FILED FEBRUARY 23, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **JOSEPH C. RAINERI,** **Member No. 136192**, A Member of the State Bar.	)	**Case No. 04-O-15203-JMR** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. Introduction

In this default proceeding, respondent **Joseph C. Raineri** is charged with 18 acts of misconduct in five client matters. The misconduct alleged includes: (1) failure to perform legal services competently; (2) improper withdrawal from employment; (3) failure to communicate; (4) failure to promptly release a client's files upon request; (5) failure to notify a client of receipt of client funds; (6) failure to maintain client funds in a trust account; and (7) multiple acts of moral turpitude. For the reasons set forth below, the court finds respondent culpable by clear and convincing evidence of 17 of the charged acts of misconduct. Based upon the misconduct found and in light of the serious nature and extent of culpability, as well as the evidence in aggravation, the court recommends that respondent be disbarred from the practice of law in California.

II. Pertinent Procedural History

This proceeding was initiated by the filing of an 18 count Notice of Disciplinary Charges (NDC) on September 30, 2005, by the Office of the Chief Trial Counsel of the State Bar of California (State Bar). The NDC was properly served upon respondent on the same date by certified mail, return receipt requested, addressed to respondent's official membership records address (official address). (Rules Proc. of State Bar, rule 60.) A return receipt was not received by the State Bar. Respondent did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

On October 20, 2005, the State Bar attempted to reach the respondent by telephone at his official membership records telephone number. However, the number had been disconnected. The State Bar also e-mailed respondent on October 20, 2005, at the address provided to membership records to notify him of the pending disciplinary matter. The e-mail was returned as undeliverable.

On October 24, 2005, the State Bar contacted directory assistance for the area that includes respondent's official address, requesting all telephone listings for respondent. Directory assistance had no listings for respondent. On that same date, the State Bar checked *Parker's Directory*, but it contained no address of which the State Bar was not already aware. Finally, on October 24th, the State Bar left a message for respondent on a cell phone number that had an outgoing message identifying the number as that of "Joe Raineri." The State Bar's message informed respondent that the State Bar would be filing a motion for entry of default in this disciplinary proceeding on October 25, 2005.

On the State Bar's motion, respondent's default was entered on November 10, 2005, and respondent was enrolled as an inactive member on November 13, 2005, under Business and Professions Code section 6007(e).[1] An order of entry of default was sent to respondent's official membership records address, by certified mail, return receipt requested, but was returned with the word "Refused" stamped on the envelope, as well as the handwritten words "Refused 11-12-05 Box closed."

In the Order of Entry of Default, the court ordered that no default hearing would be held unless the State Bar requested a hearing. The State Bar did not request a hearing, but did file a brief on culpability and discipline on November 30, 2005. On that same date, the court took the matter under submission for decision.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State

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

Bar, rule 200(d)(1)(A).)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 7, 1988, and has been a member of the State Bar of California since that date.

B. Count One A through Count One D (The Wise Matters (Case Nos. 04-O-15203))

In April 2002, Joanne Wise (Wise) hired respondent to represent her on a contingent fee basis in a personal injury matter against Donald Faughnan. In December 2003, respondent filed an action, *Wise v. Faughnan,* Santa Clara County Superior Court case No. 103 CV 010096 (*Wise v. Faughnan*) on Wise's behalf.

During the course of litigation in *Wise v. Faughnan,* respondent was required to appear at case management conferences scheduled for March 30, 2004 and April 29, 2004. Despite receiving proper notice and having the ability to appear at the conferences, respondent did not do so, nor did he make any attempt to continue the conference dates. Moreover, respondent did not tell Wise of the setting of the case management conferences or of his failure to appear. As a result of respondent's failure to appear at the noticed conferences in *Wise v. Faughnan*, that action was dismissed by the court. Respondent received notice of the dismissal shortly after April 29, 2004, but did not inform Wise of the dismissal, nor did he take any action to attempt to set aside the dismissal. With the exception of filing the complaint, respondent did not provide any legal service to Wise and took no affirmative action to advance her interests in *Wise v. Faughnan.*

On April 2, 2004, Wise visited respondent's office. At that time respondent told her that he was vacating his office premises and was relocating in order to operate a winery. Respondent and Wise agreed to meet again on April 5, 2004. At that meeting, respondent assured Wise that he would continue to practice law and represent her interests. Based on his assurances, Wise hired respondent to represent her on a contingent fee basis in another action relating to an accident which occurred on April 1, 2004. At the meeting, Wise provided respondent with copies of a police report and photographs related to the April 1, 2004 accident. However, subsequent to being retained in the matter arising out of the April 1, 2004 accident, respondent did not provide any legal services to

Wise in either of the two matters for which he had been retained.

Respondent did not notify Wise at any time that he would not be providing legal services to her in the two matters for which he had been retained. Nor did he notify her that he was withdrawing from the practice of law.

On June 8, 2004, Wise left a telephone message with respondent's office requesting that he contact her regarding the status of her two cases. Respondent did not reply.

