PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **PHILIP HARVEY BUDA,** **Member No. 83369,** A Member of the State Bar.	**Case Nos. 03-O-02802-JMR; 03-O-04335; 03-O-04630; 04-C-12354 (Cons.)** **DECISION**

I. INTRODUCTION

In this disciplinary matter, Robert A. Henderson appeared for the Office of the Chief Trial Counsel of the State Bar of California ("State Bar"). Respondent Philip Harvey Buda did not appear in person or by counsel.

After considering the evidence and the law, the court recommends, among other things, that respondent be suspended for one year and that the suspension be stayed on conditions including 90 days actual suspension and until he complies with rule 205 of the Rules of Procedure of the State Bar of California.

II. SIGNIFICANT PROCEDURAL HISTORY

Case nos. 03-O-04335 and 03-O-02802

In case no. 03-O-04335, the Notice of Disciplinary Charges ("NDC") was filed on July 26, 2004, and was properly served on respondent on that same date at his official membership records address, by certified mail, return receipt requested, as provided in Business and

Professions Code section[1] 6002.1, subdivision (c) ("official address"). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.)

On August 10, 2004, respondent was properly served at his official address with a notice advising him, among other things, that a status conference would be held on September 13, 2004.

On August 24, 2004, respondent was properly served at his official address with a notice rescheduling the September 13 status conference to September 27, 2004. Respondent did not appear at the September 27 status conference. By order filed and properly served on respondent on September 28, 2004, he was advised that a status conference was scheduled on November 8, 2004.

In case no. 03-O-02802, the NDC was filed on September 24, 2004, and was properly served on respondent on that same date at his official address, by certified mail, return receipt requested.

On September 28, 2004, respondent was properly served at his official address with a notice advising him, among other things, that a status conference would be held on November 8, 2004.

On November 2, 2004, motions were filed and properly served on respondent seeking the consolidation of these two cases. No response was filed to these motions.

Respondent did not file responsive pleadings to the NDCs. In each case, on November 2, 2004, a motion for entry of default was filed and properly served on respondent at his official address by certified mail, return receipt requested. The motions advised him that minimum discipline of two years stayed suspension and one year actual suspension would be sought if he was found culpable. He did not respond to either motion.

Respondent did not appear at the November 8 status conferences. On that same date, he was properly served with a status conference order at his official address by first-class mail, postage prepaid. The order advised him that the motion to consolidate the two cases was granted

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[1]All future references to "section(s)" are to the Business and Professions Code unless otherwise specified.

and that an oral motion changing the venue of case no. 03-O-04335 from Los Angeles to San Francisco was also granted.

On November 18, 2004, the court entered respondent's default in both matters and enrolled him inactive effective three days after service of the order. The order was properly served on him at his official address on that same date by certified mail, return receipt requested. The United States Postal Service ("USPS") returned this correspondence as undeliverable. The envelope was marked "unclaimed" and also bore a sticker and handwriting indicating an address in Belmont, California.

Case no. 04-C-12354

By order filed December 20, 2004, the State Bar Court review department referred this disciplinary proceeding to the hearing department, pursuant to rule 951(a) of the California Rules of Court, for a hearing and decision regarding whether the facts and circumstances surrounding respondent's violation of Penal Code section 415, subdivision (2), involved moral turpitude or other misconduct warranting discipline and, if so, for a recommendation as to the discipline that should be imposed.

Thereafter, on January 5, 2005, this court filed a Notice of Hearing on Conviction and caused it to be properly served upon respondent on that same date by certified mail, return receipt requested, at his official membership records address. The notice also advised him that a status conference would be held on January 31, 2005. The USPS returned this correspondence as undeliverable. The envelope was marked "unclaimed" and also bore a sticker and handwriting indicating an address in Belmont, California.

Respondent did not file a responsive pleading to the NDC in case no. 04-C-12354. On February 7, 2005, a motion for entry of default was filed and properly served on respondent at his official address by certified mail, return receipt requested. The motion advised him that minimum discipline of two years stayed suspension and six months actual suspension would be sought if he was found culpable. He did not respond to the motion.

On February 24, 2005, the court entered respondent's default in this matter and enrolled him inactive effective three days after service of the order. The order was properly served on him

at his official address on that same date by certified mail, return receipt requested. The order also consolidated this case with the other pending disciplinary cases addressed in this decision. The USPS returned this correspondence as undeliverable. The envelope was marked "unclaimed" and also bore a sticker and handwriting indicating an address in Belmont, California.

The State Bar's efforts to locate and contact respondent were fruitless.

The consolidated matters were submitted for decision without hearing on March 15, 2005.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings in case nos. 03-O-02802 and 03-O-04335 are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (Bus. & Prof. Code § 6088; Rules Proc. of State Bar, rule 200(d)(1)(A).) The court's findings in case no. 04-C-12354 are based on a certified copy of the record of respondent's conviction filed on December 14, 2004. The findings are also based on exhibits 1 and 2 to the State Bar's March 14, 2005, request for waiver of default hearing and brief on culpability which are admitted into evidence.[2]

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on November 29, 1978, and has been a member of the State Bar at all times since.

B. Case no. 03-O-02802 - The Berube Matter

Facts

Judith and Remi Berube ("the Berubes") hired respondent to represent them with respect to an automobile accident in which Judith Berube had been involved.

