Count 18: Withdrawal From Employment Without Court's Permission (Rule 3-700(A)(1))

Rule 3-700(A)(1) provides that an attorney must not withdraw from employment in a proceeding without the court's permission, if its rules require such permission for the termination of employment.

On July 20, 2005, respondent effectively withdrew from the second Harrison federal case since she did not appear on behalf of Harrison at his July 20, 2005 deposition, nor provide any further legal services on Harrison's behalf after that date. At the time of her effective withdrawal, respondent was counsel of record for Harrison in the second Harrison federal case. Pursuant to Judge Walker's February 9, 2005 order, respondent was required to obtain the court's permission to withdraw as counsel; but, she did not do so.

Accordingly, respondent wilfully violated rule 3-700(A)(1) by withdrawing from employment without the court's permission, when such permission was required.

Count 19: Failure to Return Unearned Fees (Rule 3-700(D)(2))

When respondent was retained by Harrison, she quoted him a flat fee of $5,000 to prepare and file a complaint in Harrison's wrongful termination matter, and to work out a settlement on his behalf. However, at the time of her termination from employment, respondent had not provided the services as agreed, in that she did not work out a settlement on Harrison's behalf and therefore, did not earn all of the $5,000 advance fees.

Thus, by failing to refund any unearned portion of the $5,000 advance attorney fee that she had received to represent Harrison, respondent wilfully violated rule 3-700(D)(2).

Count 20: Failure to Render Accounts (Rule 4-100(B)(3))

By not providing an accounting of the funds that Harrison had paid to her as she agreed to do in their February 24, 2004 meeting, and by again failing to provide an accounting of the funds which she received from Harrison when he reiterated his request to respondent for an accounting in their June 30, 2005 telephone conversation, respondent failed to render appropriate accountings to a client regarding all funds, securities and other properties of the client coming into respondent's possession, in wilful violation of rule 4-100(B)(3).

H. The Marr Matter (06-O-10097)

On November 14, 2002, respondent was employed by Rosemary Marr (Marr), and was paid $2,000 in advance attorney fees at that time. On December 7, 2002, Marr sent respondent a letter terminating respondent's representation, and demanding a full refund of the advance fees. Respondent received the letter, but did not respond or refund any unearned fees. On April 14, 2003, Marr sent respondent a second demand letter in which she once more requested a full refund of the advance fees. Respondent received the letter, but again failed to respond, or to refund any unearned fees.

At Marr's request, a fee arbitration was conducted by the Alameda County Bar Association in September 2003. Marr filed a request to have the fee arbitration be binding. Respondent, however, filed no such request.

The fee arbitration was conducted on September 22, 2003. At the arbitration, respondent orally requested a binding fee arbitration. After the hearing was over, the program administrator and the fee arbitrator for the Alameda County Bar Association fee arbitration program left several telephone messages for respondent, requesting that she sign and return the form giving her consent to binding fee arbitration. Respondent never complied. Accordingly, on November 20, 2003, the fee arbitrator issued a non-binding award on all parties, in favor of Marr, in the amount of $1,000 in attorney fees and $25 in costs. Although respondent received notice of the award, she never paid the arbitration award to Marr.

Thereafter, Marr filed a small claims case against respondent in Alameda County Small Claims Court Docket No. WS3131961 (the small claims case) to recover the attorney fees she had paid to respondent. The small claims case was set for hearing on March 9, 2004. However, on March 8, 2004, respondent filed a declaration under penalty of perjury in support of a request for a continuance of the small claims case hearing, on the grounds that she was in trial in another department on March 9, 2004. In fact, respondent's representation that she was in trial was false. However, based on respondent's declaration, the small claims case hearing was continued.

