

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case Nos.: 07-O-13099, 09-O-19313-DFM
	)	
<b>ANDREW M. ZANGER,</b>	)	<b>DECISION INCLUDING DISBARMENT</b>
	)	<b>RECOMMENDATION AND</b>
<b>Member No. 73268,</b>	)	<b>INVOLUNTARY INACTIVE</b>
	)	<b>ENROLLMENT ORDER</b>
<u>A Member of the State Bar.</u>	)	

INTRODUCTION

In this default disciplinary matter<sup>1</sup>, respondent **Andrew M. Zanger** (Respondent) is charged with multiple acts of professional misconduct in two client matters, including (1) failing to perform competently (two counts); (2) failing to communicate with clients (two counts); (3) making a misrepresentation to a client; (4) failing to obey a court order; (5) improperly withdrawing from employment; and (6) failing to cooperate with a State Bar disciplinary investigation.

The court finds that Respondent is culpable of the alleged misconduct. In view of Respondent's serious misconduct and the evidence in aggravation, particularly his three prior records of discipline and his failure to participate in this disciplinary proceeding, the court recommends that Respondent be disbarred from the practice of law.

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<sup>1</sup> The *new* Rules of Procedure of the State Bar effective January 1, 2011, are not applicable to this proceeding because the court has determined that injustice would otherwise result. Instead, the *former* Rules of Procedure of the State Bar continue to govern the proceeding in the hearing department. (See Rules Proc. of State Bar (eff. Jan. 1, 2011), Preface, item 3.) Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

## **PERTINENT PROCEDURAL HISTORY**

On November 17, 2010, the State Bar of California, Office of the Chief Trial Counsel (State Bar), filed and properly served on Respondent a Notice of Disciplinary Charges (NDC).<sup>2</sup> Five days later, Respondent filed his resignation with charges pending. As a result, the court abated this matter on January 27, 2011.

On August 17, 2011, the California Supreme Court declined to accept Respondent's voluntary resignation and ordered this disciplinary matter to proceed promptly. Accordingly, this matter was unabated on September 26, 2011. Respondent then failed to participate in the action, including both failing to file a response to the NDC or failing to appear at a properly noticed September 26, 2011 status conference. On October 4, 2011, the State Bar filed a motion for entry of default in the case. When Respondent failed to file an opposition to that motion, the court entered his default on October 21, 2011. In addition, Respondent was enrolled as an inactive member effective October 24, 2011. The matter was submitted on November 4, 2011, following the filing of State Bar's brief on culpability and discipline.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

### **Jurisdiction**

Respondent was admitted to the practice of law in California on December 22, 1976, and has been a member of the State Bar of California at all times since that date.

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<sup>2</sup> The court finds Respondent was properly served with a copy of the NDC and that all due process requirements have been adequately satisfied. (See *Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.)

**Case No. 07-O-13099 [Reyes]**

Gerardo Reyes ("Reyes") and Nancy Hanover-Reyes ("Hanover-Reyes") (collectively referred to as "Reyeses") decided to purchase a 37-foot long modular unit as an addition to the back of their home.

In May 2004, the Reyeses entered into a contract with Construction Resource Group (CRG), a manufacturer of a pre-fabricated "modular unit" to extend their home.

On January 18, 2005, the Reyeses entered into a written agreement ("contract") with M3 Construction Services ("M3 Services") for the installation of the "modular unit." Under the contract, M3 Services would act as contractor, providing labor, equipment, services and material as necessary for the work of improvement on the subject property according to CRG's specifications.

In July 2005, the Reyeses and M3 Services entered into an additional agreement to remodel their kitchen and for other improvements to the property.

A construction dispute arose and M3 alleged that the Reyeses owed a total of \$8,072.87. The Reyeses contended that they only owed \$4,037.

On December 1, 2005, M3 Services filed a mechanics lien against property owned by the Reyeses.

On December 12, 2005, the Reyeses faxed Respondent copies of documents they received from M3 Services.

On December 13, 2005, the Reyeses formally employed Respondent to represent them in the ongoing contract dispute with M3 Services.

On December 14, 2005, the Reyeses sent Respondent a letter, asking him to give them his thoughts on the problems they were having with M3 Services. They also asked about his thoughts regarding the fax they sent to him a couple of days earlier. Respondent received the letter but did not respond.

On December 27, 2005, the Reyeses met with Respondent regarding the lien filed against their property.

In January 2006, Respondent spoke with attorney Mary Jones ("Jones"), attorney for M3 Services, regarding payment for outstanding invoices.

On January 17, 2006, the Reyeses faxed Respondent a letter regarding the amount they believed they owed M3 Services. In the letter they authorized Respondent to tender a settlement offer to M3 Services.

In February 2006, Jones called Reyes about the contract dispute, and he referred her to Respondent as his attorney.