On or about June 19, 2001, respondent filed a lawsuit on the Berubes' behalf entitled

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[2]See discussion regarding admissibility of exhibit 1 post.

Judith and Remi Berube v. John Blackburn, Sacramento Superior Court case number 01AS03652.

On or about October 17, 2001, the court served respondent, as the Berubes' attorney of record, with an Order to File Answers in which it ordered the plaintiff in *Berube v. Blackburn* to, among other things, secure service of the Summons and Complaint, take the default of the defendants who have failed to appear, and take the default judgment of defendants if no appearance had been made on or before November 26, 2001. The Order to File Answers also required the plaintiff to file a supplemental diligence statement on or before December 3, 2001, showing compliance with the court's order. The court clerk served the order via United States mail. Respondent, as the Berubes' attorney of record, received a copy of the court's Order to File Answers.

On or about October 26, 2001, the defendant, Blackburn, filed his answer to the complaint and, on that same day, served respondent with Form Interrogatories and Requests for Production of Documents. The responses to discovery were due thirty days from the date of service.

On or about January 4, 2002, Blackburn filed a motion to compel the Berubes' discovery responses in which he sought sanctions against respondent and the Berubes for their failure to respond to the requests. The hearing was scheduled for February 13, 2002. Respondent was served with a copy of the motion, and he received the motion. Respondent did not serve an opposition to Blackburn's motion to compel.

On or about February 13, 2002, the court issued a tentative ruling on Blackburn's motion to compel. The court ordered the Berubes to serve verified responses, without objections, to Blackburn's Form Interrogatories and Request for Identification of Documents. The court ruled that the request for production of documents was premature and denied the imposition of sanctions as the motion had been unopposed. The court's order was effective immediately and no formal order was issued and no other notice was provided.

On or about February 14, 2002, the court issued an order, ordering respondent to appear at an Order Show Cause ("OSC") hearing to be held on March 14, 2002. The OSC would

address why sanctions should not be imposed due to respondent's failure to file an At-issue Memorandum. The court clerk served respondent with the order via United States mail. Respondent received the order.

On March 14, 2002, the court held the OSC and imposed sanctions against respondent in the amount of $150 due to respondent's failure to appear at the hearing and failure to timely file the At-issue Memorandum. Respondent was ordered to pay the sanctions within 10 calendar days from the date of mailing of the order and to file the At-Issue Memorandum by April 19, 2002. The court clerk served the order on respondent at his law offices located at 250A Twin Dolphin Drive, Redwood City, CA 94065, via the United States mail.

In or about June 2002, Blackburn took Judith Berube's deposition in the presence of respondent. Respondent received the deposition transcript and informed Judith that he would send it to her for her review and signature. Respondent never sent Judith Berube her deposition.

On or about June 7, 2002, the court issued an order, ordering respondent to appear at an OSC hearing to be held on July 7, 2002. The OSC would address why sanctions, including dismissal of the action, should not be imposed due to respondent's failure to file an At-issue Memorandum. The court clerk served respondent with the order via United States mail. Respondent received the order.

On July 11, 2002, the court held the OSC hearing and imposed sanctions against respondent in the amount of $150, payable within 10 calendar days from the date of the mailing of the order. The sanctions were imposed due to respondent's failure to appear at the hearing and failure to timely file the At-issue Memorandum. Respondent was ordered to file the At-issue Memorandum by August 9, 2002. The court clerk served respondent with the order via United States mail. Respondent received the order imposing sanctions.

On or about August 14, 2002, Judith Berube sent a letter to respondent via the United States mail requesting that he provide her with her entire client file. Judith Berube placed the letter in a sealed envelope with the appropriate postage and deposited the letter with the USPS. Respondent did not respond to Berube's request for her client file. The letter was not returned to Berube as undeliverable.

On or about October 15, 2002, the court issued an order, ordering respondent to appear at an OSC hearing to be held on November 14, 2002. The OSC would address why sanctions, including dismissal of the action, would not be imposed due to respondent's failure to file an At-issue Memorandum. The court clerk served respondent with the order via United States mail. Respondent received the order.

On or about October 18, 2002, Judith Berube sent a letter to respondent via the United States mail renewing her request that he provide her with her entire client file. Berube placed the letter in a sealed envelope with the appropriate postage and deposited the letter with the USPS. Respondent did not respond to Berube's request for her client file. The letter was not returned to Berube as undeliverable.

On November 14, 2002, the court held the OSC regarding respondent's failure to file the At-issue Memorandum and his failure to appear at the previously scheduled OSC hearings. Respondent was served with the order from the OSC via United States mail. Respondent received the order.

On or about November 18, 2002, and November 21, 2002, the court issued orders, ordering respondent to appear at an OSC hearing to be held on December 19, 2002. The OSC would address why sanctions including dismissal of the action, should not be imposed due to respondent's failure to file an At-issue Memorandum and his numerous failures to appear. The court clerk served respondent with the orders via United States mail. Respondent received the orders.

On December 19, 2002, the court held the OSC regarding sanctions as to respondent's numerous failures to appear. Respondent failed to appear at the December 19, 2002, hearing, and the court dismissed the Berubes' complaint. The court served respondent with a copy of the December 19, 2002, minute order via United States mail. Respondent received the order.

