PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **DENNIS EARL BRAUN,** **Member No. 152816,** A Member of the State Bar.	)	**Case Nos.: 14-O-06193-DFM** **DECISION**

INTRODUCTION

Respondent **Dennis Earl Braun** (Respondent) was originally charged here with four counts of misconduct, involving a single client matter. The counts included allegations that Respondent willfully violated (1) rule 3-110(A) of the Rules of Professional Conduct[1] (failure to perform with competence); (2) Business and Professions Code section 6068, subdivision (i) (failure to cooperate with State Bar investigation)[2]; (3) rule 3-700(A)(2) (improper withdrawal from employment); and (4) section 6068, subdivision (m) (failure to inform client of significant development). Count 2, alleging a failure to cooperate with the State Bar's investigation, was dismissed by the State Bar at the time of the pretrial conference in this matter. With regard to the

[1] Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

[2] Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

remaining counts, the State Bar had the burden at trial of proving the above charges by clear and convincing evidence. The court finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on October 23, 2015. On November 20, 2015, Respondent filed his response to the NDC, generally denying all of the allegations thereof.

An initial status conference was held on December 7, 2015. At that time, the case was given a trial date of February 2, 2016, with a two-day trial estimate. Thereafter, due to the illness of the undersigned, the trial was continued and subsequently reset for March 22, 2016.

Trial was commenced and completed on March 22, 2016. The State Bar was represented at trial by Deputy Trial Counsel Hugh Radigan. Respondent was represented by Edward O. Lear of Century Law Group LLP.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's response to the NDC, the stipulation of undisputed facts and conclusions of law previously filed by the parties, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on June 6, 1991, and has been a member of the State Bar at all relevant times.

Case No. 14-O-06193 (Gilroy Matter)

In June 2010, Timothy Gilroy (Gilroy) had filed a petition for dissolution and obtained a restraining order against Julia Gilroy (Julia), a woman with whom he had lived and fathered two children. In July 2011, the restraining order was dissolved and the dissolution case dismissed on

the court's finding that there was no valid underlying marriage. After the dissolution action was dismissed, both sides filed separate civil suits against the other.

In August 13, 2011, Respondent was retained by Gilroy to handle the ongoing disputes between Gilroy and Julia.

In response to a verified cross-complaint filed by Julia in the action filed by Gilroy, Gilroy responded with an anti-SLAPP motion to strike under Code of Civil Procedure section 425.16. When confronted by Gilroy's anti-SLAPP motion, Julia dismissed her charges of fraud, intentional and negligent infliction of emotional distress, and partition of real property, but retained her causes of action alleging fraud in the inducement and unjust enrichment. When the court eventually ruled on the motion, the motion was denied. Respondent, on behalf of Gilroy, then appealed this ruling, assisted by an outside attorney.

On June 26, 2014, the appellate court affirmed the trial court's ruling, determining that the surviving two causes of action were not based on conduct protected by the anti-SLAPP statute. The remittitur issued in conjunction with the appellate court's decision awarded Julia her costs on appeal.

Gilroy was predictably disappointed by the adverse appellate court decision but initially did not blame Respondent for the bad outcome. To the contrary, in a text message to Respondent on June 27, 2014, the day after the decision was filed, Gilroy stated:

> "Hello Dennis, what a disappointment, yeah? [¶] I put a lot of hope into that one. I really feel this one. Well, you can't win them all the time even if you do well. [¶]I want to tell you, I think you did a great job and I am sorry it went that way." (Ex. 26, p. 52.)

Thereafter, from the end of June 2014 until late August 2014, Gilroy and Respondent continued to communicate with one another about the many problems Gilroy was having with Julia, including disputes regarding parenting issues involving their daughter Leslie. Many of

these communications were in the form of text messages, with the vast majority of Gilroy's texts being sent to Respondent well outside of normal business hours.

In late August 2014, a serious breakdown in the relationship between Gilroy and Respondent occurred. After being provided by Respondent with a written analysis by the outside appellate attorney regarding the significance of the adverse appellate decision, Gilroy became increasingly depressed about the many problems in his life being caused by Julia, and he began to fault Respondent for not being more successful and responsive in resolving those problems. At the same time, Gilroy was falling far behind in paying Respondent for the extensive services that Respondent had already provided, and Gilroy was open with Respondent about being financially unable to pay for the growing legal fees at any time in the foreseeable future. This breakdown was largely played out in the following text messages between the two individuals:[3]

8/19/2014 at 17:38: [By Gilroy]: I don't know what to do or where to go anymore. I feel defeated in everyway and from every angle. And there is no way out. There is no direction to go that has light. Everywhere, I lose.

