PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **PAUL A. SCHELLY** A Member of the State Bar.	**05-O-00181** **OPINION AND ORDER**

We review the recommendation of a hearing judge that respondent Paul Alan Schelly be disbarred based on, among other things, his practice of law in three cases while he was suspended pursuant to a prior disciplinary order. Respondent seeks review of the hearing judge's culpability determinations and argues that disbarment is excessive. The State Bar seeks review of the hearing judge's finding that respondent was not culpable of count seven alleging moral turpitude.

After our independent review of the record (Cal. Rules of Court, rule 9.12), we adopt most of the hearing judge's findings, with modifications that ultimately do not affect the degree of discipline recommended. Accordingly, we recommend that respondent be disbarred from the practice of law in California.

I. PROCEDURAL BACKGROUND

Respondent was admitted to practice law on December 14, 1972, and has been previously disciplined three times. In the third disciplinary proceeding, respondent received a stayed suspension with conditions that he be actually suspended for 60 days and that he comply with terms of probation. In addition, respondent was ordered to pay disciplinary costs as a condition of return to active membership. (Bus. & Prof. Code, § 6140.7.) Pursuant to the Supreme Court's

order, respondent's actual suspension began on October 13, 2004. If he had paid his disciplinary costs, he would have been entitled to resume practicing law in California on December 12, 2004. Respondent, however, failed to timely pay the costs before resuming his practice of law. As we discuss below, the record reflects respondent's continued practice in immigration court during his suspension in California.[1]

On October 30, 2006, the State Bar filed a notice of disciplinary charges (NDC), alleging respondent violated provisions of the Business and Professions Code[2] and the Rules of Professional Conduct[3] by: 1) practicing law and holding himself out as entitled to practice law in two client matters while suspended; 2) acting with moral turpitude by representing in court that he was eligible to practice in California when he was not; 3) acting with moral turpitude by stating under penalty of perjury on his report to the State Bar Office of Probation that he had not practiced law at any time during his suspension; 4) improperly holding himself out to practice law and practicing law when he was retained in a separate, third client matter; 5) failing to refund an unearned fee; 6) failing to respond to client inquiries; and 7) acting with moral turpitude based on the fee he charged his client and the manner in which he responded to a request for the return of unearned fees.

Respondent and the State Bar stipulated to facts and admission of documents. After a two-day trial, the hearing judge found respondent culpable of six of the seven counts with no

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[1]"Immigration courts are administrative trial courts that are part of the United States Department of Justice's Executive Office of Immigration Review (hereafter EOIR)." (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 510.) Decisions of immigration trial judges are subject to review by the Board of Immigration Appeals (BIA). (*Ibid.*) In this decision, the term "immigration courts" refers to both the immigration trial courts and the BIA.

[2]Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

[3]Unless noted otherwise, all references to rules are to the provisions of the State Bar Rules of Professional Conduct.

mitigating factors but several factors in aggravation. Based on his findings, the hearing judge recommended disbarment and ordered respondent to pay restitution in the amount of $2,000 plus ten percent interest per annum to one client. Finally, the hearing judge ordered respondent involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4). Both respondent and the State Bar seek review.

II. MOTION TO REMAND AND JUDICIAL NOTICE

Five days before oral argument, the State Bar moved to remand this case to the hearing department and remove respondent from involuntary inactive enrollment because it learned only a week earlier that respondent had not been suspended by the BIA until January 11, 2005. Since most of the charges in the NDC were based on allegations of respondent's unauthorized practice of law in immigration court prior to January 11, 2005, the State Bar argued that some of the hearing judge's culpability findings were improper and the matter should be remanded to give the hearing department an opportunity to conduct a new analysis.