Between January 2006 and February 28, 2006, Jones and Respondent exchanged telephone messages. In one telephone discussion, Respondent asked Jones for a copy of the contract and related documents so that he could review them. They discussed the possibility of submitting the matter to arbitration, and they agreed to talk again once Respondent had an opportunity to review the documents and meet with the Reyeses.

On February 16, 2006, Jones sent Respondent information about the work performed on the Reyeses home. In the letter, Jones reminded Respondent of the time constraints that required M3 Services to proceed in filing the complaint and foreclosure proceeding if the parties could not resolve the matter. Jones informed Respondent that if they did not have an agreement by February 23, 2006, she would file the civil complaint. Respondent received the documents but failed to follow up with Jones regarding the contract dispute.

On February 16, 2006, Hanover-Reyes called Respondent regarding the status of the case. Respondent told Hanover-Reyes that he was in negotiation with Jones and was waiting for Jones to send him information.

On February 28, 2006, M3 Services filed a complaint against Reyes and Hanover-

Reyes in the Los Angeles County Superior Court entitled, *Lauryn S. Burnett, d.b.a. M3 Construction v. Gerardo Reyes and Nancy Hanover Reyes*, case number BC348140 ("the breach of contract action") for breach of contract.

On March 8, 2006, the court served Notice of a Case Management Conference set for June 5, 2006.

On March 30, 2006, Hanover-Reyes sent a letter to Respondent via fax asking Respondent to present their settlement offer to the attorney for M3 Services.

On April 3, 2006, M3 Services served Hanover-Reyes with a summons and complaint. After receiving the summons and complaint, Hanover-Reyes called Respondent. Hanover-Reyes faxed Respondent the paperwork.

On April 8, 2006, Hanover-Reyes faxed Respondent a letter, inquiring about filing a response to the summons and complaint from M3 Services. Respondent received the letter.

On April 30, 2006, Jones personally served Reyes with the summons and complaint.

On May 15, 2006, the default of Hanover-Reyes was entered by the court.

On May 30, 2006, Jones served the Reyeses with a Case Management Statement for a Case Management Conference set for June 5, 2006.

On May 31, 2006, the Reyeses faxed Respondent a copy of the Case Management Statement. Respondent received the fax.

On June 5, 2006, the default of Reyes was entered by the court. Jones mailed a copy of the default to Reyes.

On September 22, 2006, M3 Services filed a Request for Court Judgment on the Request for Entry of Default.

On October 4, 2006, the Reyeses faxed Respondent a 46-page document which included the Request for Court Judgment on the Request for Entry of Default. Respondent received the fax.

On January 3, 2007, the Reyeses sent Respondent a letter regarding the status of the case. In the January 3, 2007, letter the Reyeses inquired how much it would cost to settle with M3 Services, Respondent's fee, and the status of their case. Respondent received the letter.

On April 3, 2007, the court entered a Notice of Entry of Default Judgment against the Reyeses in the amount of \$54,396.48, and served the Reyeses. Jones served the Reyeses with the judgment.

On April 12, 2007, the Reyeses received the judgment.

On April 12, 2007, the Reyeses sent a letter to Respondent inquiring as to why they owed the judgment, and reminded Respondent that he had asserted that he had been negotiating with the opposing party, and that they had attempted to contact Respondent on numerous occasions. Respondent received the letter.

In April 2007, the Reyeses employed attorney David Jones Morris ("Morris") to represent them in their breach of contract action.

On April 25, 2007, Morris spoke to Respondent regarding the Reyeses matter and asked him to submit an attorney affidavit to support the relief from judgment and the default motion.

On April 27, 2007, Morris sent Respondent a letter as a follow-up to their phone conversation. In the letter, Morris outlined his intent to have the default judgment set aside and represent the Reyeses in their dispute with M3 Services. He also reiterated the need for the attorney affidavit to support the motion.

On May 2, 2007, Morris sent Respondent another letter regarding the need for an attorney affidavit of fault to support the motion to set aside the judgment. Respondent received the letter.

On May 9, 2007, Morris sent Respondent another letter regarding the need for an attorney affidavit of fault to support the motion to set aside the judgment. Respondent received the letter.

On May 10, 2007, Morris filed a motion to set aside judgment and default. Plaintiff M3 Services filed an opposition to the motion.

On June 19, 2007, the Court held an evidentiary hearing on the motion to set aside the judgment.

On June 29, 2007, the trial court granted the motion to set aside the default judgment based on equitable mistake that the Reyeses believed Respondent was representing them in this matter. This was upheld on appeal.

**Count 1 - Rule 3-110(A) [Failure to Perform Legal Services with Competence]**

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

By not responding to the Reyeses' inquiries, communicate with defense counsel, or perform legal services of value, Respondent intentionally, recklessly, and repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).