On December 20, 2002, the court entered Judgment of Dismissal of the Berubes's complaint and served a copy of the Judgment on respondent via the United States mail. Respondent received the Judgment of Dismissal.

Respondent never attempted to get the dismissal of the Berubes' complaint set aside.

On September 22, 2003, Judith Berube sent a letter to respondent via the United States mail renewing her request for her client file and terminating respondent's legal services. Judith Berube placed the letter in a sealed envelope with the appropriate postage and deposited the letter with the USPS. Respondent did not respond to Berube's letter. The letter was not returned to Berube as undeliverable.

After attending Judith Berube's deposition in June 2002, respondent ceased to perform any legal services on the Berubes' behalf. Respondent did not inform the Berubes that he intended to terminate the attorney-client relationship and took no affirmative steps to withdraw as counsel of record.

In or about July 2003, the State Bar opened case number 03-O-02802 pursuant to a complaint made by Judith and Remi Berube ("the Berube matter").

On or about July 28, 2003, State Bar Investigator William Stephens ("Stephens") wrote to respondent regarding the Berube matter. Stephens's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Berube matter. Stephens's letter was placed in a sealed envelope correctly addressed to respondent at his official membership records address. The letter was properly mailed by first-class mail, postage prepaid, by depositing for collection by the USPS in the ordinary course of business. The USPS did not return Stephens's letter as undeliverable or for any other reason.

On or about September 29, 2003, Stephens wrote to respondent regarding the Berube matter. Stephens's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Berube matter. Stephens's letter was placed in a sealed envelope correctly addressed to respondent at his official membership records address. The letter was properly mailed by first-class mail, postage prepaid, by depositing for collection by the USPS in the ordinary course of business. The USPS did not return Stephens's letter as undeliverable or for any other reason.

Respondent never responded to the allegations in the Berube matter.

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Conclusions of Law

Count One - Rule 3-110(A), Rules of Professional Conduct[3] (Failure to Act Competently); Count Two - Rule 3-700(A)(2) (Improper Withdrawal from Representation); and Count Three - Rule 3-700(D)(1) (Failure to Return Client Papers or Property)

Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until he or she has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of a client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) and with other applicable laws and rules. By ceasing to perform any legal services on the Berubes' behalf after Judith Berube's deposition in June 2002, respondent effectively withdrew from employment. Respondent did not inform the Berubes that he intended to terminate the attorney-client relationship and took no affirmative steps to withdraw as counsel of record. He also failed to return the Berubes' client file as per Judith Berube's request. Respondent therefore failed to take reasonable steps to avoid reasonably foreseeable prejudice to his clients in wilful violation of rule 3-700(A)(2).

Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently. The court finds that before respondent ceased entirely to perform legal services on behalf of the Berubes, he reckless or repeatedly failed to perform legal services competently in wilful violation of rule 3-110(A) by failing to comply with discovery requests, failing to oppose the motion to compel discovery, repeatedly failing to file the At-issue Memorandum, and failing to appear at the March 14, 2002, OSC hearing.

Rule 3-700(D)(1) requires an attorney whose employment has been terminated to promptly release to the client, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. However, as the court has already found respondent culpable of wilfully violating rule 3-700(A)(2), the court declines to find respondent also culpable of wilfully violating rule 3-700(D)(1). The rule prohibiting prejudicial withdrawal from employment, rule 3-700(A)(2), is more comprehensive than rule 3-700(D)(1). (*In the*

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[3]All references to "rule" are to the Rules of Professional Conduct unless otherwise specified.

Matter of Dahlz (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 280.) The rule prohibiting prejudicial withdrawal mandates compliance with the rule requiring the prompt release of all client papers and property. Thus, an attorney's failure to promptly return papers may be a portion of the conduct disciplinable as a violation of the rule prohibiting prejudicial withdrawal. (*Ibid.*) Because respondent's failure to return the clients' file is relied on as part of the basis for finding that respondent violated the rule prohibiting prejudicial withdrawal, the court rejects a separate finding of culpability under rule 3-700(D)(1). Count three is therefore dismissed with prejudice.

Count Four - Business and Professions Code Section 6068, Subdivision (i)[4] (Failure to Participate in a Disciplinary Investigation)

Section 6068, subdivision (i), requires an attorney to participate and cooperate in any disciplinary investigation or other disciplinary or regulatory proceeding pending against him- or herself.

By failing to respond to the allegations in the Berube matter, respondent failed to cooperate in a disciplinary investigation in wilful violation of section 6068, subdivision (i).

C. Case no. 03-O-04335 - The Rogers Matter

Facts

In or about August 16, 2002, the California Supreme Court entered an order S108829 ("Order"), effective September 4, 2002, suspending respondent from the practice of law as a result of his failure to pay State Bar of California membership fees ("the first suspension"). On or about August 16, 2002, the State Bar Membership Records Office properly served upon respondent a copy of the Order at his State Bar membership records address.

On or about September 28, 2002, while respondent was actually suspended from the practice of law, respondent entered into an agreement for legal services with Randy Rogers ("Rogers") relative to Rogers's dissolution of marriage. At the time respondent entered into the agreement to perform legal services on Roger's behalf, respondent knew or should have known

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[4]Unless otherwise indicated, all further references to sections refer to provisions of the Business and Professions Code.

that he was suspended from the practice of law. Respondent did not inform his client that he was not entitled to practice law.