In our October 29, 2008 order, we denied remand and took judicial notice, in accordance with rule 306(c) of the Rules of Procedure of the State Bar, of the BIA disciplinary procedures and suspension orders to correct the record to show that respondent was not suspended by the BIA until January 11, 2005. We have considered the parties' arguments for remand to the extent they bear on our culpability and discipline recommendations.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Respondent's Suspension from the Practice of Law

1. In California

Respondent is a solo practitioner who maintains three separate offices in Southern California, with non-attorney employees in each office. His actual suspension from practice in California as a result of his prior discipline commenced on October 13, 2004, and was projected

to end on December 12, 2004 (projected end date). On November 23, 2004, the State Bar's Membership Billing Services prepared and mailed a letter informing respondent that he owed $3,654 for disciplinary costs, that payment of those costs remained a condition of his return to active membership, and that "**[P]ayment must be received in 'CERTIFIED FUNDS' (i.e., cashier's check, certified check, or money order).**" (Emphasis in original.) Although respondent received the letter, he testified that he did not open it until sometime after January 14, 2005, because: "I felt so much pressure with the stuff from the Bar that I really didn't open anything. I knew what it was about. I mean, I knew what I had to do, but I really was not opening the letter, and I didn't open it until after all these proceedings started . . . I really didn't want to deal with it unless I felt I – you know, the pressure I had to deal with it, I suppose."

Despite not opening the letter from the State Bar, respondent alleges that he instructed his wife to pay the disciplinary costs. Although the record is unclear as to the date, respondent contends that his wife sent a personal check instead of the required certified payment to the State Bar. Respondent remained suspended after the projected end date because the State Bar either did not receive or did not accept the payment.

Respondent contends that he assumed he was again eligible to practice on the projected end date, and thereafter, appeared as the attorney of record at three immigration court hearings until January 12, 2005, when an immigration judge (IJ) informed him that he had not been reinstated to practice law. Respondent then submitted a cashier's check to the State Bar to cover the disciplinary costs, and he was reinstated as an active attorney in California on January 14, 2005.

2. In the Immigration Courts

In immigration matters, "[t]he term attorney means any person who is eligible to practice law in and is a member in good standing of the bar of the highest court of any State . . . and is not

under any order suspending . . . or otherwise restricting him in the practice of law." (8 C.F.R. § 1001.1(f).) The regulations provide: "Any practitioner who has been . . . suspended by . . . the highest court of any state . . . must notify the Office of the General Counsel of the Service of any such . . . disciplinary action within 30 days of the issuance of the initial order . . . ." (8 C.F.R. § 292.3(c)(4).) A practitioner who has been suspended is subject to "immediate suspension" by the BIA. (8 C.F.R. § 292.3(a)(1)(ii).) The record is silent as to whether respondent notified the Office of the General Counsel of his suspension.

On December 17, 2004, as a result of respondent's 60-day suspension by the California Supreme Court, the Office of the General Counsel for the EOIR initiated disciplinary proceedings against respondent and petitioned for his immediate suspension from practice before the immigration courts. On January 11, 2005, the BIA suspended respondent pending final disposition of the proceeding before it.

On February 14, 2005, after respondent failed to respond to the disciplinary proceedings, the BIA adopted the recommendation set forth in the Notice of Intent to Discipline and suspended respondent from practice before the immigration courts for 60 days, crediting him with the time already served since January 11, 2005. The BIA's order also provided that to be reinstated, respondent must petition the BIA and demonstrate that he was reinstated to practice law in California.

B. Respondent's Practice in Two Immigration Matters (Case No. 05-O-00181)

In October 2004, two clients hired respondent to represent them to avoid their deportation in removal proceedings in immigration court. Although respondent knew of his upcoming suspension in California, he did not inform his clients about it, and he believed it was not a problem because he could send another attorney to appear in immigration court, ask for a continuance, and notify the immigration court that respondent was suspended in California.

In the first matter, members of the family of Ciro Mojica-Mojica met with respondent's employee on October 2, 2004, signed an "immigration retainer agreement" in which they agreed to pay $3,500 in installments, and paid an initial $1,500 to secure respondent's services. The family paid an additional $250 after the start of respondent's suspension in California.

While suspended in California, respondent appeared before the immigration court on December 14, 2004 as Mojica's representative. When the IJ questioned respondent about the current status of his license, respondent represented that he was "fully licensed to practice law in the State of California," and that his license had been reinstated on December 13, 2004.

