FILED JUNE 10, 2011

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case Nos.: **08-O-14872-RAP** (09-O-10101; 09-O-10489; 10-O-05429); **10-O-03673-RAP** (10-O-05552; 10-O-05592; 10-O-05596) (Consolidated.)
STEVEN PAUL NIETO	)	
Member No. 80474,	)	**DECISION INCLUDING DISBARMENT RECOMMENDATION AND INVOLUNTARY INACTIVE ENROLLMENT ORDER**[1]
A Member of the State Bar.	)	

I. Introduction

In this consolidated, original disciplinary proceeding, which proceeded by default, respondent **STEVEN PAUL NIETO**[2] is charged with a total of 27 counts of misconduct in eight separate client matters. The court finds, by clear and convincing evidence, that respondent is culpable on 24 of the 27 counts of charged misconduct. The State Bar of California ("State Bar") s represented by Deputy Trial Counsel Augustine Hernandez. Initially, respondent

[1] The Rules of Procedure of the State Bar of California were amended effective January 1, 2011. Nonetheless, the court orders the application of the former Rules of Procedure of the State Bar based on a determination that injustice would otherwise result. (See Rules Proc. of State Bar (eff. Jan. 1, 2011), Preface, item 3.)

[2] Respondent was admitted to the practice of law in this state on June 23, 1978, and has been a member of the State Bar of California since that time. He has two prior records of discipline.

represented himself in this matter. However, as noted in more detail *post*, respondent's default was entered because he failed to appear at trial.

The court recommends that respondent be disbarred.

II. Significant Procedural History

On July 9, 2010, the State Bar filed the notice of disciplinary charges in case number 08-O-14872-RAP (NDC 1). On that same day, the State Bar properly served a copy of NDC 1 on respondent in accordance with former rule 60 of Rules of Procedure of the State Bar. Thereafter, respondent filed a response to NDC 1 on August 12, 2010.

On September 22, 2010, the State Bar filed the notice of disciplinary charges in case number 10-O-03673-RAP (NDC 2). On that same day, the State Bar properly served a copy of NDC 2 on respondent in accordance with former rule 60 of Rules of Procedure of the State Bar. And respondent filed a response to NDC 2 on November 12, 2010.

In an order filed on October 26, 2010, the court consolidated case number 10-O-03673-RAP with case number 08-O-14872-RAP for all purposes. In that same order, the court also set the consolidated proceedings for a five-day trial beginning on March 14, 2011.

On February 24, 2011, the State Bar filed and served on respondent a notice to appear in lieu of subpoena, which required that respondent personally appear at trial. (Code Civ. Proc., § 1987; Rules Proc. of State Bar, former rule 152(a).)

On March 7, 2011, the court issued two orders precluding respondent from calling any witnesses or proffering any documentary evidence at trial because respondent failed to file a pretrial conference statement and failed to respond to the State Bar's second set of interrogatories and inspection demands.

When the consolidated cases were called for trial on March 14, 2011, the State Bar appeared, but respondent did not. Accordingly, after determining that all of the statutory and

rule prerequisites were met (see, e.g., Rules Proc. of State Bar, former rule 201(a)), the court filed an order on March 14, 2011, entering respondent's default and, as mandated by Business and Professions Code section 6007, subdivision (e)(1),[3] ordering that he be involuntary enrolled as an inactive member of the State Bar of California.[4]

III. Findings of Fact and Conclusions of Law

Under section 6088 and former rules 200(d)(1)(A) and 201(c) of the Rules of Procedure of the State Bar, upon the entry of respondent's default, the factual allegations (but not the charges or conclusions) set forth in NDC 1 and NDC 2 were deemed admitted and no further proof was required to establish the truth of those facts. Accordingly, the court adopts the facts alleged (but not the charges or the conclusions) in those two NDC's as its factual findings. Briefly, those facts establish or fail to establish the following charged disciplinary violations by clear and convincing evidence.[5]

A. Case No. 08-O-14872 – Gutierrez Client Matter

Facts

On about December 1, 2008, Andres Gutierrez filed a complaint against respondent with the State Bar. On about January 8, 2009, and again on about January 27, 2009, a State Bar investigator mailed respondent a letter asking respondent to respond in writing to specified

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[3] Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

[4] Respondent's inactive enrollment became effective on March 17, 2011. An inactive member of the State Bar of California cannot lawfully practice law in this state. (§ 6126, subd. (b); see also § 6125.)

[5] Notwithstanding the entry of respondent's default, "All reasonable doubts must [still] be resolved in [his] favor . . . , and if equally reasonable inferences may be drawn from a proven fact, the inference which leads to a conclusion of innocence rather than guilt [must] be accepted [by the court]. [Citation.]" (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 563.)

allegations of misconduct that the State Bar was investigating because of Gutierrez's complaint. Even though respondent received both of those letters, respondent did not respond to them.

Thereafter, on about October 28, 2009, a State Bar investigator spoke with respondent on the telephone. In that telephone conversation, respondent stated that he would provide the State Bar with a written response to the allegations of misconduct in the Gutierrez matter by about November 6, 2009. Respondent, however, never provided the State Bar with a written response to the allegations.