On or about July 17, 2004, Wise sent respondent an e-mail message again requesting that he contact her regarding the status of her two matters. Wise sent the e-mail to two e-mail addresses--one known to her as belonging to respondent, and a second known to her as belonging to Wise's wife and paralegal. Respondent did not reply.

On October 25, 2004, Wise sent a letter to respondent by certified mail, return receipt requested, noting that time was of the essence in her cases, and asking that he contact her to schedule an appointment so that she could pick up all of her documents and photographs. Although Wise's letter was received by respondent's agent, respondent did not respond to it.

As of November 30, 2005, the date of the filing of the NDC, respondent had not provided Wise with the documents and photographs related to her matters as requested in the October 25, 2004 certified letter.

Count 1A: Failure to Perform (Rules Prof. Conduct, Rule 3-110(A))[2]

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

Respondent intentionally and repeatedly failed to perform legal services with competence, in wilful violation of rule 3-110(A), by taking no affirmative action to advance Wise's interests in *Wise v. Faughnan*, and specifically by failing to appear at two scheduled case management conferences of which he had notice, and thereafter failing to seek relief from the dismissal of the matter.

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[2]Unless otherwise indicated, all further references to rule refer to the Rules of Professional Conduct of the State Bar of California.

Count 1B: Improper Withdrawal from Employment (Rule 3-700(A)(2))

Rule 3-700(A)(2) states that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules." Rule 3-700(D) requires an attorney, upon termination of employment, to promptly return client papers and refund unearned fees.

By ceasing to perform legal services on Wise's behalf in both matters in which he had been retained by Wise, after assuring her that he would represent her interests, respondent effectively withdrew from his representation of Wise. However, at no time did respondent provide any notice to Wise that he was withdrawing from employment. He also failed to promptly release to Wise, upon her request as set forth in her letter to him, all of her papers and property, consisting of the documents and photographs which she had provided to him. Thus, respondent withdrew from employment without taking reasonable steps to avoid reasonably foreseeable prejudice to the rights of his client in wilful violation of rule 3-700(A)(2).

Count 1C: Failure to Communicate (Business & Prof. Code, §6068, Subd. (m))

Respondent is charged with a violation of section 6068, subdivision (m), which provides that it is the duty of 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 inform Wise of the setting of the case management conferences in *Wise v. Faughnan,* did not inform Wise that he had not appeared on her behalf at those noticed case management conferences, and did not inform her of the dismissal of *Wise v. Faughnan.* Thus, by failing to inform Wise of the setting of the case management conferences, of his failure to appear at those conferences, and of the dismissal of *Wise v. Faughnan,* and by failing to respond to Wise's telephone, e-mail, and letter inquiries regarding the status of her two cases, respondent failed to inform his client of significant developments and to respond to her reasonable status inquiries in

wilful violation of section 6068, subdivision (m).

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

As the court has already found respondent culpable of wilfully violating rule 3-700(A)(2), it declines to find respondent also culpable of wilfully violating 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 of the client's papers and property.

The rule prohibiting prejudicial withdrawal from employment, rule 3-700(A)(2), is more comprehensive than rule 3-700(D)(1). (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 280.) The rule prohibiting prejudicial withdrawal mandates compliance with the rule requiring prompt release of all the client's papers and property. Thus, an attorney's failure to promptly return papers or property may be a portion of the conduct subject to discipline as a violation of the rule prohibiting prejudicial withdrawal. (*Ibid.*) Because respondent's failure to return Wise's photographs and documents is relied on as part of the basis for finding that respondent violated the rule prohibiting prejudicial withdrawal, the court rejects a separate finding of culpability under rule 3-700(D)(1), and therefore, this count is dismissed with prejudice.

C. Count Two A through Count Two C (The Olah Matter (Case No. 05-O-00658))

On March 27, 2002, Frank Aboytes (Aboytes) sued Michael J. Olah (Olah) for dissolution of partnership and breach of contract in *Frank Aboytes v. Michael J. Olah,* et. al., Santa Clara County Superior Court case No. CV 806454 *(Aboytes v. Olah).* Olah hired respondent to represent him in *Aboytes v. Olah.* On May 6, 2002, respondent, as counsel of record, filed a counterclaim for Olah in *Aboytes v. Olah.* However, after filing the counterclaim, respondent took no further affirmative action on Olah's behalf to advance his interests.

During the course of litigation in *Aboytes v. Olah,* properly noticed hearings were scheduled for January 15, 2004, September 9, 2004, October 28, 2004, and December 7, 2004. Although respondent received notice and was able to attend the scheduled hearings, he did not do so. Nor did respondent move to continue the hearings, notify Olah of the setting of the hearings, or take any other action on behalf of Olah.