Also in October 2004, a friend of Carlos Jacobo Maglio Malena paid respondent $500 to represent Malena. On December 14, 2004 and January 12, 2005, respondent appeared in immigration court in the Malena matter. During the December 14th appearance, respondent told the IJ that he was "fully licensed to practice law in the State of California," as his license had been reinstated on December 13, 2004. However, at the January 12th appearance, the IJ informed respondent that the court had learned his license had not been reinstated. The record does not show whether the IJ discussed or referenced the BIA's January 11, 2005 suspension order.

On January 10, 2005, two days before the Malena hearing, respondent submitted his quarterly probation report to the Office of Probation of the State Bar (quarterly report) for the preceding calendar quarter, which covered October through December 2004. In the quarterly report, respondent stated under penalty of perjury that he "did not practice law at any time during the preceding calendar quarter or applicable portion thereof during which [he] was suspended pursuant to the Supreme Court order in this case." Respondent also stated under penalty of perjury that he "did not possess client funds at any time during the preceding calendar quarter."

Count One: Unauthorized Practice of Law in Violation of Sections 6068, Subdivision (a), 6125, and 6126

In their briefs addressing the motion to remand, the parties argued that since the BIA did not suspend respondent until January 11, 2005, he cannot be disciplined based on his appearances in immigration court for either the unauthorized practice of law or holding himself out as entitled to practice law. However, while section 6125 prohibits any person from practicing law in California unless he is an active member of the State Bar, section 6126 is broader and prohibits an attorney suspended by the State Bar from holding himself out as entitled to practice law in California. Respondent thus violated section 6126 by representing in immigration court on three occasions that he was fully licensed in California while he was still suspended. He further violated section 6106 as a result of his misrepresentations to the immigration court. However, in light of the BIA suspension orders, we agree that the record does not show by clear and convincing evidence that respondent's appearances in immigration court constituted the unauthorized practice of law in violation of section 6125. (See *Bogart v. Carter* (9th Cir. 1971) 445 F.2d 321, 322 [attorney is entitled to hearing before BIA before being denied right to practice before agency].)

Respondent argues that he did not intentionally hold himself out as entitled to practice law because he did not know his suspension continued past the projected end date. This contention is unavailing because respondent's own gross negligence blinded him to this crucial fact. Respondent's decision not to open mail from the State Bar – despite being on probation and having been disciplined three previous times – seriously calls into question his current fitness to practice. Further, there is no evidence that respondent took reasonable steps to assure proper payment was made, including advising his wife about the proper form of payment and verifying that it was done. Under the circumstances, he was, at a minimum, grossly negligent because he either knew or should have known that he remained suspended. (See *In the Matter of Heiner*

(Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 318-19 [attorney who appeared in court after placement on involuntary inactive status violated §§ 6068, subd. (a), 6125 and 6126, despite disavowing knowledge of his inactive enrollment at time of appearance].)

The parties rely on *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61 in support of their argument that respondent cannot be disciplined for the unauthorized practice of law in immigration court or for holding himself out as entitled to practice when he had not been suspended by the BIA at that time. We find *Benninghoff* to be inapposite under the facts of this case. It is true that the appellate court in *Benninghoff* broadly stated that "state law cannot restrict the right of federal courts and agencies to control who practices before them." (*Id.* at p. 74.) However, it is also well-established that the California Supreme Court has the authority to discipline a practitioner for acts he commits in immigration court that " 'reflect on his integrity and fitness to enjoy the rights and privileges of an attorney' " in California. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. St. Bar Ct. Rptr. 416, 420, citations omitted; see also *Canatella v. California* (9th Cir. 2005) 404 F.3d 1106, 1110-1111 ["Barring the [s]tates from disciplining their bar members based on misconduct occurring in federal court would lead to the unacceptable consequence that an attorney could engage in misconduct at will in one federal district without jeopardizing the state-issued license that facilitates the attorney's ability to practice in other federal and state venues."].) In the present case, we do not seek to restrict or assume jurisdiction over respondent's practice before the immigration courts; rather, we find him culpable of violating a California Supreme Court order that prohibited him from holding himself out as entitled to practice in California and for the affirmative misrepresentations to the IJ regarding his license status in California.