8/21/2014 at 7:58: [By Gilroy]: Dennis, I need to file an OSC for full custody of my children. In the last 2 weeks, Julia enrolled Leslie in public school and actually took her to tha school to begin there and tried to hide what she was doing. She will not allow me to take Leslie to her counseling appointment and instead took her to the session. Then, without notice she took Leslie to a neurologist who diagnosed her differently than the Dr./counselor I am taking Leslie to, the Dr. Julia took her to just Prescribed medication and she informs me she will take Leslie to counseling now as well. She wasn't going to let me know except I sent her an email yesterday cautioning her about trying to do something like that then she sent me an email today telling me this is what she has done. Julia is way out of bounds and will not abide by the court's orders.

[3] Text messages routinely include grammatical shortcuts and errors. The quoted texts are repeated in this decision just as they appeared in the materials submitted by Gilroy in 2014 to the superior court.

8/22/2014 at 20:51: [By Gilroy]: What?[4]

8/22/2014 at 21:06: [By Gilroy]: I have serious shit happening into life and you seem to take a leisurely vacation anytime you feel uncomfortable. I've missed numerous opportunities for success because all of a sudden you become a no show. I have given you between 15 and 20 thousand $ for a half assed attention to my case, you think it is OK to not communicAte – it's funny it is the same tactic my ex uses to screw me too. 20k is less than you deserve but it is not nothing. You lead me on as if then you don't do anything even when you expend a good effort. If you quit in the fourth quarter, you shouldn't have been in the game at all yet you take the snap and always give it to the other team. I think 20 K I should at least get a response. You have fucked me just like everyone else. I have always appreciated what you have done, but when the end result is a lot less than zero????fuck!!!!

(Ex. 26, p. 51.)

On the following morning, Respondent responded via text to the above messages by indicating his intent to withdraw from representing Gilroy:

8/23/2014 at 10:23: [By Respondent]: I was dealing with a woman who was beaten up by her husband who I obtained a TRO and then appeared Friday all day Downtown for the RO trial. You are correct you have paid me a sum of money that is so far less than the time in two separate cases that I have been severely financially damaged. How dare you speak to me this way at 9:00 pm. Friday night. You believe I've given your cases "half-assed" attention .... then I should not be your counsel any longer in any case. Some lawfirms can carry large accounts receivables ... you have known from the beginning I can not. Then you accuse me of treating you as Julia has ... I dont think there is much more to say...

8/23/2014 at 10:25: [By Respondent]: I will put together a final bill and forward it shortly. Meanwhile there is another hearing set

[4] This chain of texts reflects the information provided by Gilroy to the superior court in 2014, when Gilroy was seeking to convince that court that Respondent had abandoned him. While Gilroy had succeeded in being able to retrieve and copy his prior text messages to and from Respondent, Gilroy conceded during the trial of this matter that he did not provide all of those text messages to the superior court, the State Bar, or this court. Respondent testified – and the content of the some of text messages tend to confirm – that Respondent would frequently respond to Gilroy's messages with a return telephone call, rather than a responsive text message.

for Monday in your civil case. I will inform the court of my withdrawal unless you find someone else to take over.

(Ex. 26, pp. 50-51.)

Within an hour of the above messages from Respondent, Gilroy communicated his agreement that Respondent could withdraw from the case:

8/23/2014 at 11:16: [By Gilroy]: It's funny when your feelings are hurt you have plenty of time. How dare I? You have to agree that not responding to serious situations in half assed and I am the one that gets screwed – so I dare to tell the truth when my life is getting fucked and you can't find the time to say "I hear you i'll get back to you" or we'll discuss what needs to happen and what I need to do.

I have expressed my absolute appreciation for all you have done and I will never not honor your effort and involvement.

I understand Julia is a bitch and her lawyer is a nasty piece of work. But this bitch and nasty piece of work keep getting the upper hand and take my family, property, and money. I can not wait until it is too late again to respond to serious situations. There are serious situations going on now.

Withdraw and give me the bill if you can't handle the truth or the situation.

