

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of	)	<b>Case No. 06-O-10557-PEM; 06-O-11149</b>
	)	
<b>MATTHEW S. UNGER,</b>	)	<b>DECISION</b>
	)	
<b>Member No. 137742,</b>	)	
	)	
<u>A Member of the State Bar.</u>	)	

**I. Introduction**

In this default disciplinary matter, respondent **Matthew S. Unger** is charged with multiple acts of professional misconduct in two matters, including (1) failing to support the laws of this state; (2) failing to comply with an agreement made in lieu of disciplinary prosecution; (3) failing to perform services competently; (4) failing to communicate with a client (two counts); (5) charging or collecting illegal fees; (6) failing to return unearned fees; (7) engaging in the unauthorized practice of law; (8) committing acts of moral turpitude (two counts); (9) seeking to mislead a judge; (10) failing to obey a court order; and (11) failing to cooperate with the State Bar.

This court finds by clear and convincing evidence that respondent is culpable of 7 of the 13 alleged counts of misconduct. In view of respondent’s misconduct and the evidence in aggravation, the court recommends, among other things, that respondent be suspended from the practice of law for one year, that execution of suspension be stayed, and that he be actually suspended from the practice of law for six months and until the State Bar Court grants a motion to terminate respondent’s actual suspension. (Rules Proc. of State Bar, rule 205.)

**II. Pertinent Procedural History**

**A. First Notice of Disciplinary Charges (Case No. 06-O-11149)**

On April 28, 2006, the Office of the Chief Trial Counsel of the State Bar of California (State

Bar) filed and properly served on respondent a two-count Notice of Disciplinary Charges (NDC) at his official membership records address. On May 2, 2006, the State Bar received a return receipt with respondent's signature, showing that he had received the NDC.

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

Thereafter, Deputy Trial Counsel (DTC) Cydney Batchelor tried to contact respondent several times to no avail. On the State Bar's motion, respondent's default in case No. 06-O-11149 was entered on August 3, 2006, and respondent was enrolled as an inactive member on August 6, 2006, under Business and Professions Code section 6007, subdivision (e).<sup>1</sup> An order of entry of default was sent to respondent's official address by certified mail. A return receipt for the certified mailing was signed by respondent and returned to the State Bar Court.

The matter was taken under submission on August 21, 2006.

**B. Second Notice of Disciplinary Charges (Case No. 06-O-10557)**

On July 31, 2006, the State Bar properly served and filed a second NDC on respondent at his official membership records address. Respondent again did not file a response to the NDC. However, on August 2, 2006, the State Bar received a return receipt showing that the NDC had been delivered to respondent.

DTC Batchelor then placed two telephone calls to respondent in the first two weeks of August 2006, but respondent did not respond to those calls.

On the State Bar's motion, respondent's default was entered in case No. 06-O-10557 on October 24, 2006, and respondent was enrolled as an inactive member on October 27, 2006, under section 6007, subdivision (e). An order of entry of default was sent to respondent's official address by certified mail, but was returned to the court as unclaimed.

Case No. 06-O-10557 was taken under submission on November 14, 2006.

Thereafter, on January 3, 2007, the court consolidated case No. 06-O-11149 and case No. 06-O-10557. The court also ordered that the August 21, 2006 submission date in case No. 06-O-11149

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<sup>1</sup>All references to section (§) are to Business and Professions Code, unless otherwise indicated.

and the November 14, 2006 submission date in case No. 06-O-10557 be vacated.

Respondent did not participate in the disciplinary proceedings. The consolidated matters were submitted for decision on January 8, 2007, following the filing of the State Bar's brief on culpability and discipline.

### **Findings of Fact and Conclusions of Law**

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

#### **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 at all times since that date.

#### **B. The Agreement in Lieu of Discipline (ALD) Matter (Case No. 06-O-11149)**

On January 20, 1999, respondent was rendered a quadriplegic as a result of a one-car accident, for which he was criminally charged with misdemeanor violations of Vehicle Code sections 23152, subdivision (a) and 23152, subdivision (b), with one prior conviction that occurred on August 18, 1994.

On April 8, 1999, respondent pleaded nolo contendere to a criminal misdemeanor violation of Vehicle Code section 23103 (reckless driving in willful or wanton disregard for the safety of persons or property), and admitted a prior conviction for the same offense. The other charges (Vehicle Code sections 23152, subdivisions (a) and (b)) were dismissed. As a result of his plea, respondent was placed on two years summary probation.

On October 7, 2003, the Review Department of the State Bar Court issued an order referring the matter (State Bar case No.03-C-3442-PEM) to the Hearing Department of the State Bar Court (Hearing Department) for a hearing and decision recommending the discipline to be imposed in the event that the Hearing Department found that the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline.