The small claims case was heard on April 13, 2004. Both respondent and Marr participated. In respondent's March 8, 2004 declaration in support of her request for a continuance, respondent also represented that she had participated in binding fee arbitration, and the binding arbitration award was $1,000 in attorney fees. Actually, respondent had not signed the document affirming that she agreed to binding fee arbitration and had received notice that the arbitrator's award was non-binding. Thus respondent's representation, made in support of her request for a continuance, was false

and known by respondent to be false at the time that she made it to the small claims court. However, based on that misrepresentation, the small claims court entered judgment in favor of Marr in the amount of $1,128.25 ($1,062.50 principal and $65.75 in costs). Respondent received notice of the judgment. She never paid any part of it to Marr. On May 14, 2004, Marr wrote to respondent, demanding that respondent pay the judgment entered by the small claim's court. However, respondent never paid any part of the judgment to Marr.

Count 21: Failure to Return Unearned Fees (Rule 3-700(D)(2))

After respondent's services were terminated by Marr and Marr requested a refund of the $2,000 advance fees she had paid respondent, respondent wilfully violated rule 3-700(D)(2) by failing to return to Marr any unearned portion of the $2,000 advance fees.

Count 22: Seeking to Mislead a Judge or Jury (Rule 5-200(B))

Rule 5-200(B) provides that an attorney must not seek to mislead a judge, judicial officer, or jury by artifice or false statement of fact or law.

By clear and convincing evidence respondent sought to mislead the small claims court by filing a declaration in that court in support of her request for a continuance of a March 9, 2004 hearing, on grounds that she was in trial in another department on that same date, when that representation was false, and by further representing in her declaration that she had participated in binding arbitration, when in fact she had not signed the document affirming that she agreed to binding arbitration, and had actually received notice that the arbitrator's award was non-binding. By filing said declaration with the small claims court that was false and known by respondent to be false at the time she made it, respondent sought to mislead the court in wilful violation of rule 5-200(B) .

I. The Javier Matter (06-O-11719)

On October 10, 2005, Cesar and Maria Javier (the Javiers) employed respondent to represent them in a criminal case in which they were co-defendants. At the time, respondent told them she could represent both of them. However, respondent failed to

disclose to the Javiers that there was a potential or actual conflict of interest, and failed to obtain their consent to the joint representation despite the conflict.

On the date that she was retained by the Javiers, respondent also told them that she would represent both of them for a flat fee of $2,500. The Javiers paid respondent $250 in advance attorney fees on that day, and on October 12, 2005, they paid respondent an additional $2,250 by cashier's check, for a total payment of $2,500 in advance fees. On the cashier's check was the written notation, "full payment for the rest of the case proceedings." Respondent cashed the check.

Respondent appeared in court on Mr. Javier's behalf on November 15, 2005, and entered a "special appearance" on behalf of Mrs. Javier. At that time, the pre-trial hearing for both of the Javiers was set for February 14, 2006. Respondent's November 15, 2005 court appearance for the Javiers was the only work respondent performed on the case. The Javiers telephoned respondent numerous times over the next two weeks to inquire what had happened at the court appearance. When respondent finally replied, she informed Mr. Javier that she would require additional fees to represent both him and his wife.

On December 7, 2005, Mr. Javier telephoned the State Bar of California and learned that respondent had two other pending matters in court. He then telephoned the assigned deputy trial counsel (DTC). Mr. Javier indicated to the DTC that he would be filing a complaint against respondent. The DTC in turn wrote to respondent's State Bar counsel to inform her of the call.

Respondent wrote a letter to the Javiers on December 13, 2005, informing them for the first time of the potential conflict and requesting that they agree to her representation of both of them and return the letter to her. Respondent also included the following language, "Representation of both Mr. and Mrs. Javier through resolution of the case on 2/14/06," despite the fact that she had already been paid $2,500 for the entire representation.

On February 14, 2006, the Javiers appeared for the pretrial conference. Respondent, however, did not appear. When they telephoned respondent about her failure to appear, she told them for the first time that she had another hearing that day.

By letter dated February 15, 2006, and signed on or about February 21, 2006, the Javiers wrote to respondent, terminating her representation and demanding a full refund of their attorney fees. Respondent never replied to the Javiers' letter, nor did she refund any portion of the attorney fees.