Conclusions of Law

Count One in NDC 1 -- (Rules Prof. Conduct, rule 4-100(A) [Trust Account Violation])[6]

At trial, the court dismissed count one in NDC 1 without prejudice on the motion of the State Bar.

Count Two in NDC 1 -- (§ 6106 [Moral Turpitude – Misappropriation])

At trial, the court dismissed count two in NDC 1 without prejudice in the interest of justice on the court's own motion.

Count Three in NDC 1 – (§ 6068, subd. (i) [Failure to Cooperate in Disciplinary Investigation])

The court finds there is clear and convincing evidence that respondent failed to cooperate in a State Bar disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide the State Bar with a written response to the allegations of misconduct in the Gutierrez matter in accordance with the State Bar investigator's two January 2009 letters and in accordance with respondent's own statements in his October 28, 2009 telephone conversation with the State Bar investigator.

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[6] Unless otherwise indicated, all further references to rules are to the State Bar Rules of Professional Conduct.

B. Case No. 09-O-10489 – Walker Client Matter

Facts

In about March 2007, Laura Walker employed respondent on a contingency fee basis to represent her in a personal injury claim arising from a dog bite that occurred on about March 20, 2007. The dog owners were insured by Farmers Insurance.

In about June 2008, respondent settled Walker's personal injury claim for $10,000 with Walker's permission. On about June 9, 2008, Farmers Insurance sent respondent a $10,000 settlement check, which was made payable to both respondent and Walker. On about June 13, 2008, respondent deposited that settlement check into his client trust account (CTA).

After subtracting respondent's one-third contingency fee from the settlement, respondent was required to maintain, in his CTA, about $6,667 for Walker. On May 30, 2008, which was two weeks *before* respondent deposited the Walker $10,000 settlement check from Farmers Insurance into his CTA, the balance in his CTA fell to a negative $113.17.

In July 2009, Walker filed a small claims action against respondent to recover her share of the settlement funds. On about November 25, 2009, respondent paid $6,767.67 to Walker

In about January 2009, Walker filed a complaint against respondent with the State Bar. On about February 24, 2009, a State Bar investigator mailed to respondent a letter requesting that respondent respond in writing to specified allegations of misconduct that the State Bar was investigating in the Walker matter. Respondent received that letter, but failed to respond to it.

On about October 28, 2009, the State Bar investigator spoke with respondent on the telephone. In that telephone conversation, respondent stated that he would provide the State Bar with a written response to Walker's allegations of misconduct by about November 6, 2009. Respondent, however, never provided the State Bar with such a written response.

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Conclusions of Law

Count Four in NDC 1 – (Rule 4-100(A) [Trust Account Violation])

In count four in NDC 1, the State Bar charges that respondent willfully violated rule 4-100(A), which requires, inter alia, attorneys to deposit and maintain all funds received or held for the benefit of clients in a trust-account bank account. "An attorney violates [rule 4-100] when he or she fails to deposit and manage funds in the manner delineated by the rule, even if this failure does not harm the client. [Citation.]" (*Murray v. State Bar* (1985) 40 Cal.3d 575, 584.)

Moreover, a rule 4-100(A) violation involving the conversion of client funds is established whenever the actual balance of the bank account in which the client funds were deposited drops below the amount credited to the client. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795.) Once such a violation is established, the burden then shifts to the attorney to show (1) that he or she did not act in bad faith or engage in an act involving moral turpitude, dishonesty, or corruption and (2) that the conversion occurred as a result of only ordinary negligence (as opposed to gross carelessness and recklessness). (Cf. *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 585-586; *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26.)

According to the State Bar, respondent violated rule 4-100(A) because he failed to maintain $6,667 in his CTA for Walker. The record, however, fails to establish the charged rule 4-100(A) violation because there is no evidence that, sometime after respondent deposited the Walker $10,000 settlement check into his CTA on June 13, 2008, respondent withdrew all or a

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part of the $6,667 he was required to maintain in his CTA for Walker.[7] Accordingly, the court must presume that respondent maintained the $6,667 in his CTA until November 25, 2009, when he finally paid Walker $6,767.67. In short, count four in NDC 1 is DISMISSED WITH PREJUDICE for want of proof.

Count Five in NDC 1 – (§ 6106 [Moral Turpitude -- Misappropriation])

In count five in NDC 1, the State Bar charges that respondent willfully violated section 6106, which prohibits an attorney from committing acts involving moral turpitude, dishonesty, or corruption. Specifically, the State Bar charges that "Respondent dishonestly or with gross negligence misappropriated approximately $6,666.67 of Walker's settlement funds." The record fails to establish the charged violation because there is no evidence that respondent withdrew any portion of Walker's $6,666.67 from his CTA after he deposited the $10,000 check into that account on June 13, 2008. Again, the court must presume that respondent maintained the $6,667 in his CTA until November 25, 2009, when he finally paid Walker $6,767.67. Therefore, count five in NDC 1 is also DISMISSED WITH PREJUDICE for want of proof.

