# PUBLIC MATTER



**STATE BAR COURT OF CALIFORNIA**

**HEARING DEPARTMENT – LOS ANGELES**

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| In the Matter of<br><br>**DONALD STEPHEN LUCIEN,**<br><br>A Member of the State Bar, No. 101069. | **Case Nos.: 16-O-10408-DFM**<br><br>**DECISION AND ORDER OF PUBLIC REPROVAL** |

## INTRODUCTION

Respondent **Donald Stephen Lucien** (Respondent) is charged here with three counts of misconduct arising out of a single client matter. [1] The counts include allegations of wilfully violating: (1) rule 3-110(A) of the Rules of Professional Conduct[2] (failure to perform with competence); (2) rule 4-100(B)(1) (failure to notify of receipt of client funds); and (3) rule 4-100(B)(4) (failure to pay client funds promptly).

The court finds culpability and imposes discipline as set forth below.

## PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) in this case was filed by the State Bar of California on November 29, 2016.

On December 27, 2016, Respondent filed his response to that NDC.

[1] The charging document originally included a fourth count alleging a failure to cooperate in the State Bar's investigation. After the completion of the trial, the State Bar requested that this fourth count be dismissed. That request is granted, and the count is dismissed with prejudice.

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

On January 9, 2017, the initial status conference in the case was held. At that time the case was given a trial date of February 28, 2017, with a two-day trial estimate.

Trial was commenced and completed as scheduled on February 28, 2017, followed by a period of post-trial briefing. At the commencement of the trial, the parties filed a stipulation regarding undisputed facts and the admission of documents. The State Bar was represented at trial by Deputy Trial Counsel Michaela Carpio. Respondent acted as counsel for himself.

## 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 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 December 1, 1981, and has been a member of the State Bar at all relevant times.

**Case No. 16-O-10408**

On August 31, 2010, Angela Pinheiro (Pinheiro) was involved in a traffic collision and sustained injuries. As a result of the accident, Pinheiro was taken by ambulance to a hospital for medical attention and she subsequently incurred medical expenses with several medical providers, including the Centinela Hospital Medical Center Emergency Room, Grace Chiropractic, and Clyde Harris, M.D.

On September 3, 2010, Pinheiro retained Respondent to represent her in her personal injury matter. Pursuant to the terms of the retainer agreement signed by the parties, the scope of Respondent's retention was "to represent me [Pinheiro] in the claims I have against all parties who may be liable to me as a result of an incident which occurred on or about 8/31/2010." Under the terms of this agreement, Respondent was entitled to a contingent fee of 40% of

amounts recovered if the resolution of the case occurred after litigation was filed. Pinheiro was also obligated to reimburse Respondent for all costs incurred by him in the prosecution of the case.

Respondent worked on Pinheiro's claim, including obtaining the medical records related to her injuries and providing them to the opposing party's insurance company. When a settlement of the claim was not accomplished without the filing of a lawsuit, Respondent filed *Pinheiro v. Traham* on August 23, 2012, in the Los Angeles County Superior Court, just prior to the running of the statute of limitations.

On September 13, 2013, the defendant's attorney in the personal injury case sent a $2,500 settlement offer to Respondent pursuant to Code of Civil Procedure section 998. On September 18, 2013, Respondent sent a letter to Pinheiro, advising her of the statutory offer and explaining to her the significance of the fact that the offer was made pursuant to section 998.[3]

At the time of this offer, the medical expenses previously incurred by Pinheiro as a result of the accident totaled $6,786.50; the costs incurred by Respondent in pursuing the litigation totaled $729.70; and Respondent's contingent legal fee portion of the offered settlement, if accepted, would be $1,000. Although the $2,500 proposed settlement amount fell far short of covering the litigation and medical expenses associated with Pinheiro's claim, she accepted the $2,500 settlement offer.

Because a portion, but not all, of Pinheiro's medical expenses had been paid by Medi-Cal, it had a statutory lien on the $2,500 settlement. The precise amount of that lien was

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[3] Section 998 provides in pertinent part: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

unknown to Respondent and Pinheiro. In addition, Grace Chiropractic also had a lien against the $2,500 settlement for the $2,215 of medical expenses that Pinheiro had incurred at that facility. (Ex. 16, pp. 3-5.)

