

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No. 07-O-13891-DFM (07-O-14911;
)	08-O-10877; 08-O-13771)
JEFFREY S. MINTZ)	
)	DECISION
Member No. 113467,)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this default matter, respondent Jeffrey S. Mintz is charged with 18 counts of professional misconduct. The court finds, by clear and convincing evidence, that respondent is culpable of 16 of the charged acts of misconduct.¹

The court recommends, inter alia, that respondent be suspended for five years, stayed, and that he be actually suspended from the practice of law for a minimum of two years and until: (1) he has shown proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct; and (2) the court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California.

II. Pertinent Procedural History

The Notice of Disciplinary Charges (NDC) was filed on December 11, 2008, and was properly served on respondent on that same date at his official membership records address

¹ The State Bar's motion to dismiss counts eight and nine is hereby granted.

(official address), by certified mail, return receipt requested, as provided in Business and Professions Code section 6002.1, subdivision (c).² Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The State Bar received from the U.S. Postal Service the certified mailing return receipt which contained respondent's printed name and signature. (Declaration of Supervising Trial Counsel Joseph R. Carlucci, attached to the State Bar's motion for the entry of respondent's default filed on January 12, 2009.)

On December 18, 2008, a Notice of Assignment and Notice of Initial Status Conference was filed in this matter, setting an in person status conference for January 26, 2009. A copy of said notice was properly served on respondent by first-class mail, postage fully prepaid, on December 18, 2008, addressed to respondent at his official address. The notice was not subsequently returned to the State Bar Court as undeliverable or for any other reason.

Respondent did not file a responsive pleading to the NDC. On January 12, 2009, the State Bar filed a motion for entry of default. The motion was properly served on respondent at his official address by certified mail, return receipt requested.³ The motion advised respondent that the State Bar would seek, at a minimum, discipline including a two-year actual suspension if he was found culpable of the alleged misconduct. Respondent did not file a response to the motion for entry of default.

On February 4, 2009, the court entered respondent's default and enrolled him inactive effective three days after service of the order. The order was filed and properly served on respondent at his official address on that same date by certified mail, return receipt requested.

² All further references to section(s) are to the Business and Professions Code, unless otherwise stated.

³ Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of respondent's official membership address history.

The State Bar Court received from the U.S. Postal Service the certified mailing return receipt which contained respondent's printed name and purported signature.

The State Bar's and the court's efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220 [126 S.Ct. 1708, 164 L.Ed.2d 415].)

The court took this matter under submission on February 24, 2009, following the filing of the State Bar's brief on culpability and discipline which requested waiver of a hearing in this matter.

III. Findings of Fact and Conclusions of Law

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

Jurisdiction

Respondent was admitted to the practice of law in California on June 13, 1984, and has been a member of the State Bar of California at all times since that date.

The Kimberly Stephens Matter [Case No. 07-O-13891]

In or about January 2003, Kimberly Stephens (Kimberly) consulted by mail with respondent about possibly employing respondent to pursue a challenge to her criminal conviction and resulting life sentence. At that time, Kimberly provided respondent with a copy of the trial transcripts from her criminal case.

On or about February 6, 2003, respondent sent a letter to Kimberly in prison. In his letter, respondent informed Kimberly that upon his receipt of payment of \$2,500, he would

review Kimberly's case and thereafter advise her of the possibilities for relief, and provide a further estimate of fees for preparing and filing the appropriate paperwork with the court.

On or about March 4, 2003, Kimberly paid respondent \$2,500.

On or about March 24, 2003, respondent sent Kimberly a letter in which he acknowledged that he received the \$2,500 payment and would begin reviewing the materials she provided to him.

On or about September 23, 2004, respondent sent Kimberly a letter in which he advised Kimberly that she might be successful in a petition for writ of habeas corpus based upon ineffective assistance of counsel at trial. Respondent also stated that upon his receipt of an additional \$2,500 from Kimberly, he would prepare the petition and file it with the superior court within 90 days of his being paid. Respondent also stated that if the petition was unsuccessful, he would then file a petition in the court of appeal within 30 days of the petition's denial and his receipt of an additional \$2,500 payment by Kimberly. Respondent ended his letter by asking Kimberly to sign the letter where indicated at the bottom to confirm her agreement to these terms and return the letter to respondent.

On or about August 24, 2005, Kimberly signed respondent's September 23, 2004 letter and returned it respondent.

On or about August 31, 2005, Kimberly paid respondent \$1,000. Sometime between on or about August 31, 2005 and on or about November 18, 2005, Kimberly's mother, Linda Stephens, paid respondent \$1,500.

On or about November 18, 2005, respondent sent a letter to Kimberly confirming his receipt of payment from Kimberly and Kimberly's mother. Respondent also stated that he would begin work on Kimberly's petition for writ of habeas corpus.

By on or before November 4, 2007, Kimberly had not received any communication from respondent regarding the status of her petition for writ of habeas corpus. Sometime on or before November 4, 2007, Kimberly sought the help of Error Juris Docet, a legal aid entity, in communicating with respondent regarding the status of her petition.

On or about November 4, 2007, Howard L. Johnson (Johnson), a staff paralegal for Error Juris Docet, sent a letter via facsimile to respondent on behalf of Kimberly requesting that respondent provide him the status of Kimberly's case. Respondent received the letter.