(Ex. 26, p. 50.)

On August 25, 2014, Respondent appeared at a case management conference in the *Gilroy* litigation. Gilroy was also present. The August 25, 2014, minute order does not reflect that Respondent advised the court of his intent to withdraw. Instead, before the hearing Respondent and Gilroy had discussed the risk that the filing by Respondent of a motion to withdraw as Gilroy's attorney would be seized on by Julia as a basis for challenging Gilroy's existing custody rights in the ongoing and hotly contested custody case between the two parties (also being handled by Respondent for Gilroy), where Gilroy's anger management problems had been a point of contention and a cause of concern by the family law court. In this discussion, Respondent recommended, and Gilroy agreed, that the two individuals would merely execute

and file Substitution of Attorneys forms, allowing Respondent to be dismissed from the two pending matters without having to air any issues between them.

On August 26, 2014, the day after the status conference, Gilroy sent an email to Respondent, apologizing for his prior "harsh, profane and inappropriate message to you. I was wrong and you are undeserving of that from me." After complimenting and thanking Respondent for his prior efforts on Gilroy's behalf, for which Respondent had largely been unpaid, Gilroy concluded:

> As a result, I concur with you and agree to dismiss you as my lawyer and sign the substitution and file it. Let me know when you are at the Court house and I will bring the forms for your signature. I will file it and mail the appropriate copies to you and Karaffa and Julia.
>
> I appreciate all you have done for me and your great sacrifice on my and my daughters' behalf. You are unforgettable to me. I also am indebted to you. Please provide me with a final bill. I can't pay it immediately, but it will be paid. I wish I could do more and sooner rather than later.
>
> See you to sign the forms.
>
> With deep respect, Tim

(Ex. 1023.)

As one of the many reasons why this court concludes that Gilroy is not a credible witness, he neither provided this email message, nor disclosed the content of it, to either the superior court or the State Bar.

On August 26, 2014, in apparent response to Gilroy's email of the prior day, Respondent provided executed Substitution of Attorney forms to Gilroy for the two legal matters then pending, together with the following letter confirming Gilroy's agreement to sign and file the substitutions:

> After these multiple cases and appeals and your inability to pay for legal services and really, unwarranted abusive behavior directed at me, I can no

> longer continue in your case. I accept your apology, however, I have also seriously considered this situation. I cannot continue to represent you in these matters. I do not want to take any action that Julia could seize upon to again try to get the family law judge to take custody away from you as she has in the past. You agreed to the substitution of attorney rather than have me file any motions, which is certainly in your best interest.
>
> I am attaching Substitution of Attorney forms for both cases. These need to be filed as soon as possible.

(Ex. 1005.)

During his trial testimony in this matter, Gilroy acknowledged receiving the executed Substitution of Attorney forms from Respondent at or about the time of the above letter. Although he stated that he could not recall receiving the above letter, which he had not produced to either the superior court or the State Bar, he remembered meeting in person with Respondent, who hand-delivered the executed substitutions to Gilroy for filing and again explained that he was not able to go forward with the cases.[5] During that meeting, Respondent also provided Gilroy with the name of another attorney who might be interested in handling the file. Gilroy acknowledged during trial that he did not retract during that meeting his previously-stated willingness to dismiss Respondent from the pending cases and to file the executed substitutions.

Despite having previously agreed to file the executed substitutions provided to him by Respondent, Gilroy did not follow-up to do so. At trial, Gilroy testified that, at some unspecified time after he had received the Substitution of Attorney forms from Respondent, he and Respondent had another conversation in which Gilroy informed Respondent that he did not want to discharge Respondent from the cases. That trial testimony by Gilroy was not credible. In none of Gilroy's prior statements to either the superior court or the State Bar did he ever describe

[5] As a cost-saving measure, Gilroy frequently handled the filing of court papers in the *Gilroy* matters. By way of example, in 2011, he had previously handled the filing of the substitution, substituting Respondent into the case for Gilroy's prior attorney.

or make any contention of any such conversation. To the contrary, he affirmatively represented that Respondent had never provided him with any executed substitution forms and claimed that Respondent had completely abandoned him without any prior knowledge on the part of Gilroy or any consent by him.[6] There is also no indication in any of Gilroy's texts and email messages to Respondent before October 24, 2014, when Gilroy complained to the court about being abandoned by Respondent, that Gilroy had notified Respondent that he did not intend to file the substitution. In fact, Gilroy has shown himself to be far less than a credible historian. He concealed from both the superior court and the State Bar the facts that he had agreed to discharge Respondent from the case, that he had received executed substitution forms from Respondent in August 2014, and that he had agreed to execute and file those forms with the superior court. He also did not disclose the many conversations he and Respondent both acknowledge having after the breakdown of their relationship occurred.

