PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **RICHARD A. HOFMAN** A Member of the State Bar.	**Nos. 03-O-04890; 04-O-11705** **OPINION ON REVIEW**

Respondent Richard A. Hofman's clients, who were husband and wife, paid him $4,000 to file bankruptcy petitions on behalf of themselves and their family business. Although respondent advised them that he would "prepare the paperwork and afford you the proper protection," he delayed filing their personal bankruptcy petition for 14 months, only to have it subsequently dismissed for failure to timely file the required documents. Respondent never filed the bankruptcy petition on behalf of the family corporation. During this time, his clients were besieged by creditors, their bank account was attached, two liens were placed on their home and they were unable to provide the necessary documentation to obtain welfare benefits. Moreover, their numerous requests for progress reports and meetings with respondent were met with evasions and half-truths. Respondent has been disciplined twice before for similar misconduct in four matters.

The hearing judge found respondent culpable, inter alia, of misconduct involving moral turpitude, as well as failure to perform competently, to return an unearned fee and to inform his clients of significant developments in their case. He found several factors in aggravation and none in mitigation. The hearing judge recommended that respondent be placed on five years'

stayed suspension and five years' probation on the condition that he be actually suspended from the practice of law for one year and until he makes full restitution with interest to his former clients.

Respondent is appealing the hearing judge's findings and the discipline recommendation, seeking dismissal of all charges against him. The State Bar also is appealing, asking for additional culpability findings and urging disbarment as the appropriate discipline.

We review the record de novo (*In re Morse* (1995) 11 Cal.4th 184, 207), and in so doing, we adopt most of the hearing judge's findings and conclusions, although we find additional culpability, aggravation and modest mitigation. Ultimately, we conclude that the hearing judge's discipline recommendation of one year of actual suspension is inadequate to protect the public, the courts and the profession. As we discuss more fully below, we recommend, inter alia, that respondent be actually suspended for two years and until he pays restitution to his clients and satisfies the requirements of Rules of Procedure of the State Bar, Title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent was admitted to the practice of law in December, 1983. He has been disciplined twice before, although he has not been actually suspended from practice. In 1998, he received a six months' stayed suspension, and in 2002, he was privately reproved. As discussed more fully below, his prior two disciplines involved, inter alia, dereliction of his duty to perform competently and failure to keep his clients apprised of significant developments.

[1]All further references to standards are to these Standards for Attorney Sanctions for Professional Misconduct, and all further references to rules are to these Rules of Procedure of the State Bar, unless otherwise indicated.

A. Navarro/Genesis Matter (Case No. 03-O-04890)

In March 2002, Jacqueline Navarro and her husband, Jorge, retained respondent to file a chapter 7 bankruptcy petition on their behalf and a chapter 11 bankruptcy petition for their party supply business, Genesis Corporation ("Genesis"). On March 13, 2002, respondent sent a letter to the Navarros, along with a retainer agreement, confirming the terms of his retention. In the letter, he stated: "Because you wish to preserve the business [Genesis] but discharge personal debts, you must be very careful in making sure that the personal Chapter 7 filings track and support the business's Chapter 11. I certainly can prepare the paperwork and afford you the proper protection . . . . The purpose would be to completely discharge all of the personal obligation, [sic] and retain the business, if possible." (Emphasis in the original.) Mrs. Navarro signed the retainer agreement on behalf of herself, her husband and Genesis on March 13, 2002.

The Navarros agreed to pay respondent a flat fee of $3,000 for their personal chapter 7 bankruptcy, and an additional $1,000 in advanced fees and a $250 hourly fee for Genesis's chapter 11 bankruptcy proceedings. The Navarros paid in two installments: $1,500 on March 18, 2002, and the remaining $2,500 on April 13, 2002.

At their initial meeting, respondent advised Mrs. Navarro that he would be filing the bankruptcy petitions soon and that she should stop paying her creditors. Within a month of their meeting, Mrs. Navarro wrote to respondent of her growing concern about her creditors, who were hounding her regarding unpaid bills. She also advised him that her bank, Washington Mutual, had levied their bank account, taking $800.09 from it and assessing a $35 levy fee. Respondent told Mrs. Navarro that the $800.09 levy would be reversed by the bankruptcy court.