On or about December 25, 2007, Johnson sent a letter to respondent via certified mail to respondent. Enclosed with his letter, Johnson provided respondent with a copy of a limited power of attorney executed by Kimberly authorizing Johnson to act on her behalf. In his letter, Johnson again requested that respondent provide him with the status of Kimberly's case. Respondent received the letter.

On or about February 12, 2008, Kimberly's mother, Linda Stephens, sent a letter to respondent on behalf of Kimberly in which she requested that respondent refund to Kimberly the \$5,000 paid to him and return Kimberly's trial transcripts to her. Respondent received the letter.

At no time did respondent return Kimberly's trial transcripts to Kimberly or Kimberly's mother; nor did respondent communicate with Kimberly or Kimberly's mother regarding how they could obtain the transcripts from him.

Respondent did not respond in any manner to either of Johnson's letters; nor did he otherwise communicate with Johnson or Kimberly regarding the status of her case.

At no time did respondent prepare and file the petition for writ of habeas corpus on behalf of Kimberly, nor did he perform any legal service of value for Kimberly.

By failing to perform any legal services of value on behalf of Kimberly after November 18, 2005, respondent constructively withdrew from his employment with Kimberly as of that

date. Respondent did not inform Kimberly of his intent to withdraw from representation or take any other steps to avoid reasonably foreseeable prejudice to Kimberly.

Respondent did not earn any portion of the \$5,000 Kimberly and Kimberly's mother paid him between on or about March 4, 2003 and on or about November 18, 2005 to prepare and file the petition for writ of habeas corpus. At no time did respondent refund any portion of the \$5,000 paid to him by Kimberly and Kimberly's mother.

On or about October 1, 2007, the State Bar opened an investigation, case no. 07-O-13891, pursuant to a complaint filed by Kimberly Stephens (Stephens complaint).

On or about October 24, 2007, a State Bar investigator wrote to respondent regarding the Stephens complaint. The October 24, 2007 letter was placed in a sealed envelope addressed to respondent at his State Bar of California Membership Records address. The letter was mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business on or about the date on the letter. The United States Postal Service did not return the investigator's letter as undeliverable or for any other reason. Respondent received the letter.

The State Bar investigator's October 24, 2007 letter requested that respondent respond in writing by November 7, 2007 to specified allegations of misconduct being investigated by the State Bar in the Stephens complaint.

Respondent did not respond in any manner by November 7, 2007 to the investigator's October 24, 2007 letter.

On or about November 9, 2007, the State Bar investigator wrote to respondent regarding his failure to respond to the investigator's October 24, 2007 letter. The November 9, 2007 letter was placed in a sealed envelope addressed to respondent at his State Bar of California Membership Records address. The letter was mailed by first class mail, postage prepaid, by

depositing for collection by the United States Postal Service in the ordinary course of business on or about the date on the letter. The United States Postal Service did not return the investigator's letter as undeliverable or for any other reason. Respondent received the letter.

The State Bar investigator's November 9, 2007 letter enclosed a copy of the October 24, 2007 letter and requested that respondent respond in writing by November 26, 2007 to specified allegations of misconduct being investigated by the State Bar in the Stephens complaint.

Respondent did not respond in any manner by November 26, 2007 to the investigator's November 9, 2007 letter.

On or about February 29, 2008, respondent called the State Bar investigator and requested an extension to March 10, 2008 to respond in writing to the allegations of misconduct in the Stephens complaint. The State Bar investigator granted respondent the extension.

On or about March 11, 2008, the State Bar investigator called respondent at his State Bar of California Membership Records telephone number. The State Bar investigator left respondent a voice mail message regarding his failure to provide a written response to the allegations in the Stephens complaint and requested that respondent call the investigator.

At no time did respondent provide a response in writing to the allegations in the Stephens complaint or otherwise communicate with the State Bar investigator after requesting an extension on February 29, 2008.

Count 1: *Failure to Perform with Competence* [Rules of Professional Conduct, Rule 3-110(A)]⁴

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence. By failing to prepare and file a petition for writ of habeas corpus on behalf of Kimberly or perform any legal services of value on behalf of

⁴ All further references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

Kimberly, 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 Client Inquiries* [Section 6068, subd. (m)]

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

By failing to respond to Johnson's November 4, 2007 and December 25, 2007 letters sent on behalf of Kimberly, respondent failed to respond to a client's reasonable status inquiries, in wilful violation of section 6068, subdivision (m).

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

Rule 3-700(A)(2) provides that an attorney may not withdraw from employment until taking reasonable steps to avoid foreseeable prejudice to the client's rights.

By failing, upon termination of employment, to inform Kimberly of his intent to withdraw from employment and by failing to take reasonable steps to avoid foreseeable prejudice to his client's rights, respondent improperly withdrew from employment in wilful violation of rule 3-700(A)(2).⁵

Count 4: *Failure to Release File* [Rule 3-700(D)(1)]

Rule 3-700(D)(1) states that a member whose employment has terminated shall promptly release to the client, at the request of the client, all the client papers and property. By not releasing the trial transcripts to Kimberly or Kimberly's mother, respondent failed, upon

⁵ Because of the close relationship and/or duplication of the facts underlying this count and those underlying Count One, the court declines to give any additional weight to this latter finding of misconduct in assessing the appropriate discipline to recommend.

termination of employment, to release promptly to a client, at the request of the client, all client papers, in wilful violation of rule 3-700(D)(1).