Respondent came to believe after September 5, 2014, that the substitutions had been filed by Gilroy. This belief was based on a docket entry Respondent observed on the superior court's website, indicating that a "Substitution of Attorney (IN PRO PER)" had been filed in the *Gilroy*

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[6] See, e.g., Gilroy's Declaration filed with the superior court in December 2014 (Ex. 26, p. 5 ["When the Appellate Court released its decision in Favor of the Cross-Complainant, my Attorney abandoned me at the time the appeal decision was published, approximately June 27, 2014 without providing any information on what that decision meant and/or what needs to be done next, or any comment whatsoever about what to do. While I was unaware at that time that I was abandoned, he continued to have no communication with me and would not answer any telephone calls or return any calls, respond to any texts or emails. Since hat time. I may have received approximately 2 texts from my attorney and he did not follow-up those texts with further communication or action."]); and Gilroy's November 16, 2014 complaint to the State Bar ("He continues to be listed as the Attorney of record but he does not: 1) Communicate with me (for over 6 months) except with very vague comments causing me to believe he will act responsibly but never does . . . 3) Provide a signed substitution" [Ex. 26, pp. 38]; "I have begged my Attorney for my files, substitution, and answer a few questions so that I might be able to proceed. The only answer is he will give me my files and then nothing. He doesn't answer my phone, email, or texts." [Ex. 26, p. 39].)

case on September 5, 2014. Unfortunately, because Respondent merely assumed that this "In Pro Per" substitution had been filed by Gilroy, he did not read the docket entry sufficiently carefully to see that, by coincidence, it was Julia, the opposing party, who had filed the substitution, removing her own attorney and becoming counsel for herself. (Ex. 26, p. 41.)

Respondent acknowledged at trial that he was derelict in failing to take affirmative steps to verify that he had been formally removed as counsel for Gilroy in the pending litigation. Gilroy never told him that the substitution had been filed, and Respondent never received "proof" that he was no longer counsel of record in the *Gilroy* litigation. Moreover, even if Respondent was arguably only negligent in misreading the above docket entry, there were numerous subsequent events that should have caused him to realize – or at least investigate – whether he remained counsel of record in the *Gilroy* case and, more significantly, to communicate with Gilroy about ongoing developments in that litigation. Those events include the following.

On September 4, 2014, the day prior to the substitution of attorneys being filed by Julia, her attorney served various discovery requests on Gilroy by sending them to Respondent as counsel of record in the case. (Ex. 20, p. 18.)[7] Because Respondent had no reason to believe that this was not valid service of the discovery requests, Respondent had a duty – even if he was correct in believing that he had been terminated as counsel – to take reasonable steps to ensure

[7] Respondent's testimony – that he did not receive or see these discovery requests and the many other documents sent to him after August 2014 by opposing counsel, Julia, and the superior court – was not persuasive. His testimony that a member of his staff repeatedly received and merely filed the many minute orders, sent to Respondent by the superior court and referring to the court's concerns about Respondent's abandonment of Gilroy, was also not credible. Similarly, his assertion that opposing counsel and Julia falsely claimed service of the various documents filed on her behalf was not persuasive and is undercut by third-party tracking information for at least one of the documents, the amended cross-complaint served on September 5, 2014. (See Ex. 19, pp. 36-38.)

that the termination of his employment did not result in foreseeable prejudice to Gilroy – a duty that required him to at least inform Gilroy of his receipt of the discovery requests and the need to respond to them. (Rule 3-700(A)(2); see also *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, 710 [duty to avoid foreseeable prejudice continues after attorney has been terminated by client].) This he did not do.

Then, on September 5, 2014, Julia, now acting in pro per, served and filed a verified first amended cross-complaint. Service of this amended cross-complaint was accomplished by mailing it to Respondent as Gilroy's continuing counsel of record in the case. (Ex. 19, pp. 5-6.)