On or about September 28, 2002, Rogers paid, and respondent accepted, $3,500 in legal fees. On or about September 28, 2002, when respondent entered into the agreement to provide legal services to Rogers, respondent collected and retained legal fees from Rogers when respondent was not entitled to practice law.

On or about October 10, 2002, respondent paid his membership fees and penalties and the first suspension was terminated.

In or about May 2004, the State Bar opened an investigation, case number 03-O-04335, pursuant to a complaint made against respondent by Rogers ("Rogers matter").

On or about May 20, 2004, State Bar Investigator Rose Sandoval ("Sandoval") sent a letter to respondent requesting that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Rogers matter.

On or about June 26, 2004, respondent wrote a letter to Sandoval in which he discussed the Rogers matter. In his letter, respondent explained that due to an "oversight" on respondent's part, he was unaware that he had been suspended from the practice of law because earlier in 2002, respondent had moved his office and "certain mail was not delivered timely, or simply not delivered at all."

Respondent's membership records address, as maintained by the Office of Membership Records, reveals that respondent did not update his official membership records address with the State Bar until on or about October 15, 2002.

Conclusions of Law

Count One - Sections 6068, Subdivision (a)/6125, 6126 (Engaging in the Unauthorized Practice of Law)

Section 6068, subdivision (a), requires an attorney to support the Constitution as well as state and federal laws. Section 6125 requires an individual to be a member of the State Bar in order to practice law in California. Section 6126(a) makes it a misdemeanor for an individual to advertise or to hold him- or herself out as practicing or entitled to practice law or otherwise

practicing law when he or she is not an active member of the State Bar of California.

By accepting representation of Rogers in a dissolution of marriage case, while suspended from the practice of law, respondent held himself out as entitled to practice law when he was not so entitled. In so doing, he violated sections 6125 and 6126, subdivision (a), and failed to support the laws of this State in wilful violation of section 6068, subdivision (a).

Count Two - Section 6106 (Misrepresentation)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his or her relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106. He knew, or should have known, that he was suspended from the practice of law as a result of is failure to pay his annual membership fees. Despite his ineligibility to practice law, he accepted employment from Rogers in connection with a marital dissolution. Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

Count Three - Section 6068, Subdivision (m) (Failure to Communicate)

Section 6068, subdivision (m), requires 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.

The State Bar charged respondent with a failure to keep Rogers informed of significant developments in his matter, specifically, respondent's suspension from the practice of law. However, the court relied on respondent's failure to tell Rogers of his suspension to establish respondent's culpability for holding himself out as entitled to practice law when he was not entitled to do so. The court, therefore, finds duplicative the charge of a failure to inform Rogers of a significant development. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 536 [because the attorney's repeated and reckless failure to communicate with his client was relied on to find his culpability for improper withdrawal from employment, the court dismissed as duplicative the charge of a failure to adequately communicate].) The court, therefore, dismisses with prejudice the charge of a violation of section 6068, subdivision (m).

Count Four - Rule 4-200 (Illegal or Unconscionable Fee)

Rule 4-200(A) prohibits an attorney from entering into an agreement for, charging or collecting an illegal or unconscionable fee.

By agreeing to represent Rogers in a marital dissolution and charging and collecting $3,500 in legal fees, while suspended from the practice of law, respondent entered into an agreement for, and charged an illegal fee, in wilful violation of rule 4-200(A).

Count Five - Section 6068, Subdivision (j) (Failure to Maintain Address)

Section 6068, subdivision (j), requires an attorney to comply with the requirements of section 6002.1, which, among other things, requires him or her to maintain a current address and telephone number with the State Bar and to notify the State Bar within 30 days of any change in same.

Respondent admitted to the State Bar that he did not change his official address when he moved in early 2002, and as a result, did not receive mail from the State Bar. Respondent's address was not changed until October 2002.

By not maintaining a current address and telephone number with the State Bar, respondent wilfully violated section 6068, subdivision (j).

D. Case no. 03-O-04630 - The Bevilockway Matter

Facts

On or about October 27, 1999, William Bevilockway ("Bevilockway") hired respondent to represent him in his marital dissolution.

On or about November 10, 1999, respondent filed Bevilockway's Petition for Dissolution in the San Mateo Superior Court, case number FAM057415.

On or about August 3, 2000, respondent's secretary sent a letter to the court clerk informing the clerk that the parties had reached a settlement. Respondent also asked that the August 4, 2000, trial be taken off calendar. The court vacated the trial date.

On or about November 2, 2000, respondent attempted to file a judgment with the court in Bevilockway's case and, on or about that same day, the court rejected the document for filing because the judgment did not contain the necessary supporting documentation.

On or about December 8, 2000, respondent attempted to file a judgment with the court in Bevilockway's case and, on or about that same day, the judgment was again rejected by the court because it lacked the necessary supporting documentation. Respondent never filed the judgment properly. Bevilockway's dissolution has never been finalized.

By in or about March 2001, Bevilockway had paid respondent $5,430.50 in legal fees.

In or about August 16, 2002, the California Supreme Court entered an order S108829 ("Order"), effective September 4, 2002, suspending respondent from the practice of law as a result of his failure to pay State Bar of California membership fees ("the first suspension"). On or about August 16, 2002, the State Bar Membership Records Office properly served upon respondent a copy of the Order at his State Bar membership records address.