On July 27, 2004, respondent signed a stipulation as to facts and an agreement in lieu of discipline (the ALD) pursuant to Business and Professions Code sections 6068, subdivision (1) and

6092.5, subdivision (i). The facts to which respondent and the State Bar (the parties) stipulated are those summarized in the first two paragraphs of section “B The Agreement in Lieu of Discipline (ALD) Matter (Case No. 06-O-11149),” *ante*. The ALD specified that the facts to which the parties stipulated were binding upon respondent, and that the ALD could be admitted as evidence without further foundation at any disciplinary hearing held in conjunction with respondent’s failure to comply with the conditions of the ALD. DTC Cydney Batchelor signed the ALD on behalf of the State Bar on August 3, 2005, and it became effective on that date.

Upon execution of the ALD by the parties, and pursuant to the terms of the ALD, the parties requested that the State Bar Court dismiss case No. 03-C-3442-PEM. Accordingly, the court dismissed the case on August 5, 2004. Under the terms of the ALD, it was to remain in effect for one year, from August 3, 2004 to August 2, 2005.

The ALD required that respondent was to attend the State Bar Ethics School within one year from the date of the execution of the ALD by the parties, as well as take and pass the test given at the end of the course. The ALD further required respondent to file written quarterly reports with the Probation Unit of the State Bar on or before January 10, April 10, July 10, and October 10, during the effective period of the ALD. Pursuant to the terms of the ALD, respondent was also to file a final written report, in addition to the last required quarterly report, which would cover the remaining portion of the effective period of the ALD.

On August 6, 2004, Probation Deputy Lydia Dineros of State Bar’s Office of Probation sent a letter to respondent at his official membership records address, summarizing respondent’s duties under the ALD. The letter provided respondent with the “conditions section of the ALD,” information regarding the Ethics School, and the August 3, 2005 completion/due date. The letter also notified respondent that his first quarterly written report would be due by October 10, 2004. Enclosed with the August 6, 2004 letter was a quarterly report form.

On or about April 27, 2005, Probation Deputy Dineros again wrote to respondent at his official membership records address, reminding him, among other things, that he was required to file a final written report “by August 3, 2005,” and that he was to satisfactorily complete Ethics School “no later than August 3, 2005.” The letter further informed respondent: “FAILURE TO TIMELY

FILE THE FINAL REPORT AND/OR ANY OTHER REQUIRED PROOF OF COMPLIANCE WILL RESULT IN A REFERRAL FOR REVIEW AND DETERMINATION OF FURTHER ACTION.” [Emphasis in original.]

However, respondent failed to attend Ethics School, as required by the ALD, before August 3, 2005, or at any time since. In addition, respondent did not file his quarterly and final written reports until October 6, 2005, although, by the terms of the ALD, they had been due on or before August 3, 2005.

***Count 1: Failure to Obey the Law (Bus. & Prof. Code, §6068, Subd. (a))***

Section 6068, subdivision (a), provides that it is the duty of an attorney to support the Constitution and the laws of the United States and of California. It is a conduit by which attorneys may be charged and disciplined for violations of other specific laws which are not otherwise made disciplinable under the State Bar Act, including a violation of: (1) a statute not specifically relating to the duties of attorneys; (2) a section of the State Bar Act which is not, by its terms, a disciplinable offense; and (3) an established common law doctrine which is not governed by any other statute. (See *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487.)

As a result of having pleaded nolo contendere to a criminal misdemeanor violation of Vehicle Code section 23103, respondent was placed on summary probation. Therefore, by failing to comply with California Vehicle Code 23103, respondent failed to support the laws of this state in wilful violation of Business and Professions Code section 6068, subdivision (a).<sup>2</sup>

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<sup>2</sup>The instant matter has been brought as an original (“O”) disciplinary proceeding. The court must determine whether respondent violated the laws of this state under section 6068, subdivision (a), and failed to comply with the agreement in lieu of discipline under section 6068, subdivision (l). The “other misconduct warranting discipline” standard provides a ground for levying discipline in a criminal conviction (“C”) proceeding (*In re Kelley* (1990) 52 Cal.3d 487, 494), the same as the Rules of Professional Conduct and the State Bar Act provide the grounds for the imposition of discipline in an original disciplinary proceeding. The determination of whether the conviction involves “other misconduct warranting discipline” is a legal question decided by the court. As this proceeding is not a criminal conviction (“C”) proceeding, a determination as to whether respondent’s 1999 criminal conviction involved “other misconduct warranting discipline” will not be reached. Thus, the assertion in paragraph 7 of the NDC that respondent “engaged in other misconduct warranting discipline” is without basis.

***Count 2: Failure to Comply with Agreement Made in Lieu of Disciplinary Prosecution (Bus. & Prof. Code, §6068, subd. (l))***

Section 6068, subdivision (l), provides that it is the duty of an attorney to keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.