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

Rule 3-700(D)(2) requires an attorney whose employment has been terminated to promptly refund any part of a fee paid in advance that has not been earned. By not refunding to Kimberly and/or Kimberly's mother any portion of the \$5,000, which he had not earned, respondent failed to refund unearned fees in wilful violation of rule 3-700(D)(2).

Count 6: *Failure to Cooperate with State Bar Investigation* [Section 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.

Respondent failed to cooperate in a disciplinary investigation, in wilful violation of section 6068, subdivision (i), by failing to provide a response to any of the State Bar investigator's letters or to the allegations of the Stephens complaint.

The Michael Darrow Matter [Case No. 07-O-14911]

In or about 1999, Michael Darrow (Darrow), a private investigator, was convicted of voluntary manslaughter for shooting to death a man Darrow was hired to follow. Darrow was sentenced to 11 years in prison. One component of Darrow's defense at trial was his claim that he acted in self-defense because, at the time of the shooting, the victim was under the influence of and exhibiting the effects of cocaethylene, a powerful combination of alcohol and cocaine, that often leads to uncontrolled aggressive and bizarre behavior by those under its influence.

In or about 2000, Darrow consulted with respondent regarding potential challenges to his conviction that may be available to Darrow. Between in or about 2000 and in or about December 2003, Darrow paid respondent approximately \$20,000 to file, prepare, and litigate a federal petition for writ of habeas corpus.

On or about December 15, 2003, respondent filed a petition for writ of habeas corpus on behalf of Darrow in the United States District Court, Central District. The petition was entitled *Darrow v. Hernandez*, U.S.D.C., case no. EDCV 03-1470ABC (RNB) (*Darrow* petition). One of the claims raised in the *Darrow* petition was ineffective assistance of counsel based upon Darrow's trial attorney's failure to present expert evidence at trial regarding the victim's cocaethylene intoxication and the effects thereof (ineffective assistance of counsel claim).

On or about July 28, 2004, the magistrate judge assigned to the *Darrow* petition filed an order that, after his review and analysis of the pleadings, further development was required of Darrow's ineffective assistance of counsel claim. The magistrate judge's order permitted the parties to engage in discovery on Darrow's ineffective assistance of counsel claim.

On or about September 21, 2006, a status conference was held before the magistrate judge in the *Darrow* petition. Respondent appeared on behalf of Darrow and the government was also represented. At the conference, the magistrate judge scheduled an evidentiary hearing for November 13, 2006 regarding the ineffective assistance of counsel claim.

On or about November 6, 2006, the magistrate judge filed an order continuing the November 13, 2006 evidentiary hearing in the *Darrow* petition at the joint request of Darrow and respondent. The magistrate judge's order also ordered respondent to ascertain the availability of the government's attorney and arrange a further status conference with the court within 10 days for the purpose of setting a new date for the evidentiary hearing. The November 6, 2006 order was properly served on respondent. Respondent received the order and knew of its contents.

Respondent did not ascertain the availability of the government's attorney; nor did he arrange a status conference with the court within 10 days, as ordered by the court, or at any time thereafter.

On or about November 21, 2006, because of respondent's failure to comply with his previous order, the magistrate judge filed an order in the *Darrow* petition requiring respondent and the government's attorney to appear in person for a status conference on December 21, 2006. The November 21, 2006 order was properly served on respondent. Respondent received the order and knew of its contents.

On or about December 21, 2006, the status conference was held before the magistrate judge in the *Darrow* petition. The government's attorney appeared. Respondent failed to appear. At that time, the magistrate judge ordered respondent to appear in person in court on January 9, 2007, for an order to show cause regarding the imposition of sanctions against respondent for his violation of the court's November 6 and November 21, 2006 orders, and regarding the court's intention to report respondent to the State Bar for abandonment of his client. The magistrate judge also granted the government leave until January 12, 2007 to file a motion to vacate the court's earlier order for an evidentiary hearing and to dismiss the *Darrow* petition. The December 21, 2006 order was properly served on respondent. Respondent received the order and knew of its contents.

On or about January 9, 2007, the order to show cause regarding respondent was held before the magistrate judge in the *Darrow* petition. Respondent did not appear. At that time, the magistrate judge issued an order that respondent's failure to appear in court was deemed as respondent's consent to the imposition of sanctions against him for violation of court orders and consent to the court reporting him to the State Bar for abandonment of a client. The magistrate judge ordered that respondent pay sanctions of \$1,500 to the court within 10 days of the order. The magistrate judge also stated in his order that respondent would be reported to the State Bar. The January 9, 2007 order was properly served on respondent. Respondent received the order and knew of its contents.

On or about January 12, 2007, the government filed a motion to vacate the court's order for an evidentiary hearing and to dismiss the *Darrow* petition. The government's motion was properly served upon respondent and respondent received the motion.

On or about March 7, 2007, respondent filed and served an opposition to the government's motion to vacate the court's order for evidentiary hearing and to dismiss the *Darrow* petition. On or about that same date, respondent filed and served a motion to vacate the January 9, 2007 sanctions order against him in the *Darrow* petition.