In or about August 28, 2003, the California Supreme Court entered an order S118232 ("Order Two"), effective September 16, 2003, again suspending respondent from the practice of law as a result of his failure to pay State Bar of California membership fees ("the second suspension"). On or about August 28, 2003,[5] the State Bar Membership Records Office properly served upon respondent a copy of Order Two at his State Bar membership records address. As of the date of the filing of this decision, respondent remains suspended from the practice of law.

Respondent was Bevilockway's counsel of record from September 4, 2002 through October 10, 2002, the duration of his first suspension. Respondent held himself out to Bevilockway as entitled to practice law and did practice law during his first suspension.

Respondent was also Bevilockway's counsel of record when his second suspension began on September 16, 2003. From the commencement of the second suspension, respondent held himself out to Bevilockway as entitled to practice law and did practice law relative to Bevilockway's matter until early October 2003, when respondent last had contact with Bevilockway.

Respondent did not make any court appearances, nor did he file any documents with the

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[5]Although the NDC alleges this date as August 28, 2002, this appears to be a typographical error, as the order could not have been served before it was entered.

court during his first or second suspensions.

During the pendency of his first and second suspensions, respondent knew or should have known that he was suspended from the practice of law.

Respondent failed to inform his client, during his 2002 suspension and during his 2003 suspension, that he was not entitled to practice law.

On or about October 4, 2003, Bevilockway met with respondent and inquired about the status of his divorce. On or about October 7, 2003, respondent called Bevilockway and assured him that the matter would be resolved by the end of that week. Respondent did not resolve Bevilockway's dissolution that week.

On or about October 20, 2003, Bevilockway wrote a letter to respondent in which he reminded respondent that his case had not been resolved. Bevilockway requested that respondent contact him as soon as possible to inform him of the status of his dissolution. Since on or about October 4, 2003, Bevilockway has written and called respondent in order to obtain the status of his dissolution. Respondent has not responded to Bevilockway's letter or calls.

Respondent never completed Bevilockway's dissolution.

Conclusions of Law

Count Six - Rule 3-110(A) (Failing to Perform Competently)

By failing to complete the dissolution matter on behalf of Bevilockway, respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A).

Count Seven - Section 6068, Subdivision (a) (Engaging in the Unauthorized Practice of Law)

By continuing his representation of Bevilockway in the marital dissolution case during his two suspensions from the practice of law, respondent held himself out as entitled to practice law, and did practice law until early October 2003, when he had his last contact with the client. In so doing, he violated sections 6125 and 6126(a) and failed to support the laws of this State in wilful violation of section 6068, subdivision (a).

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Count Eight - Section 6106 (Dishonesty or Moral Turpitude)

There is clear and convincing evidence that respondent violated section 6106. He knew or should have known that he was suspended from the practice of law on two separate occasions. However, he did not withdraw from representation of Bevilockway during his suspension periods; in fact, he did not even inform Bevilockway of the suspensions.

Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

Count Nine - Section 6068, Subdivision (m) (Failure to Communicate)

By failing to respond to Bevilockway's requests for information about the status of his dissolution matter, and failing to inform Bevilockway of his two suspensions from the practice of law, respondent did not respond promptly to Bevilockway's reasonable status inquiries and did not keep Bevilockway reasonably informed of significant developments in his dissolution matter, in wilful violation of section 6068, subdivision (m).[6]

E. Case no. 04-C-12354 - Conviction of Penal Code Section 415(2)

Respondent's culpability is conclusively established by the record of his conviction. (Section 6101(a); *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588.)

The Conviction

On April 28, 2004, a criminal complaint was filed in the San Mateo Superior Court charging that on or about March 13, 2004, respondent "did willfully and unlawfully commit a battery upon Ellen Buda who was a spouse, a person with whom the defendant is cohabitating, or a person who is the parent of defendant's child, in violation of Penal Code section 243

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[6]In this instance, the court finds a violation of section 6068, subdivision (m), because respondent was Bevilockway's counsel when the two suspensions went into effect. Respondent, therefore, had a duty to inform his client of any significant developments. Compare the court's finding in count 3 in the Rogers matter, where respondent was suspended at the time Rogers employed him. The fact that respondent accepted employment without telling Rogers he was suspended was relied on to find respondent culpable of the unauthorized practice of law. The court, therefore, found the charge of a violation of section 6068, subdivision (m), to be duplicative in the Rogers matter.

[subdivision] (E), a misdemeanor." Thereafter, on September 15, 2004, in accordance with a plea agreement, the complaint was amended to dismiss the charged violation of Penal Code section 243, subdivision (e), and to charge of violation of Penal Code section 415, subdivision (2) (disturbing another person by loud and unreasonable noise). Respondent pleaded nolo contendere to and the superior court convicted respondent on the charged violation of section 415, subdivision (2). The superior court suspended the imposition of sentence and placed respondent on one year's probation on conditions including that he pay a $20 court security surcharge fee, make a $110 payment to the state restitution fund, and attend 32 hours of anger management meetings.