Count Six in NDC 1 – (§ 6068, subd. (i) [Failure to Cooperate in Disciplinary Investigation])

The court finds there is clear and convincing evidence that respondent failed to cooperate in a State Bar disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide the State Bar with a written response to the allegations of misconduct in the Walker matter in accordance with the State Bar investigator's February 24, 2009 letter and in accordance with respondent's own statements in his October 28, 2009 telephone conversation with the State Bar investigator.

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[7] Even though the record establishes that the balance in respondent's CTA dipped to a negative $113.17 on May 30, 2008, respondent did not deposit the Walker $10,000 settlement check into his CTA until a full two weeks later on June 13, 2008.

C. Case No. 09-O-10101 -- Vargas Client Matter

Facts

In about September 2006, Jose Vargas employed respondent on a contingency fee basis to represent him in his personal injury claim arising out of a recent automobile accident.

In about August 2008, respondent settled Vargas's personal injury claim for $7,000 with Vargas's authorization. And, on about August 15, 2008, Infinity Insurance issued a $7,000 settlement check made payable to both respondent and Vargas.

Respondent deposited that $7,000 check into his CTA on about August 22, 2008. After subtracting respondent's one-third contingency fee, respondent was required to maintain $4,667 in his CTA for Vargas. However, on about November 17, 2008, and before respondent had made any disbursements to, or on behalf of Vargas, the balance in respondent's CTA fell to a negative $0.51. Thus, respondent through gross negligence misappropriated Vargas's share of the settlement funds.

In about November 2008, Vargas filed a complaint against respondent with the State Bar. And, on about January 20, 2009, a State Bar investigator mailed to respondent a letter requesting that respondent respond in writing to specified allegations of misconduct that the State Bar was investigating in the Vargas matter. Respondent received that letter, but failed to respond to it.

On about October 28, 2009, the State Bar investigator spoke with respondent on the telephone. In that telephone conversation, respondent stated that he would provide the State Bar with a written response to Vargas's allegations of misconduct by about November 6, 2009. Respondent, however, never provided the State Bar with such a written response.

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Conclusions of Law

Count Seven in NDC 1 – (Rule 4-100(A) [Trust Account Violation])

The court finds there is clear and convincing evidence that respondent failed to maintain $4,667 in a client trust account for Vargas in willful violation of rule 4-100(A) on November 17, 2008, when the balance in respondent's CTA dropped to a negative $0.51. (*Edwards v. State Bar, supra*, 52 Cal.3d at p. 37; *Palomo v. State Bar, supra*, 36 Cal.3d at p. 795.)

Count Eight in NDC 1 – (§ 6106 [Moral Turpitude -- Misappropriation])

The court finds there is clear and convincing evidence that respondent willfully violated section 6106's proscription against acts involving moral turpitude when, through gross negligence, respondent misappropriated $4,667 from Vargas on November 17, 2008, when the balance in respondent's CTA dropped to a negative $0.51. (Cf. *Giovanazzi v. State Bar, supra*, 28 Cal.3d at pp. 585-586; *In the Matter of Respondent F, supra*, 2 Cal. State Bar Ct. Rptr. at p. 26.)

Count Nine in NDC 1 – (§ 6068, subd. (i) [Failure to Cooperate in Disciplinary Investigation])

The court finds there is clear and convincing evidence that respondent failed to cooperate in a State Bar disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide the State Bar with a written response to the allegations of misconduct in the Vargas matter in accordance with the State Bar investigator's January 20, 2009 letter and in accordance with the statements respondent made to a State Bar investigator in a telephone conversation on about October 28, 2009.

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D. Case No. 10-O-05429 – Disciplinary Probation Matter

Facts

On April 9, 2009, the Supreme Court filed, in *In re Steven Paul Nieto on Discipline*, case number S170328 (State Bar Court case number 04-O-13994, etc.) (Supreme Court's April 9, 2009 order), an order placing respondent on one year's stayed suspension and two years' probation on conditions, but no actual suspension.

The Clerk of the Supreme Court promptly mailed a copy of the Supreme Court's April 9, 2009 order to respondent once the order was filed. (Cal. Rules of Court, rule 8.532(a); Evid. Code, § 664; *In Re Linda D.* (1970) 3 Cal.App.3d 567, 571.) And respondent received that copy of the order. (Evid. Code, § 641 [mailbox rule].)

The Supreme Court's April 9, 2009 order became effective on May 9, 2009.

On about May 7, 2009, the State Bar's Office of Probation mailed, to respondent, a letter in which it enclosed, inter alia, copies of the Supreme Court's April 9, 2009 order and the conditions of the two-year disciplinary probation imposed on him under that Supreme Court order. Respondent received the Office of Probation's May 7, 2009 letter.

1. Probation-Deputy-Meeting Condition

Respondent's conditions of probation include a probation-deputy-meeting condition under which respondent was required, within the first 30 days of probation (i.e., by June 8, 2009) to "contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation." Respondent did not contact the Office of Probation and make an appointment with his probation monitor by June 8, 2009. Respondent finally met with his probation deputy on November 24, 2009.