On or about November 12, 2013, Respondent received the $2,500 settlement check. The check, however, was made payable to Respondent, Pinheiro, and Medi-Cal. As a result, it was not possible for Respondent to deposit the check into his client trust account without the endorsement of the other two payees.

When the check was received, Respondent gave instructions to his secretary to notify Pinheiro that the funds had been received. No other effort was made by Respondent at that time to contact Pinheiro regarding his receipt of the funds. Unfortunately, the only effort made by Respondent's secretary to notify Pinheiro that the funds had been received was to leave a message on Pinheiro's phone on or about December 9, 2013, asking Pinheiro to return the call. When Pinheiro did not do so, no follow-up effort was made to send a letter, an email, or a text to Pinheiro regarding the receipt by Respondent of the settlement funds.

Nor did Respondent make any effort at the time to communicate with Pinheiro regarding the problems of allocating the limited funds between the various parties having competing claims to the funds. It was not until December 5, 2014, more than a year later and only after Pinheiro had contacted Respondent to determine the status of the settlement, that Pinheiro first learned from Respondent that the settlement check had been received but that it could not be cashed because of the three payees named in it. When Respondent did talk with Pinheiro at that time about the settlement proceeds and problems, he indicated to her that it would only take a couple of months to resolve the lien issue and that he would get back to her.

In November 9, 2015, nearly another year later, the settlement check remained uncashed and the competing liens and other claims to the funds remained unresolved. When Respondent

talked to Pinheiro at that time, he informed her that he still had the uncashed settlement check and explained that he still had to deal with the medical liens before any funds could be distributed.

At some unspecified time while he was holding the uncashed settlement check, Respondent tried to reach Medi-Cal by telephone to determine the amount of its lien, obtain Medi-Cal's endorsement on the check, and seek to negotiate an agreed reduction of its lien. In response to his inquiry, the Medi-Cal representative with whom Respondent talked on the phone declined to disclose the amount of its lien and, instead, merely directed Respondent to sign the check and forward it to Medi-Cal. Because there were competing claims to the funds, including another lien on the funds, Respondent was not willing and legally unable to do this.

On December 7, 2015, Respondent called Pinheiro, told her that he was having trouble reaching Medi-Cal, and asked her to contact Medi-Cal because he was not able to make contact with them. When Pinheiro then tried to reach Medi-Cal herself, she was also unable to reach anyone to discuss the situation. She then notified Respondent of this fact on December 14, 2015.

There is no evidence of any further effort by Respondent after December 14, 2015, to resolve the competing claims to the $2,500 settlement funds. The settlement check received in November 2013 remained uncashed and no funds had been disbursed to anyone, including Pinheiro and all of the lienholders. In February 2016, Pinheiro, not having heard anything further from Respondent, filed a complaint against him with the State Bar.

After the State Bar investigation began, Respondent was successful in securing a replacement settlement check from the insurance company. He then attempted to send this check to Pinheiro, but learned that she had moved. At trial, he was still in possession of the uncashed settlement check.

Pinheiro testified at trial that none of her medical providers has made any attempt to collect any of her medical bills against her.

**Count 3 – Rule 4-100(B)(4) [Failure to Pay Client Funds Promptly]**

Rule 4-100(B)(4) of the Rules of Professional Conduct requires attorneys to "[p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive." This obligation includes the duty to pay valid medical liens where the attorney is holding client funds for that purpose. (See, e.g., *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 286; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 10.) An attorney holding funds for a person who is not the attorney's client must comply with the same fiduciary duties in dealing with such funds as if an attorney-client relationship existed. (*In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632; See also *Hamilton v. State Bar* (1979) 23 Cal.3d 868, 879; *Crooks v. State Bar* (1970) 3 Cal.3d 346, 355; *Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156; *In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr 185, 191; *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 27.) Where an attorney represents a Medi-Cal beneficiary in a personal injury matter and has received notice of the Medi-Cal lien, the attorney has a fiduciary obligation toward the Department of Health Services as to its advancement of funds for the beneficiary and the Medi-Cal lien. (See *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 200.)