Evidence of Facts and Circumstances Surrounding Conviction

The facts and circumstances are established by copies of the Redwood City Police Department's case clearance reports, which include copies of the actual crime reports, that are attached as exhibit 1 to the State Bar's March 14, 2005, request for waiver of default hearing and brief on culpability and discipline. Even though the State Bar failed to have the copies of these clearance reports properly certified, the court will, in the interest of justice, consider them (and the included copies of the crime reports).[7] It will do so only because each of the case clearance reports are signed by the police officer who wrote the included crime reports, by the reviewing investigator, and by the reviewing patrol officer. These signatures purport to be signatures of public employees affixed in the employees' official capacity. Accordingly, because there is no evidence to the contrary, the signatures are presumed to be genuine and authorized, and the reports are deemed to be authentic even without the testimony of any of the officers. (Evid. Code, §§ 1280, 1453, subd. (b); *Poland v. Department of Motor Vehicles* (1995) 34 Cal.App.4th 1128, 1135.)

In California, "a police officer's report is admissible under Evidence Code section 1280 if it is based upon the observations of a public employee who had a duty to observe facts and report

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[7]In the absence of compelling circumstances that prevent it, it is fundamental, even in default proceedings, that the State Bar should present, to the court, only exhibits that are formally authenticated (certified copies).

and record them correctly. [Citation.]" (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 430, fn. 6; *Gananian v. Zolin* (1995) 33 Cal.App.4th 634, 642 [portions of a police report containing officer's personal observations or personal knowledge are clearly admissible under Evidence Code section 1280].) Thus, the portions of the report in which the officer records what he was told are clearly admissible as evidence as to what he was told. Moreover, even though those portions of the report would not ordinarily be admissible for proof of the matters stated because they are hearsay, the court may consider them for such because respondent has waived the hearsay bar to their admission by not objecting to them on that ground. (*Bowles v. State Bar* (1989) 48 Cal.3d 100, 108-109 [any hearsay objection deemed waived where attorney disregarded his statutory duties to appear and participate in disciplinary trial in the State Bar Court]; see also *Read v. State Bar* (1991) 53 Cal.3d 394, 413-414, fn. 5 [failure to object to hearsay testimony in the State Bar Court waives hearsay bar to its admission].) Moreover, even if respondent had made a timely hearsay objection, the portions of the reports in which the officer reports that respondent told him that he kicked his wife would still be admissible either as party admissions (Evid. Code, § 1220) or as declarations against interest (Evid. Code, § 1230). In that regard, many of the following facts and circumstances are established by or consistent with the statements that respondent made directly to the police officer who wrote the case clearance and crime reports. (Rules Proc. of State Bar, rule 202(a).)

Findings of Facts and Circumstances Surrounding the Conviction

On Saturday morning March 3, 2004, while they were in the kitchen of their home fixing breakfast, respondent and his wife began arguing about the wife's desire for a divorce. Both of the couple's teenage children were in the kitchen at the time. Respondent's wife turned away from him and he kicked her one time squarely on the buttocks; the wife reacted by saying "Ow!"; and respondent promptly "backed off" and, shortly thereafter, walked out of the kitchen.

Respondent's wife claims to have been shocked by the incident and even though she stated that the kick caused her pain, she never sought medical treatment. The kick did, however, cause a bruise about two inches long and three-quarters of an inch high on the wife's buttock.

Even though respondent and his wife have a history of arguing frequently, often times

screaming at each other, the only other incidence involving physical contact, other than respondent's wife spitting on him, occurred many years earlier, when respondent grabbed his wife's arm during an argument. Apparently, that incident and the incidence in which the wife spit on respondent were very minor and no injuries resulted from them.

Respondent has never threatened his wife, other than to threaten to spit on her as she had done to him. After March 13, 2004, respondent's wife was not afraid of respondent and initially felt that a protective order was unnecessary. In fact, respondent's wife told a coworker that she was afraid respondent might try to harm himself. However, later in March 2004, respondent's wife became worried because respondent appeared to become more angry as she prepared to move out the family's home, and a restraining order was issued against respondent. There is nothing in the record to suggest that respondent ever violated the restraining order. Nor is there anything in the record to suggest that respondent has violated any of his conditions of probation.

Conclusions of Law

As noted *ante*, the review department referred respondent's conviction to this court for a trial on the issues of whether the facts and circumstances surrounding the commission of the crime involved moral turpitude or other misconduct warranting discipline, and if so, for a recommendation as to the discipline to be imposed. (Cal. Rules of Court, rule 951(a); Rules Proc. of State Bar, rule 320(a).)

In reviewing the circumstances surrounding respondent's commission, the court is "not restricted to examining the elements of the crime, but rather may look to the whole course of [respondent's] conduct which reflects upon his fitness to practice law. [Citations.]" *(In re Hurwitz* (1976) 17 C.3d 562, 567.) That is because it is the misconduct underlying respondent's conviction, as opposed to the conviction itself, that warrants discipline. (*In re Gross* (1983) 33 Cal.3d 561, 569.)

Under section 6101, subdivisions (a) and (e), "an attorney's conviction of a crime pursuant to a plea of nolo contendere is 'conclusive evidence of guilt of the crime' for purposes of disciplinary proceedings. [Citations.]" (*In re Gross, supra*, 33 Cal.3d at p. 567.) In other words, the criminal conviction "is conclusive proof that the attorney committed all acts necessary

to constitute the offense. [Citation.]" (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.) Thus, respondent's conviction of violating Penal Code section 415, subdivision (2), conclusively establishes that he "maliciously and willfully [disturbed] another person by loud and unreasonable noise." Nonetheless, it is clear that not every conviction such as that suffered by respondent warrants discipline. (*In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, 266-267.) In this regard, the State Bar has not cited any case in which an attorney has been disciplined for violating any subdivision of Penal Code section 415. And, in the only two cases the court is aware of that involve violations of section 415, no discipline was imposed for the criminal conduct.