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2. Quarterly-Reporting Condition

Respondent's conditions of probation also include a quarterly-reporting condition under which respondent is required, on every January 10, April 10, July 10, and October 10, to submit, to the Office of Probation, a written report stating, under penalty of perjury, inter alia, "whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all the conditions of probation during the preceding calendar quarter."

Respondent did not submit his quarterly reports that were due on July 10 and October 10, 2009, until about November 30, 2009. Furthermore, respondent never submitted his quarterly reports that were due on January 10 and April 10, 2010.

3. Ethics-School Condition

Respondent's conditions of probation also include an ethics-school condition under which respondent was required to attend the State Bar's Ethics School no later than May 9, 2010. Respondent, however, failed to attended ethics school.

Conclusions of Law

Count Ten in NDC 1 – (§ 6068, subd. (k) [Failure to Comply With Probation Conditions])

In count ten in NDC 1, the State Bar charges that respondent willfully violated his duty, under section 6068, subdivision (k), to comply with all conditions attached to any disciplinary probation. The court finds there is clear and convincing evidence that respondent willfully violated section 6068, subdivision (k) when he (1) did not contact the Office of Probation no later than June 8, 2009, to schedule an appointment with his probation monitor; (2) submitted his quarterly report due July 10, 2009, more than four months late on November 30, 2009; (3) submitted his quarterly report due October 10, 2009, more than one month late on November 30,

2009; (4) did not submit his quarterly reports due January 10 and April 10, 2010; and (5) did not attend ethics school no later than May 9, 2010.

E. Case No. 10-O-03673 -- Aguilar Client Matter

Facts

On about June 6, 2008, Frank Aguilar employed respondent to prepare a qualified domestic relations order (QDRO) which could be approved by Aguilar's retirement plan and ordered by the superior court to establish the payments to be made to Aguilar's former wife. At that time, Aguilar paid respondent $1,500 in advanced fees.

On about February 16, 2009, Aguilar called respondent's office and left a message asking that respondent inform him of the status of his case. Respondent received the message. Respondent did not return Aguilar's call or otherwise inform him of the status of Aguilar's case.

On about June 9, 2009, Aguilar called respondent's office and spoke to respondent. Aguilar asked to be informed as to the status of his case, and respondent told Aguilar that he would respond to Aguilar's inquiry by the end of the month. Respondent did not call Aguilar back by the end of the month or thereafter to inform him of the status of his case.

On about June 9, 2009, respondent sent a letter to the administrator for Aguilar's retirement plan informing them that he would submit a proposed QDRO. Thereafter, respondent did not submit a proposed QDRO to the retirement plan administrator for approval. Nor did respondent submit a QDRO to the superior court for its review and order.

On about August 8, 2009, Aguilar called respondent's office and left a message asking that respondent inform him of the status of his case. Respondent received the message, but did not return Aguilar's call or otherwise inform him of the status of Aguilar's case.

On about October 16, 2009, Aguilar called respondent's office and left a message

asking that respondent inform him of the status of his case. Respondent received the message, but did not return Aguilar's call or otherwise inform him of the status of Aguilar's case.

On about October 25, 2009, Aguilar mailed, to respondent, a letter requesting a full refund of the fees he paid respondent to prepare a QDRO due to respondent's failure to respond to his inquiries. By this letter, Aguilar terminated respondent's employment. At no time did respondent provide Aguilar with an accounting for the advanced fees.

Respondent did not provide any services of value to Aguilar. Thus, respondent did not earn any of the $1,500 advanced fees he received from Aguilar. At no time did respondent refund to Aguilar any of the $1,500 he received from him in advanced fees.

On about February 17, 2010, Aguilar made a complaint to the State Bar about respondent's conduct. And, on about May 10, 2010, a State Bar investigator mailed, to respondent at his official State Bar membership records address, a letter regarding the complaint by Aguilar. The letter requested that respondent respond in writing to specified allegations of misconduct under investigation by the State Bar raised by the complaint. Respondent received the letter. Respondent did not respond to the letter or otherwise cooperate in the investigation.

On about May 24, 2010, a State Bar investigator mailed, to respondent at his official State Bar membership records address, another letter requesting that respondent provide a response to Aguilar's complaint. Respondent received the letter. Respondent did not respond to the letter or otherwise cooperate in the investigation.

On about August 4, 2010, a State Bar investigator met with respondent and requested that respondent respond to the outstanding letters requesting his response to Aguilar's complaint. Respondent stated that he would provide a response by August 11, 2010. Thereafter, respondent did not respond in writing to the allegations raised by Aguilar's complaint or otherwise cooperate in the investigation of Aguilar's complaint.

Conclusions of Law

Count One in NDC 2 – (§ 6068, subd. (m) [Failure to Communicate])

Section 6068, subdivision (m) requires, inter alia, that an attorney respond promptly to reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services. The court finds there is clear and convincing evidence that respondent failed to respond to reasonable client inquiries in willful violation of section 6068, subdivision (m) by failing to respond to Aguilar's reasonable status inquires.