Count 23: Failure to Perform Competently (Rule 3-110(A))

By failing to appear on the Javiers' behalf at their pretrial hearing, which was set when respondent had previously appeared in court for the Javiers on November 15, 2005, and by failing to provide the Javiers with prior notice that she would not appear on their behalf at that pretrial hearing, respondent intentionally failed to perform legal services with competence, in wilful violation of rule 3-110(A).

Count 24: Failure to Respond to Status Inquiries (§6068, Subd. (m))

The State Bar alleges that respondent wilfully failed to respond to the Javiers' telephone calls in a timely manner. Respondent appeared in court for the Javiers on November 15, 2005. It is alleged in the NDC that the Javiers telephoned respondent "numerous" times over the next two weeks to inquire as to what happened at that court appearance. However, the court notes, and pursuant to Evidence Code section 452 takes judicial notice of the fact, that the week following November 15, 2005, was Thanksgiving week. Moreover, the NDC states that respondent did reply to the Javiers' telephone calls, but fails to provide the date on which respondent replied.

The failure of an attorney to return an unspecified number of phone calls in a two week period, especially when one of the weeks at issue is a major holiday week, is insufficient evidence to support a charge that an attorney failed to respond in a timely manner to status inquiries.

Accordingly, as there is no clear and convincing evidence that respondent failed to respond reasonably promptly to status inquires of a client, the court dismisses count 24 with prejudice.

Count 25: Failure to Return Unearned Fees (Rule 3-700(D)(2))

After her services were terminated, respondent retained the $2,500 paid her for the entire representation of the Javier criminal case, although the only work respondent had performed in the case was to make one court appearance on November 15, 2005, at which a pre-trial conference date was set.

By failing to return any portion of the $2,500 in advance attorney fees she had been paid for her services to complete the entire case, when she had performed no work on behalf of the Javiers beyond making one court appearance, respondent did not return an unearned fee in wilful violation of rule 3-700(D)(2).

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[6]

However, respondent does not have any record of prior discipline in her 10 years of practice previous to her misconduct in the current proceeding. A period of at least 10 years of practice without prior discipline is entitled to weight as a mitigating factor. (Std. 1.2(e)(i); *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596.)

B. Aggravation

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

Respondent's misconduct demonstrates a pattern of misconduct. (Std. 1.2(b)(ii).) Respondent's misconduct began in 2002. Within four years she failed to competently perform services in eight client matters, thereby abandoning her clients, failed to

[6]All further references to standards are to this source.

communicate in four client matters, and failed to return unearned fees in nine client matters.[7] (Std. 1.2(b)(ii).) Respondent also committed numerous other acts of wrongdoing, including improperly withdrawing from employment, accepting fees from a non-client, failing to release client files, failing to render accounts of client funds, failing to obey a court order, and seeking to mislead a judge.

Respondent's misconduct cause significant financial harm to nine clients by depriving each of them of unearned fees totaling $19, 600. Respondent's failure to pay court ordered sanctions in the Campbell case also harmed the administration of justice. (Std. 1.2(b)(iv).)

Respondent demonstrated indifference toward rectification of or atonement for the consequences of her misconduct. (Std. 1.2(b)(v).) She has yet to refund any portion of the unearned fees in the nine client matters, discussed *ante*.

Despite respondent's initial participation in the disciplinary proceedings involving case No. 04-O-14564 and case No. 04-O-14565, she has subsequently abandoned all participation in the current disciplinary proceeding. Respondent's failure to participate in this disciplinary matter before the entry of her default is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. Discussion

The purpose of disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the

[7]In the Haines Matter (case No. 04-O-14565), although respondent failed to return unearned fees to her client, the court did not actually make a separate finding under rule 3-700(D)(2). Respondent was found culpable of violating the rule prohibiting prejudicial withdrawal from employment, rule 3-700(A)(2) . As discussed in counts 3 and 4 of the Haines Matter, *ante*, the rule prohibiting withdrawal mandates compliance with the rule requiring the return of unearned fees. Thus, because respondent's failure to promptly return unearned fees was encompassed in her improper withdrawal from employment, the court did not need to make a separate finding of culpability under rule 3-700(D)(2).

highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103,111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016,1025, std.1.3.)