Respondent, however, did not fulfill the terms of the ALD as he agreed to do. He failed to complete the State Bar Ethics School by August 3, 2005 (or at any time since), as required by the ALD. In addition, respondent did not timely file his quarterly and final written reports, which, under the terms of the ALD, were due on or before August 3, 2005. By failing to keep the agreement that he made in lieu of disciplinary prosecution, respondent wilfully violated section 6068, subdivision (l).

**C. The Wheeler Matter (Case No. 06-O-10557)**

On August 20, 2003, criminal charges were filed against Racheal Wheeler (Wheeler) in *People v. Wheeler*, Yuba County Court No. YCSF CRF 03-0000528 (Wheeler criminal case). On November 14, 2003, Wheeler entered a plea of not guilty to the charges.

In early December 2003, Wheeler employed respondent as replacement counsel in her criminal matter and her aunt paid respondent \$10,000 as advanced legal fees.

Respondent's default was entered by this court in State Bar Court case No. 03-C-03442-PEM on December 12, 2003, as a result of his failure to file a response to the "Notice of Hearing on Conviction."<sup>3</sup> As a result of the entry of respondent's default, the court ordered that respondent be placed on involuntary inactive enrollment pursuant to section 6007, subdivision (e). The order of involuntary inactive enrollment became effective December 17, 2003. However, there was a defect in the service of the order of entry of default. Therefore, on January 13, 2004, in its "Order Vacating Respondent's Default *Ab Initio*," the court vacated the entry of respondent's default, retroactive to December 12, 2003.

Because respondent still had not responded to the "Notice of Hearing on Conviction" and

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<sup>3</sup>Pursuant to Evidence Code section 452, the court takes judicial notice of all orders filed in State Bar Court case No. 03-C-03442-PEM.

the State Bar had properly moved for entry of respondent's default, the court again ordered the entry of respondent's default on January 14, 2004, and placed respondent on inactive status pursuant to section 6007, subdivision (e), effective January 17, 2004.

As explained in the court's January 23, 2004 "Order Re Treating Response of Matthew S. Unger as Motion for Relief from Default" in case No 03-C-03442-PEM, on January 16, 2004, two days after entry of respondent's default, the court received a facsimile transmission of a document entitled, "Response of Matthew S. Unger" (Response). The court subsequently received a copy of the Response, along with the proof of service of a copy of said Response on DTC Cydney Batchelor. Pursuant to its January 23, 2004 order, the court treated the Response both as a motion to set aside respondent's default and as a proposed response to the "Notice of Hearing on Conviction." Thereafter, by order of the court, effective February 18, 2004, respondent was ordered retransferred to active status pursuant to section 6007, subdivision (e).

On or about December 31, 2003, respondent appeared in the Wheeler criminal case, presented a business card, which identified him as an "attorney at law," and requested that the court allow him to substitute into the case as attorney of record for Wheeler. The criminal court permitted respondent to substitute into the case.

Thereafter, on or about January 5, 2004, respondent appeared in court with and on behalf of Wheeler. Respondent identified himself to Yuba County Superior Court Judge James L. Curry as counsel for Wheeler. The Yuba County District Attorney's office, however, informed Judge Curry that respondent was not entitled to practice law. The judge then cited respondent for criminal contempt, and set an order to show cause hearing for January 12, 2004, as to why respondent should not be held in contempt (OSC hearing).

On January 12, 2004, respondent appeared on behalf of Wheeler, and was removed as counsel of record by Judge Curry. Judge Curry then conducted the OSC hearing, at which respondent represented to the court that he was entitled to practice law, or words to that effect. Upon respondent's representation, the judge continued the OSC hearing until January 26, 2004, to allow respondent to provide documentary proof that he was entitled to practice law.

However, instead of appearing at the January 26, 2004 OSC hearing, respondent telephoned

the court and represented that he was receiving information from the State Bar regarding the setting aside of his default. Respondent also requested that the OSC hearing be continued for one week. Judge Curry granted respondent's request and continued the hearing until February 2, 2004.

On February 2, 2004, at the calling of the OSC hearing, respondent again failed to appear. Rather, he telephoned the court, representing that he was still collecting documents from the State Bar. Respondent requested a further continuance of the OSC hearing, which Judge Curry granted. The matter was continued to March 1, 2004. Respondent received notice of the March 1, 2004 hearing.

On March 1, 2004, respondent did not appear at the calling of the OSC hearing. Nor did he telephone or otherwise notify the court to inform it that he would not appear. The court continued the OSC hearing to March 29, 2004.

Respondent appeared at the March 29 OSC hearing and presented documents showing that he was then entitled to practice law. The OSC was set aside. Respondent then substituted into the Wheeler criminal case as counsel for Wheeler. The court set a further court date in the case for March 30, 2004, of which respondent had notice.