By December 7, 2004, respondent had ceased performing legal services on Olah's behalf and thereby terminated his professional relationship with Olah. Respondent never informed Olah that he had ceased working on the *Aboytes v. Olah* matter. However, on December 17, 2004, Olah decided to retain a new attorney, Richard K. Abdalah (Abdalah), to represent his interests in *Aboytes v. Olah.*

From December 17, 2004 through January 19, 2005, Abdalah telephoned and e-mailed respondent in an attempt to arrange for the execution of a substitution of attorney form and the transfer of the case between counsel. Respondent's office telephone number was disconnected and an e-mail message which Abdalah sent to Olah was returned as undeliverable. Abdalah also mailed a letter to respondent. Although the letter was not returned to Abdalah as undeliverable, respondent did not reply to the letter.

Abdalah effectuated the substitution of attorney by motion to the Superior Court, which ordered the substitution after finding that respondent had abandoned *Olah*.

Count 2A: Failure to Perform (Rules Prof. Conduct, Rule 3-110(A))

By failing to appear at four scheduled court hearings of which he had notice and which he was able to attend in *Aboytes v. Olah,* and by failing to take any affirmative action (other than filing a counterclaim on May 6, 2002) on his client's behalf between May 2002 and December 2004, respondent intentionally and repeatedly failed to perform legal services with competence, in wilful violation of rule 3-110(A).

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

Respondent, in effect, withdrew from representation of Olah by ceasing without notice to perform legal services on Olah's behalf in *Aboytes v. Olah.* When Olah finally had to hire other counsel, respondent was unavailable for contact by the potential successor counsel, Abdalah, to facilitate a transfer of the case. Abdalah effectuated the substitution of attorney, by motion to the Superior Court, which ordered the substitution after finding that respondent had abandoned Olah. Thus, the court finds by clear and convincing evidence that respondent wilfully violated rule 3-700(A)(2) by withdrawing from employment without taking reasonable steps to avoid foreseeable

prejudice to the rights of Olah.

Count 2C: Failure to Communicate (§ 6068(m))

By failing to inform Olah about the January 14, 2004, September 9, 2004, October 28, 2004, and December 7, 2004 scheduled hearings in *Aboytes v. Olah* and by failing to inform Olah that respondent had failed to appear at those scheduled hearings, respondent failed to keep a client reasonably informed of significant developments in a matter in which he had agreed to provide legal services, in wilful violation of section 6068, subdivision (m).

D. Counts Three A through Count Three C (The Osborn Matter (Case No. 05-O-00658))

In August of 2004, Jeff Osborn (Jeff) hired respondent to represent Jeff, Dana Osborn (Dana) and Peppertree Schools Fundraising (Peppertree) in *Northern California District Church of the Nazarene, Inc. v. Peppertree Schools Fundraising, Inc., Jeff Osborn, et al.,* Santa Clara County Superior Court case No. 104 CV 026056 *(Nazarene v. Peppertree)*

On or about October 29, 2004, Jeff's and Dana's depositions were properly noticed for November 23, 2004. Respondent did not inform Jeff or Dana of the scheduling of the depositions, nor did he contact opposing counsel to attempt to continue the deposition dates. On November 23, 2004, respondent told opposing counsel that no one would appear at the depositions and that he would reschedule the depositions for later in the week. Respondent did not reschedule the depositions, did not contact opposing counsel, and did not take any steps to advance his clients' interests in respect to the depositions.

On December 9, 2004, opposing counsel filed and properly served a Motion to Compel, regarding Jeff's and Dana's attendance at depositions. Respondent did not respond to the motion and did not appear at the hearing on the motion. As a result of the motion to compel, Jeff and Dana were sanctioned $636.60 and ordered to appear for deposition on February 10, 2005. A copy of the order imposing sanctions and ordering Jeff and Dana to appear for deposition was properly served on respondent. Respondent, however, did not inform Jeff or Dana of the sanctions or the fact that their depositions were scheduled for February 10, 2005; nor did respondent communicate with opposing counsel regarding the depositions. Neither Jeff nor Dana appeared for their properly noticed

depositions on February 10, 2005.

A case management conference was scheduled for January 4, 2005, in *Nazarene v. Peppertree.* Respondent did not file the case management conference statement as required, nor did he attend the conference, or otherwise advance his clients' interests. Respondent did not inform Jeff or Dana of his failure to file the statement or attend the conference.

On January 28, 2005, the court issued an Order to Show Cause (OSC) why sanctions should not be imposed for respondent's failure to file a case management statement on behalf of Jeff, Dana, and Peppertree. The OSC with notice of hearing, scheduled for February 17, 2005, was properly served on respondent. Respondent did not respond to the OSC, did not appear at the hearing, nor otherwise advance his clients' interests in respect to the OSC.

Thereafter, respondent was ordered inactive by the State Bar Court and became ineligible to practice law, effective February 18, 2005. Respondent was properly served with the order of inactive enrollment. However, he did not inform Jeff or Dana of his ineligibility to practice law, nor did he withdraw as attorney of record or attempt to withdraw as attorney of record for Jeff, Dana, or Peppertree.