**Count 2 – Section 6068, subd. (m) [Failure to Communicate]**

Section 6068, subdivision (m), provides that an attorney has a duty to promptly respond 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 allowing the default to be entered against the Reyeses, Respondent failed to keep a client reasonably informed of significant developments in a matter in which Respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

**Count 3 - Section 6106 [Moral Turpitude]**

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

By falsely representing to the Reyeses that he was in negotiation with counsel for M3 Services to settle the matter prior to the entry of the default judgment, Respondent engaged in an act or acts of moral turpitude, dishonesty or corruption in willful violation of section 6106.

**Case No. 09-O-19313 [Wilson]**

On November 7, 2007, Fabiane and Ethan Wilson ("the Wilsons") employed Respondent to represent them in a lawsuit against their landlord, Lisa Bassis ("Bassis").

On November 7, 2007, Respondent wrote a letter to Bassis regarding the lease agreement between Bassis and the Wilsons. The Wilsons paid Respondent \$200 for writing the letter.

On March 26, 2008, Respondent filed a complaint for damages against Bassis in Los Angeles County Superior Court on behalf of the Wilsons.

Respondent and the Wilsons did not have a written retainer agreement. Respondent told the Wilsons that he would be paid on a contingency fee basis but it was not reduced to writing.

On September 2, 2008, Larry Backman ("Backman"), counsel for Bassis, filed a motion to dismiss the Wilsons' suit for lack of jurisdiction because the lease agreement required the parties to mediate any dispute or claim arising before resorting to court action.

On September 19, 2008, Respondent filed an opposition to the motion to dismiss. On September 22, 2008, Bassis filed a reply in support of the motion to dismiss.

On October 15, 2008, the Court granted the motion to dismiss, in part. The Court stayed the action and referred the case to mediation to be completed by January 13, 2009. Each counsel was responsible for selecting a mediator by November 14, 2008. The court set an order to show cause hearing for January 22, 2009, regarding compliance with the mediation order.

On November 21, 2008, Backman sent Respondent a letter recommending a mediator. Respondent received the letter but did not respond.

On December 11, 2008, Backman sent a second letter to Respondent. In the letter Backman referenced his November 21, 2008 letter and requested a response. Respondent received the letter but did not respond.

Respondent effectively terminated his representation of the Wilsons by abandoning this case on December 29, 2008.

On December 29, 2008, Backman sent a third letter to Respondent regarding selection of a mediator. In the letter, Backman referenced his earlier letters to Respondent and requested a mutual release wherein both sides would bear their own costs contingent on the Wilsons' dismissing their case with prejudice. Respondent received the letter but did not respond.

On January 16, 2009, Backman filed another motion to dismiss for Respondent's failure to mediate the matter. On January 22, 2009, after a hearing regarding the Wilsons' non-compliance with the prior mediation order, the court dismissed the Wilsons' action.

The Wilsons then complained about Respondent to the State Bar. On January 29, 2010, a State Bar investigator sent a letter of investigation to Respondent. In the January letter, Respondent was requested to provide a written response to the Wilsons' allegations by February 12, 2010. Respondent received the letter but did not respond.

On March 3, 2010, a State Bar investigator sent a second letter regarding the investigation. Respondent received the letter but again did not respond.

**Count 4 - Rule 3-110(A) [Failure to Perform Legal Services with Competence]**

By failing to comply with a court order to mediate and communicate with the Wilsons and opposing counsel Backman, Respondent intentionally, recklessly, and repeatedly failed to perform legal services with competence in violation of rule 3-110(A).

**Count 5 - Rule 3-700(A)(2) [Improper Withdrawal from Employment]**

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

By abandoning his representation of the Wilsons and by not formally withdrawing, Respondent failed, upon termination of employment, to take reasonable steps to avoid reasonably foreseeable prejudice to his clients in willful violation of rule 3-700(A)(2).

**Count 6 - Section 6103 [Failure to Obey a Court Order]**

Section 6103 provides, in pertinent part, that a willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which an attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment.

By not selecting a mediator by November 14, 2008, and completing mediation by January 13, 2009, Respondent willfully failed to comply with a court order in violation of section 6103.

**Count 7 - Section 6068, subd. (m) [Failure to Communicate]**

By not responding to the Wilsons' emails regarding the status of the case and Backman's letters regarding mediation, Respondent failed to communicate in willful violation of section 6068, subdivision (m).

**Count 8 - Section 6068, subd. (i) [Failure to Cooperate]**

Section 6068, subdivision (i), provides that an attorney has a duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney.

By not responding to the January 29 and March 3, 2010 letters from the State Bar, Respondent willfully failed to cooperate with the State Bar investigation in violation of section 6068, subdivision (i).

**Aggravation**

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof.