Respondent's suspension stripped him of the rights and privileges enjoyed by active members of the State Bar, including the right to hold himself out as entitled to practice in

California. Thus, we find respondent culpable of violating section 6126 based on his representations to the immigration court that he was an attorney in good standing in California when he was not.

Counts Two and Three: Moral Turpitude in Violation of Section 6106

Respondent committed two separate acts of moral turpitude by misrepresenting to the immigration court that he was fully licensed to practice law in California (count two), and to the State Bar Office of Probation that he had not practiced law while suspended (count three). As discussed *ante*, respondent acted with gross negligence in assuming that his California license was reinstated under the circumstances presented here, which is sufficient to sustain charges of moral turpitude. (*In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91 [§ 6106 violation found where attorney acted with gross negligence in holding himself out as entitled to practice law while suspended].) However, since the facts supporting a violation under count two are the same facts for the violation under count one (i.e., respondent's misrepresentation to the immigration court that he was entitled to practice law in California), we give no additional weight to the duplication in determining discipline. (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 10-11.)

As to count three, respondent falsely stated under penalty of perjury to the Office of Probation that he did not practice law or possess client funds during the preceding quarter (i.e., October through December 2004) when he had accepted at least two new clients and collected fees during that time. The question on the quarterly report required respondent to disclose any practice of law and was not limited to practice in state courts. This is clearly consistent with the State Bar's interest in assuring that suspended attorneys do not attempt to circumvent a California Supreme Court order by practicing law in federal court in a manner that violates the rules of professional conduct and the State Bar Act. Since respondent failed to disclose his

continued immigration practice on his quarterly report in violation of section 6106, the Office of Probation's ability to investigate the appropriateness of respondent's practice, or otherwise effectively monitor him while on probation, was negatively impacted.

C. The Bojorquez Matter (Case No. 05-O-01315)

On January 8, 2005, while respondent was suspended in California and three days before his BIA suspension, a family member of Rosa Bojorquez (Bojorquez) and a friend, Leticia Lisama, paid an initial $2,000 of the total fee of $3,000 to respondent's non-attorney employee for respondent to represent Bojorquez in a removal proceeding. Neither Bojorquez nor respondent was present at the meeting, and no written agreement was executed.[4] Bojorquez was in custody, but had given her family the authority to hire an attorney.

Bojorquez expected respondent to appear at her scheduled bond hearing on January 10, 2005, but respondent sent in his place a contract attorney, John Garcia, along with respondent's employee, Ronald, to act as an interpreter. Although she signed a representation form, and was questioned by the immigration judge as to whether Garcia represented her, Bojorquez did not realize that Garcia was not respondent because Garcia arrived late to the immigration court and did not introduce himself to her. After the hearing, Bojorquez was released on bond.

On January 18, 2005, Bojorquez decided to terminate respondent so that another attorney who represented her in a related civil matter could also handle her immigration case. She placed the first of several calls to respondent's office to demand a refund of her unearned fees, and spoke with Ronald, who had acted as the interpreter at her bond hearing. Every time Bojorquez called, she spoke to Ronald, who was generally rude. Rather than agreeing to return any

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[4]Respondent's general lack of oversight of his firm's intake procedures, including his willingness to allow non-attorneys to accept clients and collect fees, is troubling. (See, e.g., *In the Matter of Scapa & Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, 651-652 [moral turpitude found where attorney engaged services of contractors with authority to, among other things, execute retainer agreements and explain complex details of fee agreements].)

unearned fees, Ronald threatened to report her to the immigration service to have her deported and to sue her for $1,000 in unpaid fees he claimed were due.

After Bojorquez's unsuccessful attempts to obtain a fee refund, attorney Berenice De La Parra telephoned respondent's office to request Bojorquez's refund. De La Parra worked for the law office representing Bojorquez in her civil and immigration matters. She was able to speak with respondent and requested a refund of Bojorquez's unearned fees. Respondent told De La Parra that Bojorquez's family had not executed a written fee agreement, the $2,000 was non-refundable based on the oral agreement, and there would be no refund. The conversation turned from cordial to accusatory, and at times during her telephone conversation with respondent and his office staff, De La Parra could hear taunting in the background.