On February 22, 2005, opposing counsel in *Nazarene v. Peppertree* filed a Motion to Strike and Enter Default based on Jeff's and Dana's failure to cooperate in the discovery process.

On or about March 1, 2005, Jeff hired a new attorney to represent the interests of Jeff, Dana, and Peppertree in *Nazarene v. Peppertree.* Prior to successor counsel being hired, respondent did not inform Jeff, Dana, or Peppertree of the issuance of the OSCs or depositions.

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

Respondent intentionally, recklessly, and repeatedly failed to perform legal services with competence in wilful violation of rule 3-110(A), by failing to take affirmative steps to advance the interests of Jeff, Dana, and Peppertree, including failing to attend or reschedule properly noticed depositions, failing to respond to the Motion to Compel, failing to attend the hearing on the Motion to Compel, failing to file a case management statement, failing to attend a case management

conference, failing to respond to the OSC, and failing to appear at the hearing on the OSC.

Count 3B: Failure to Withdraw (Rules Prof. Conduct, Rule 3-700(B)(2))

Rule 3-700(B)(2) states: "(B)Mandatory Withdrawal. A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment if. . .: (2) the member knows or should know that continued employment will result in violation of these rules or the State Bar Act. . . ."

By remaining as Jeff's, Dana's, and Peppertree's attorney of record in *Nazarene v. Peppertree*, after failing to inform Jeff , Dana or Peppertree that he was ordered inactive by the State Bar Court or that he was otherwise ineligible to practice law on their behalf from February 18, 2005, respondent failed to withdraw from employment where there was a mandatory duty to withdraw. Respondent knew or should have known that his continued employment would result in a violation of the Rules of Professional Conduct and of the State Bar Act. Accordingly, the court finds that respondent failed to withdraw from employment in wilful violation of rule 3-700(B)(2).

Count 3C: Failure to Communicate (§6068(m))

By failing to inform Jeff, Dana or Peppertree of the scheduling of depositions, the filing of the Motion to Compel and the scheduling of a hearing on that motion, the failure of respondent to respond to the Motion to Compel, the filing of the Motion to Strike and the scheduling of a hearing on that motion, and of respondent's ineligibility to practice law, respondent failed to keep his clients reasonably informed of significant developments in a matter in which he had agreed to provide legal services in wilful violation of section 6068, subdivision (m).

E. Count Four (A) through Count Four (E) (The Corbin Matter (Case No. 05-O-01130))

In October 2002, Jill Corbin (Corbin) hired respondent to represent her in a personal injury matter on a contingent fee basis. Under the terms of their fee agreement, respondent was entitled to compensation in the amount of 33% of the gross recovery if Corbin's matter settled prior to trial.

On September 5, 2003, respondent filed a complaint on Corbin's behalf entitled *Jill D. Lewis*

v. Julie Chou, et al., Santa Clara County Superior Court case No. 103 CV 004595 *(Lewis v. Chou).* At no time in the course of their professional relationship or otherwise did Corbin authorize respondent or any other individual to sign legal documents or checks on her behalf.

On March 18, 2004, respondent confirmed settlement of Corbin's claim against Chou for $10,000. On April 28, 2004, Corbin signed a release of her claim against Chou and returned it to respondent. Between March 24, 2004 and May 10, 2004, respondent received settlement check no.14055272 in the amount of $10,000 (the settlement check) payable to respondent and Corbin. Without Corbin's knowledge or consent, respondent caused a simulation of Corbin's signature to be placed on the settlement check. On May 10, 2004, respondent, who maintained a client trust account, account No. 2610434 (the client trust account), caused the settlement check to be deposited into the client trust account. Respondent failed to inform Corbin of the receipt of the settlement check until April 19, 2005, and did not inform Corbin that the settlement check had been deposited into his client trust account.

Under the terms of the fee agreement, respondent's 33% contingent fee in the matter amounted to $3,300, which respondent was allowed to retain as his fees. Therefore, the remaining $6,700 ($10,000 - $3,300) should have been maintained in the client trust account until paid to Corbin or others for her benefit.

However, between May 10, 2004 and May 20, 2004, no portion of the $6,700 remaining from the $10,000 was paid to Corbin or others for her benefit. As of May 20, 2004, respondent's client trust account did not contain Corbin's $6,700, but instead had a negative balance of $635.04. Respondent used $6,700 of the $10,000, Corbin's portion of the settlement funds, for his own purposes unrelated to Corbin.