The record contains extensive correspondence and faxes from respondent to the Navarros, most of which was of a mundane nature about cancelling and rescheduling appointments or requesting documents. Mrs. Navarro also regularly corresponded with

respondent, often expressing her increasing frustration with him.[2] On June 24, 2002, three months after she hired respondent, she advised him that a deputy sheriff had appeared at her workplace to execute a levy and that she had been receiving calls from creditors stating that they had called respondent but he did not return their calls. On June 28, 2002, Mrs. Navarro faxed a request to respondent, asking for the number of the bankruptcy case because a deputy sheriff had returned and taken all of the cash from her business because she could not provide specific information regarding the bankruptcy case. Respondent's response to these requests was merely: "Please let me know your availability for a meeting. Thanks."

Mrs. Navarro again sent him a letter, dated August 27, 2002, stating:

> I want to know what is going on. My daughter is being harassed a great deal by all kinds of creditors. I am receiving subpoenas and rude people are coming in yelling at my daughter and myself. I had understood this process would not take more than 90 days. What is going on? Why are the creditors still harassing? *Why hasn't anything [been] filed?* I paid you the full amount . . . I don't want to keep dealing with this. This is why I contacted you in the first place . . . . [Italics in original.]

In another letter, dated September 18, 2002, she said:

> I went to your office on Friday 9/13/02 and I was told that you hadn't been seen in your office for over a week and that you didn't leave any papers. I didn't appreciate being stuck in traffic and driving all the way over there for nothing. Give me a date and I will be there. You had given me 9/13/02 and I was there.

Again, on January 3, 2003, ten months after Mrs. Navarro hired respondent, she wrote:

> Give me an appointment that will actually be kept. I can go over or you can come over. I want this over with. I first saw you in March 2002. It's been way over

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[2]The hearing judge found that although Mrs. Navarro's English was limited, her testimony was credible. She could read and speak English with some fluency, but she was less skilled at writing in English and therefore her correspondence to respondent was prepared at her direction by her daughter. Mrs. Navarro dictated the letters to her daughter, reviewed them in her presence and then signed most of them. Respondent raises for the first time on appeal the issue of lack of foundation for these letters. However, all of the correspondence from Mrs. Navarro was admitted into evidence below without objection by respondent. "Where respondent did not object to the admission of evidence, it is well settled that any objection at that point has been waived. [Citation.]" (*In the Matter of Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844, 857.)

the 90 day time frame. Either I go to your office or you come here, but something has to be done now. Please give me a date and time, without canceling it again. (Emphasis in original.)

Mrs. Navarro's written communications corroborated her testimony that she understood both petitions would be filed within 90 days, and that she was besieged by creditors and the bank because of respondent's delay.

A year after she hired respondent, Mrs. Navarro still had not been provided with the bankruptcy case number, so on March 19, 2003, and again on April 3, 2003, she wrote to him expressing her urgent need:

> "I need the bankruptcy # ASAP. You told me by this Monday 3/31/03, and I did not receive it. It is extremely important to me to have it by tomorrow Friday 4/4/03." (Emphasis in original.)

On April 4, 2003, respondent finally sent a reply fax to Mrs. Navarro, with the handwritten notation "BK# LACH7 SV0310157." Neither the Navarros' chapter 7 bankruptcy petition nor Genesis' chapter 11 petition had been filed as of that date, and the number was a sham. Although respondent testified that he did not recall sending this case number to Mrs. Navarro, he acknowledged that the number was in his own handwriting.

Even after respondent filed the Navarros' chapter 7 petition on May 22, 2003, he failed to timely prosecute the matter. On June 24, 2003, a U. S. Bankruptcy Trustee notified respondent and the Navarros that they had failed to appear for a scheduled creditors' meeting and he was therefore resetting the meeting to August 6, 2003. Mrs. Navarro testified that respondent had not informed her of the initial creditors' meeting. On July 16, 2003, the bankruptcy court filed an order dismissing the Navarros' case because they had not timely filed the required schedules, statements, or plan and barring them from filing another petition for 180 days. Respondent received a copy of that dismissal order shortly after it was filed, but he did not promptly inform the Navarros about it. Instead, on July 28, 2003, respondent filed a motion to vacate the

dismissal. The bankruptcy court did not vacate the dismissal, but it did modify its order on July 31, 2003, deleting the 180-day restriction against filing a future petition.