On September 16, 2014, Julia filed and served a motion for attorney's fees and costs premised on the appellate court's remittitur. Service of the motion was again accomplished by mailing it to Respondent as Gilroy's counsel of record in the case. (Ex. 18, pp. 18-19.) The hearing date for the attorney's fees motion was November 21, 2014.

Respondent did not forward the above documents to Gilroy, did not notify Gilroy of his receipt of the motions,[8] and took no steps to oppose the motions or respond to the cross-complaint. Inexplicably, despite his belief that Gilroy was now acting as counsel for himself (unless he could secure replacement counsel), Respondent also made no effort to return to Gilroy his files generated during the course of the pending litigation.

On October 13, 2014, Gilroy sent Respondent a text, stating in pertinent part: "Hello Dennis, there are all of these items on the case summary that happened in September and August and I don't know what they [are]. Regularly losing sleep on sinking ship." (Ex. 26, p. 50.)

[8] The evidence at trial is not clear and convincing that Respondent failed to advise Gilroy of the amended cross-complaint. While Gilroy represented to both the superior court and the State Bar that Respondent had never told him of the amended cross-complaint, during his testimony in this proceeding Gilroy stated that Respondent "may have" told him of the amended cross-complaint.

On October 16, 2014, Julia sent two letters to Respondent, demanding responses to her pending discovery requests and threatening to file motions to compel unless responses were provided by October 24, 2014. Respondent failed to take any action in response to those letters.

On October 24, 2014, the re-scheduled case management conference was held in the pending *Gilroy* matter. Gilroy appeared at the conference; Respondent, who remained counsel of record, did not. Gilroy, having become aware of the various pending matters previously filed by Julia, complained to the court that Respondent had abandoned him and was not communicating with him. The court then continued the case management conference to November 21, 2014 (the date of the scheduled hearing on Julia's motion for attorney's fees and costs regarding the remittitur) and advised Gilroy to contact the State Bar if Respondent continued to fail to communicate with Gilroy. A copy of the court's minute order, memorializing the above facts, was mailed to Respondent by the court. (Ex. 12.)

On October 27, 2014, despite her awareness of the issues regarding Respondent's abandonment of Gilroy, Julia filed a request for entry of Gilroy's default, based on his failure to file a response to her amended cross-complaint against him. The requested default was entered that same day by a deputy clerk of the court. (Ex. 19.)

Acting on the superior court's advice, Gilroy emailed Respondent on October 24, 2014, requesting him to assist in addressing the pending matters. (Ex. 26, p. 46.) On October 28, 2014, Respondent replied to the email with a text message, stating that his financial situation had caused him to move out of his office and that he would "deliver your files to you with substitutions of attorneys tomorrow." Respondent then failed to follow through with that

assurance, although he was at that point certainly aware that he remained counsel of record in the pending superior court matter.[9]

On November 12, 2014, Julia filed and served motions to compel Gilroy to provide answers to the form interrogatories, special interrogatories, and requests for production of documents that had previously been sent to Respondent. In those motions, Julia also sought sanctions against both Respondent and Gilroy. Service of the motions was again accomplished solely by mailing them to Respondent as Gilroy's ongoing counsel of record in the case, despite Julia's knowledge that Gilroy was complaining of Respondent's abandonment. (Ex. 20, p. 8.) Respondent did not notify Gilroy of his receipt of these motions; did not forward the motion papers to Gilroy; took no steps to oppose the motions; and failed to take any formal steps at that time to be removed as counsel of record in the case.

On or about November 16, 2014, Gilroy filed a complaint against Respondent with the State Bar. (Ex. 26, pp. 38, et seq.)

On November 21, 2014, the continued case management conference and the hearing on Julia's motion for attorney's fees premised upon the remittitur were conducted. Gilroy was present; Respondent, although he was then aware that he remained counsel of record, was not. At the hearing, the court awarded Julia attorney's fees against Gilroy in the amount of $4,420, but denied without prejudice any award to Julia of costs premised on the remittitur. During the conference, Gilroy again complained of Respondent's abandonment and advised the court that a

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[9] At trial, Respondent sought to justify his failure to return the files to Gilroy at that time by stating that Gilroy wanted Respondent to bring the files to Gilroy's home. Respondent said that he was unwilling to go to Gilroy's home because of Gilroy's history of problems with anger management. This explanation, however, fails to justify Respondent's complete failure to return the files. At a minimum, the files could have been delivered by a messenger to Gilroy's home. Nor does Respondent's expressed concern explain or justify his failure to mail or email new Substitution of Attorneys forms to Gilroy.

complaint had now been filed by him with the State Bar. The court then continued the case management conference to December 30, 2014, indicating that the court could not proceed until the issue of Gilroy's representation was resolved. A copy of the court's minute order, memorializing the above facts, was prepared and mailed by the court to Respondent. (Ex. 13.)