The State Bar alleges that Respondent's ongoing failure since November 2013 to disburse any portion of the settlement funds received by him for the benefit of his client and/or the parties holding liens against those funds (including Medi-Cal) constitutes a wilful violation by him of his duty under this rule. This court agrees.

Rule 4-100(B)(4) requires no special state of mind to establish a violation; the "wilfulness" required for all rule violations is enough; and the mere fact that payment was not made is sufficient to constitute wilfulness for this purpose. (*In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 113; citing *King v. State Bar* (1990) 52 Cal.3d 307, 313-314; *In the Matter of Respondent P, supra*, 2 Cal. State Bar Ct. Rptr. at p. 633.)

Unlike the conduct of the disciplined attorneys in virtually all of the cases finding ethical violations for failure to pay an existing medical lien, Respondent did not pay out any of the encumbered funds either to himself or to his client. Nor does it appear that there were sufficient funds available from the settlement to pay all of the existing liens in their entirety.[4] Those distinctions, however, do not mean that Respondent did not violate his obligations under rule 4-100(B)(4) by his lack of effort to resolve the competing demands. As stated by the Review Department in *In the Matter of Riley*: "[R]ule 4-110(B)(4) is violated where, after it has become clear that negotiations with the lienholder will not be productive, the attorney neither promptly pays the lien in full, nor takes appropriate steps to resolve the dispute promptly." *(In the Matter of Riley, supra*, 3 Cal. State Bar Ct. Rptr. at p. 114 [emphasis added].)

Here, Respondent's culpability results from his lack of any reasonable effort for the past three years to seek to have the issue of the outstanding liens resolved. In fact, he has done virtually nothing to obtain a resolution of the competing liens. He has not even written to Medi-Cal to ask the amount of its lien. Having exercised no diligence in seeking to resolve the

[4] At the conclusion of the trial, the court asked the parties to brief, inter alia, whether the Medi-Cal statutory lien has priority over any of the other competing liens. It also asked the parties to brief the issue of the attorney's ethical obligations when there are competing liens on a settlement exceeding the amount of the available settlement proceeds. Inexplicably, in its post-trial brief the State Bar declined to brief these issues on its factually unjustified claim that there were no liens on the Pinheiro settlement other than the Medi-Cal lien. (See State Bar Posttrial Brief, pp. 5-6; compare: State Bar Ex. 16, pp. 3-5 [August 31, 2010 written demand on Respondent for immediate satisfaction of Grace Chiropractic Clinic's "outstanding lien"].)

competing claims, he cannot justify his ongoing failure to pay out those funds by the fact that those claims are ongoing.

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

Rule 3-110(A) provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." In this matter, the State Bar alleges that Respondent violated his duties under this rule by "failing to negotiate a Medi-Cal lien after receiving the settlement draft on or about October 22, 2013 [sic], failing to obtain Medi-Cal's signature on the settlement draft and thus allowing the check to go stale, and performing no other services for three years following the settlement."

The above alleged misconduct is, of course, the very same inaction giving rise to Respondent's violation of rule 4-100(B)(4), above. This court declines to find that Respondent is culpable of a violation of rule 3-110(A) based on the same misconduct giving rise to his culpability for violating rule 4-100(B)(4). The Review Department made clear in *Respondent P* that such charges are overlapping and duplicative, and it even discouraged the State Bar from pursuing such duplicative charges simultaneously:

> At oral argument, the deputy trial counsel on review invited us to address and clarify the propriety of the overlapping and duplicative charges of statutory and rule violations. In *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060, the Supreme Court stated that "little, if any, purpose is served by duplicative allegations of misconduct." We likewise see no benefit to duplicative charges such as the charge that respondent violated former rule 6-101(A)(2) [now rule 3-110(A)] in addition to the charge that he violated former rule 8-101(B)(4) [now rule 4-100(B)(4)]. The latter charge addresses the same alleged misconduct far more aptly and supports identical or greater discipline. (See Bus. & Prof. Code, § 6077; compare standard 2.2(b) of the Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("the standards") with standard 2.4(b); (cf. *Bates v. State Bar*, *supra*, 51 Cal.3d 1056, 1060).)
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> If it is not apparent at the time of filing of the notice to show cause, it should be apparent by the time of the pretrial conference which charges are most apt, which other charges might show additional misconduct, and which are simply duplicative and unnecessary. At any time prior to a

> decision, the OCTC may dismiss charges in the notice to show cause. Rule 1222(k) of the Provisional Rules of Practice specifically provides that the pretrial statement is an opportunity to amend the pleadings or dismiss charges in order to focus the hearing on the true gravamen of the charges. Such amendment or dismissal of charges serves the interest of litigant and judicial economy and would clearly have been of benefit here.