Corbin hired another lawyer, Gordon J. Finwall (Finwall). On December 29, 2004, and on February 8, 2005, Finwall sent respondent letters requesting the distribution of the $10,000 consistent with the contingent fee agreement. Although respondent received the letters, he did not respond. On February 18, 2005, Finwall filed an action entitled, *Jill Corbin v. Joseph C. Raineri,*

Santa Clara County Superior Court case No.105 CV035949 *(Corbin v. Raineri).*

On April 19, 2005, respondent sent Corbin a letter and a cashier's check for $10,000, which was not drawn on his client trust account. Accompanying the April 19, 2005 letter was a copy of a letter, dated December 1, 2004, purportedly sent evidencing earlier attempts by respondent to give Corbin her share of the proceeds from the *Lewis v. Chou* settlement. The April 19, 2005 letter in conjunction with the letter dated December 1, 2004, were sent to create the false and misleading impression that the letter dated December 1, 2004, had been sent to Corbin along with a check, that there had been two attempts (the purported December 1, 2004 attempt and another attempt prior to December 1, 2004) to provide the settlement proceeds to Corbin, that respondent was unaware that Corbin had not received the proceeds until December 1, 2004, and that the settlement distribution check sent to Corbin on December 1, 2004, was returned to respondent as undeliverable.

In fact these statements and impressions created by the April 19, 2005 letter and the accompanying December 1, 2004 letter were false and misleading; and respondent knew that they were false and misleading when he made them. Respondent had not attempted to provide Corbin with her share of the settlement proceeds at any time prior to April 19, 2005.

Count 4A: Moral Turpitude (§6106)

Section 6106 prohibits an attorney from engaging in acts of moral turpitude, dishonesty or corruption. By causing to be placed on the $10,000 settlement check a simulation of Corbin's signature without her knowledge or consent, respondent committed an act of dishonesty in wilful violation of section 6106.

Count 4B: Failure to Notify Client Re Receipt of Client Funds (Rule 4-100(B)(1))

Rule 4-100(B)(1) requires an attorney to notify a client promptly of the receipt of the client's funds. Although respondent received the settlement check between March 24, 2004 and May 10, 2004, he delayed informing Corbin of the receipt of the settlement proceeds until April19, 2005, thereby failing to notify a client promptly of the receipt of the client's funds in wilful violation of rule 4-100(B)(1).

Count 4C: Failure to Maintain Client Funds in Trust Account (Rule 4-100(A))

Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney shall be deposited therein or commingled therewith.

Respondent had a fiduciary duty to hold in trust the $6,700 of the settlement proceeds, representing Corbin's share of the settlement under the contingency fee agreement she had entered with respondent until such time as it was paid to Corbin or others for her benefit. After respondent deposited $10,000 in the client trust account on May 10, 2004, the balance dropped to a negative $635.04 on May 20, 2004. Therefore, by allowing the balance in the client trust account to drop below $6,700, the amount that should have been maintained for Corbin, respondent failed to maintain client funds in wilful violation of rule 4-100(A).

Count 4D: Moral Turpitude (§6106)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

On May 10, 2004, respondent was holding in trust on behalf of Corbin the amount of $6,700, representing her share of the settlement funds. However, respondent used $6,700 of the $10,000 settlement for his own purposes unrelated to Corbin. Thus, respondent wilfully misappropriated $6,700 for his own use and benefit, an act involving moral turpitude in wilful violation of section 6106.

Count 4E: Moral Turpitude (§6106)

Respondent wilfully created a sham letter dated December 1, 2004, which was intended to deceive and mislead Corbin as to his efforts to forward the settlement proceeds prior to April 19, 2005. Respondent then sent the April 19, 2005 letter and the accompanying sham letter to Corbin, knowing that the statements which he made therein were false and misleading. The letters were sent to create the false and misleading impressions that: (1) respondent had attempted on two occasions to send Corbin the $6700 settlement proceeds; (2) respondent was unaware until December 1, 2004,

that Corbin had not received the settlement proceeds; and (3) a settlement distribution check purportedly sent to Corbin on December 1, 2004, was returned to respondent as undeliverable. The court finds by clear and convincing evidence that by sending the aforementioned letters to Corbin and by making the statements therein which he knew to be false and misleading, respondent wilfully made misrepresentations to his client in violation of section 6106.

F. Count Five (A) through (C) (The Gonzales Matter (Case No. 05-O-02201))

On May 2, 2002, respondent substituted into *Martha Magna, et al. v. Manuel Gonzales, et al.,* Santa Clara County Superior Court case No. CV801989 *(Magna v. Gonzales)* on behalf of Manuel Gonzales (Gonzales). Respondent agreed to settle the matter on behalf of Gonzales for a $25,000 payment from Gonzales to Magna in exchange for a release of all claims by her against Gonzales.

On July 24, 2003, Gonzales gave respondent check No. 3766 in the amount of $25,000 (check No. 3766) for the purpose of using it to pay the settlement in *Magna v. Gonzales*. On July 24, 2003, Gonzales separately paid respondent $5,176.95 in attorney fees for his legal services in relation to *Magna v. Gonzales.* On July 25, 2003, check No. 3766 was deposited into the client trust account. The entire $25,000 was to be held in trust until paid to Magna in settlement of the matter.