On December 23, 2014, Gilroy filed a motion to set aside his default on the amended cross-complaint. The motion included a declaration by Gilroy, in which he reported that Respondent had promised both to return Gilroy's files and to provide him with an executed substitution but had failed to do either. (Ex. 26, p. 6.)

At the December 30, 2014, conference, Gilroy advised the court that Respondent had still neither responded to his communications nor provided Gilroy with the files for the pending case. As a result, the court once again continued the case management conference, this time to January 30, 2015.

On January 23, 2015, Respondent filed a motion to be relieved as counsel in the pending *Gilroy* matter. In this motion, he stated that Gilroy had refused both to execute a Substitution of Attorney form and to receive the files on the case.

At a January 30, 2015, hearing in the *Gilroy* case, Respondent appeared, together with Gilroy. At that time, Respondent notified the court that he had filed his motion to withdraw as counsel of record and that the motion was set for hearing on March 18, 2015. He also informed the court that he had brought two boxes of file materials for Gilroy, which the court instructed Respondent to make available to Gilroy promptly after the conference was completed. When Respondent then made the files available to Gilroy in the court hallway after the hearing, Gilroy refused to take them – in stark contrast to his many complaints to the State Bar and the superior court that he had been "begging" to have the files.

On February 9, 2015, a fully executed Substitution of Attorney form, replacing Respondent with Gilroy as an in pro per party, was filed with the superior court.

On March 18, 2015, the case management conference and scheduled hearing of the pending discovery motions was held. Gilroy was present; Respondent, no longer counsel of record, was not. The minute order issued by the court after that hearing states that Respondent's motion to withdraw was deemed moot due to the substitution of counsel filed on February 9, 2015. The order further states that Julia's motions to compel discovery were denied as moot, but that she was awarded discovery sanctions of $180. Finally, the previously-entered default regarding the amended cross-complaint was set aside.

Count 1 – Rule 3-110(A) [Failure to Perform with Competence]
Count 3 – Rule 3-700(A)(2) [Improper Withdrawal From Employment]

Rule 3-700(A)(2) provides, "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules." In Count 3, the State Bar alleges that Respondent violated rule 3-700(A)(2) "by constructively terminating Respondent's employment on or about August 23, 2014, by failing to take any action on the client's behalf after on or about August 23, 2014, and thereafter failing to properly substitute out of the matter or file a motion to withdraw until January 23, 2015."

Rule 3-110(A) provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." In Count 1, the State Bar alleges that Respondent violated the prohibition of rule 3-110(A) "by failing to appear at a number of case management conferences, failing to oppose an attorney's fees request based on remittitur, failing to answer a verified cross-complaint resulting in the entry of a default, failing to secure discovery

responses and failing to oppose the attendant motion to compel, or otherwise take any action to pursue the client's objectives subsequent to or on or about August 23, 2014."

At the conclusion of his testimony during the trial of this matter, Respondent stipulated, and this court now finds, that Respondent is culpable of improperly withdrawing from his employment by Gilroy after August 26, 2014, in willful violation of rule 3-700(A)(2) [Count 3]. In turn, the State Bar agreed during closing argument that, under the facts of this case, the allegations of Count 1 [willful violation of rule 3-110(A)] are duplicative of the facts forming the basis for Respondent's culpability of Count 3. As a result, while the evidence is clear and convincing that Respondent's repeated failures to take required actions on behalf of Gilroy represent a violation of the prohibition of rule 3-110(A), this court finds no need to assess any additional discipline as a consequence of that fact. (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 10-11.)

Count 2 – Section 6068, subd. (i) [Failure to Cooperate in State Bar Investigation]

At the pretrial conference in this matter, the State Bar asked that this count be dismissed. Reaffirming the oral order made by the court at that time, this count is dismissed with prejudice.