*(In the Matter of Respondent P, supra,* 2 Cal. State Bar Ct. Rptr. 622, 634.)[5]

This count is dismissed as duplicative.

**Count 2 – Rule 4-100(B)(1) [Failure to Notify Client of Receipt of Client Funds]**

Rule 4-100(B)(1) requires that a member "shall promptly notify a client of the receipt of the client's funds, securities, or other properties." Respondent failed to notify Pinheiro of Respondent's receipt of the settlement check for more than a year after his receipt of the settlement check, and he did so only after she contacted him regarding the status of the settlement.

The action of Respondent's secretary in only leaving a telephone message for Pinheiro to call Respondent's office did not satisfy or extinguish Respondent's obligation under rule 4-100(B)(1). No explanation has been offered, and no justification exists, for the dearth of additional effort by Respondent to communicate with Pinheiro regarding Respondent's receipt of the settlement funds. This lack of attention by Respondent to this issue constituted a wilful violation of his duties under rule 4-100(B)(1).

**Aggravating Circumstances**

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct,[6] std. 1.5.) The court finds the following with respect to aggravating circumstances.

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[5] While in *In the Matter of Riley, supra,* the Review Department found that a violation of rule 3-110(A) resulted from the attorney's failure to promptly resolve an existing medical lien, the court in that matter emphasized that the respondent there had not also been charged with a violation of rule 4-100(B)(4) for his mishandling of the liens. (See 3 Cal. State Bar Ct. Rptr. 91, 113, fn. 23.)

**Multiple Acts of Misconduct**

Respondent is culpable of two counts of misconduct. This is an aggravating factor, albeit not a significant one. (Std. 1.5(b); see, however, *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 839; *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177.)

**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.

**No Prior Discipline**

Respondent had practiced law in California for approximately 32 years prior to the commencement of the instant misconduct. During that span, Respondent had no prior record of discipline. Respondent's lengthy tenure of discipline-free practice is a significant mitigating factor. (Std. 1.6(a); see *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 764-765 [25 years of prior service without discipline warrants "strong mitigation" and "his long service at the bar and for his community counterbalances misconduct that would otherwise warrant substantial discipline"]; *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749 [entitled to "considerable weight in mitigation"]; *Heavey v. State Bar* (1976) 17 Cal.3d 553, 560; *In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 789; *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 127; *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13[noting that the Supreme Court has repeatedly applied former standard 1.2(e)(1) in cases involving serious misconduct and citing *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029]; *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal.

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

State Bar Ct. Rptr. 61, 66.).) The "absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269; *In the Matter of Lane*, *supra*, 2 Cal. State Bar Ct. Rptr. 735, 749.)

The lack of a prior discipline record is most relevant if the misconduct is aberrational and unlikely to recur. (*Cooper v. State Bar*, *supra*; *In the Matter of Reiss* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 206, 218.) Such is clearly the case here.

**Cooperation**

Respondent did not admit culpability in the matter but entered into a stipulation of facts, thereby assisting the State Bar in the prosecution of the case. For such conduct Respondent is entitled to some mitigation. (Std. 1.6(e); *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50.) However, the weight of that credit is limited by the fact that Respondent did not acknowledge any culpability in the matter. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [credit for stipulating to facts "very limited" where culpability is denied].)

**Community Service**

Respondent testified that he devoted significant time performing pro bono work and had been a member of the board of the California Applicants Association. However, Respondent offered only his own testimony to establish these efforts. The court therefore assigns only modest weight to this mitigation evidence. (*In the Matter of Shalant*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 840 [limited mitigation weight for community service established only by respondent's testimony].)

## DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this 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.) The court then looks to the decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As the Review Department noted more than two decades ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) 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; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *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.