On February 1, 2005, Bojorquez and Lisama went to respondent's office to obtain her refund. Ronald had previously told Bojorquez that respondent would provide a refund only if she came with the friend who had initially paid the fees on her behalf, i.e., Lisama. Although Bojorquez had made an appointment and respondent was in the office, his staff initially told her he was not in. After Bojorquez insisted, she eventually met with respondent and Ronald. Bojorquez was given an invoice during the meeting that showed respondent was charging her $1,500 of the $2000 paid for the following services: $1,200 for six hours for Garcia's appearance and $300 for six hours for a "paralegal" to act as an interpreter.[5] Respondent, however, had paid Garcia a flat fee of $400 to appear on his behalf, and he himself did not perform any services of value for Bojorquez. In total, respondent charged Bojorquez $1,500 for a court appearance that cost him at most $700: $400 for Garcia and $300 for Ronald's services as a translator. The terms for the appearances of Garcia and Ronald were neither spelled out in a written agreement nor communicated to Bojorquez before they were charged.

[5]The six hours included four hours of driving time to and from the detention center where the hearing was conducted and two hours for the appearance at the hearing.

Respondent insisted that Bojorquez sign a document before he would return any fees, but Bojorquez refused because she did not understand the document and did not trust respondent. The document was in English and Bojorquez speaks only Spanish. Moreover, respondent had failed to explain how he arrived at the $1,500 fee stated in the invoice. Although Bojorquez was unsure whether $1,500 was a fair amount for Garcia's brief appearance at the bail hearing, she repeatedly asked respondent to return at least the remaining $500 that was unearned and not in dispute. Respondent refused to give her any money unless she signed the document.

Ronald and respondent insulted and laughed at Bojorquez and Lisama during their visit to respondent's office. Although respondent disputes Bojorquez's assertions that she was treated rudely, the hearing judge found Bojorquez's testimony on this issue to be more credible than respondent's. We see nothing in the record to contradict, and we therefore defer to, the hearing judge's finding, which is based on his assessment of credibility. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1056.)

On February 9, 2005, Bojorquez faxed respondent a demand for the $500 refund. Respondent neither responded to this fax nor refunded any of the $2,000. Since then, Bojorquez has not had any further contact with respondent. At the time of trial, respondent asserted that he was prepared to refund $500, but was not certain to whom the funds should go.

Count Four: Unauthorized Practice of Law in Violation of Sections 6068, Subdivision (a), 6125, and 6126

The hearing judge found that respondent improperly held himself out as entitled to practice law while on suspension, in violation of section 6126, but did not actually practice law in violation of 6125 in the Bojorquez matter. Although respondent was suspended from practicing in California at the time he was hired and when the contract attorney Garcia appeared in court on behalf of Bojorquez, he was not suspended in the immigration courts. Therefore, we

find that respondent is not culpable of either practicing law or holding himself out as entitled to practice law as alleged in this count. Accordingly, we dismiss count four with prejudice.

Count Five: Failure to Return Unearned Fees in Violation of Rule 3-700(D)(2)

Under rule 3-700(D)(2), an attorney whose employment has been terminated must promptly refund any unearned part of an advanced fee. We find that the hearing judge properly found respondent culpable of failing to return Bojorquez's unearned fees.

Bojorquez repeatedly requested a $500 refund from respondent. Respondent conceded he owed at least $500 but has not yet repaid that amount, claiming he does not know to whom it should be given. We reject respondent's defense for his non-payment as implausible. However, the State Bar has failed to prove by clear and convincing evidence that respondent owes Bojorquez a refund beyond $500.

The hearing judge's finding that respondent is not entitled to any portion of the $2,000 was based on his determination that respondent earned this fee while he was suspended from the practice of law. However, respondent had not yet been suspended by the BIA. (See *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119 [invalidating fees charged by out-of-state attorneys practicing in California in violation of § 6125].) Accordingly, we limit our finding of culpability to the $500 respondent has failed to return.