Respondent's misconduct involved nine client matters. The standards provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the victim. (Stds. 1.6, 2.4(a), 2.6, and 2.10.)

Standard 2.4 provides that culpability of a member's pattern of wilful failure to perform services demonstrating the attorney's abandonment of the causes in which she was retained must result in disbarment.

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept., August 24, 2006, No. 99-O-12923) __Cal. State Bar Ct. Rptr. ___.) It has been long-held that the court "is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges disbarment, citing several cases, including *Grove v. State Bar* (1967) 66 Cal.2d 680; *Alkow v. State Bar* (1971) 3 Cal.3d 924; and *Ridley v. State Bar* (1972) 6 Cal.3d 551 in support of its recommendation.

The court agrees with the recommendation of disbarment.

In another instructive Supreme Court case, *Pineda v. State Bar* (1989) 49 Cal.3d 753, the Supreme Court actually suspended the attorney for two years and placed him on probation for five years with a five-year stayed suspension because he had accepted fees from clients, failed to perform services for which he was retained, refused to communicate with his clients, then abandoned them and kept the fees in seven client matters. Respondent's misconduct began four years after he was admitted to the practice of law. The court noted that disbarment was not warranted because of the mitigating

factors, which included the attorney's cooperation with the State Bar throughout the disciplinary proceedings, his demonstrated remorse for his wrongful conduct, his determination to rehabilitate himself, and his concurrent personal and professional problems.

Here, respondent's misconduct began 10 years after she was admitted to the practice of law and involved nine clients over a course of four years. Like the attorney in *Pineda*, respondent accepted fees from clients, failed to perform services for which she was retained, refused to communicate with her clients, then abandoned them and kept the fees. Although some weight is given to the fact that respondent had 10 discipline-free years prior to the commencement of her misconduct, the court must balance that mitigating factor against the aggravating factors in this matter and the lack of other mitigation. Unlike the attorney in *Pineda*, who also had no prior record of misconduct, respondent demonstrated no remorse for her wrongful misconduct and showed no willingness to rehabilitate herself.

Moreover, unlike the attorney in *Pineda*, who participated in his disciplinary proceeding, respondent has displayed total indifference by ignoring this disciplinary proceeding. Failing to appear and participate in this disciplinary proceeding shows that respondent comprehends neither the seriousness of the charges against her, nor her duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) Respondent's failure to participate leaves the court without information about the underlying cause of her misconduct or of any mitigating circumstances surrounding her misconduct. No explanation has been offered that might render disbarment inappropriate and the court can glean none. The court has no reason to believe that respondent could or would conform her behavior to the ethical rules, particularly in light of her pattern of misconduct and her failure to participate in the instant proceeding.

It would undermine the integrity of the disciplinary system and damage public confidence in the legal profession if respondent were not disbarred for her misconduct. If she desires to practice law again, she must bear the burden of demonstrating by clear and convincing evidence her rehabilitation and fitness to practice. Accordingly the court recommends disbarment.

Finally, the court recommends that respondent be ordered to make restitution. Here, respondent should make restitution even to those clients for whom she did some preliminary work.[8] An attorney may "be required to make restitution as a moral obligation even when there is no legal obligation to do so." (*Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1008.) Restitution is a method of protecting the public and rehabilitating errant attorneys because it forces an attorney to confront the harm caused by her misconduct in real, concrete terms. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084,1093.) "It is common in State Bar matters involving the failure to perform services to require as a rehabilitative condition, restitution of unearned fees kept by the attorney and to deem as unearned the entire fee when only preliminary services were performed which did not result in benefit to the client." (*In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 231.) "It is also common to recommend the payment of interest incident to such restitution." (*Ibid.*) Therefore, respondent should refund all advance fees received from her nine clients and pay the CMC sanctions ordered by the Contra Costa Court, in *Jim Campbell and Flora Campbell v. John E. Stephens, et al.*, Contra Costa Superior Court Docket No. C04-01429 (the Campbell case).