On or about March 27, 2007, the magistrate judge filed an order denying respondent's motion to vacate the January 9, 2007 sanctions order in the *Darrow* petition. The magistrate judge also denied the government's motion to vacate the evidentiary hearing and dismiss the *Darrow* petition. The magistrate judge ordered that respondent and the government's attorney appear in person for a status conference on April 12, 2007. The March 27, 2007 order was properly served on respondent. Respondent received the order and knew of its contents.

On or about April 12, 2007, the status conference was held in the *Darrow* petition before the magistrate judge. Respondent appeared. The government's attorney appeared. During the conference, the magistrate judge conferred with both parties about the need for an evidentiary hearing regarding Darrow's ineffective assistance of counsel claim and, specifically, the need for Darrow to present expert testimony regarding the effects of cocaethylene intoxication. The magistrate court then granted respondent until May 14, 2007 to locate and obtain from a toxicologist an expert declaration regarding the effects of cocaethylene intoxication. The magistrate judge then informed respondent and the government's attorney that based upon the expert declaration submitted by respondent, or respondent's failure to timely file such a declaration by May 14, 2007, the magistrate judge would then render a decision whether an

evidentiary hearing was needed regarding the ineffective assistance of counsel claim before making an ultimate ruling on the *Darrow* petition.

At no time did respondent: retain a toxicologist or any other expert on Darrow's behalf; obtain a declaration from a toxicologist or any other expert regarding the effects of cocaethylene intoxication; file a declaration from a toxicologist or any other expert regarding the effects of cocaethylene intoxication; or request an extension from the court of the May 14, 2007, deadline to submit an expert declaration.

On or about May 21, 2007, the magistrate judge filed an order that an evidentiary hearing would not be held, that he would make a ruling on the *Darrow* petition on the current state of the record, and that the *Darrow* petition was taken under submission effective that date. In his May 21, 2007 order, the magistrate judge made findings that its order was based upon respondent's failure to file an expert declaration by May 21, 2007 and respondent's failure to file any request for an extension of the May 14, 2007 deadline to do so. The May 21, 2007 order was properly served on respondent. Respondent received the order and knew of its contents.

On or about May 31, 2007, the magistrate judge issued its Report and Recommendation to the United States District Court judge recommending that the *Darrow* petition be denied. The May 31, 2007 report and recommendation was properly served on respondent. Respondent received the order and knew of its contents.

On or about July 16, 2007, the United States District Court denied the *Darrow* petition, dismissed it with prejudice, and entered judgment against Darrow. The July 16, 2007 judgment was properly served on respondent. Respondent received the order and knew of its contents.

On or about August 16, 2007, respondent filed a notice of appeal of the district court's judgment in the United States Court of Appeals, Ninth Circuit on behalf of Darrow in the *Darrow* petition. Respondent did not file the notice of appeal timely.

On or about August 22, 2007, the United States District Court filed an order denying the certificate of appealability for the *Darrow* petition because respondent failed to file the notice of appeal within 30 days of the entry of the judgment. The August 22, 2007 order was properly served on respondent. Respondent received the order and knew of its contents.

On or about July 31, 2008, the United States Court of Appeals, Ninth Circuit, issued its own order denying the appealability of the *Darrow* petition because of respondent's failure to file the notice of appeal within 30 days of the entry of judgment. The July 31, 2008 order was properly served on respondent. Respondent received the order and knew of its contents.

At no time did respondent inform Darrow that: the court ordered respondent to submit an expert declaration by May 14, 2007; that respondent did not obtain an expert on Darrow's behalf; that respondent did not submit an expert declaration on Darrow's behalf; that the court did not hold an evidentiary hearing on Darrow's ineffective assistance of counsel claim; that the court took Darrow's petition under submission without an expert declaration; that the magistrate court recommended that Darrow's petition be denied; that the United States District Court denied his petition without prejudice and entered judgment against Darrow; that respondent filed a notice of appeal on behalf of Darrow to the United States Court of Appeals, Ninth Circuit; that the United States District Court and the United States Court of Appeals, Ninth Circuit denied the appealability of the district court judgment; or that the United States District Court and United States Court of Appeals, Ninth Circuit denied the appealability of Darrow's petition because of respondent's failure to timely file the notice of appeal.

On or about July 18, 2007, Darrow's wife, Michelle, sent respondent an e-mail on behalf of Darrow requesting that respondent provide her or Darrow with an update regarding the status of Darrow's petition. In her e-mail, Michelle informed respondent that she had been trying to call respondent, but was unable to leave a message for him because his voice mail was full.

Respondent received the e-mail. Respondent did not return Michelle's call or otherwise communicate with Michelle or Darrow.

On or about October 1, 2007, Darrow sent respondent a letter that requested respondent provide Darrow with an update regarding the status of his petition. In his letter, Darrow stated that he had not heard from respondent since the evidentiary hearing was originally scheduled for November 2006. Darrow also stated that, if he did not hear from respondent, Darrow would complain to the State Bar regarding respondent. Respondent received Darrow's October 1, 2007 letter.

Respondent did not respond to Darrow's October 1, 2007 letter or otherwise communicate with Darrow.

On or about December 10, 2007, the State Bar opened an investigation, case no. 07-O-14911, pursuant to a complaint filed by Darrow (Darrow complaint).