Count Six: Failure to Communicate with a Client in Violation of Section 6068, Subdivision (m)

Respondent's failure to respond to Bojorquez's faxed request for the return of her fee violates section 6068, subdivision (m). Respondent had a duty to respond promptly to Bojorquez's inquiries about the status of her case, including questions about fees. (*In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 922 [finding attorney failed to promptly respond to client's reasonable status inquiry about refund of fee].) Respondent contends he acted reasonably in failing to respond to Bojorquez because he believed De La Parra

represented her in the fee dispute and that any communications with Bojorquez would be improper. This argument is unavailing, however, because respondent failed to meet his duty to communicate with his client, either directly or through her representative. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 153-54 [finding violation of § 6068, subd. (m) where respondent failed to respond to requests for status updates from both client and client's successor counsel].)

Count Seven: Moral Turpitude in Violation of Section 6106

The NDC alleged moral turpitude based on respondent stating the $2,000 fee was non-refundable, presenting Bojorquez with an invoice charging $1,200 for Garcia's services when respondent had paid Garcia only $400, and threatening to report Bojorquez to the immigration authorities when she sought a refund. We find respondent culpable of violating section 6106.

When Bojorquez requested a refund, respondent chose to stall and harass his client instead of promptly returning all unearned fees. Then, when De La Parra was forced to intervene to try to obtain the refund, respondent falsely stated that the fee was nonrefundable based on an oral agreement. Respondent's assertion was without merit. (See *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757-758 [where attorney did not devote certain blocks of time to certain clients' claims or turn away other business to proceed with their matters, attorney was not excused from accounting for advanced fee on ground that it was retainer earned on receipt].)

Respondent and his staff used inappropriate tactics to intimidate Bojorquez into foregoing her request for a refund. Ronald threatened to have her deported. Then, when Bojorquez was forced to go to respondent's office to obtain her refund, respondent's treatment of her was not only unprofessional but abusive, and clearly constituted moral turpitude in violation of section 6106. (See *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr.

944, 959-960 [attorney's exploitation of his superior knowledge and position of trust to detriment of vulnerable clients was evidence of overreaching that constituted moral turpitude].)

III. FINDINGS IN MITIGATION AND AGGRAVATION

A. Mitigation

Respondent bears the burden of showing mitigation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[6] He offered no evidence in mitigation, and we find none on this record.

B. Aggravation

We agree with most, but not all, of the hearing judge's conclusions regarding aggravating factors.

1. Prior record of discipline

The most serious aggravating factor is respondent's prior record (std. 1.2(b)(i)), which involves three separate instances of discipline for misconduct that has negatively impacted his clients.

First, in March 2001, respondent stipulated to a private reproval in Case No. 99-O-12607 for his violations of: rule 4-100(B)(4) for failure to pay a medical lien promptly from client funds after a settlement in a personal injury case in 1998; and section 6103 for failure to pay a court-ordered judgment in 1999 in a small claims action the same client filed for the non-payment of the medical lien.

Second, in July 2002, respondent was suspended for two years after stipulating to misconduct in Case Nos. 01-O-01834 and 02-O-10016. The first case involved violations, based on events occurring from 1997 to 2002, of: (1) rule 3-110(A) for failures to file a visa application or to properly request an immigrant visa; (2) section 6068, subdivision (m) for failure

[6]All further reference to standard(s) are to this source.

to communicate with a client; (3) rule 3-700(A)(2) for failure to advise a client of his intent to take no further action or withdraw; (4) rule 4-100(A) for failure to deposit filing fees in a client trust account; (5) rule 4-100(B)(3) for failure to account for filing fees; (6) rule 3-700(D)(2) for failing to refund advanced fees; and (7) section 6106 for misappropriation, amounting to moral turpitude, of at least $4,185. The second case involved a violation of rule 4-100(A) for failure to properly administer a client trust account in August 2001. In mitigation, respondent displayed candor and cooperation and had practiced law for 30 years until March 2001 without discipline. In aggravation, he had a prior record of discipline, committed trust account violations, harmed a client and committed multiple acts of wrongdoing. The suspension was stayed and conditions of probation were imposed, but no actual suspension was ordered.