Count 4 – Section 6068, subd. (m) [Failure to Inform Client of Significant Development]

Section 6068, subdivision (m), obligates 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." In this count the State Bar alleges that Respondent violated the above obligation "by failing to inform the client of the receipt of discovery or the need for responses, by failing to advise the client of service of a verified cross-complaint and the need to serve and file a verified answer and that the client's default had been entered as to the cross-complaint." While Respondent, after the completion of

the evidentiary portion of the trial, stipulated to culpability for improper withdrawal (Count 3), he continued to dispute culpability for any violation of section 6068, subdivision (m).

As noted briefly above, the evidence is not clear and convincing that Respondent failed to notify Gilroy of the amended cross-complaint or the need to serve and file a verified answer to it. While Gilroy complained to both the superior court and the State Bar that Respondent had never told him of the amended cross-complaint, during his testimony in this proceeding Gilroy testified that Respondent "may have" told him of the amended cross-complaint and of Gilroy's need to respond to it.

Similarly, there is no clear and convincing evidence that Respondent had failed to inform Gilroy that his default had been entered with regard to Julia's amended cross-complaint. Indeed, there was no testimony to this effect at all by Gilroy during the trial of this case.

However, the evidence is clear and convincing that Respondent failed to notify Gilroy of the various discovery requests sent to him by Julia's counsel and of the need for Gilroy to provide responses to them. This failure by Respondent constituted a willful violation by him of his obligations under section 6068, subdivision (m), and is not duplicative of the misconduct underlying the finding of Respondent's culpability of violating rule 3-700(A)(2). (*In the Matter of Wolff, supra*, 5 Cal. State Bar Ct. Rptr. at p. 10.)

Aggravating Circumstances

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).)[10] The court finds the following with regard to aggravating factors.

[10] All further references to standard(s) or std. are to this source.

Prior Discipline

Respondent was privately reproved (with public disclosure) by this court in 2003 in case No. 01-H-3607. In that case, Respondent stipulated to failing to act with competence, in willful violation of the prohibition of rule 3-100(A), by failing to take steps to properly distribute funds held by him for the benefit of his client and a lienholder.

This record of a prior discipline is an aggravating factor.

Multiple Acts of Misconduct

Respondent is culpable of multiple acts of misconduct. This is an aggravating factor. (Std. 1.5(b).)

Harm

Respondent's misconduct resulted in an award of sanctions against Gilroy and in repeated delays in the superior court's efforts to move the underlying *Gilroy* matter forward to resolution. That Respondent's actions impacted the efficient administration of justice and burdened the superior court is an aggravating circumstance. (Std. 1.5(j); *In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 792.)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with regard to mitigating factors.

Cooperation

Respondent entered into a lengthy pretrial stipulation of facts and agreed to the admission of all of the State Bar's proffered exhibits. While Respondent is entitled to some mitigation credit for this cooperation, the weight of this credit is limited by the fact that he did not provide any pretrial stipulation regarding culpability in the matter, but instead denied all culpability until

near the conclusion of the trial. (Std. 1.6(e); *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171, 185 [limited mitigation credit where the stipulation was relevant and assisted the State Bar's prosecution of the case but respondent did not admit culpability]; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [where appropriate, more extensive weight in mitigation is accorded those who admit to culpability as well as facts].)

Character Evidence

Respondent presented impressive good character evidence from 15 witnesses, including three attorneys and numerous former and current clients, regarding Respondent's integrity, fine qualities as an attorney, good character, and sincere (and frequently successful) efforts on behalf of his clients. Respondent is entitled to substantial mitigation for this character evidence. (Std. 1.6(f).)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in a talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle*

(2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the court considers 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 1.7(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for Respondent's misconduct is found in standard 2.7(c), which provides: "Suspension or reproval is the presumed sanction for performance, communication, or withdrawal violations, which are limited in scope or time. The degree of sanction depends on the extent of the misconduct and the degree of harm to the client or clients." Also applicable is standard 1.8(a), which provides: "If a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust."

The State Bar argues that an actual suspension of 30 days is appropriate in the instant case, citing *Layton v. State Bar* (1990) 50 Cal.3d 889 and *Bach v. State* Bar (1991) 52 Cal.3d 1201. In contrast, Respondent contends that discipline consisting of a public reproval is appropriate, citing *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32; *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703; and *In the Matter of*

Kopinski (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 716. Either of these proposed outcomes would be consistent with the applicable standards quoted above.