The court served a copy of its July 31 order on the Navarros, which was the first time they learned that their case had been dismissed. On August 22, 2003, Mrs. Navarro sent respondent a fax stating: "I have not heard from you, and I received a letter from the court that my [bankruptcy] case was dismissed. What's going on? I am constantly receiving phone calls from creditors. I don't know what to do, that is the reason I hired you as my attorney." In response, on August 26, 2003, respondent sent a fax to the Navarros, simply stating: "The court has asked us to re-submit some documents. Please sign and return." In fact, the bankruptcy court did not ask respondent or his clients to resubmit any documents; it had only authorized the Navarros to file a second bankruptcy without waiting 180 days from its dismissal order. On September 12, 2003, respondent again sent an identical two-sentence letter to the Navarros, without any explanation of the dismissal. By that time, the Navarros had lost confidence in respondent and ceased any further dealings with him.

Thereafter, the Navarros attempted to compel respondent to participate in a fee arbitration, but he did not respond to the local bar association's inquiries or to Mrs. Navarro's certified letter requesting an arbitration, which was returned as unclaimed. Respondent testified that after the commencement of the investigation by the State Bar, he offered to return a portion of the $4,000 to the Navarros, although he never actually refunded any of the fees to them.

The Navarros filed a complaint with the State Bar on September 16, 2003. After an investigation, the State Bar filed a Notice of Disciplinary Charges (NDC) in case No. 03-O-04890 on December 23, 2005, alleging six counts of misconduct involving the Navarros and Genesis. On January 9, 2006, respondent filed a response denying culpability.

B. Bakkenson Matter (Case. No. 04-O-11705)

A second case, number 04-O-11705 (the Bakkenson matter), was filed on May 19, 2006, alleging a violation of rule 4-100(B)(3) due to respondent's alleged failure to render appropriate accounts for legal fees paid by a client, John Bakkenson, for various intellectual property matters in 2000-2001. Respondent filed his response on June 6, 2006.[3]

C. Involuntary Enrollment Proceeding (06-TB-12818-RMT)

On June 15, 2006, the State Bar initiated a third proceeding, case number 06-TB-12818-RMT, by filing a motion pursuant to Business and Professions Code section 6007, subdivision (b)(1),[4] which requires that an attorney be enrolled inactive if he or she "asserts a claim of insanity or mental incompetence in any pending [disciplinary] action or proceeding, alleging his or her inability to understand the nature of the action or proceeding or inability to assist counsel in representation of the member." According to the State Bar's motion, respondent asserted in the instant disciplinary case that he was unable to assist his counsel in his defense due to memory loss as the result of a recent seizure. On July 28, 2006, a different hearing judge, who was not hearing these proceedings, ordered respondent enrolled inactive. Respondent sought interlocutory review, and we reversed the order. At that point, he had been inactively enrolled for 28 days.[5]

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[3]The hearing judge dismissed case No. 04-O-11705, finding there was not clear and convincing evidence that respondent failed to render appropriate accounts to a different client. The State Bar does not challenge the hearing judge's dismissal of this matter, and upon our de novo review, we affirm the dismissal of case No. 04-O-11705, with prejudice, and we do not discuss the matter further.

[4]All further references to section(s) are to this source.

[5]Many of the arguments in respondent's briefs on appeal are based on his assertion of denial of his constitutional fair trial and due process rights as the result of the State Bar's filing of its motion in 06-TB-12818-RMT and the actions of the hearing judge in ordering his enrollment as an inactive member. He claims this ancillary matter was the result of prosecutorial misconduct and an attempt by the State Bar at "manipulation of the system" to his prejudice. We find his constitutional challenges to be without merit. Moreover, they are moot as we have

D. Consolidated Discipline Proceedings

After a two-day trial, the hearing judge filed a decision on November 20, 2007, dismissing the Bakkenson case, but finding culpability in the Navarro matter for four of the six counts: 1) acts of moral turpitude in violation of section 6106; 2) failure to perform competently in violation of rule-100(A); 3) failure to keep clients advised of significant developments in violation of section 6068, subdivision (m); and 4) failure to promptly refund unearned fees under rule 1-700(D)(2). The hearing judge dismissed two counts that charged respondent with failure to respond to a client's reasonable status inquiries in violation of section 6068, subdivision (m), and a violation of rule 3-700(A)(2) for improper withdrawal from employment.