Third, on October 13, 2003, respondent was suspended for two years, stayed, with an actual suspension of 60 days, after he stipulated to misconduct in Case No. 03-O-03386 of failing to comply with probation terms ordered by the Supreme Court in the prior matter. Specifically, in 2003, he failed to timely file three quarterly probation reports, or to timely provide proof that he had complied with the MCLE requirements, both violations of section 6068, subdivision (k).

2. Multiple acts of wrongdoing

Respondent committed multiple acts of wrongdoing in the instant matters. (Std. 1.2(b)(ii).) He improperly held himself out to the immigration court as entitled to practice while he was suspended, falsely stated to the State Bar that he had not practiced law during his suspension, failed to respond to Bojorquez's reasonable status inquiries or to return unearned fees to her, and acted with moral turpitude in his dealings with her.

thread linking respondent's actions (or inactions) in these matters is his continual willingness to allow others to handle significant details of his professional practice with little or no supervision. We are concerned that respondent fails to recognize the harmful consequences of this laissez-faire attitude. Most importantly, he has not accepted responsibility for his own role in the failure to pay the costs necessary to terminate his suspension, which, as he acknowledges, resulted in culpability for most of the counts in this case.

IV. LEVEL OF DISCIPLINE

The purposes of disciplinary proceedings are to protect the public, the courts and the legal profession. (*In re Silverton* (2005) 36 Cal.4th 81, 91, quoting *In re Morse, supra*, 11 Cal.4th 184, 205, quoting std. 1.3.) In determining the appropriate level of discipline, we first consider the standards applicable to this case. While we are "not compelled to strictly follow [the standards] in every case," we look to them for guidance (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and they should generally be given great weight in order to assure consistency in attorney disciplinary cases. (*In re Brown* (1995) 12 Cal.4th 205, 220.)

The standards applicable to this case are 1.6, 1.7(b), 2.3, 2.4, 2.6 and 2.10. Because respondent's conduct involved more than two acts of professional misconduct, standard 1.6(a) compels us to impose the most severe of the applicable sanctions. Thus, we look to standard 2.3, which provides in relevant part: "Culpability of a member of an act of moral turpitude . . . shall result in actual suspension or disbarment depending upon 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 member's acts within the practice of law." Similarly, under standard 2.6, an attorney who violates section 6126 is also subject to disbarment or suspension, depending on the gravity of the offense.

However, since this is respondent's fourth imposition of discipline, our focus is on standard 1.7(b), which provides that in the absence of compelling mitigating circumstances, disbarment is the presumptively appropriate discipline if a member found culpable of misconduct has a record of two prior impositions of discipline. Disbarment is particularly appropriate "[w]hen there is a repetition of offenses for which an attorney has previously been disciplined that 'demonstrates a pattern of professional misconduct' . . . . [Citations.]" (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 977.)

Our discipline recommendation is tempered by the decisional law. We have considered *Morgan v. State Bar* (1990) 51 Cal.3d 598, where the Supreme Court disbarred an attorney who had been previously disciplined five times. Morgan engaged in the practice of law while under suspension by, among other things, accepting a retainer fee from a new client, appearing in court as the attorney of record in a pending case, and associating another attorney to make a court appearance on behalf of a client. (*Id.* at p. 604.) The Supreme Court considered standards 1.7(b) and 2.6, and concluded the appropriate level was disbarment after noting that standard 1.7(b) makes no distinction between recent and remote disciplinary proceedings, observing that Morgan had been cumulatively suspended for two years and on probation for eleven years, and finding a "pattern of professional misconduct and an indifference to . . . disciplinary orders." (*Id.* at p. 607.)

Likewise, respondent has been suspended, on probation, or inactive for six years. While we recognize that the most serious conduct in respondent's second disciplinary proceeding occurred at the same time as the conduct in the first proceeding so that the two proceedings could arguably be considered as one, such a consideration does not ultimately affect the discipline we recommend based on the totality of respondent's misconduct. His professional misconduct involves several incidents from 1997 to 2005, and demonstrates a pattern of misconduct and

indifference to disciplinary orders. Moreover, although Morgan offered character witnesses and evidence of community service and pro bono work, and his practice of law while suspended was an "isolated incident," the court found this showing in mitigation was inadequate to demonstrate "compelling mitigating circumstances" sufficient to overcome the presumptive discipline of disbarment under standard 1.7(b). (*Id.* at pp. 607-608.) Here, respondent has offered no evidence in mitigation, and equally troubling, he has demonstrated indifference toward rectification or atonement for the consequences of his misconduct.

