FILED SEPTEMBER 24, 2007

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **DAVID ANTHONY SILVA**, **Member No. 149506**, A Member of the State Bar.	**Case No. 04-O-15180-LMA** **04-O-15710; 05-O-00146** **05-O-00344; 05-O-02612** **DECISION**

I. INTRODUCTION

In this disciplinary matter, Manuel Jimenez appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent David Anthony Silva did not appear in person or by counsel.

After considering the evidence and the law, the court recommends, among other things, that respondent be suspended for five years; that said suspension be stayed; and that he be actually suspended for two years and until he makes restitution and complies with rule 205, Rules Proc. of State Bar, among other things.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on February 6, 2007, and was properly served on respondent on that same date at his official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section[1] 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) This correspondence was returned marked "unclaimed."

[1]Future references to section are to the Business and Professions Code.

On February 7, 2007, respondent was properly served at his official address with a notice advising him, among other things, that a status conference would be held on March 19, 2007.

On February 13, 2007, a first amended NDC was filed and served by regular mail at respondent's official address. This correspondence was not returned as undeliverable.

On March 19, 2007, the first amended NDC was properly served by certified mail, return receipt requested, at respondent's official address. This correspondence was returned marked "unclaimed."

Respondent did not appear at the March 19 status conference. On March 20, 2007, he was properly served with a status conference order at his official address by first-class mail, postage prepaid.

Respondent did not file a responsive pleading to the first amended NDC. On June 20, 2007, a motion for entry of default was filed and properly served on respondent at his official address by certified mail, return receipt requested. The motion advised him that, if he was found culpable, discipline would be sought consisting of five years' stayed suspension, five years' probation[2] and three years' actual suspension, among other things. Respondent did not respond to the motion.

On July 6, 2007, the court entered respondent's default and enrolled him inactive effective three days after service of the order. The order was filed and properly served on him at his official address on that same date by certified mail, return receipt requested. The court judicially notices its records pursuant to Evidence Code section 452, subdivision (d)(1) which indicate that this correspondence was returned as undeliverable.

The State Bar's efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process.

[2]A probationary period is not specified in default proceedings. (Rule 205(a), Rules Proc. of State Bar.)

(*Jones v. Flowers, et al.* (April 26, 2006, No. 04-1477) 547 U.S. ___, 126 S.Ct. 1708, 164 L.Ed.2d 415, <http://www.supremecourtus.gov/opinions/05slipopinion.html>.)

The matter was submitted for decision without hearing after the State Bar filed a brief on July 26, 2007.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (§6088; Rules of Proc. of State Bar[3], rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 5, 1990, and has been a member of the State Bar at all times since.

B. Case no. 04-O-15710 (The Lemos Matter)

1. Facts

In June 2003, Monica Lemos hired respondent to represent her in a personal injury matter.

On March 26, 2004, respondent filed a complaint on Lemos' behalf. (*Lemos v. Bolanos*, Fresno County Superior Court case no. 04 CE CL 02129.) He did not serve the defendants.

Although respondent had notice of a case management conference scheduled for December 6, 2004, he did not appear even though he was otherwise capable of doing so.

[3]Future references to the Rules of Procedure are to this source

On December 6, 2004, respondent was served with an order to show cause (OSC) why he should not be sanctioned for not appearing at the case management conference and for not serving the defendants with the complaint. Respondent received the OSC shortly after it was served. The hearing on the OSC was set for February 10, 2005.

Respondent did not appear at the February 10 OSC hearing although he had notice of it and was otherwise capable of appearing.

On February 10, 2005, Superior Court Judge James Quashnick issued an order imposing $100 in sanctions on respondent to be paid on or before March 17, 2005[4] and to appear at a continued OSC hearing on that same date. Respondent received a copy of this final, valid and enforceable order shortly after it was issued.

Respondent did not appear at the March 17 OSC hearing although he had notice of it and was otherwise capable of appearing.

On March 17, 2005, Judge Quashnick issued an OSC regarding dismissal of Lemos' case and set the hearing for May 26, 2005. The order stated, in part, that nonappearance at the hearing would result in the dismissal of *Lemos v. Bolanos*. Respondent received a copy of the order shortly after it was issued.

Respondent did not appear at the May 26 OSC hearing although he had notice of it and was otherwise capable of appearing. Lemos' case was dismissed with prejudice because he did not appear. Respondent received a copy of the order dismissing the case shortly after it was issued.

Respondent took no action to protect Lemos' interests after her case was dismissed.