First, in *In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, the attorney was convicted not only for violating section 415, subdivision (1) (fighting or challenging a person to fight in public), but also for violating Vehicle Code section 23152, subdivision (b) (driving under the influence of alcohol); yet, both the hearing judge and the review department found that the attorney's convictions did *not* involve either moral turpitude or other misconduct warranting discipline. (*Id.* at pp. 327-328.) In that case, the review department agreed with the hearing judge that the attorney's convictions were of a "singular instance" and that there was not clear evidence of any disrespect for the law or dangerous or violent criminal behavior or other aggravating circumstances.

Second, in *In the Matter of Pasyanos* (Review Dept., Jan. 13, 2005, case no. 02-O-11558) 4 Cal. State Bar Ct. Rptr. ___,[8] the attorney was charged with misdemeanor violations of Penal

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[8]The court notes that (1) the State Bar has filed a petition for writ of review in *Paysanos*, (2) the Supreme Court has not yet acted on that petition, and (3) therefore, the review department's opinion in *Pasyanos* is no longer citable as precedent unless and until the Supreme Court denies the petition for writ of review, dismisses the writ without issuing an opinion, or orders that the review department's opinion remain citable. (Rule Proc. of State Bar, rule 310(c).) Accordingly, the court has not relied on the review department's opinion in *Pasyanos* in making its decision in the present proceeding nor has the court otherwise considered that opinion as precedential or persuasive authority. Instead, the court has noted the review department's disposition in *Pasyanos* merely to notify the parties that it is aware of it because the review department opinion in that case might again be citable as precedent before this court's decision (or, if review is sought, the review department's opinion) in this proceeding becomes final.

Code section 243, subdivision (e)(1) (battery against a former spouse) and of Penal Code section 166, subdivision (a)(4) (disobedience of domestic violence restraining order) after she filed her application for moral character determination, but before she was admitted to practice. The attorney, however, did not update her application to disclose these charges to the State Bar even though she had a clear duty to do so. Thereafter, she was admitted to practice; the charges against her were amended to charge only a violation of Penal Code section 415, subdivision (1), which, as noted *ante*, criminalizes fighting or challenging a person to fight in public; and the attorney was convicted of violating section 415, subdivision (1), based on her plea of nolo contendere.

Even though the review department described the attorney's conviction in *In the Matter of Pasyanos, supra*, 4 Cal. State Bar Ct. Rptr. ___, as being only for challenging a person to fight in public, the facts establish that the attorney actually fought in public with David Yardley, the father of her son. In addition, the facts disclose that the attorney had an extensive history of feuding with Yardley, "supported by the many incidents and restraining orders between them;" that the attorney and Yardley had each directed charges of battery and vandalism at the other; and that both the attorney and Yardley had been arrested and prosecuted on those charges. Nonetheless, the review department did not discipline the attorney in that case for her criminal conviction nor any of the facts and circumstances surrounding it. Instead, it disciplined her only for failing to update her moral character determination, in wilful violation of rule 1-200(A), to disclose the fact that she had been charged with violating Penal Code sections 243, subdivision (e)(1), and 166, subdivision (a)(4).

In light of *In the Matter of Babero, supra*, 2 Cal. State Bar Ct. Rptr. 322, the court rejects the State Bar's contention that *In re Otto* (1989) 48 Cal.3d 970 is comparable. In *Otto*, the attorney was convicted of *felony* violations of Penal Code section 245, subdivision (a) (assault by means likely to produce great bodily injury) and Penal Code section 273.5 (infliction of corporal punishment on a cohabitant of the opposite sex resulting in a traumatic condition), which the trial court reduced to misdemeanors. Even though *Otto* was a default proceeding and does not recite the factual basis of the attorney's convictions or the surrounding facts and circumstances, it is

clear that the crimes for which the attorney in that case was convicted are much more serious than the single crime for which respondent was convicted and that the assault in *Otto* resulted in substantial harm (i.e., a traumatic condition) versus the resulting bruise in the present proceeding. These conclusions are further supported by the fact that one of the probation conditions imposed on the attorney in *Otto* was that he actually serve 90 days in jail.

Finally, in light of *In the Matter of Babero, supra*, 2 Cal. State Bar Ct. Rptr. 322, the court finds that respondent's conviction is a singular instance and that there is no clear and convincing evidence of any disrespect for the law or dangerous or violent criminal behavior or other aggravating circumstances. Accordingly, the court finds that neither respondent's misdemeanor conviction for violating Penal Code section 415, subdivision (2), nor the facts and circumstances surrounding it involve moral turpitude or other misconduct warranting discipline. (*Ibid.*)

IV. LEVEL OF DISCIPLINE

Aggravating Circumstances

Respondent has one prior instance of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b)(i) ("standard").) In Supreme Court order no. 85-I-30 (State Bar Court case no. 85-2-155 SM), effective March 6, 1986, respondent was publicly reproved for violations of former rules 6-101(2), 2-111(A)(2) and sections 6068(a)/6103 in one client matter. Not much weight is given to this disciplinary record as it is 19 years old. (*In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96, private reproval more than 20 years earlier was too remote in time to merit significant weight on the issue of degree of discipline.)