Respondent failed to appear in the Wheeler criminal case on March 30, 2004. Judge Curry set another OSC hearing for May 10, 2004 (second OSC hearing), as to why respondent should not be held in contempt.

Respondent appeared at the second OSC hearing, was found to be in contempt by Judge Curry, and was sanctioned \$500, to be stayed until September 15, 2004. Judge Curry ordered that if respondent had no further failures to appear and no further appearances for which he was tardy, the stay would become permanent. Judge Curry set another court date for July 26, 2004; respondent had notice of the new date.

On or about July 26, 2004, respondent again failed to appear in the Wheeler criminal case. Yuba County Superior Court Judge Kathleen O'Connor set another OSC hearing as to why respondent should not be held in contempt (the third OSC hearing) for August 9, 2004. Respondent appeared at the third OSC hearing, which was continued to August 20, 2004, to allow respondent to provide a response.

Respondent appeared at the August 20, 2004 OSC hearing, and testified under oath. Judge O'Connor found respondent to be in contempt of court for his failure to appear in court on July 26, 2004, and lifted the stay on the \$500 fine which had previously been imposed by Judge Curry. Judge O'Connor further ordered the fine to be paid by September 20, 2004. Respondent had notice of the sanctions, and of the due date, as ordered by Judge O'Connor. However, respondent failed to pay the sanctions by September 20, 2004, or at any time thereafter.

Trial in the Wheeler criminal case was scheduled to start on January 10, 2005. Prior to that date, respondent had demanded no discovery, interviewed no witnesses, and conducted no investigation. Nor did respondent file any motions, witness list or jury instructions on Wheeler's behalf. Respondent did meet with Wheeler on several occasions. However, he smoked marijuana in Wheeler's presence several times during those meetings. In addition, during the course of his representation, respondent failed to return telephone status inquiries from Wheeler on numerous occasions. Respondent earned no part of the \$10,000 that he had been paid to represent Wheeler.

From the time he was retained to represent Wheeler until the date trial was to commence, respondent had continuously told her that the prosecution's case was weak and that she should go to trial. However, on the date trial was to commence, respondent suddenly told Wheeler that she should accept a settlement offer, which would be withdrawn at the end of the day. The offer required that Wheeler agree to enter a guilty plea to one count of second degree robbery in exchange for the dismissal of a battery charge and two other robbery charges. Wheeler was not able to enter a plea that day, and the settlement offer was withdrawn.

The next day, on January 11, 2005, respondent appeared with Wheeler, who entered a guilty plea on terms less favorable to her than the settlement offer which had expired at the end of the previous day. Wheeler pled guilty to three counts of second degree robbery. After accepting Wheeler's plea, Yuba County Superior Court Judge Timothy Evans set a sentencing date of March 4, 2005. Respondent had notice of the sentencing date.

On February 15, 2005, Wheeler wrote to the State Bar to complain that respondent had not properly represented her in her criminal case.

On February 22, 2005, Wheeler wrote to respondent to terminate his legal services, and to

demand the return of her file and other documents related to her case. In her letter Wheeler stated that she received no return phone calls for weeks at a time and that respondent was unprepared for court and trial in that he filed no motions or witness list. Wheeler sent a facsimile of the letter to respondent, who received the letter. At no time did respondent refund the \$10,000 in advanced fees, or any portion thereof.

Despite his termination by Wheeler, respondent did not file a substitution in the Wheeler criminal case, or otherwise seek to be relieved by the court as counsel. Nor did respondent appear at Wheeler's March 4, 2005 sentencing. Judge Evans, therefore, removed respondent as Wheeler's counsel of record, and appointed replacement counsel, who indicated that he would file a motion to withdraw Wheeler's guilty plea on the grounds that respondent had provided ineffective legal counsel.

The motion to withdraw the guilty plea was heard on July 8, 2005. Respondent appeared and testified. Although Judge Evans denied Wheeler's motion to withdraw her guilty plea, he struck two robbery convictions in the interests of justice. The judge specifically found that respondent had provided ineffective assistance of counsel to Wheeler.

On February 3, 2006, the State Bar opened an investigation regarding respondent's representation of Wheeler. On March 27, 2006, the State Bar sent respondent a letter regarding the Wheeler complaint. The letter included a request that respondent respond in writing by April 11, 2006, to specified allegations of misconduct relating to the Wheeler complaint, which were being investigated by the State Bar. Respondent received the State Bar's letter, but did not respond until April 17, 2006, when he transmitted a letter to the State Bar by facsimile. Respondent requested an extension of time until April 24, 2006, in which to respond to the State Bar's letter. However, he failed to provide a written response to the State Bar by April 24, 2006, or at any other time.