No portion of the $25,000 from check No. 3766 was ever paid to Magna, or otherwise used to satisfy the settlement in *Magna v. Gonzales.* On July 29, 2003, the balance of the trust account was $20,079.93. On September 30, 2003, the balance of the trust account was $426.99. On May 28, 2004, the client trust account was overdrawn in the amount of $667.90. From July 29, 2003 through September 30, 2003, respondent caused to be withdrawn the full $25,000 from the client trust account. Respondent used the $25,000 from check No. 3766 for his own purposes unrelated to Gonzales or the settlement of *Magna v. Gonzales*.

After receiving the check for $25,000 from Gonzales, respondent had no further contact with Magna's counsel regarding the settlement. A court hearing on the status of the settlement was scheduled for December 18, 2003. Respondent received notice of the December 18, 2003 hearing,

but did not appear at the hearing, nor did he otherwise act to protect Gonzales' interests in relation to the hearing.

An Order to Show Cause hearing (OSC hearing) was scheduled for January 22, 2004, at which respondent was to show cause why sanctions should not be imposed upon him for failure to appear at the December 18, 2003 hearing. Respondent received notice of the hearing on the OSC, but did not appear at that hearing, nor did he otherwise act to protect Gonzales' interests in relation to the hearing.

Following respondent's failure to appear at the OSC hearing, the court struck Gonzales' answer in *Magna v. Gonzales* and entered Gonzales' default in the matter. Gonzales received notice of the entry of default and contacted respondent. Respondent assured Gonzales that he would take care of everything.

On April 28, 2004, respondent filed a motion to set aside the default. Respondent attached his own declaration as the basis for the motion with no other supporting documentation. On June 1, 2004, respondent filed a supplemental declaration in support of the motion to set aside the default in which he admitted that he was at fault for not making sure the release was executed and the settlement funds given to the plaintiff. On June 3, 2004, the Court granted the motion to set aside the default and vacate judgment. It also awarded $3,500 in attorney fees and $36.50 in costs to the plaintiff and against Gonzales, payable within thirty days. Respondent attempted to file a motion for enforcement of settlement. However, the check for the filing fee was returned as unpaid. Respondent never paid the filing fee, and therefore, the moving papers were never filed.

On or about December 9, 2004, the Court issued an order denying the motion for enforcement of settlement. After a mediation, the case settled for $35,000 plus $3,536.50[3] in

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[3]The NDC cited the attorney fees as "$3,6536.50." However, the State Bar acknowledged on page 11 of its brief on discipline that the amount listed in NDC was inaccurate, and should have been $3,536.50. As the correction inures to respondent's benefit, and appears to be a typographical error, the court accepts and finds that the amount of the attorney fees agreed upon after mediation was $3,536.50.

attorney fees and costs owed to opposing counsel.

Count 5A: Failure to Maintain Client Funds in Trust Account (Rule 4-100(A))

Respondent had a fiduciary duty to hold in trust the $25,000, which Gonzales entrusted to respondent for the purpose of using it to pay Magna in exchange for a release of all claims by her against Gonzales. However, after respondent deposited the $25,000 into the client trust account on July 25, 2003, the balance dropped to $20,079.93 on July 29, 2003. On September 30, 2003, the balance in the trust account was $426.99; on May 28, 2004, the trust account was overdrawn in the amount of $667.90. Between July 29, 2003 and September 30, 2003, respondent caused to be withdrawn the full $25,000 from the client trust account. Thus, the court finds by clear and convincing evidence that by allowing the balance of the client trust account to drop below $25,000, the amount that should have been maintained for Gonzales' benefit to be used in satisfaction of the settlement agreement between Magna and Gonzales, respondent wilfully failed to maintain client funds in wilful violation of rule 4-100(A).

Count 5B: Moral Turpitude (§6106)

Respondent used the $25,000 from check no 3766 for his own purposes unrelated to Gonzales or the settlement of *Magna v. Gonzales.* Thus, the court finds by clear and convincing evidence that respondent wilfully misappropriated $25,000 for his own purposes, an act of moral turpitude in wilful violation of section 6106.

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

By failing to have the settlement of *Magna v. Gonzales* executed, by allowing a default judgment to be entered against Gonzales, and by failing to have the settlement enforced which resulted in a $35,000 settlement instead of a $25,000 settlement, respondent intentionally recklessly, and repeatedly failed to perform legal services with competence in wilful violation of rule 3-110(A).

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).)[4]

B. Aggravation

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

Respondent has a prior record of discipline.[5] (Std. 1.2(b)(i).) In an order filed December 28, 2005, in case No. S138282 (State Bar Court case Nos. 04-O-11864; 04-O-15050; 04-O-15455 (cons.)), the California Supreme Court ordered, inter alia, that the respondent be suspended from the practice of law for two years, stayed, that he be actually suspended from the practice of law for 90 days, and until he makes restitution totaling $3,900 plus interest. Respondent's culpability in that proceeding, involving three client matters, resulted from respondent's failing to release a client file, failing to return unearned fees (two counts), failing to render an accounting of client funds, failing to cooperate with State Bar investigations (three counts), failing to perform legal services competently, and failing to promptly respond to a client's reasonable status inquiries (two counts).