Standard 2.2 provides that actual suspension of three months "is appropriate" for failure to promptly pay out entrusted funds. The State Bar points to this standard and asks that discipline including 90 days of actual suspension be recommended as a result of Respondent's

misconduct in this matter. While the State Bar acknowledges that "respondent has 32 years of discipline free practice," it argues that "the mitigation is outweighed by the aggravation of multiple acts of misconduct and harm to his client."

This court declines to recommend 90 days of actual suspension in this matter.

In the first instance, the State Bar's suggestion that the mitigating weight of Respondent's 32 years of discipline-free practice is outweighed by the "harm to his client" caused by Respondent's misconduct is unsupported by the evidence in the case. As set out above, the $2,500 settlement agreed to by Pinheiro is subject to Respondent's 40% contingency fee, Respondent's entitlement to be reimbursed for $729.70 in costs, and medical liens well in excess of $2,500. While Respondent has failed to exercise diligence in securing a resolution of the competing claims, there is no clear and convincing evidence that the client will eventually be entitled to receive anything from the settlement funds when such a resolution is accomplished. This possibility is magnified by the possibility that it may become necessary for Respondent to interplead the funds with a court to resolve the competing claims[7] – something that would not only reduce the likelihood that Pinheiro would "net" any money from the settlement, but also increase the risk of Pinheiro becoming obligated to pay her own money to her medical providers as a result of cross-claims. In the interim, while the competing claims remain unresolved, none of Pinheiro's creditors has sought to recover any monies from her.

The court also declines to apply the 90-day suspension described in standard 2.2 without consideration of the significant mitigation and other circumstances in this case. The history of the current standard makes clear that the consideration of such factors is both appropriate and expected.

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[7] See *Miller v. Rau* (1963) 216 Cal.App.2d 68, 76; Cal. State Bar Form Opn. 1988-101.

The current standard 2.2 was adopted in July 2015. It amended former standard 2.2, which provided that commingling and non-misappropriation violations of rule 4-100, including failures to promptly pay client funds in violation of rule 4-100, "shall result in at least a three month actual suspension from the law, irrespective of mitigating circumstances." At the time that the proposed new standard 2.2 was presented to the State Bar Board for consideration and possible adoption, the reason for the amendment of the old standard was explained as follows:

> Proposed Standard 2.2 (Commingling and Other Trust Account Violations) The language requiring three months actual suspension, irrespective of mitigating circumstances, for a commingling violation has been criticized as too harsh and has not been routinely followed. Commingling and other trust violations often result in a lesser sanction. (See *Duduglian v. State Bar*, *supra*, 52 Cal.3d at 1100.) By removing the binding language – that three months actual suspension must be imposed, irrespective of mitigating circumstances – there is no prohibition in considering factors in mitigation. Consequently, the proposed standard presents three months as a starting point that may be adjusted accordingly.

(Memorandum, dated June 27, 2013, from Office of General Counsel to Members, Regulation, Admissions and Discipline Oversight re: Standards for Attorney Sanctions for Professional Misconduct, Proposed Modifications – Request for Public Comment, pp. 7-8 [emphasis added].)

The State Bar has cited no published cases applying the new standard, and this court is unaware of any. However, a review of the cases applying the former standard, which purported to mandate discipline of 90 days of actual suspension, makes clear that both the Supreme Court and this court have routinely rejected ordering a 90-day actual suspension in cases involving misconduct comparable to and/or worse than that here. (See, e.g., *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092; *Sternlieb v. State Bar* (1990) 52 Cal.3d 317; *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1; *In the Matter of Fonte*, *supra*, 2 Cal. State Bar Ct. Rptr. 752; *In the Matter of Respondent F*, *supra*, 2 Cal. State Bar Ct. Rptr. 17; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 732; *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354; *In the Matter of Lazarus* (Review Dept.