On May 1, 2006, the State Bar sent respondent a second letter regarding the Wheeler complaint. The May 1 letter requested respondent to respond in writing on or before May 5, 2006 to specified allegations of misconduct relating to the Wheeler complaint, which were being investigated by the State Bar. Respondent received the State Bar's May 1 letter, but did not respond to it or otherwise communicate with the State Bar regarding the allegations of the Wheeler

complaint.

***Count 1: Failure to Perform Competently (Rules of Prof. Conduct, Rule 3-110(A))<sup>4</sup>***

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

The court finds the facts, as alleged in the NDC, do not demonstrate by clear and convincing evidence that respondent failed to give proper advice to his client about her plea and trial options.

However, by failing to: (1) demand discovery, interview witnesses or conduct any investigation prior to the first date of the Wheeler criminal trial; (2) file any motions, a witness list, and jury instructions on his client's behalf; and (3) appear at scheduled court hearings on March 30 and July 26, 2004,<sup>5</sup> respondent intentionally, recklessly, and repeatedly failed to perform legal services with competence in wilful violation of rule 3-110(A).

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

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

By failing to respond during the course of his representation of Wheeler to her numerous telephone calls regarding the status of her matter, respondent failed to respond to reasonable status inquiries in wilful violation of section 6068, subdivision (m).

***Count 3: Failure to Inform Client of Significant Developments (§6068, Sub. (m))***

In paragraph four of the NDC, it is erroneously alleged that respondent's suspension from the practice of law was effective December 17, 2003. As discussed, *ante*, respondent's involuntary

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<sup>4</sup>References to rule are to the current Rules of Professional Conduct, unless otherwise noted.

<sup>5</sup>Paragraph 31 of the NDC charges, among other things, that respondent failed to perform competently by failing to appear on his Wheeler's behalf at the January 12, 2004 Wheeler court hearing. However, paragraph 7 alleges that respondent appeared on behalf of Wheeler at the January 12, 2004 hearing. Thus, because of the contradictory facts alleged within the NDC, there is no clear and convincing evidence that respondent failed to perform on January 12, 2004, by failing to appear on his client's behalf.

inactive enrollment was not effective until January 17, 2004.<sup>6</sup> Thus, the State Bar's assertion that respondent failed to inform a client of a significant development in a matter in which respondent had agreed to provide legal services, by failing to inform Wheeler that he was not entitled to practice law from December 17, 2003 until January 5, 2004, is without merit, as respondent was in fact entitled to practice law during that time period.

Accordingly, as there is no clear and convincing evidence that respondent failed to inform a client of a significant development in a matter in which he had agreed to provide legal services, the court dismisses count 3 with prejudice.

***Count 4: Illegal Fee (Rule 4-200(A))***

Rule 4-200(A) states that a member "shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee."

In paragraph 40 of the NDC the State Bar asserts that "[b]y accepting a fee from Wheeler's aunt to represent Wheeler in a criminal case, when he was not entitled to practice law, respondent wilfully accepted an illegal fee." However, as discussed, *ante*, respondent's suspension from the practice of law was not effective until January 17, 2004. As alleged in the NDC, it was in early December 2003, when respondent accepted the fee to represent Wheeler. At that time, contrary to the allegation in paragraph 40, respondent was entitled to practice law.<sup>7</sup> Thus, since at the time respondent accepted the fee to represent Wheeler, he was entitled to practice law, the fee was not an illegal fee, and respondent was not in violation of rule 4-200(A) .

Accordingly, the court dismisses count 4 with prejudice.

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<sup>6</sup>The State Bar knew or should have known that respondent's suspension was effective on January 17, 2004, not December 17, 2003. A more careful review of the orders and records relevant to the allegations in the NDC was warranted.

<sup>7</sup>Even the erroneous factual allegations of the NDC would not have supported the assertion that respondent collected an illegal fee. According to the facts alleged by the State Bar, respondent's suspension did not become effective until December 17, 2003. Since it is alleged that respondent accepted the advance fees "in early December" of 2003, prior to December 17, 2003, respondent's acceptance of the fee in early December would have been legal.

***Count 5: Failure to Return Unearned Fees (Rule 3-700 (D)(2))***

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

Respondent earned no part of the \$10,000 in advanced attorney fees he had accepted to represent Wheeler, because he did not undertake any useful action in the Wheeler criminal case. When Wheeler terminated respondent's employment on February 22, 2005, respondent was obligated to promptly refund the advanced fees. By failing to refund the \$10,000 in unearned advanced fees he had received to represent Wheeler, respondent wilfully violated rule 3-700(D)(2).

***Count 6: Moral Turpitude (§6106)***

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. Moral turpitude has been defined as "an act of baseness, vileness or depravity. . . . [Citations.]" (*In re Higbie* (1972) 6 Cal.3d 562, 569.)