Respondent committed multiple acts of wrongdoing, including failing to perform services competently, improperly withdrawing from employment, failing to communicate, failing to release a client file, failing to withdraw from employment (mandatory withdrawal), failing to promptly notify a client of receipt of client funds, failing to maintain client funds in a trust account, misappropriating client funds, and other acts of moral turpitude. (Std. 1.2(b)(ii).)

Respondent's misconduct caused his clients substantial harm. Respondent's failure to perform legal services with competence and his misappropriation of funds significantly harmed his clients. His failure to perform legal services with competence significantly harmed Wise as it

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

[5]The court takes judicial notice under Evidence Code section 452 of Supreme Court's order in case No. S138282, filed on December 28, 2005, in *In re Joseph Charles Raineri.* Along with its brief on culpability, filed on November 30, 2005, the State Bar submitted a certified copy of this court's decision in case Nos. 04-O-11864-JMR and 04-O-15050-JMR (consolidated). It was subsequent to the filing of the State Bar's brief on discipline that the Supreme Court filed its order regarding the discipline of respondent.

resulted in the dismissal of *Wise v. Faughnan*. Respondent misappropriated $6,700 from Corbin. Respondent also misappropriated the $25,000 which Gonzales had entrusted to him. Additionally, Gonzales was required to pay an additional $10,000 to settle his matter, since respondent's failure to have the $25,000 settlement in *Magna v. Gonzales* enforced resulted in a $35,000 settlement, instead of a $25,000 settlement. (Std. 1.2(b)(iv).)

Respondent's failure to participate in this disciplinary proceeding prior to the entry of his default is also a serious aggravating factor, (Std.1.2(b)(vi).)

V. 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.)

In determining the appropriate level of discipline, the court first looks to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) As noted in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419), even though the standards are not to be applied in a "talismanic fashion," they are to be followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) Thus, while the standards are not binding they are entitled to great weight. (*In re Silverton*, *supra*, 36 Cal.4th 81, 92.)

In this case, the standards provide for the imposition of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds. 1.6, 1.7, 2.2, 2.3, 2.4, 2.6, and 2.10.) Standard 1.6(a) states, in pertinent part, "If two or more acts of professional misconduct are found or acknowledged in a single disciplinary proceeding; and different sanctions are prescribed by these standards for said acts, the sanction imposed shall be the more or most severe of the different applicable sanctions." The most severe sanction is found at Standard

2.2(a) which provides that wilful misappropriation of entrusted funds must result in disbarment absent compelling mitigation. Respondent's misappropriation totaling $31, 700 is significant and there is no compelling mitigation.

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

In this matter, respondent has been found culpable of engaging in very serious misconduct from April 2002 through April 2005, including the following acts of moral turpitude, dishonesty or corruption: (1) the misappropriation of $31,700 in client funds; (2) causing a client's signature to be affixed to a settlement check without the client's knowledge or permission; and (3) fabricating and backdating a letter to create false and misleading impressions regarding respondent's efforts to forward settlement proceeds to a client.

In addition, respondent intentionally, recklessly or repeatedly failed to perform legal services with competence, improperly withdrew from employment, failed to withdraw from employment where withdrawal was mandatory, failed to promptly release a client's files upon request, failed to communicate, failed to promptly notify a client of receipt of client funds, and failed to maintain client funds in a trust account.

In aggravation, respondent has a prior record of discipline, has committed multiple acts of misconduct, has caused substantial harm to clients, and has failed to participate in this disciplinary proceeding prior to the entry of his default.

Prior discipline is always a proper factor in aggravation. However, because part of the rationale for considering it is that it is indicative of a recidivist attorney's inability to conform to ethical norms, the aggravating force of prior discipline is diminished if the misconduct occurred during the same period as the misconduct in the prior matter. In such circumstance, it is appropriate to consider what the discipline would have been if all the charged misconduct during the time period

had been brought as one case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619.)

In the prior matter for which respondent was disciplined, respondent was found culpable of 10 counts of wrongdoing in three client matters, which occurred between 2003 and 2005. Thus, it is apparent that the prior misconduct was contemporaneous with the current misconduct, occurring between 2002 and 2005. Accordingly, the court must consider the totality of the findings; that is, the court must consider the findings in the prior matter taken in conjunction with the findings in the current matter to determine what the discipline would have been had all the charged misconduct in this period been brought in one case. (*In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.)

In the prior matter for which respondent was disciplined, as in the current matter, he was found culpable of failing to release a client file, failing to perform legal services competently, and failing to promptly respond to a client's reasonable status inquiries. Respondent was also disciplined for failing to return unearned fees totaling $3,900, failing to render an accounting of client funds, and failing to cooperate with State Bar investigations. In aggravation, respondent had engaged in multiple acts of misconduct, caused significant harm to two clients, and failed to participate in the disciplinary proceeding prior to the entry of his default.[6] In mitigation, respondent had practiced law in this state for 15 years before the misconduct began.