We also find *In the Matter of Thomson, supra,* 4 Cal. State Bar Ct. Rptr. 966, particularly instructive to our analysis. The attorney in *Thomson* had been disciplined four times; in the fifth proceeding, the review department determined he was culpable of failing to report judicial sanctions, willfully disobeying an order of the bankruptcy court, and probation violations. (*Id.* at pp. 973-974.) Moreover, after respondent filed a motion with the State Bar Court to stay his suspension, but before the court ruled on it, respondent wrote a letter on his office letterhead in an effort to negotiate a settlement for a client. We concluded that this communication improperly held respondent out as entitled to practice law and constituted the unauthorized practice of law. (*Id.* at p. 975.)

In *Thomson*, we found no factors in mitigation, but in aggravation, found the attorney engaged in multiple acts of wrongdoing, engaged in misconduct involving bad faith, dishonesty, or concealment, demonstrated indifference to the consequences of his misconduct, and had four prior instances of discipline. (*Id.* at pp. 975-976.) Applying standard 1.7(b), we recommended disbarment after finding respondent demonstrated a "disturbing repetitive theme" of disciplinary violations (*id.* at p. 977); to wit, respondent had "repeatedly violated court orders, failed to report court sanctions, and engaged in the unauthorized practice of law." (*Id.* at p. 979.)

Like the attorney in *Thomson*, respondent improperly held himself out as entitled to practice law when he knew or should have known he was still suspended. Moreover, the several aggravating factors here are untempered by any mitigating factors. Finally, respondent's disciplinary record shows a disturbing pattern of his failure to properly communicate with clients, and to ensure fees or judgments were properly paid to clients, as well as his propensity to engage in acts amounting to moral turpitude, either intentionally or through gross negligence. Accordingly, we reach the same conclusion as in *Thomson*: "we consider the risk of recurrence of professional misconduct is high and therefore conclude respondent is not a good candidate for probation or suspension." (*Id.* at p. 978.)

V. RECOMMENDATION

We therefore recommend that respondent Paul Allan Schelly be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys licensed to practice.

We further recommend that respondent make restitution to Rosa Bojorquez in the amount of $500 plus 10% interest per annum from January 8, 2005 (or to the Client Security Fund (CSF) to the extent of any payment from the CSF to Rosa Bojorquez, plus interest and costs, in accordance with Business and Professions Code section 6140.5). We also recommend that respondent make the restitution within 30 days following the effective date of the Supreme Court order in this matter or within 30 days following any CSF payment to Rosa Bojorquez, whichever is later.

We further recommend that respondent be ordered to comply with the provisions of rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter.

We further recommend that the State Bar be awarded costs in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VI. ORDER OF INACTIVE ENROLLMENT

Because the hearing judge recommended disbarment, he properly ordered that respondent be involuntarily enrolled as an inactive member of the State Bar as required by Business and Professions Code section 6007, subdivision (c)(4), and Rules of Procedure of the State Bar, rule 220(c). The hearing judge's order of involuntary inactive enrollment became effective on December 9, 2007, and respondent has remained on involuntary inactive enrollment since that time. In light of our disbarment recommendation, it is hereby ordered that Paul Allan Schelly remain on involuntary inactive enrollment pending the final disposition of this proceeding.

REMKE, P. J.

We concur:

EPSTEIN, J.

STOVITZ, J.*

*Honorable Ronald W. Stovitz, retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge.

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

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on February 11, 2009, I deposited a true copy of the following document(s):

OPINION AND ORDER ON REVIEW FILED FEBRUARY 11, 2009

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

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

ROBERT G. BERKE
BERKE LAW OFCS
7108 DE SOTO AVE STE 206
CANOGA PARK, CA 91303

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

ELI D. MORGENSTERN, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on February 11, 2009.

Rosalie Ruiz
Case Administrator
State Bar Court