The factual allegations of the NDC provide that although "[respondent] met with Wheeler on several occasions, he smoked marijuana in her presence several times during those meetings." The State Bar thereafter concluded, without presenting additional facts or evidence, that by smoking marijuana in his client's presence, respondent exposed her to the possibility of criminal charges in addition to those with which she had already been charged, and thus committed an act of moral turpitude.

In reaching its conclusion as to whether a specific act constitutes moral turpitude, the court is bound to resolve all doubts in favor of the accused respondent. (*Himmel v. State Bar* (1971) 4 Cal.3d 786; *Lee v. State Bar* (1970) 2 Cal.3d 927, 939.) The court finds that the facts as alleged are insufficient to show by clear and convincing evidence that respondent's conduct involved baseness, vileness or depravity, and should be deemed conduct involving moral turpitude. Accordingly, the court dismisses count 6 with prejudice.

***Count 7: Unauthorized Practice of Law (§§ 6068, Subd. (a), 6125, and 6126)***

Section 6068, subdivision (a), provides that an attorney has a duty to support the laws of the United States and of this state. Section 6125 prohibits the practice of law by anyone other than an active attorney and section 6126 prohibits holding oneself out as entitled to practice law by anyone

other than an active attorney.

The NDC's allegation that respondent violated sections 6125 and 6126 by appearing in court on the Wheeler matter on December 31, 2003 and January 5 and 12, 2004, when he was not entitled to practice is clearly contradicted by the evidence. As set forth, *ante*, respondent's suspension from the practice of law was not effective until January 17, 2004; respondent thereafter remained on inactive status until February 18, 2004. The facts make clear that respondent was entitled to practice law on December 31, 2003, and January 5 and 12, 2004, and thus did not violate section 6125 or 6126 by his court appearances or representations to the Wheeler court on those dates.

It is also alleged in the NDC that on January 26, 2004, respondent telephoned the court in the Wheeler criminal case and represented that he was receiving information from the State Bar setting aside his default. It is further alleged that on February 2, 2004, respondent again telephoned the court and "represented that he was still collecting documents from the State Bar, or words to that effect." The State Bar contends that respondent's representations were false, and intended to mislead the court into believing that he was entitled to practice law when he was not.

Given the State Bar Court's January 23, 2004 "Order Re Treating Response of Matthew S. Unger as Motion for Relief from Default," the court's statement therein that it intended to treat respondent's Response as both a motion to set aside respondent's default and a proposed response to the Notice of Hearing on Conviction, and the court's February 18, 2004 order retransferring respondent to active status pursuant to section 6007, subdivision (e), the evidence is not clear and convincing that respondent's January 26 or February 2, 2004 statements to the Wheeler criminal court were false or were intended to mislead.

Thus, the evidence is not clear and convincing that respondent practiced law when he was not an active attorney or that he held himself out as entitled to practice law when he was not an active attorney.

Accordingly, the court dismisses count 7 with prejudice.

***Count 8: Moral Turpitude (§6106)***

As set forth in the factual findings, *ante*, as well as in the legal conclusion regarding count

7, respondent was in fact entitled to practice law on December 31, 2003 and January 5<sup>8</sup> and 12, 2004. Thus, when respondent appeared in the Wheeler case on the afore stated dates, any representation he made, directly or by implication, as to the fact that he was entitled to practice law on those dates was a true statement. As discussed in the court's legal conclusions as to count 7, and for the same reasons stated therein, the court also finds that the evidence is not clear and convincing that respondent's January 26 or February 2, 2004 statements to the Wheeler criminal court were false or were intended to mislead the court.

Accordingly, the court finds no clear and convincing evidence that respondent committed acts of dishonesty or moral turpitude, and dismisses count 8 with prejudice.

***Count 9: Misrepresentation to Tribunals (§ 6068, Subd. (d))***

Section 6068, subdivision (d), provides that an attorney must never mislead a judge in the furtherance of his representation of a client. As discussed, *ante*, the court finds that respondent was entitled to practice law on December 31, 2003, and on January 5 and 12, 2004. Thus, any representation by respondent to the Wheeler court that he was entitled to practice law on those dates was true. As set forth in counts 7 and 8, *ante*, and for the reasons stated therein, the evidence is not clear and convincing that respondent's January 26 or February 2, 2004 representations to the court were untrue or intended to mislead.