Count Two in NDC 2 – (Rule 3-110(A) [Failure to Perform Competently])

Rule 3-110(A) prohibits an attorney from intentionally, recklessly, or repeatedly failing to perform legal services with competence.

The court finds there is clear and convincing evidence that respondent willfully violated rule 3-110(A) because he *intentionally* failed to perform legal services with competence by not submitting a proposed QDRO to Aguilar's retirement plan or to the superior court. Aguilar's multiple status inquires clearly establish that respondent's failures to submit a proposed QDRO to the retirement plan and to the superior court were intentional and not merely repeated or reckless.

Count Three in NDC 2 – (Rule 4-100(B)(3) [Failure to Account])

Rule 4-100(B)(3) requires an attorney to render appropriate accountings to clients for all funds coming into the attorney's possession. The record clearly establishes that respondent willfully violated rule 4-100(B)(3) by failing to provide Aguilar with an accounting of the $1,500 in advanced fees that Aguilar paid to respondent.

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Count Four in NDC 2 – (Rule 3-700(D)(2) [Failure to Refund Unearned Fees])

The record clearly establishes that respondent willfully violated rule 3-700(D)(2) by failing to refund the unearned $1,500 advanced fee to Aguilar.

Count Five in NDC 2 – (§ 6068, subd. (i) [Failure to Cooperate in Disciplinary Investigation])

The court finds there is clear and convincing evidence that respondent failed to cooperate in a State Bar disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide the State Bar with a written response to the allegations of misconduct in the Aguilar matter in accordance with the State Bar investigator's two May 2010 letters and in accordance with respondent's own statements to the State Bar investigator on August 4, 2010.

F. Case No. 10-O-05552 – Ishihara/Verner Client Matter

Facts

On about September 26, 2009, Chie Ishihara and Bill Verner employed respondent to represent them in a dispute with a contractor, JM Floors. At that time, Ishihara paid respondent $3,000 in advanced fees.

On about October 13, 2009, respondent sent to Ishihara and Verner by email a draft letter to JM Floors which Ishihara and Verner reviewed and requested changes. On about October 16, 2009, respondent sent another draft letter to Ishihara asking that she review the letter so that he could mail it that date. On that same date, Verner responded to respondent by email informing respondent that they were unable to open the attachment to his email.

On about October 19, 2009, Verner sent respondent an email requesting that he inform him and Ishihara if respondent had received a response to his letter. Also, Verner requested in the email that respondent provide an accounting for his time and costs for writing

the letter. On about October 26, 2009, and again on about October 30, 2009, Verner sent further emails to respondent requesting that respondent provide an accounting for his time. On about October 30, 2009, respondent responded to Verner by email stating that his office would send Verner a statement the next week.

Respondent did not inform Verner whether he had sent the letter to JM Floors or received any response.

On about October 31, 2009, Verner sent respondent an email asking whether JM Floors had responded to any letter from respondent. Respondent did not respond to the email. Thus, on about November 31, 2009, Verner sent respondent an email terminating respondent's employment and requesting an accounting and refund of unearned fees. Respondent did not respond to the email. At no time did respondent provide Verner or Ishihara with an accounting for the advanced fees they paid respondent.

Respondent did not provide any services of value to Verner or Ishihara. Thus, respondent did not earn any of the $3,000 in advanced fees that he received from Verner and Ishihara. What is more, at no time did respondent refund to Verner or Ishihara any portion of the $3,000 unearned advanced fees.

On about November 30, 2009, Verner and Ishihara made a complaint to the State Bar about respondent's conduct. On about May 7, 2010, a State Bar investigator mailed, to respondent at his official State Bar membership records address, a letter regarding the complaint by Verner and Ishihara. The letter requested that respondent respond in writing to specified allegations of misconduct under investigation by the State Bar raised by their complaint. Respondent received the letter. Respondent did not respond to the letter or otherwise cooperate in the investigation.

On about May 21, 2010, the State Bar investigator mailed, to respondent at his official State Bar membership records address, another letter requesting that respondent provide a response to the complaint of Verner and Ishihara. Respondent received the letter, but did not respond to it or otherwise cooperate in the investigation.

On about August 4, 2010, a State Bar investigator met with respondent and requested that respondent respond to the outstanding letters requesting his response to the complaint of Verner and Ishihara. Respondent stated that he would provide a response by August 11, 2010. Thereafter, respondent did not respond in writing to the allegations raised by the complaint of Verner and Ishihara or otherwise cooperate in the investigation of that complaint.

Conclusions of Law

Count Six in NDC 2 – (§ 6068, subd. (m)[Failure to Communicate])

The court finds there is clear and convincing evidence that respondent failed to respond to reasonable client inquiries in willful violation of section 6068, subdivision (m) by failing to respond to Verner's reasonable status inquires.

Count Seven in NDC 2 – (Rule 4-100(B)(3) [Failure to Account])

The record clearly establishes that respondent willfully violated rule 4-100(B)(3) by failing to provide Verner and Ishihara with the requested accounting of the $3,000 in advanced fees that they paid to respondent.