On or about January 10, 2008, a State Bar investigator wrote to respondent regarding the Darrow complaint. The January 10, 2008 letter was placed in a sealed envelope addressed to respondent at his State Bar of California Membership Records address. The letter was mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business on or about the date on the letter. The United States Postal Service did not return the investigator's letter as undeliverable or for any other reason. Respondent received the letter.

The State Bar investigator's January 10, 2008 letter requested that respondent respond in writing by January 25, 2008 to specified allegations of misconduct being investigated by the State Bar in the Darrow complaint.

Respondent did not respond in any manner by January 25, 2008 to the investigator's January 10, 2008 letter.

On or about January 30, 2008, the State Bar investigator wrote to respondent regarding his failure to respond to the investigator's January 10, 2008 letter. The January 30, 2008 letter was placed in a sealed envelope addressed to respondent at his State Bar of California Membership Records address. The letter was mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business on or about the date on the letter. The United States Postal Service did not return the investigator's letter as undeliverable or for any other reason. Respondent received the letter.

The State Bar investigator's January 30, 2008 letter enclosed a copy of the January 10, 2008 letter and requested that respondent respond in writing by February 14, 2008 to specified allegations of misconduct being investigated by the State Bar in the Darrow complaint.

Respondent did not respond in any manner by February 14, 2008 to the investigator's January 30 letter.

On or about February 29, 2008, respondent called the State Bar investigator and requested an extension to March 10, 2008 to respond in writing to the allegations of misconduct in the Darrow complaint. The State Bar investigator granted respondent the extension.

On or about March 11, 2008, the State Bar investigator called respondent at his State Bar of California Membership Records telephone number. The State Bar investigator left respondent a voice mail message regarding his failure to provide a written response to the allegations in the Darrow complaint and requested that respondent call the investigator.

At no time did respondent provide a response in writing to the allegations in the Darrow complaint or otherwise communicate with the State Bar investigator after requesting an extension on February 29, 2008.

Count 7: Failure to Perform with Competence [Rule 3-110(A)]

By failing to obtain and submit to the court a declaration from an expert regarding the effects of cocaethylene intoxication on behalf of Darrow, and by failing to timely file a notice of appeal in the *Darrow* petition, respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence, in wilful violation of rule 3-110(A).

Count 10: Failure to Inform Client of Significant Development [Section 6068, subd. (m)]

By failing to inform Darrow that: the court ordered respondent to submit an expert declaration by May 14, 2007; that respondent did not obtain an expert on Darrow's behalf; that respondent did not submit an expert declaration on Darrow's behalf; that the court did not hold an evidentiary hearing on Darrow's ineffective assistance of counsel claim; that the court took Darrow's petition under submission without an expert declaration; that the magistrate court recommended that Darrow's petition be denied; that the United States District Court denied his petition without prejudice and entered judgment against Darrow; that respondent filed a notice of appeal on behalf of Darrow to the United States Court of Appeals, Ninth Circuit; that the United States District Court and the United States Court of Appeals, Ninth Circuit denied the appealability of the district court judgment; or that the United States District Court and United States Court of Appeals, Ninth Circuit denied the appealability of Darrow's petition because of respondent's failure to timely file the notice of appeal, respondent failed to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services, in wilful violation of section 6068, subdivision (m).

Count 11: Failure to Respond to Client Inquires [Section 6068, subd. (m)]

By not responding to Michelle's e-mail or Darrow's letter, respondent failed to respond to a client's reasonable status inquiries, in wilful violation of section 6068, subdivision (m).

Count 12: *Failure to Cooperate with State Bar Investigation* [Section 6068, subd. (i)]

Respondent failed to cooperate in a disciplinary investigation, in wilful violation of section 6068, subdivision (i), by failing to provide a response to any of the State Bar investigator's letters or to the allegations of the Darrow complaint.

The Redick & Harmon Matters [Case No. 08-O-10877]

On or about July 12, 2005, Donald Redick (Redick) and Daryl Harmon (Harmon), both convicted felons in prison, employed respondent to prepare individual petitions for writ of habeas corpus for each them. Redick and Harmon each separately paid respondent a flat fee of \$1,750 for the preparation, filing, and litigation of the petitions.

After being employed by Redick and Harmon on or about July 12, 2005, respondent did not prepare or file petitions for writ of habeas corpus for Redick or Harmon; nor did he perform any legal services of value for Redick or Harmon.

On or about May 5, 2007, Harmon sent a letter to respondent requesting that respondent refund to Harmon the \$1,750 he paid respondent because respondent failed to file his petition for writ of habeas corpus or perform any work on his behalf. Respondent received the letter.

Respondent did not respond in any manner to Harmon's letter.

In or about January 2008, Redick and Harmon employed attorney Doug Galanter (Galanter) to prepare and file the petitions for writ of habeas corpus that respondent failed to prepare for them.

On or about January 11, 2008, Galanter sent respondent a letter informing` respondent that Redick and Harmon had employed Galanter in place of respondent. In his letter, Galanter requested that respondent refund to Redick and Harmon the \$1,750 each had paid respondent. In the letter, Galanter also requested that respondent turn over Redick's and Harmon's files to them

or contact Galanter to make arrangements for Galanter to retrieve them directly from respondent. Respondent received Galanter's letter.

Respondent did not respond in any manner to Galanter's letter.