Misconduct, std. 1.2(b).)<sup>3</sup> The court finds the following with respect to alleged aggravating factors.

**Prior Record of Discipline (Std. 1.2(b)(i))**

Respondent has been disciplined on three prior occasions, as set forth below. This record of prior discipline is an extremely serious aggravating circumstance. (Std. 1.2(b)(i).)

By order filed September 2, 1992, Respondent was suspended for three years, execution stayed, and he was placed on probation for three years on conditions, including six months' actual suspension. The misconduct in this first case involved nine client matters and included failing to communicate with clients (nine counts), failing to perform legal services competently (eight counts), improperly withdrawing from employment (two counts), and failing to provide an accounting to his client (one count). (Supreme Court case No. S027308; State Bar Court Case No. 88-O-14348.)

In his second discipline case, by order filed December 22, 1994, Respondent was suspended for one year, execution stayed, and he was placed on probation for four years on conditions, including 30 days' actual suspension. His misconduct involved two client matters and included failing to communicate with clients (two counts), failing to perform legal services competently (two counts), improperly withdrawing from employment (two counts), failing to return a client's file (one count), and failing to cooperate with the State Bar in its investigation (two counts). (Supreme Court case No. S042669; State Bar Court Case No. 92-O-14999.)

In his third discipline case, by order filed January 12, 2004, Respondent was suspended for two years, execution stayed, and he was placed on probation for two years on conditions, including 75 days' actual suspension. The misconduct involved one client matter and included failing to perform legal services competently, failing to provide an accounting of client funds to his client, failing to return an unearned fee, and failing to cooperate with the State Bar in the

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<sup>3</sup> All further references to standard(s) or std. are to this source.

investigation of the misconduct. (Supreme Court case No. S119944; State Bar Court Case No. 02-O-12290.)

### **Multiple Acts of Misconduct**

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).) He failed to perform services competently, failed to communicate with clients, misrepresented the status of the case to clients, improperly withdrew from employment, disobeyed a court order and failed to cooperate with the State Bar's disciplinary investigation.

### **Significant Harm**

Respondent's misconduct significantly harmed his clients. (Std. 1.2(b)(iv).) His failure to perform services in the Reyeses matter resulted in a default judgment of \$54,396 against his clients. Because of his failure to perform in the Wilsons matter, their case was dismissed.

### **Lack of Participation in Disciplinary Proceeding**

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

### **Mitigation**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) No mitigating factors were shown by the evidence presented to this court.

## **DISCUSSION**

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are

not binding, they are to be afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” (*In re Silvertown* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.) We determine the appropriate discipline in light of all relevant circumstances, including aggravation and mitigation. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

Standards 2.3, 2.4, 2.6, and 2.10 apply in this matter. Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for Respondent's misconduct is found in standard 1.7(b) which provides that, if an attorney has two prior records of discipline, the degree of discipline in the current proceeding must be disbarment unless the most compelling mitigating circumstances clearly predominate. In addition, Standard 2.3 provides that culpability of an act of moral turpitude, fraud or intentional dishonesty, or of concealment of a material fact, must result in actual suspension or disbarment depending upon the degree of harm to the victim, the magnitude of the misconduct, and the extent to which it relates to the member's practice of law.

The State Bar urges disbarment. The court agrees. In recommending discipline, the “paramount concern is protection of the public, the courts and the integrity of the legal profession.” (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) The court is seriously concerned that Respondent will continue to harm his clients by repeated acts of misconduct if discipline less than disbarment is ordered. Three prior impositions of discipline did not serve to prevent the most recent multiple instances of misconduct. Worse, he has now apparently concluded that he need not even participate in the disciplinary process. Under such circumstances there is absolutely no reason to deviate from the disbarment recommendation of standard 1.7(b) and every reason to follow that recommendation.

### **RECOMMENDED DISCIPLINE**

#### **Disbarment**

It is recommended that respondent **Andrew M. Zanger**, State Bar Number **73268**, be disbarred from the practice of law in California and that Respondent’s name be stricken from the roll of attorneys.

#### **California Rules of Court, Rule 9.20**

It is further recommended that Respondent comply with 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 calendar days, respectively, after the effective date of this order.

#### **Costs**

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. Respondent must also reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds, and such payment is enforceable as provided under Business and Professions Code section 6140.5.

**ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **Andrew M. Zanger**, State Bar Number **73268**, be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 5.111(d)(1).)<sup>4</sup>

Dated: December \_\_\_\_\_, 2011

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DONALD F. MILES  
Judge of the State Bar Court

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<sup>4</sup> An inactive member of the State Bar of California cannot lawfully practice law in this state. (Bus. & Prof. Code, § 6126, subd. (b); see also Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to practice of law, or to even hold himself or herself out as entitled to practice law. (*Ibid.*) Moreover, an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Ibid.*; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)