Count Eight in NDC 2 – (Rule 3-700(D)(2) [Failure to Refund Unearned Fees])

The record clearly establishes that respondent willfully violated rule 3-700(D)(2) by failing to refund the $3,000 in unearned fees to Verner and Ishihara after they terminated respondent's employment.

Count Nine in NDC 2 – (§ 6068, subd. (i) [Failure to Cooperate in Disciplinary Investigation])

The court finds there is clear and convincing evidence that respondent failed to cooperate in a State Bar disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide the State Bar with a written response to the allegations of misconduct in the Ishihara/Verner matter in accordance with the State Bar investigator's two May 2010 letters and in accordance with respondent's own statements to the State Bar investigator on August 4, 2010.

G. Case No. 10-O-05592 – Simeone Client Matter

Facts

On about April 11, 2009, Michelle Simeone employed respondent to represent her in a dissolution case. Thereafter, Simeone paid respondent $1,200 in advanced fees.

On about August 6, 2009, respondent filed a petition for dissolution on behalf of Simeone in the Orange County Superior Court. Respondent, however, paid the filing fees for that petition with a check that was returned unpaid because it was insufficiently funds.

On about September 2, 2009, the superior court clerk mailed, to respondent at the address he listed on Simeone's petition, a notice informing respondent that, if the filing fees were not paid within 20 days, the court would void the filing of Simeone's petition. Respondent received that notice.

On about October 9, 2009, respondent mailed, to Simeone, a letter requesting that she fill out an asset and debt statement and a billing statement showing that respondent had incurred and paid a $350 filing fee on Simeone's petition. At no time did respondent inform Simeone that she needed to advance the filing fee to respondent so that her petition would not be dismissed.

Respondent did not pay the filing fees for Simeone's divorce petition. Therefore, on

about November 12, 2009, the superior court ordered that Simeone's petition be dismissed with prejudice. On about November 17, 2009, the superior court mailed a copy of that order to respondent at his address of record in the dissolution proceeding. Respondent received the order.

On about November 17, 2009, Simeone spoke to respondent by telephone to learn the status of her case. Respondent informed her that he needed to review the financial information and would discuss the case with her later. At no time did respondent inform Simeone that the superior court would void the filing of the petition if she did not advance the filing fee.

In about December 2009 and January 2010, Simeone called respondent on at least four separate dates and left messages requesting that he return her call to inform her of the status of her case. Respondent received the messages, but did not return Simeone's calls.

On about February 12, 2010, Simeone mailed a letter to respondent at two addresses she had for him informing him that she was terminating his services and requesting an accounting for the fees paid and the release of her client file. Respondent received, but did not respond to Simeone's letter. At no time did respondent release her client file to Simeone or inform Simeone how she could receive her file. At no time did respondent provide an accounting to Simeone for the $1,200 she paid.

Respondent provided no services of value to Simeone. Respondent did not earn the $1,200 in advanced fees he received from Simeone. At no time did respondent refund to Simeone any portion of the $1,200 in unearned fees

On about April 27, 2010, Simeone made a complaint to the State Bar about respondent's conduct. On about July 2, 2010, a State Bar investigator mailed, to respondent at his official membership records address, a letter regarding Simeone's complaint. The letter requested that respondent respond in writing to specified allegations of misconduct under

investigation by the State Bar raised by her complaint. Respondent received the letter, but did not respond to it or otherwise cooperate in the investigation.

On about July 22, 2010, a State Bar investigator mailed, to respondent at his official membership records address, a letter requesting that respondent provide a response to Simeone's complaint. Respondent received the letter. But respondent did not respond to the letter or otherwise cooperate in the investigation.

On about August 4, 2010, a State Bar investigator met with respondent and requested that respondent respond to the outstanding letters requesting his response to Simeone's complaint. Respondent stated that he would provide a response by August 11, 2010. Thereafter, respondent did not respond in writing to the allegations raised by Simeone's complaint or otherwise cooperate in the investigation of Simeone's complaint.

Conclusions of Law

Count Ten in NDC 2 – (Rule 3-110(A) [Failure to Perform Competently])

The court finds there is clear and convincing evidence that respondent recklessly and repeatedly, if not intentionally, failed to perform legal services with competence in willful violation of rule 3-110(A) by failing to pay the $350 filing fee or to take action in response to the superior court's notice to keep the filing from being voided.

Count Eleven in NDC 2 – (§ 6068, subd. (m)[Failure to Communicate])

The record clearly establishes that respondent willfully violated his duty, under section 6068, subdivision (m), to properly communicate with his clients by failing to inform Simone that the superior court had voided the filing her petition and dismissed her case and by failing to respond to Simeone's reasonable status inquiries.

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Count Twelve in NDC 2 – (Rule 3-700(D)(1) [Failure to Release File])

Rule 3-700(D)(1) requires an attorney to release promptly, upon termination of employment, to the client, at the request of the client, all the client papers and property.

The court finds there is clear and convincing evidence that respondent willfully failed to promptly release a client file in willful violation of rule 3-700(D)(1) by failing to release the client file to Simeone in accordance with Simeone's request in her February 12, 2010 letter to respondent.