By not responding to Harmon's May 5, 2007 letter or Galanter's January 11, 2008 letter, respondent constructively withdrew from his employment with Redick and Harmon as of January 11, 2008, at the latest. At no time did respondent inform Redick or Harmon of his intent to withdraw from representation of them or take any steps to avoid reasonably foreseeable prejudice to Redick or Harmon.

Respondent provided no legal services of value to Redick or Harmon. Respondent did not earn any portion of the \$1,750 flat fee Redick and Harmon each paid to respondent. At no time did respondent refund any portion of the \$1,750 flat fee Redick and Harmon each paid to respondent.

Between in or about January 2008 and on or about February 2, 2008, Galanter placed several telephone calls to respondent. Galanter was never able to speak to respondent, but left voice mail messages each time for respondent to return Redick's and Harmon's file to them or to Galanter. Respondent received the messages.

Respondent did not respond in any manner to Galanter's voice mail messages.

At no time did respondent return Redick's or Harmon's file to them, or to Galanter, nor did respondent ever communicate with Redick, Harmon, or Galanter how they could obtain their files from respondent.

On or about February 22, 2008, the State Bar opened an investigation, case no. 08-O-10877, pursuant to a complaint filed by Galanter on behalf of Redick and Harmon (Galanter complaint).

On or about March 11, 2008, a State Bar investigator called respondent at his State Bar of California membership telephone number. The State Bar investigator left respondent a voice mail message requesting that respondent return Redick's and Harmon's files to them. Respondent received the message.

On or about March 18, 2008, a State Bar investigator wrote to respondent regarding the Galanter complaint. The March 18, 2008 letter was placed in a sealed envelope addressed to respondent at his State Bar of California Membership Records address. The letter was mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business on or about the date on the letter. The United States Postal Service did not return the investigator's letter as undeliverable or for any other reason. Respondent received the letter.

The State Bar investigator's March 18, 2008 letter requested that respondent respond in writing by May 1, 2008 to specified allegations of misconduct being investigated by the State Bar in the Galanter complaint.

On or about April 3, 2008, the State Bar investigator again wrote to respondent regarding the Galanter complaint. The April 3, 2008 letter was placed in a sealed envelope addressed to respondent at his State Bar of California Membership Records address. The letter was mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business on or about the date on the letter. The United States Postal Service did not return the investigator's letter as undeliverable or for any other reason. Respondent received the letter.

The State Bar investigator's April 3, 2008 letter enclosed a copy of the March 18, 2008 letter and again requested that respondent respond in writing by May 1, 2008 to specified allegations of misconduct being investigated by the State Bar in the Galanter complaint.

Respondent did not respond in any manner by May 1, 2008 to the investigator's March 18, 2008 or April 3, 2008 letters.

On or about May 15, 2008, the State Bar investigator called respondent at his State Bar of California Membership Records telephone number. The State Bar investigator left respondent a voice mail message regarding his failure to provide a written response to the allegations in the Galanter complaint and requested that respondent call the investigator.

Respondent did not respond in any manner to the State Bar investigator's May 15, 2008 voice mail message.

At no time did respondent provide a response in writing to the allegations in the Galanter complaint or otherwise communicate with the State Bar investigator.

Count 13: *Failure to Perform with Competence* [Rule 3-110(A)]

By not preparing or filing the petitions for writ of habeas corpus for Redick or Harmon, and by not performing any legal service of value for Redick or Harmon, respondent intentionally, recklessly and repeatedly failed to perform legal services with competence in wilful violation of rule 3-110(A).

Count 14: *Improper Withdrawal from Employment* [Rule 3-700(A)(2)]

By failing, upon termination of employment, to inform Redick or Harmon of his intent to withdraw from employment, respondent withdrew from employment without taking reasonable steps to avoid foreseeable prejudice to his client's rights, in wilful violation of rule 3-700(A)(2).

Count 15: *Failure to Refund Unearned Fees* [Rule 3-700(D)(2)]

By not refunding to Redick or Harmon any portion of the \$1,750 flat fee each paid to respondent, which he had not earned, respondent failed to refund unearned fees in wilful violation of rule 3-700(D)(2).

Count 16: Failure to Release File [Rule 3-700(D)(1)]

By not releasing their files to Redick, Harmon, or their attorney, Galanter, respondent failed, upon termination of employment, to release promptly to a client, at the request of the client, all client papers, in wilful violation of rule 3-700(D)(1).

Count 17: Failure to Cooperate with State Bar Investigation [Section 6068, subd. (i)]

Respondent failed to cooperate in a disciplinary investigation, in wilful violation of section 6068, subdivision (i), by failing to provide a response to any of the State Bar investigator's letters or to the allegations of the Galanter complaint.

The Probation Matter [Case No. 08-O-13771]

On or about July 5, 2007, respondent entered into a Stipulation re Facts, Conclusions of Law and Disposition (Stipulation) with the State Bar of California in case nos. 06-O-10595, 07-O-10251, and 07-O-11126.

On or about July 11, 2007, the Hearing Department of the State Bar Court filed an order approving the Stipulation and recommending that respondent receive a six-month stayed suspension and two years' probation (State Bar Court Order).

On or about July 12, 2007, the Stipulation and State Bar Court Order were properly served upon respondent at his official State Bar membership records address. Respondent received the Stipulation and State Bar Court Order, and knew of the contents of each.