1991) 1 Cal. State Bar Ct. Rptr. 387; and *In the Matter of Bleecker*, *supra*, 1 Cal. State Bar Ct. Rptr. 113.)[8]

There is no purpose to be served by imposing on Respondent any period of actual suspension for his failure to pursue more aggressively a resolution of the competing claims to his client's $2,500 settlement. His 32 years of discipline-free practice, coupled with the absence of any other client complaints against him and the unusual circumstances of the situation with which he was confronted here, make clear that his misconduct was aberrational and will not be repeated. (*Rodgers v. State Bar*, *supra*, 48 Cal.3d at 316-317; *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 363.) Existing case law indicates that a public reproval is sufficient discipline in this situation. (See, e.g., *Dudugjian v. State Bar*, *supra*, 52 Cal.3d 1092; *In the Matter of Respondent K, supra; In the Matter of Respondent E*, *supra*, 1 Cal. State Bar Ct. Rptr. 732.)

Moreover, this court is not unmindful of the difficult, and potentially treacherous, situation in which Respondent found himself. Confronted with multiple lienholders holding combined and competing claims exceeding the small amount of available funds, it was less than clear that any resolution agreeable to all of the claimants, including Pinheiro, could be readily accomplished. Although the court in *Riley* stated that an attorney is obligated in that situation either to pay the full amount of the liens from the funds held in trust or take "appropriate steps to resolve the dispute promptly," the fact that there were insufficient funds here to pay "in full" all of the competing claims means that only the latter option of "taking appropriate steps to resolve the dispute promptly" would be available if a quick resolution could not be reached. Taking

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[8] The State Bar's severe discipline recommendation may be explained by its assumption that there would be an additional finding of culpability and by its apparent failure to recognize that there were competing liens for the settlement proceeds, the cumulative total of which far exceeded those proceeds. Hence, Respondent's obligation to disburse the settlement funds to a lienholder was far more complicated here than in other published disciplinary cases.

such appropriate steps, however, would likely result in Pinheiro – and possibly all of the lienholders – not netting any money from the settlement. Worse, as noted above, taking any of the possible available steps to resolve any impasse in the negotiations could also have resulted in Respondent's client being sued to pay her own money to her creditors.

It would be understandable to this court if Respondent had become reluctant to initiate "appropriate steps" to resolve the competing claims after it became clear that negotiations with the lienholders were not going to be productive. That, however, is not the situation here. Because Respondent never took reasonable steps to determine whether a compromise resolution could be accomplished, as required by rule 4-100, it was never determined whether a mutually-agreeable compromise could be readily accomplished. It was this lack of effort by Respondent that has resulted in the ongoing impasse over the distribution of the settlement funds, and it is that lack of effort that results here in the need for discipline, albeit modest.

## ORDER OF PUBLIC REPROVAL

**Public Reproval**

IT IS ORDERED that respondent **Donald Stephen Lucien**, State Bar Number 101069, be publicly reproved. Pursuant to the provisions of rule 5.127(a) of the Rules of Procedure of the State Bar of California (Rules of Procedure), the public reproval will be effective when this decision becomes final.

**Conditions of Reproval**

Further, pursuant to rule 9.19(a) of the California Rules of Court and rule 5.128 of the Rules of Procedure, the court finds that the interests of Respondent and the protection of the public will be served by the following specified conditions being attached to the public reproval imposed in this matter. Failure to comply with any conditions attached to this reproval may

constitute cause for a separate proceeding for wilful breach of rule 1-110 of the Rules of Professional Conduct of the State Bar of California (Rules of Professional Conduct).

Accordingly, Respondent is hereby ordered to comply with the following conditions attached to the public reproval for a period of one year following the effective date of the public reproval imposed in this matter:

**Comply with State Bar Act, Rules of Professional Conduct and Reproval Conditions**

During the reproval period, Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of Respondent's reproval.

**Maintain Valid Official Membership Address and Other Required Contact Information**

Within 30 days after the effective date of the reproval resulting from this order, Respondent must make certain that the Office of Probation and the Membership Records and Compliance Office have Respondent's current office address, email address, and telephone number, or, if no office is then maintained by Respondent, the address, email address and telephone number to be used for State Bar purposes. Thereafter, within 10 days after any change in the above information, Respondent must report such change in writing to the Membership Records and Compliance Office in the manner required by that office.