Count Thirteen in NDC 2 – (Rule 4-100(B)(3) [Failure to Account])

The record clearly establishes that respondent willfully violated rule 4-100(B)(3) by failing to provide Simeone with the requested accounting of the $1,200 in advanced fees she paid to respondent.

Count Fourteen in NDC 2 – (Rule 3-700(D)(2) [Failure to Refund Unearned Fees])

The record clearly establishes that respondent willfully violated rule 3-700(D)(2) by failing to refund the $1,200 unearned fee to Simeone after she terminated respondent's employment.

Count Fifteen in NDC 2 – (§ 6068, subd. (i) [Failure to Cooperate in Disciplinary Investigation])

The court finds there is clear and convincing evidence that respondent failed to cooperate in a State Bar disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide the State Bar with a written response to the allegations of misconduct in the Simeone matter in accordance with the State Bar investigator's two July 2010 letters and in accordance with respondent's own statements to the State Bar investigator on August 4, 2010.

in accordance with respondent's own statements to the State Bar investigator on August 4, 2010.

H. Case No. 10-O-05596 – Chavez Client Matter

Facts

On about November 15, 2007, respondent filed a civil complaint on behalf of Gary Chavez ("Chavez") in the Orange County Superior Court styled *Chavez v. Kaplan, et al.* On about March 2, 2009, respondent obtained a judgment on behalf of Chavez against two of the defendants for the principal sum of $337,028. Thereafter, respondent agreed to represent Chavez in collecting the judgment. On about February 4, 2010, respondent appeared in court for a debtor's examination of one of the judgment debtors.

Thereafter, Chavez called respondent on many occasions seeking to learn the status of the case and left messages for respondent to return his calls. Respondent received Chavez's messages. Respondent did not return Chavez's calls or otherwise communicate with Chavez to inform him of the status of the case.

On about April 28, 2010, Chavez made a complaint to the State Bar about respondent's conduct. On about August 2, 2010, a State Bar investigator mailed, to respondent at his official membership records address, a letter regarding Chavez's complaint. The letter requested that respondent respond in writing to specified allegations of misconduct under investigation by the State Bar raised by his complaint. Respondent received the letter, but did not respond to it or otherwise cooperate in the investigation.

Conclusions of Law

Count Sixteen in NDC 2 – (§ 6068, subd. (m)[Failure to Communicate])

The record clearly establishes that respondent willfully violated his duty, under section 6068, subdivision (m), to properly communicate with his clients by failing to respond to Chavez's reasonable status inquiries.

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Count Seventeen in NDC 2 – (§ 6068, subd. (i) [Failure to Cooperate in Disciplinary Investigation])

The court finds there is clear and convincing evidence that respondent failed to cooperate in a State Bar disciplinary investigation in willful violation of section 6068, subdivision (i) by failing to provide a written response to Chavez's complaint or otherwise respond to the State Bar's requests with an explanation for his conduct.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

The record establishes no mitigating factors. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).) [8]

B. Aggravation

The record establishes several factors in aggravation. (Std. 1.2(b).)

Respondent's present misconduct is comprised of multiple acts. (Std.1.2(b)(ii).)

Respondent's misconduct harmed significantly a client, the public or the administration of justice. (Std. 1.2(b)(iv).)

Respondent's failures to promptly submit his quarterly probation reports that were due on January 10 and April 10, 2010 and to promptly provide proof of his completion of ethics school in response to the State Bar's filing of case number 08-O-14872-RAP not only defy understanding, but also clearly establish respondent's indifference toward rectification, which alone is serious aggravation. (Std. 1.2(b)(v); *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 702.)

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[8] Future references to standards (or std.) are to this source.

Respondent has two prior records of discipline. (Std. 1.2(b)(i).) Respondent's first prior record of discipline is the Supreme Court's September 20, 2002 order in *In re Steven Paul Nieto on Discipline*, case number S108954 (State Bar Court case number 00-O-11960, etc.) in which respondent was placed on ninety days' stayed suspension and two years' probation on conditions, including $600 in restitution but no actual suspension (*Nieto* I). The Supreme Court imposed that discipline on respondent in accordance with a stipulation that respondent and the State Bar submitted and that the State Bar Court approved in an order filed on May 17, 2002, in State Bar Court case number 00-O-11960, etc.

The parties' stipulation in *Nieto* I conclusively establishes that respondent was culpable of six counts of misconduct in two separate client matters. In one client matter respondent represented a mother and her daughter who were injured in an auto accident. Respondent settled the clients' claims with their consent, but improperly delayed paying the clients their $4,000 share of the settlement proceeds for almost a year (rule 4-100(B)(4)).

Moreover, during the time that respondent improperly failed to pay the clients their share of the settlement proceeds, the balance in respondent's CTA repeatedly dipped below the amount respondent was required to maintain in his CTA for the mother and daughter (rule 4-100(A)).

In the second client matter in *Nieto* I, respondent failed to perform (rule 3-110(A)), failed communicate (§ 6068, subd. (m)), failed to release client files (rule 3-700(D)(1)), and failed to refund unearned fees (rule 3-700(D)(2)).