On or about October 31, 2007, the Supreme Court of California filed an order (Supreme Court Disciplinary Order) in case no. S155923 (State Bar Court Case nos. 06-O-10595, 07-O-10251, 07-O-11126), imposing on respondent the discipline recommended by the State Bar Court Order. The Supreme Court Disciplinary Order suspended respondent from the practice of law for six months, execution of the suspension was stayed, and respondent was placed on probation for two years subject to the conditions of probation contained in the Stipulation and

recommended by the State Bar Court Order. The Clerk of the Supreme Court of California properly served respondent with the Supreme Court Disciplinary Order.

The Supreme Court Disciplinary Order became effective on November 30, 2007.

Pursuant to the Supreme Court Disciplinary Order, respondent was required to comply with certain conditions of probation set forth in the Stipulation and State Bar Court Order, including the following:

- a. Within 30 days of the effective date of the Supreme Court Disciplinary Order, contact the Office of Probation of the State Bar of California (Office of Probation) and schedule a meeting with respondent's assigned probation deputy to discuss the terms and conditions of probation;
- b. Submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the probationary period, stating whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter;
- c. Pay restitution of \$7,500 to Noel Scott according to the following schedule: \$2,500 within 30 days of the effective date of the Supreme Court Disciplinary Order followed by five monthly payments of \$1,000 beginning 60 days from the effective date of the Supreme Court Disciplinary Order.

On or about December 27, 2007, the Office of Probation wrote a letter to respondent in which it reminded respondent of the terms and conditions of the Stipulation and the State Bar Court Order, including his reporting requirements, his restitution requirements, and due dates. The December 27, 2007 letter also specifically warned respondent that failure to timely submit reports or any other proof of compliance would result in a non-compliance referral to the Enforcement Unit of the Office of Chief Trial Counsel and the State Bar Court. Enclosed with

the December 27, 2007 letter was, among other things, a copy of the Supreme Court Disciplinary Order, a copy of the portion of the Stipulation setting forth the conditions of respondent's probation, instructions for providing proof of payment of restitution, quarterly report instructions, and a blank quarterly report form. The letter was mailed on or about December 27, 2007 via the United States Postal Service, first class postage prepaid, in a sealed envelope addressed to respondent at his official State Bar membership records address. The December 27, 2007 letter was not returned as undeliverable by the United States Postal Service.

Respondent received the December 27, 2007 letter from the Office of Probation. Respondent failed to contact the Office of Probation by December 30, 2007, 30 days after the effective date of the Supreme Court Disciplinary Order.

On January 29, 2008,⁶ approximately a month beyond the deadline for respondent to comply with this condition, respondent called the Office of Probation and spoke to his assigned probation deputy regarding the terms and conditions of his probation. During that telephone conversation, respondent represented to the probation deputy that he would fax or mail to the deputy his January 10 quarterly report, which was already overdue, and information regarding the status of his restitution payments.

Respondent did not fax, mail or otherwise submit to the Office of Probation his January 10, 2008 quarterly report or any information regarding restitution.

On September 8, 2008, the Office of Probation wrote a letter to respondent in which it again reminded respondent of the terms and conditions of the Stipulation and the State Bar Court Order, including his reporting requirements, his restitution requirements, and due dates. The letter also advised respondent that the Office of Probation had not received his first quarterly

⁶ The NDC mistakenly lists this date as "February 29, 2009." The court finds that this minor typographical error is not prejudicial to respondent.

report, due January 10, 2008, or the subsequent reports due thereafter on April 10 and July 10, 2008. The letter stated that the Office of Probation did not intend to send him any further reminder letters, and that respondent's continued non-compliance with his probationary conditions would result in automatic referral for disciplinary action. The letter was mailed on or about September 8, 2008 via the United States Postal Service, first class postage prepaid, in a sealed envelope addressed to respondent at his official State Bar membership records address. The September 8, 2008 letter was not returned as undeliverable by the United States Postal Service.

Respondent did not respond in any manner to the Office of Probation's September 8, 2008 letter.

As of December 11, 2008, respondent has not complied with the conditions of his probation, as follows:

- a. Respondent has failed to submit to the Office of Probation his quarterly reports that were due on January 10, 2008, April 10, 2008, and July 10, 2008;
- b. Respondent has not submitted to the Office of Probation proof of payment of any amount of restitution.⁷

Count 18: *Failure to Comply with Conditions of Probation* [Section 6068, subd. (k)]

By failing to contact the Office of Probation within 30 days of the effective date of the Supreme Court Disciplinary Order; failing to submit to the Office of Probation the quarterly reports due on January 10, April 10, and July 10, 2008, and failing to submit proof of payment of any amount of restitution, respondent failed to comply with the conditions of his disciplinary probation in wilful violation of section 6068, subdivision (k).

⁷ There is no indication in the record that respondent has made any effort to comply with either of these conditions since December 11, 2008.

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).)⁸

The court finds in aggravation the following:

Prior Record of Discipline

As previously noted, respondent has a prior record of discipline. (Std. 1.2(b)(i).) On October 31, 2007, the California Supreme Court issued an order (S155923) suspending respondent from the practice of law for six months, stayed, with a two-year period of probation. This discipline stemmed from respondent's misconduct in three separate matters. Said misconduct included respondent's failure to: competently perform legal services, refund unearned fees, keep clients informed of significant developments, promptly return client papers and property, obey court orders, and report the imposition of judicial sanctions to the State Bar. In mitigation, respondent was candid and cooperative with the State Bar and had no prior record of discipline. No aggravating circumstances were involved.