Under rule 291 of the Rules of Procedure, effective January 1, 2007, (1) respondent must reimburse the Client Security Fund (CSF) to the extent that the

[8]In the Harrison Matter, for example, respondent filed a complaint on Harrison's behalf. However, respondent filed the complaint, only after Harrison complained to the State Bar about respondent's failure to communicate and failure to file a complaint on his behalf.

misconduct found results in the payment of funds pursuant to section 6140.5; and (2) unless otherwise ordered by the Supreme Court or unless relief has been granted under these rules, any reimbursement so ordered must be paid within 30 days following the effective date of the final disciplinary order or within 30 days following the CSF payment, whichever is later.

Therefore, the court recommends that respondent be ordered to make restitution as follows:

	Payee	*Amount*
1.	Kenneth Haines	$3,000
2.	Karen Taylor	$1,200
3.	Lorenzo Nudo	$ 400
4.	Fran Bostick	$1,000
5.	Bernadette Williams	$1,500
6.	James and Flora Campbell	$3,000
7.	Leon Harrison	$5.000
8.	Rosemary Marr	$2,000
9.	Cesar and Maria Javier	$2,500
10.	Contra Costa Superior Court	$ 250

VI. Recommended Discipline

Accordingly, the court recommends that respondent **Melina J. Burns** be disbarred from the practice of law in the State of California and that her name be stricken from the roll of attorneys in this state.

It is recommended that respondent make restitution to the following clients within 30 days following the effective date of the Supreme Court order in this matter or within 30 days following the Client Security Fund payment, whichever is later (Rules Proc. of State Bar, rule 291):

1. to Reginald Haines in the amount of $3,000 plus 10% interest per annum from September 13, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Reginald Haines, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
2. to Karen Taylor in the amount of $1,200 plus 10% interest per annum from April 1, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Karen Taylor, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
3. to Lorenzo Nudo in the amount of $400 plus 10% interest per annum from June 18, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Lorenzo Nudo, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
4. to Fran Bostick in the amount of $1,000 plus 10% interest per annum from August 31, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Fran Bostick, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
5. to Bernadette Williams in the amount of $1,500 plus 10% interest per annum from June 9, 2005 (or to the Client Security Fund to the extent of any payment from the fund to Bernadette Williams, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
6. to James and Flora Campbell in the amount of $3,000 plus 10% interest per annum from August 18, 2005 (or to the Client Security Fund to the extent of any payment from the fund to James and Flora Campbell, plus interest and costs, in accordance with Business and Professions Code section 6140.5);
7. to Leon Harrison in the amount of $5,000 plus 10% interest per annum from August 1, 2005 (or to the Client Security Fund to the extent of any

payment from the fund to Leon Harrison, plus interest and costs, in accordance with Business and Professions Code section 6140.5);

8. to Rosemary Marr in the amount of $2,000 plus 10% interest per annum from December 7, 2002 (or to the Client Security Fund to the extent of any payment from the fund to Rosemary Marr, plus interest and costs, in accordance with Business and Professions Code section 6140.5);

9. to Cesar and Maria Javier in the amount of $2,500 plus 10% interest per annum from February 21, 2006 (or to the Client Security Fund to the extent of any payment from the fund to Cesar and Maria Javier, plus interest and costs, in accordance with Business and Professions Code section 6140.5); and

10. to the Contra Costa Superior Court in the amount of $250 plus 10% interest per annum from July 8, 2005 (or to the Client Security Fund to the extent of any payment from the fund to the Contra Costa Superior Court, plus interest and costs, in accordance with Business and Professions Code section 6140.5).

Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20(a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.

VII. Costs

The court 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.

Order of Involuntary Inactive Enrollment

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of The State Bar. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: May 1, 2007

PAT McELROY
Judge of the State Bar Court