Accordingly, as there is no clear and convincing evidence that respondent wilfully violated section 6068(d) by making false statements to the court in the Wheeler case, the court dismisses count 9 with prejudice.<sup>9</sup>

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<sup>8</sup>Counts 8 and 9 state that respondent made misrepresentations to the court on January 4, 2004. Pursuant to Evidence Code section 452 (h), the court takes judicial notice of the fact that in the year 2004, January 4 fell on a Sunday. Obviously, the reference to January 4, 2004 representations made by respondent to the Wheeler court is an error. Paragraph 6 of the NDC states that respondent appeared in the Wheeler criminal case “[o]n or about January 5, 2004. . . .” Accordingly the court finds the reference to January 4, 2004 to be harmless error. The date referenced in counts 8 and 9 should be January 5, 2004, as referenced in paragraph 6, as well as paragraph 49 of the NDC.

<sup>9</sup>As all of the alleged acts of dishonesty on which count 9 is based were encompassed in count 8's charge of committing acts of moral turpitude, there is no added value in straining to find the same conduct a violation of the statute prohibiting misrepresentations to tribunals. (See,

***Count 10: Failure to Obey Court Order (§6103)***

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

By failing to pay the \$500 sanctions, which were imposed against him on August 20, 2004, by Judge O'Connor, when he had knowledge of that sanctions order, respondent wilfully disobeyed and violated the court's order in wilful violation of section 6103.

***Count 11: Failure to Cooperate with the State Bar (§6068, Subd. (i))***

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney.

By failing to provide a substantive response to the State Bar's letters or otherwise communicate with State Bar regarding the allegations of the Wheeler complaint, respondent failed to cooperate with a State Bar investigation in wilful violation of section 6068, subdivision (i).

**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).)<sup>10</sup>

However, respondent has no prior disciplinary record in 10 years of practice at the time of his misconduct in 1999, which is a mitigating factor. (Std. 1.2(e)(i).)<sup>11</sup>

**B. Aggravation**

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

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*In the Matter of Crane & DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139,153-154.)

<sup>10</sup>All further references to standards are to this source.

<sup>11</sup>Under the express terms of standard 1.2(e)(i), a long record of practice without prior discipline is mitigating only if "coupled with present misconduct which is not deemed serious." "However, standard 1.2(e)(ii) has been applied repeatedly by the Supreme Court to cases involving serious misconduct, and the limitation in the standard's language appears essentially to have been read out of it by case law. (See, e.g., *Rodgers v. State Bar*, *supra*, 48 Cal.3d 300 at p. 317; [citation].)" (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13.)

Respondent committed multiple acts of wrongdoing, including failing to obey the law; failing to comply with the agreement made in lieu of disciplinary prosecution; failing to perform competently; failing to promptly respond to a client's reasonable status inquiries; failing to return unearned fees, failing to obey a court order; and failing to cooperate with a State Bar investigation. (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed his client. (Std. 1.2(b)(iv).) Respondent caused serious financial harm by depriving Wheeler and/or her mother of the \$10,000 unearned fees. However, the court finds the State Bar's argument that respondent significantly harmed Wheeler by smoking marijuana with her and thereby exposing her to the "possibility" of additional criminal charges to be without merit. Actually, the NDC does not allege that respondent smoked marijuana "with" his client, but rather alleges that he smoked marijuana "in her presence." More significantly, the language of Standard 1.2(b)(iv) is clear; misconduct is aggravating when it results in significant harm to a client, not when it raises the specter of "possible harm."

The State Bar next asserts in its brief on culpability that respondent caused Wheeler to receive a harsher sentence than she otherwise would have by failing to advise her to accept a plea offer in a timely manner. However, the NDC is totally devoid of facts as to why Wheeler could or would not accept the January 10, 2005 plea offer. First, it is not alleged that the prosecutor communicated the plea offer to respondent prior to January 10, 2005. Thus, it is not clear that respondent could have informed his client of the plea offer prior to that date and/or that he delayed in informing his client of the plea offer. The only facts relevant to the plea offer which are alleged in the NDC are that on January 10, 2005, respondent told Wheeler that she should accept a settlement offer which would be withdrawn at the end of the day. The NDC thereafter states, "Wheeler was not able to enter a plea that day, and the settlement offer was withdrawn." No evidence is presented to explain why Wheeler was "unable" to accept the January 10 plea offer. Thus, the evidence is not clear and convincing that respondent's conduct was the cause of Wheeler's failure to timely accept the January 10 plea offer, and of the harsher sentence she received as a result of that failure.

Respondent demonstrated indifference toward rectification of or atonement for the

consequences of his misconduct. (Std. 1.2(b)(v).) He has yet to refund any portion of the unearned fees.

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

## **V. Discussion**

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

Respondent's misconduct in two matters included failure to comply with California law, failure to comply with an agreement made in lieu of disciplinary prosecution, failure to perform competently, failure to respond to a client's reasonable status inquiries, failure to return unearned fees, failure to obey a court order and failure to cooperate with the State Bar. The standards provide a broad range of sanctions ranging from suspension to disbarment, depending upon the gravity of the offenses and the harm to the victim. (Stds. 1.6, 2.4, 2.6, and 2.10.) While the standards are not binding, they are entitled to great weight. (*In re Silvertan* (2005) 36 Cal.4th 81, 92.)