The court, however, gives diminished weight to respondent's prior discipline due to the fact that much of the present misconduct occurred in the same time period. (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171.) The court will consider the totality of the findings in respondent's present and prior discipline to determine what the discipline would have been had all the charged misconduct in this period been brought as one case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.)

Multiple Acts

Respondent has been found culpable of more than a dozen counts of misconduct in the

⁸ All further references to standard(s) are to this source.

present proceeding. The existence of multiple acts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

Significant Harm

Respondent's misconduct significantly harmed his clients. (Std. 1.2(b)(iv).) As a result of respondent's misconduct, each of the aforementioned client matters was either delayed or dismissed. In addition, Kimberly Stephens, Donald Redick, and Daryl Harmon were financially harmed in the amounts of \$5,000, \$1,750, and \$1,750, respectively.

Indifference Toward Rectification

Despite the efforts of the Office of Probation, respondent failed to comply with his court-ordered probationary conditions. He has also failed to participate in this disciplinary proceeding. Those failures demonstrate respondent's indifference toward rectification of or atonement for the consequences of his misconduct and toward compliance with his professional obligations. (Std. 1.2(b)(v).)

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.

IV. Discussion

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (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 Silverton* (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, we are 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, quoting *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.)

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 this case, the standards provide for the imposition of sanctions ranging from suspension to disbarment depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3. (Std. 2.6.) The range of discipline imposed in cases focusing on client abandonment and failure to communicate is also extremely broad, ranging from six months’ actual suspension to disbarment.” (*In re Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 960.)

The State Bar recommends, inter alia, that respondent be actually suspended from the practice of law for a minimum of two years and until he establishes his rehabilitation, present fitness to practice, and present learning and ability in the law, as provided for in standard

1.4(c)(ii). The court agrees and finds *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074, and *In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, to be instructive.

In *Bledsoe*, the California Supreme Court found, in a default proceeding, that the attorney abandoned or failed to perform for four clients, failed to communicate with three clients, failed to return fees to two clients, and failed to cooperate with the State Bar investigation. In mitigation, the attorney had been practicing for a total of seventeen years with no prior discipline.⁹ In aggravation, the attorney, at least initially, failed to participate in the proceedings. The Supreme Court ordered that the attorney be suspended from the practice of law for five years, stayed, with five years' probation and two years' actual suspension.

In *Bailey*, another default proceeding, the attorney was found to have abandoned four clients. Additionally, the attorney was found culpable of single counts of collecting an illegal fee, failing to return a client's file, failing to perform, failing to respond to reasonable status inquiries, failing to maintain a current business address, and failing to cooperate with a State Bar investigation. In aggravation, the attorney committed multiple acts of misconduct, harmed one of his clients, and failed to participate in the proceedings. The court found no mitigation. The attorney was suspended from the practice of law for five years, stayed, with two years' actual suspension.

The present case shares many similarities with *Bledsoe* and *Bailey*, including respondent's abandonment of clients, his failure to refund unearned legal fees, and his failure to participate in the current proceedings. After considering the totality of the findings in respondent's present and prior matters, the court concludes that the present matter warrants discipline similar to that found in *Bledsoe* and *Bailey*.

⁹ However, based on the analysis in the dissenting opinion, it appears that the attorney had only been practicing for twelve years prior to the commencement of his misconduct. (*Bledsoe v. State Bar*, *supra*, 52 Cal.3d at p. 1081.)

Respondent's misconduct, coupled with his aggravation, his lack of mitigation, and his failure to participate, gives the court grave concerns regarding the potential threat he poses to the public. Therefore, the court finds that the appropriate level of discipline includes a minimum suspension of two years and until respondent, among other things, proves his rehabilitation, fitness to practice and learning and ability in the general law.

V. Recommended Discipline

Accordingly, the court recommends that respondent Jeffrey S. Mintz be suspended from the practice of law for five years, execution of that period of suspension to be stayed, subject to the following conditions:

1. Jeffrey S. Mintz is suspended from the practice of law for a minimum of two years,¹⁰ and he will remain suspended until the following requirements are satisfied:

- a. The State Bar Court grants a motion to terminate his suspension pursuant to rule 205 of the Rules of Procedure of the State Bar; and
- b. Respondent provides to the State Bar Court satisfactory proof of his rehabilitation, fitness to practice, and learning and ability in the general law.

(Rules Proc. of State Bar, tit. IV, Stds. For Atty. Sanctions for Prof.

Misconduct, std. 1.4(c)(ii).)

2. Respondent complies with the conditions of probation, if any, imposed by the State Bar Court as a condition for terminating his suspension pursuant to rule 205, including any conditions that respondent must make restitution to his prior clients.

¹⁰ Only active members of the State Bar may lawfully practice law in California. (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. (Bus. & Prof. Code, § 6126, subd. (b).) 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.)

The court also recommends that respondent be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.¹¹

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

VI. Costs

The court recommends 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: May ____, 2009

DONALD F. MILES
Judge of the State Bar Court

¹¹ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or a contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)