As of February 13, 2007, respondent had not informed Lemos that he did not serve the defendants in her case; that a case management conference and three OSC hearings were scheduled and he did not appear at any of them; that her case was

[4]As of February 13, 2007, respondent had not paid the $100 in sanctions as ordered.

dismissed; and that he did not take any action to protect her interests after her case was dismissed.

On August 4, 2006, respondent wrote to a State Bar investigator that the status of the *Lemos* case was that he was waiting to hear from Farmer's Insurance Company and would keep the investigator abreast of developments as they occur.

On November 10, 2006, respondent wrote to Lemos with a copy to the State Bar investigator advising that Farmer's was "taking its sweet time getting back" to him and that he would "persist until [he] got some action."

Respondent made these misrepresentations with the intent of creating the false impression that he was actively pursuing Lemos' case although he knew that he had no contact with Farmer's after May 25, 2004, and that the case was dismissed with prejudice on May 26, 2005.

2. Conclusions of Law

a. Count 1 - Rule of Professional Conduct[5] 3-110(A) (Competence)

Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently.

Respondent intentionally, recklessly or repeatedly did not perform competently in Lemos' case in wilful violation of rule 3-110(A) by not serving the defendants; not appearing at the case management conference and at three OSC hearings; and not taking any action to protect Lemos' interests after her case was dismissed.

b. Count 2 - Section 6103 (Violating Court Orders)

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

[5]Future references to rule are to this source.

By not paying the $100 in sanctions as ordered, respondent wilfully disobeyed a court order in violation of section 6103.

c. Count 3 - Section 6068, subd. (m) (Communication)

Section 6068, subdivision (m) requires an 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.

Respondent did not keep Lemos reasonably informed of significant developments in wilful violation of section 6068, subdivision (m). He did not tell her that he did not serve the defendants in her case; that a case management conference and three OSC hearings were scheduled and he did not appear at any of them; that her case was dismissed; and that he did not take any action to protect her interests after her case was dismissed

d. Count 4 - Section 6106 (Moral Turpitude)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106 by making misrepresentations to his client and to the State Bar about the status of Lemos' case. In so doing, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

C. Case no. 05-O-00146 (The Ramirez Matter)

1. Facts

On December 5, 2001, Manuela Ramirez hired respondent to represent her on a contingent-fee basis in a medical malpractice case.

On May 3, 2002, respondent filed a complaint on Ramirez' behalf. (*Ramirez v. Patino*, Stanislaus County Superior Court case no. 810768.)

Prior to May 10, 2003, respondent presented defendant Patino's $12,000 settlement offer to Ramirez, which she rejected.

Trial was scheduled to begin on May 10, 2004. On that date and without telling his client, respondent informed the court that Ramirez had agreed to settle the case. With respondent's knowledge and consent, the case was continued to July 21, 2004, for dismissal after the settlement was finalized. Respondent knew that Ramirez had not agreed to settle the case.

On May 11, 2004, respondent told Ramirez that he had obtained a second settlement offer, this time for $12,500. She did not accept the offer but told him that she would consider it and get back with him later. She never accepted this offer.

Ramirez had no further contact with respondent after May 11, 2004. After that date, respondent took no action either to finalize a settlement or to otherwise protect Ramirez's interests in her case. He did not appear in court on July 21, 2004, nor did he inform the court that the settlement was not finalized. The case was dismissed. Respondent did not tell Ramirez that her case was dismissed.

On July 7, 2006, respondent wrote to a State Bar investigator, twice stating that he had agreed to settle Ramirez's case for $12,500. He did so with the intent of creating the false impression that he had obtained Ramirez's permission to settle her case although he knew that she had not agreed to do so.

2. Conclusions of Law

a. Count 5 - Rule 3-110(A) (Competence)

By not finalizing the settlement of the Ramirez case; not appearing at the July 21, 2004, hearing; or otherwise acting to protect Ramirez's interests, respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A).

b. Count 6 - Section 6068, subd. (m) (Communication)

By not telling Ramirez that he had informed the court that her case was settled and by not telling her that her case was dismissed, respondent did not keep Ramirez reasonably informed of significant developments in wilful violation of section 6068, subdivision (m).

c. Count 7 - Section 6106 (Moral Turpitude)

There is clear and convincing evidence that respondent violated section 6106 by misrepresenting to the court and to the State Bar that Ramirez had agreed to settle her case. Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

D. Case no. -5-O-00344 (The Jura Matter)

1. Facts

On March 27, 2002, Stacy Jura hired respondent to finalize the dissolution of her marriage to Vincent Jura and paid him $3,000 in advanced attorney fees to do so. Jura and respondent agreed that the $3,000 was a "set fee" to perform the following legal services: "Represent Stacy Jura [in] completing dissolution issues in Fresno Superior Court ... . This engagement does not include representation ... (1) if this case is contested by [Vincent Jura], and (2) in preparing any qualified domestic relations orders (QDROs). In the event of either of the foregoing, a separate fee will apply."