In its brief on culpability the State Bar urges two years actual suspension, based on the premise that respondent would be found culpable of all 13 acts of misconduct with which he is charged in the NDCs. In support of its recommended discipline, the State Bar made reference to the standards, but failed to cite any case law in support of its recommendation.

The court, however, has found respondent culpable of 7 of the 13 alleged counts of misconduct. In addition to considering the standards in its determination of the appropriate discipline to be imposed in this disciplinary proceeding, the court finds the case law, discussed *post*, to be instructive.

In *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, the attorney was given a one-year stayed suspension and three-year probation, including 45 days actual suspension and restitution of \$3,000, for his misconduct in a single client matter. The attorney was culpable of failure to perform services competently, improper withdrawal from employment while

the client was incarcerated, failure to render an accounting of unearned fees, and failure to return unearned fees. The attorney had no prior record of discipline in 20 years. But, in aggravation the attorney was found to have caused significant harm to his client by leaving her stranded in jail and was found to have been very uncooperative during the disciplinary process.

In *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, the attorney, who had no prior record of discipline in 12 years of practice, was actually suspended for 60 days for misconduct in a single client matter. The attorney failed to communicate with his client and failed to perform competently. He also improperly held himself out as entitled to practice law and engaged in an act of moral turpitude by misleading his client into believing he was still working on her case while he was on suspension for not paying his State Bar dues. He defaulted in the disciplinary proceedings as well.

In *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831, involved two client matters. The attorney was found culpable of two serious instances of reckless failure to perform legal services, improper withdrawal from employment in one matter, failure to communicate, failure to maintain the respect due to the courts, failure to obey a court order, failure to return a client file, and failure to cooperate with State Bar investigations. The court determined that the attorney's misconduct warranted a discipline recommendation of 18-months stayed suspension, two years of probation, and a 90-day actual suspension. The attorney had defaulted in the disciplinary proceedings.

In *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, the attorney failed to respond to his client's reasonable status inquiries, to provide competent legal services for an incarcerated client, to turn over the client's file promptly on demand, and to refund promptly unearned fees. Focusing upon the attorney's reckless and protracted failure to perform legal services for an incarcerated client and his failure to return any of the \$7,000 unearned fees, the review department recommended a two-year stayed suspension, a two-year probation, and a six-month actual suspension.

Here, respondent's misconduct is similar to that of the attorney in *Nees*. Like the *Nees* attorney, respondent failed to provide competent legal services to one client and failed to respond

to his client's reasonable status inquiries. Respondent failed to return any of the \$10,000 unearned fees he received, much like the *Nees* attorney, who failed to return the \$7,000 unearned fees he received.

In light of the foregoing case law, the State Bar's recommendation of two-years' actual suspension in a single client matter is excessive. Although the State Bar's recommendation of two years' actual suspension is too harsh, respondent's misconduct, as well as the aggravating circumstances surrounding his misconduct weigh heavily in assessing the appropriate level of discipline. The court is particularly troubled by the fact that respondent permitted his default to be entered.

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

In view of respondent's misconduct, the case law and the aggravating evidence, placing respondent on actual suspension for six months would be appropriate to protect the public and to preserve public confidence in the profession.

## **VI. Recommended Discipline**

Accordingly, the court hereby recommends that respondent **Matthew S. Unger** be suspended from the practice of law for one year, that said suspension be stayed, and that respondent be actually suspended from the practice of law for six months and until he files and the State Bar Court grants a motion to terminate his actual suspension. (Rules Proc. of State Bar, rule 205).

It is also recommended that respondent be ordered to comply with any probation conditions hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension, including restitution.<sup>12</sup> (Rules Proc. of State Bar, rule 205(g).)

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<sup>12</sup>A probation condition in this matter will be that: (1) respondent makes restitution to Racheal Wheeler in the amount of \$10,000 from February 22, 2005 (or to the Client Security Fund, to the extent of any payment from the fund to Racheal Wheeler), as it has long been held

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

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

It is also recommended that the Supreme Court order respondent to comply with rule 9.20 (formerly numbered as rule 955), paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter. Wilful failure to comply with the provisions of rule 9.20 may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.<sup>13</sup>

#### **VII. Costs**

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: March 26, 2007

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PAT McELROY  
Judge of the State Bar Court

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that “[r]estitution is fundamental to the goal of rehabilitation;” and (2) respondent pays \$500 in sanctions to the Yuba County Superior Court from September 20, 2004.

<sup>13</sup>Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (See, *Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)