Respondent's second prior record of discipline is the Supreme Court's April 9, 2009 order, *ante*, in which respondent was placed on one year's stayed suspension and two years' probation on conditions (*Nieto* II). The Supreme Court imposed the discipline in *Nieto* II on respondent in accordance with a stipulation that respondent and the State Bar entered into and that the State Bar Court approved in an order filed on December 10, 2008, in State Bar Court

case number 04-O-13994, etc. The parties' stipulation in *Nieto* II conclusively establishes that respondent was culpable of (1) representing three individuals who had potentially conflicting interests without first obtaining each of the three individual's written consent (rule 3-310(C)(1)) and (2) failing to respond to the one of the client's reasonable status inquiries (§ 6068, subd. (m).)

V. Discussion

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

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).) Discipline is progressive. (Std. 1.7.)

The most severe sanction is found at standard 2.2(a), which provides:

> Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances.[9]

[9] The one-year "minimum discipline" set forth in the standard "is not faithful to the teachings of [the Supreme Court's] decisions" and "should be regarded as a guideline, not an inflexible mandate." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38.)

The Supreme Court has repeatedly held that misappropriation of trust funds is a grievous violation. Moreover, the Supreme Court has made clear that even an isolated instance of misappropriation by an attorney without a prior record of discipline will result in disbarment in the absence of compelling mitigation. (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129; *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1071-1073.) There is no mitigation in the present proceeding, much less compelling mitigation.

Also relevant is standard 1.7(b), which provides:

> If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of two prior impositions of discipline . . . , the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate.

Notwithstanding its unequivocal language to the contrary, standard 1.7(b) is not strictly applied. In other words, disbarment is not mandatory under standard 1.7(b) even if there are no compelling mitigating circumstances that clearly predominate in a case. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507, citing *Arm v. State Bar* (1990) 50 Cal.3d 763, 778-779, 781.) To conclude otherwise would require that the State Bar Court and the Supreme Court blindly treat all prior records of discipline as equally aggravating. Instead, standard 1.7(b) is applied "with due regard to the nature and extent of the respondent's prior records. [Citation.]" (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 704.)

When applying standard 1.7(b), great weight is placed "on whether or not there is a 'common thread' among the various prior disciplinary proceedings or a 'habitual course of conduct' which justifies disbarment. [Citation.]" (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841.)

There are common threads among respondent's two prior records of discipline and the present proceeding -- respondent's third disciplinary proceeding**.** Each of respondent's three

disciplinary proceedings involved client misconduct. Moreover, *Nieto* I and the present proceeding both involved respondent's failure to properly communicate with his clients and failure to refund unearned fees.

In sum, the court concludes that both standard 2.2(a) and standard 1.7(b) and relevant case law strongly counsel recommending respondent's disbarment in this proceeding. Moreover, in the present proceeding, respondent has been found culpable of repeatedly failing to comply with the conditions of the two-year disciplinary probation that the Supreme Court imposed on him in *Nieto* II. Respondent's repeated failures to comply with the conditions of his probation establish that respondent is either unwilling or unable to conform his conduct to the standards of the profession even under the watchful eye of the State Bar. In sum, the court concludes that only a disbarment recommendation will adequately further the goals of attorney discipline. Finally, the court concludes that respondent should also be ordered to make restitution in the Vargas, Aguilar, Ishihara/Verner, and Simeone client matters.

VI. Recommended Discipline

IT IS HEREBY RECOMMENDED that respondent **STEVEN PAUL NIETO** be DISBARRED from the practice of law in the State of California and that his name be stricken from the roll of attorneys.

It is also recommended that **STEVEN PAUL NIETO** be ordered to make restitution to the following individuals as set forth below. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

Respondent must make restitution to Jose Vargas in the amount of $4,667 plus 10 percent interest per year from November 17, 2008 (or reimburse the Client Security Fund, to the extent

of any payment from the fund to Jose Vargas in accordance with Business and Professions Code section 6140.5).

Respondent must make restitution to Frank Aguilar in the amount of $1,500 plus 10 percent interest per year from November 24, 2009 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Frank Aguilar in accordance with Business and Professions Code section 6140.5).

Respondent must make restitution to Chie Ishihara and Bill Verner in the amount of $3,000 plus 10 percent interest per year from December 30, 2009 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Chie Ishihara and Bill Verner in accordance with Business and Professions Code section 6140.5).

Respondent must make restitution to Michelle Simeone in the amount of $1,200 plus 10 percent interest per year from March 14, 2010 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Michelle Simeone in accordance with Business and Professions Code section 6140.5).

VII. California Rules of Court, rule 9.20

It is also recommended that the Supreme Court order **STEVEN PAUL NIETO** to comply with rule 9.20, paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding and to file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.

VIII. Costs

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

IX. Involuntary Inactive Enrollment Order

It is ordered that **STEVEN PAUL NIETO** be transferred to involuntary inactive enrollment status pursuant to Business and Professions Code section 6007, subdivision (c)(4). The inactive enrollment shall become effective three days from the date of service of this decision and order by mail.

Dated: June 10, 2011.

RICHARD A. PLATEL
Judge of the State Bar Court