Vincent did not contest the dissolution. QDROs were obtained without respondent's involvement. Therefore, respondent was obligated to complete the dissolution of Jura's marriage for $3,000.

By May 2004, respondent had effectively terminated his attorney-client relationship with Stacy Jura; however, the Jura marriage had not been dissolved and Stacy remained married to Vincent contrary to her wishes.

On June 13, 2004, Stacy went to respondent's office and discovered that he had vacated the premises without notice to her. He did not provide her with contact or

forwarding information after he vacated the premises, therefore, Stacy could not communicate with him about the status of her case or obtain her client file.

Stacy was prejudiced by respondent's withdrawal from employment because: (1) she remained married to Vincent against her wishes; (2) she did not receive the benefit of her bargain with respondent, i.e., a completed dissolution in exchange for payment of $3,000; and (3) she was precluded from communicating with respondent about the status of her matter and obtaining her client file.

Respondent did not earn any of the $3,000 Stacy paid him because he did not complete the dissolution as agreed. Further, respondent did not earn any of the $3,000 Stacy paid him because his abandonment of her precluded her from communicating with him about the status of her matter and obtaining her client file. Any preliminary work he performed on her behalf was of no value to her because it was not available for her future use.

As of February 13, 2007, respondent had not refunded to Stacy any part of the $3,000 she paid him.

On October 13, 2006, respondent gave a State Bar investigator a copy of a letter to Stacy dated October 12, 2006, purportedly evidencing the return of her file. He did this to create the false impression that he had sent a letter to Stacy, had been in contact with her and had returned her file. In reality, he did none of those things.

2. Conclusions of Law

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

Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until he has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of a client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) and with other applicable laws and rules.

By terminating his attorney-client relationship with Stacy without notice and without completing the tasks for which he was employed; and by vacating his office

without providing forwarding or contact information to Stacy, respondent effectively withdrew from employment. Respondent's withdrawal prejudiced the client because: (1) she remained married to Vincent against her wishes; (2) she did not receive the benefit of her bargain with respondent, i.e., a completed dissolution in exchange for payment of $3,000; and (3) she was precluded from communicating with respondent about the status of her matter and obtaining her client file. By not informing the client of his intent to withdraw from employment, respondent failed to take reasonable steps to avoid reasonably foreseeable prejudice to the client in wilful violation of rule 3-700(A)(2).

b. Count 9 - Rule 3-700(D)(2) (Unearned Fees)

Rule 3-700(D)(2) requires an attorney whose employment has terminated to promptly return any part of a fee paid in advance that has not been earned. This rule does not apply to true retainer fees paid solely for the purpose of ensuring the availability of an attorney to handle a matter.

By not refunding the $3,000 in advanced attorney fees to Stacy after he abandoned her case and not performing the agreed-upon legal services or legal services of value, respondent did not return an advanced, unearned fee in wilful violation of rule 3-700(D)(2).

c. Count 10 - Section 6106 (Moral Turpitude)

There is clear and convincing evidence that respondent violated section 6106 by creating the October 12, 2006, letter and giving a copy of it to the State Bar investigator to create the false impression that respondent had returned his client's file. Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

E. Case no. 04-O-15180 (The Yankulich Estate Matter)

1. Facts

Michael Yankulich died on November 7, 1996. Respondent was named executor and personal representative of his estate, thereby assuming a fiduciary relationship with the estate's beneficiaries.

On April 29, 1998, respondent commenced probate proceedings. (*In re Estate of Michael Yankulich*, Los Angeles Superior Court case no. BP-050930.) Respondent named himself as attorney *in propia persona* for himself in his capacity as the estate's executor and personal representative.

On June 17, 1999, letters testamentary were issued to respondent as the estate's personal representative.

The Yankulich Estate had significant property, including cash in excess of $220,000, plus stock of an appreciable, but undetermined value.

Probate Code section 8800, subdivisions (a) and (b) provide, in relevant part, that the personal representative shall file with the court clerk an inventory and appraisal of the property to be administered in the estate within four months after the letters are first issued to a general personal representative. In this case, the inventory and appraisal were to be filed by October 17, 1999; however, respondent did not do so by that date or otherwise.

Probate Code section 12200 requires a personal representative to either petition for an order of final distribution of the estate or to make a report on the status of administration within one year after letters are issued for estates in which a federal tax return is not required or within 18 months after letters are issued for estates in which federal tax returns are required. Accordingly, assuming a federal tax return was required for the Yankulich Estate, a petition for an order of final distribution of the estate or a report on the status of administration was required by December 17, 2000.