In the current disciplinary matter respondent has been found culpable of 17 counts of wrongdoing in five client matters, as set forth above. Thus, in a period of three years respondent has been found culpable of 27 counts of wrongdoing in eight client matters.

The State Bar recommends that respondent be disbarred as a result of his misconduct. The court concurs with the State Bar's discipline recommendation. There is no compelling reason for

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[6]Although the court found that respondent's failure to participate in the disciplinary proceeding in the prior matter was an aggravating circumstance, the court found respondent's failure to participate warranted little weight in aggravation, since it so closely mirrored the misconduct relied on to find respondent culpable of violating section 6068, subdivision (i).

the court to depart from recommending respondent's disbarment as provided by standard 2.2(a). (*In re Silverton*, *supra*, 36 Cal.4th at p. 91; *Aronin v. State Bar*, *supra*, 52 Cal.3d at p. 291.) Standard 2.2(a) calls for disbarment for wilful misappropriation of entrusted funds, unless the misappropriation is "insignificantly small" or the "most compelling mitigation circumstances clearly predominate." Here, neither exception applies.

Relevant Supreme Court opinions strongly support disbarment. "Misappropriation is more than a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession. [Citations.]" *(Grim v. State Bar* (1991) 53 Cal.3d 21, 29.) "[M]isappropriation generally warrants disbarment unless `clearly extenuating circumstances' are present.[Citation.]" (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.)

When the circumstances of misappropriation have been sufficiently serious, the Supreme Court has disbarred the attorney even if the attorney had no prior record of discipline. (See, e.g., *Kaplan v. State Bar* (1991) 52 Cal.3d 1067 [misappropriation of $29,900 of the law firm funds in numerous transactions resulted in disbarment, notwithstanding lack of prior record, favorable good character testimony, and personal stress and family illness]; *Chang v. State Bar* (1989) 49 Cal.3d 114 [disbarment ordered for misappropriation of over $7000 of trust funds in an apparently isolated transaction, notwithstanding lack of prior record where attorney never acknowledged misconduct or made restitution].)

In determining the appropriate level of discipline, the court is also guided by *Cannon v. State Bar* (1990) 51 Cal.3d 1103. In *Cannon*, the attorney had a large practice and relied on his office staff to take calls and process incoming mail. He was found culpable in five different matters of, among other things, failing to refund unearned fees upon termination of employment, failing to perform competently the services for which he was retained, withdrawing from employment without taking steps to avoid prejudice to the client, and failing to return telephone calls. Although the attorney had no prior record of discipline, and no other aggravating factors were specified, there was also no mitigation. The Supreme Court found disbarment to be appropriate for multiple instances of

misconduct involving moral turpitude, i.e., repeatedly refusing to return unearned fees, even after judgment was taken against him and failing to maintain communication with clients.

In taking into consideration the totality of the findings (i.e, the findings in the prior matter taken in conjunction with the findings in the current matter), the court has found respondent culpable of 27 counts of wrongdoing in eight client matters, which is more misconduct involving more clients than were involved in *Cannon*. (See also, *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315 [disbarment recommended where, over a period of nearly four years, attorney committed 13 acts of misconduct involving five separate clients, and two separate non-clients as well as 10 different rule and code violations in a case with slight mitigation and serious, extensive aggravation].) Respondent's violations in the current proceeding and the prior proceeding, when viewed as a whole show respondent's clear disrespect for his clients.

In addition, the court is particularly troubled by respondent's failure to participate in this disciplinary proceeding and in the prior disciplinary matter. The court has no information about the underlying cause of respondent's misconduct or of any mitigating circumstances surrounding his misconduct.

It is settled that an attorney-client relationship is of the highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Here, respondent has flagrantly breached his fiduciary duties to his clients by failing to communicate with clients, misappropriating client funds, failing to perform competently, and making misrepresentations to clients.

Respondent's misappropriation, other acts of dishonesty and moral turpitude, and his default weigh heavily in assessing the appropriate level of discipline. In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." *(Snyder v. State Bar* (1990) 49 Cal.3d 1302.) The court is seriously concerned about the possibility of similar misconduct recurring. Instead of cooperating with the State Bar or rectifying his misconduct, respondent defaulted in this disciplinary proceeding.

Respondent "is not entitled to be recommended to the public as a person worthy of trust, and accordingly not entitled to continue to practice law." (*Resner v. State Bar* (1960) 53 Cal.2d 605, 615.) Therefore, based on the severity of the misconduct, the aggravating circumstances and the lack of mitigating factors, the court recommends disbarment.

VI. Recommended Discipline

Accordingly, the court hereby recommends that respondent **Joseph C. Raineri** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this State.

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 955, paragraphs (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 section 6086.10 and are enforceable both as provided in section 6140.7 and as a money judgment.

VIII. Order of Involuntary Inactive Enrollment

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

Dated: February 23, 2006

JOANN M. REMKE
Judge of the State Bar Court