A review of the potentially applicable decisions makes clear that discipline consisting of a stayed suspension, with no actual suspension, is appropriate under the facts and circumstances of this case.

Neither of the two cases relied on by the State Bar supports a recommendation of discipline including 30 days of actual suspension. The court in *Layton* emphasized that the respondent there had demonstrated continuing indifference and that the misconduct there continued for more than five years and had caused significant harm. In a subsequent analysis of that decision by the Review Department of this court, those were the key factors identified by the Review Department as making a period of actual suspension appropriate in that case. (See *In the Matter of Aguiluz*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 46.) None of those factors is present here. Similarly, in *Bach*, the Supreme Court also made clear that its decision to impose a period of actual suspension was due to the ongoing indifference and lack of remorse by the respondent there, coupled with his lack of cooperation in the disciplinary proceeding. Again, none of those factors is present here.

In contract, none of the three cases relied on by Respondent here supports the imposition of only a public reproval for Respondent's misconduct. For starters, the discipline actually imposed in two of those three cases (*Aguiluz* and *Kopinski*) was a stayed suspension, rather than a public reproval. Further, in neither of those two cases did the respondent there have any history of a prior discipline.

With regard to the third case, *Hanson*, where a public reproval was issued by this court, the misconduct there was significantly less than that present here. There, the attorney did not

leave his client effectively unrepresented for a period of months while litigation was ongoing. Nor did the attorney's misconduct there result in pending litigation being delayed and distracted for months. Instead, the misconduct there consisted primarily of the attorney's delay in returning to his former client an unearned fee and his failure, months after the employment relationship had ended, to respond to a single letter asking the respondent to confirm that he no longer represented his former clients – an omission that represented a failure to take reasonable steps to avoid foreseeable prejudice to the former client. Whether or not that failure actually caused any harm to the former client the court was unable to determine. In contrast, Respondent's misconduct here was more extensive, and it negatively impacted both the superior court and all of the parties in the *Gilroy* case. Finally, while the respondent in the *Hanson* matter, like Respondent, had a prior disciplinary record consisting of an earlier private reproval, the court in *Hanson* discounted that prior disciplinary record as an aggravating factor on its conclusion that the prior discipline was remote (because it resulted from misconduct occurring 17 years before the subsequent misconduct) and the prior misconduct was minimal. This court makes no such finding with regard to the record of Respondent's prior misconduct and discipline.

The Rules of Professional Conduct allow, and sometimes even require, an attorney to protect the courts and/or the attorney's own interests from the attorney's own client. When circumstances develop that change this entitlement from "permissive" to "mandatory," the attorney's failure to act may become a basis for discipline. Such is the situation here.

It is clear to this court, from both the extensive character evidence and Respondent's own testimony at trial, that Respondent is a talented and respected attorney of many years' experience and that his misconduct here did not result from any improper motive or deficiency of character. A period of actual suspension is neither necessary nor appropriate to avoid any repetition by

Respondent of his misconduct here or to otherwise fulfill the purposes of the disciplinary process. At the same time, given the countervailing aggravating factors, discipline of more than a mere reproval is warranted. Accordingly, consistent with standards 1.8(a) and 2.7(c) and the precedents discussed above, the court recommends discipline as set forth below.

RECOMMENDED DISCIPLINE

Stayed Suspension/Probation

For all of the above reasons, it is recommended that **Dennis Earl Braun,** State Bar No. 152816, be suspended from the practice of law for one year; that execution of that suspension be stayed; and that Respondent be placed on probation for two years, with the following conditions:

1. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.
2. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes,

he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

4. He must submit written quarterly reports to the Office of Probation on or before each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

6. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending that school. (Rules Proc. of State Bar, rule 3201.)

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if Respondent has complied with all conditions of probation, the stayed suspension will be satisfied and that suspension will be terminated.

MPRE

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

Costs

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

Dated: May 25, 2016

DONALD F. MILES
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on May 25, 2016, I deposited a true copy of the following document(s):

DECISION

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

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

EDWARD O. LEAR
CENTURY LAW GROUP LLP
5200 W CENTURY BLVD #345
LOS ANGELES, CA 90045

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

HUGH RADIGAN, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on May 25, 2016.

Tammy Cleaver
Case Administrator
State Bar Court