The Yankulich Estate was relatively simple and respondent should have resolved it in 18 months or less after letters testamentary were issued. However, without good cause, respondent did not file the first status report on the estate until December 18, 2003, three years late.

On July 5, 2002, respondent hired certified public accountant David Bean to prepare the estate's taxes. Prior to that, respondent had not taken any action to determine whether estate taxes were due or the amount thereof, if any.

In order to prepare the taxes, Bean needed information in respondent's possession relating to Michael Yankulich's finances and assets. Although respondent was aware that Bean needed this information, he did not provide it.

As of February 13, 2007, the probate proceedings were still pending and respondent had not filed a petition for order of final distribution or an accounting. He also has not provided any informal reports to the beneficiaries of the estate on the status of the probate proceedings.

2. Conclusions of Law

a. Counts 11 & 12 - Section 6068, subd. (a) (Noncompliance with Laws)

Section 6068, subdivision (a) requires an attorney to support the Constitution and laws of the United States and of this State.

By not complying with Probate Code sections 8800 and 12200, respondent did not support the Constitution or laws of the United States or California in wilful violation of section 6068, subdivision (a). Moreover, respondent breached his fiduciary duties to the estate's beneficiaries by not promptly concluding the administration of the estate or otherwise conducting its affairs appropriately thereby allowing the estate to be unresolved and the assets undistributed for nearly seven years and eight months at the time the NDC was filed.

F. Case no. 05-O-02612 (The Bautista Matter)

1. Facts

Respondent represented Maria Bautista in a civil action which, prior to April 8, 2004, settled under terms intended to net her a $5,180 settlement from Allstate Insurance Company. (*Bribiesca v. Bautista*, Tulare County Superior Court case no. 03-206190.)

Shortly after April 9, 2004, respondent received settlement documents intended for Bautista's signature but he did not release the documents to her nor did he obtain her signature on them. Because the settlement documents were not signed and returned to Allstate, a settlement draft was not released to respondent for Bautista's benefit.

Between April 9, 2004 and June 7, 2006, without good cause, respondent took no action to obtain Bautista's signature on the settlement documents or otherwise finalize the settlement of her case.

On June 7, 2006, respondent wrote to a State Bar investigator acknowledging receipt of a May 8, 2006, letter from the investigator inquiring about the status of the Bautista settlement.

On June 15, 2006, respondent contacted Raquel Birch, Allstate's attorney, and asked her to "regenerate the settlement documents" in Bautista's case.

On July 17, 2007, respondent forwarded a copy of the release to Bautista. At no time prior to that date had he told her that he had received a release to settle her case. Bautista received $5,180 as her settlement in August 2006.

2. Conclusions of Law

a. Count 13 - Rule 3-110(A) (Competence)

By not forwarding the settlement documents or obtaining Bautista's signature on them or otherwise acting to finalize the settlement in Bautista's case for over two years, respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A).

b. Count 14 - Section 6068, subd. (m) (Communication)

By not informing Bautista that he had received the settlement release, respondent did not keep her reasonably informed of significant developments in wilful violation of section 6068, subdivision (m).

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct[6], std. 1.2(b).)

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed clients. (Std. 1.2(b)(iv).) Lemos' and Ramirez's cases were dismissed. Jura remained married against her wishes. She could not communicate with respondent or obtain her file because he moved without leaving her contact information. She also was without use of the $3,000 she paid him as a "set fee" to complete her dissolution. Bautista was without her settlement funds for approximately two years and four months.

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) He has demonstrated his contemptuous attitude toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the court to participate therein, a serious aggravating factor. (Std. 1.2(b)(vi); *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 104, 109.)

[6]Future references to standard or std. are to this source.

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors, except for approximately nine years of discipline-free practice. (*In the Matter of Respondent Z*, 4 Cal.State Bar Ct. Rptr. 85, 89.)

C. Discussion

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

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.3, 2.4(b), 2.6 and 2.10 apply in this matter. The most severe sanction is found at standard 2.3 which recommends actual suspension or disbarment for culpability of an act of moral turpitude, fraud, intentional dishonesty or of concealment of a material fact from a court, client or other person, depending on the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the attorney's acts within the practice of law.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be

deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Respondent has been found culpable, in five client matters, of violating rules 3-110(A) (three counts), 3-700(A)(2) and 3-700(D)(2) (1 count each) and sections 6106 and 6068, subdivision (m) (three counts each), 6068, subdivision (a) (two counts) and 6103 (1 count). Aggravating factors include multiple acts of misconduct, client harm and not participating in the proceedings prior to the entry of default. In mitigation, the court considered approximately nine years of discipline-free practice.