**Meet and Cooperate with Office of Probation**

Within 30 days after the effective date of the reproval resulting from this order, Respondent must contact the Office of Probation and schedule and participate in a meeting with Respondent's assigned deputy to discuss the terms and conditions of Respondent's discipline. Unless otherwise instructed by the Office of Probation, Respondent may meet with the deputy in person or by telephone. During the reproval period, Respondent must promptly meet with representatives of the Office of Probation as requested by it and, subject to the assertion of

applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide to it any other information requested by it.

**Quarterly and Final Reports**

Respondent must submit written quarterly reports to the Office of Probation by no later than each January 10 (covering October 1 through December 31 of the prior year), April 10 (covering January 1 through March 31), July 10 (covering April 1 through June 30), and October 10 (covering July 1 through September 30) falling within the period of reproval. Under penalty of perjury, Respondent must answer the inquiries contained in the Quarterly Report form provided by the Office of Probation, including stating whether Respondent has complied with the State Bar Act and the State Bar Rules of Professional Conduct during the applicable quarter set forth above. In addition to all quarterly reports, a final report, responding to the same inquiries, is due no earlier than 10 days before the last day of the reproval period and no later than the last day of the reproval period. Each of these reports must be submitted on the form provided by the Office of Probation; be signed and dated after the completion of the period for which the report is being submitted (except for the final report); be filled out completely and signed under penalty of perjury; and be submitted to the Office of Probation on or before each report's due date. Submission must be by (1) fax or email to the Office of Probation; (2) personal delivery to the Office of Probation in Los Angeles; (3) certified mail, return receipt requested, to the Office of Probation (post-marked on or before the due date); or (4) some other tracked service, such as Federal Express (physically delivered to such service on or before the due date). Respondent is directed to maintain proof of Respondent's compliance with the above requirements for each such report for a minimum of one year after either the period of reproval has ended and is required to present such proof upon request by the State Bar, the Office of Probation, or the State

Bar Court. If the first report would cover less than 30 days, that report must be submitted on the next quarter date and cover the extended deadline.

**Ethics School and Client Trust Accounting School**

Within one year after the effective date of the reproval resulting from this order, Respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and of the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and Respondent will not receive MCLE credit for attending these sessions.

**Restitution/Remedial Measures**

Within 30 days of the effective date of this reproval, Respondent must provide proof to the Office of Probation that he has sent a letter, via certified mail, return receipt requested, to Pinheiro, Medi-Cal, Grace Chiropractic, and any other known competing claimant, notifying each of the settlement of the Pinheiro personal injury claim, the nature and amounts (if known) of the competing claims, the identity and known contact information for the other claimants, and the amount of the available settlement proceeds. The letter must invite the competing claimants to participate with Respondent in a joint settlement conference. In the event that settlement discussions do not occur or do not result in resolution of all competing claims within 180 days from the effective date of this reproval, Respondent must interplead the settlement funds with a court with appropriate jurisdiction, absent some other arrangement agreed to in writing by all of the above parties.

In the event that Respondent is unable to interplead the $2,500 settlement check at such time as he is required to file an interpleader action, as set forth above, he must make restitution to the aggrieved claimants by interpleading $2,500 of his own funds. In such event, he is given the

option of asserting both his claim to receive reimbursement of the costs he advanced in the underlying personal injury action and his entitlement to receive the contingent attorney's fee resulting from the settlement of that personal injury action.

Within 210 days of the effective date of this reproval, Respondent is obligated to provide proof to the Office of Probation that the competing claims of the lienholders identified above have been resolved and satisfied or that he has complied with all of the requirements set forth above.

**Multistate Professional Responsibility Examination**

Respondent must take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the reproval resulting from this order and provide satisfactory proof of such passage to the Office of Probation within that same period.

**Costs**

Costs are awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: May 16, 2017

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 16, 2017, I deposited a true copy of the following document(s):

DECISION AND ORDER OF PUBLIC REPROVAL

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:

DONALD STEPHEN LUCIEN
LAW OFC DONALD S LUCIEN
16133 VENTURA BLVD #680
ENCINO, CA 91436

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

RONALD K. BUCHER, Enforcement, Los Angeles
MICHAELA F. CARPIO, Enforcement, Los Angeles
TERRIE GOLDADE, Probation, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on May 16, 2017.

Mazie Yip
Case Administrator
State Bar Court