Respondent's multiple acts of misconduct are an aggravating factor. (Standard 1.2(b)(ii).)

Respondent's misconduct also significantly harmed the Berubes. (Standard 1.2(b)(iv).) Respondent's misconduct resulted in the court entering a Judgment of Dismissal of the Berubes' complaint.

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Standard 1.2(b)(vi).) He has demonstrated his contemptuous attitude

toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the court to participate therein, a serious aggravating factor. (Standard 1.2(b)(vi); Cf. *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 109.)

Mitigating Circumstances

Since respondent did not participate in these proceedings and he bears the burden of establishing mitigation by clear and convincing evidence, the court has been provided no basis for finding mitigating factors.

Discussion

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

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Standard 1.6(a).) The level of discipline is progressive. (Standard 1.7(b).) The standards, however, are guidelines from which the court may deviate in fashioning the most appropriate discipline considering all the proven facts and circumstances of a given matter. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11; *Howard v. State Bar* (1990) 51 Cal.3d 215.) They are "not mandatory 'sentences' imposed in a blind or mechanical manner." (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

Standards 2.3, 2.4(b), 2.6 and 2.7 apply in this matter. The most severe sanction is suggested by standard 2.3, which provides for actual suspension or disbarment for acts of moral turpitude, intentional dishonesty or fraud, depending on harm to the victim and the magnitude of the misconduct, and the degree to which the misconduct relates to acts within the practice of law.

The State Bar recommends, in part, that respondent be actually suspended from the practice of law for six months. However, in light of the fact that respondent has not been found

culpable of all the charged violations, and the court has found no disciplinable conduct with respect to the conviction referral matter, the court does not concur with the State Bar's discipline recommendation. Nevertheless, the court still finds the case cited by the State Bar in support of its discipline recommendation, *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, instructive.

In *Johnston*, the review department found the respondent culpable of: (1) wilfully failing to communicate with his client in violation of section 6068, subdivision (m); (2) recklessly failing to perform competently in violation of rule 3-110(A) and former rule 6-101(A)(2); (3) improperly holding himself out an entitled to practice law by misleading his client into believing he was working on her matter while he was suspended for nonpayment of State Bar dues in violation of section 6106; and (4) wilfully violating his duty under section 6068, subdivision (i), to participate in State Bar investigations. In mitigation, Johnston had no prior record of discipline in 12 years of practice. In aggravation, Johnston's misconduct significantly harmed his clients, and Johnston's failure to file a response to the initial charging pleading was also considered an aggravating circumstance. In *Johnston*, which also proceeded by way of default, the review department recommended that Johnston be suspended from the practice of law for one year, that execution of said suspension be stayed, and that he be placed on probation for two years subject to certain conditions of probation, including a 60-day period of actual suspension.

In this case, respondent has been found culpable of misconduct in three client matters. In two client matters, respondent has been found culpable of failing to competently perform legal services, engaging in the unauthorized practice of law, and committing an act of moral turpitude, dishonesty or corruption. In one client matter each, respondent was found culpable of improper withdrawal, failing to participate in a disciplinary investigation, entering into an agreement for and charging an illegal fee, failing to comply with the requirements of section 6002.1, and failing to communicate with his client. In aggravation, respondent engaged in multiple acts of misconduct, he failed to participate in this disciplinary matter prior to the entry of his default, and his misconduct result in significant harm to one client. No mitigating circumstances were found.

In addition, respondent's lack of participation in this matter raises concerns about his

ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. No explanation has been offered that might persuade the court otherwise and the court can glean none. Having considered the evidence, the standards and the case law, the court believes that greater discipline than that imposed in *Johnston*, but less than that recommended by the State Bar, is appropriate in this matter. The court finds that a 90-day actual suspension to remain in effect until respondent explains to this court the reasons for not participating herein and declares his willingness to comply fully with probation conditions that may hereafter be imposed, among other things, is adequate to protect the public and proportionate to the misconduct found and the court so recommends.

V. DISCIPLINE RECOMMENDATION

Accordingly, it is hereby recommended that respondent be suspended from the practice of law for one year; that said suspension be stayed; and that he be actually suspended from the practice of law for 90 days and until the State Bar Court grants a motion to terminate respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Rules Proc. of State Bar, rule 205(a), (c).)

It is also recommended that he be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (Rules Proc. of State Bar, rule 205(b).)

It is also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within 40

days of the effective date of the order showing his compliance with said order.[9]

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners within one year from the effective date of the Supreme Court's order or during the period of his actual suspension, whichever is longer, and furnish satisfactory proof of such to the State Bar Office of Probation within said period.

VI. COSTS

The court recommends that costs be awarded to the State Bar pursuant to section 6086.10, and that those costs be payable in accordance with section 6140.7.

Dated: June 13, 2005.

JOANN M. REMKE
Judge of the State Bar Court

[9]Failure to comply with rule 955 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. 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 San Francisco, on June 13, 2005, I deposited a true copy of the following document(s):

DECISION

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

[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

PHILIP HARVEY BUDA
29 LIDO CIR
REDWOOD CITY CA 94065

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

ROBERT HENDERSON, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **June 13, 2005.**

Laine Silber

Laine Silber
Case Administrator
State Bar Court