In its closing brief, the State Bar recommends discipline consisting of five years' stayed suspension and three years of actual suspension on conditions including five years' probation.[7] The court believes that actual suspension for two years, among other things, is sufficient to protect the public in this instance.

Honesty is one of the most fundamental rules of ethics for attorneys. (*Tomlinson v. State Bar* (1975) 13 Cal.3d 567, 577.) Indeed, an attorney who intentionally deceives his client is culpable of an act of moral turpitude. (See *Kitsis v. State Bar* (1979) 23 Cal.3d 857, 865-866 .) Consequently, because the ends of attorney discipline are remedial and not punitive, an act of dishonesty toward a client warrants actual suspension or disbarment from the practice of law even if no harm results to the client. (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1147-1148; *Garlow v. State Bar* (1982) 30 Cal.3d 912, 917; see also §6106; Std. 2.3.) Misconduct involving this type of deceit "is inimical to both the high ethical standards of honesty and integrity required of members of the legal profession and to promoting confidence in the trustworthiness of members of the profession. [Citations.]" (*Stanley v. State Bar* (1990) 50 Cal.3d 555, 567; see also, *Codiga v. State Bar* (1978) 20 Cal.3d 788, 793 ["[d]eceit by an attorney is reprehensible

[7]As previously noted, a probationary period is not specified in default proceedings. (Rule 205(a), Rules Proc. of State Bar.)

misconduct whether or not harm results and without regard to any motive or personal gain. (Citations.)"].)

The court found instructive *Davis v. State Bar* (1983) 33 Cal.3d 231. In *Davis*, discipline consisting of three years' stayed suspension, three years' probation and one year of actual suspension was imposed for failing to perform and making misrepresentations in pleadings. In one client matter, Respondent Davis did not file suit or settle his client's case before the statute of limitations expired. Moreover, in the client's malpractice action against him, he filed a verified answer containing false statements, namely that he had not been her attorney and that he had only represented her as to her property damage claims. No mitigating factors were noted. In aggravation, the court considered two prior instances of discipline for similar misconduct - recurring failures to perform and deception. One prior discipline resulted in two years stayed suspension and probation and the other in one year stayed suspension and probation. The attorney participated in the proceedings. Although *Davis* presents less misconduct than the present case, it has greater aggravation and was not a default matter.

However, the Supreme Court has repeatedly noted "that deception of the State Bar may constitute an even more serious offense than the conduct being investigated." (*Franklin v. State Bar* (1986) 41 Cal.3d 700, 712.) In *Olguin v. State Bar* (1980) 28 Cal.3d 195, the Supreme Court increased the recommended attorney's discipline from 90 days to six months not only because of his dereliction of duty to his client resulting in the action being dismissed but, particularly, also because of his deceptive conduct on at least two occasions – lying to a State Bar investigator about that client matter, fabricating documents for his defense, and continuing to assert their authenticity after learning of their bogus nature.

In the present case, respondent has made misrepresentations to clients, courts and the State Bar and essentially abandoned several clients. His misconduct, in fact, resulted in client harm. He did not participate in the proceedings. Considering the nature and

extent of his misconduct, which includes deception to the State Bar, he merits substantially greater discipline than in *Davis.*

Respondent's misconduct and lack of participation in this matter raises concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. No explanation has been offered that might persuade the court otherwise and the court can glean none. Having considered the evidence and the law, the court believes that a two-year actual suspension to remain in effect until he makes restitution; explains to this court his lack of participation; and manifests his willingness to comply fully with probation conditions that may hereafter imposed, among other things, is adequate to protect the public and proportionate to the misconduct found. Accordingly, the court so recommends.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent DAVID ANTHONY SILVA be suspended from the practice of law for five years; that said suspension be stayed; and that he be actually suspended from the practice of law for two years and until he makes restitution to Stacy Jura in the amount of $3,000 plus 10% interest per annum from March 27, 2002 (or to the Client Security Fund to the extent of any payment from the fund to Stacy Jura, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation[8]; and until the State Bar Court grants a motion to terminate respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Rule 205(a), (c), Rules of Proc. of State Bar.)

It is also recommended that he be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.

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

It is further recommended that respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also, rule 205(b).)

It is also recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.[9]

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners during the period of his actual suspension and furnish satisfactory proof of such to the State Bar Office of Probation within said period.

VI. COSTS

It is recommended 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.

Dated: September ___, 2007

LUCY ARMENDARIZ
Judge of the State Bar Court

[9]Failure to comply with rule 9.20 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)