The hearing judge recommended a five-year stayed suspension, a five-year probation, on the condition of a one-year actual suspension and until restitution in the amount of $4,000 plus interest was paid to respondent's former clients.

II. CULPABILITY DISCUSSION

A. Count 1: Section 6106 – Moral Turpitude

We adopt the hearing judge's finding that respondent engaged in acts involving moral turpitude in willful violation of section 6106 by providing Mrs. Navarro with a false bankruptcy case number, and by concealing from the Navarros the true status of their case, including the fact that it had been dismissed. Acts of moral turpitude include concealment as well as affirmative misrepresentations. (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315.) Indeed, "deceit of clients with respect to the status of their legal matters [is] grave misconduct going to the heart of . . . professional responsibilities . . . ." (*Kent v. State Bar* (1987) 43 Cal.3d 729, 738.) We thus conclude that respondent is culpable of willfully violating section 6106.

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already considered these same procedural and constitutional claims in arriving at our opinion reversing the hearing judge's order of inactive enrollment. We also deny respondent's request that we take judicial notice of the files and record in case number 06-TB-12818-RMT.

The State Bar asks us to find additionally that respondent repeatedly misled the Navarros about a creditors' meeting. There is evidence that respondent wanted the Navarros to attend a creditors' meeting in a different bankruptcy proceeding in order to prepare them for a future meeting with creditors in their own proceeding. But, the evidence does not establish that the Navarros were deceived into believing that the meeting in the unrelated case was part of their own bankruptcy proceedings.

B. Count 2: Rule 3-110(A) - Failure to Perform with Competence

The hearing judge correctly found respondent culpable of failing to perform legal services competently in violation of rule 3-110(A). To find such a violation, we must determine that respondent acted "in reckless disregard of a client's cause" and not merely that he acted negligently. (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 155, fn. 17.) Respondent's failure to perform was indeed reckless, in view of his most meager, belated and incomplete effort to obtain urgently needed bankruptcy protection for the Navarros and for Genesis. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 7 [delay of six months in filing bankruptcy petition, despite need for prompt action to protect clients from creditors, is reckless failure to perform]; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 641-642 [delay of over two months in obtaining temporary restraining order to protect client from stressful, harassing telephone calls constituted reckless failure to perform].)

As we explained in *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 557: "The matter thus required timely and substantive action, which [the client] did not receive from respondent. Although he took some steps, he did little to advance [his client's] interests . . . ." Sadly, such is the case here as well.

C. Count 3: Section 6068, Subdivision (m) – Failure to Inform Client of Significant Developments

We agree with the hearing judge's finding that respondent violated section 6068, subdivision (m) when he failed to inform the Navarros of the following significant developments in their case: 1) a creditors' meeting was scheduled for June 24, 2003, which they accordingly missed; (2) the bankruptcy court order dismissing their case; and (3) the bankruptcy court order modifying its dismissal order to allow the Navarros to re-file within 180 days. Respondent argues that the Navarros had independent knowledge of these facts. The record does not support his argument, but even if it did, the Navarros' purported knowledge did not excuse respondent from his independent duty to promptly notify them of these facts.

D. Count 4: Section 6068, Subdivision (m) – Failure to Respond to Client Inquiries

We adopt the hearing judge's dismissal of Count 4 with prejudice because we conclude that the State Bar did not establish by clear and convincing evidence that respondent failed to respond to the Navarros' inquiries. The record reflects a plethora of correspondence from respondent to the Navarros, even though this communication was, as the State Bar describes, "either non-responsive or of such low quality in terms of content and legibility as to be useless to her." However, in essence, the State Bar is restating the factual predicate underlying the charge of lack of competence in Count 2, and we therefore find Count 4 to be duplicative. The appropriate level of discipline does not depend on how many rules of professional misconduct or statutes proscribe the same misconduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.)

E. Count 5: Rule 3-700(A)(2) - Improper Withdrawal from Employment

The hearing judge found there was not clear and convincing evidence that respondent withdrew without taking reasonable steps to avoid foreseeable prejudice to the Navarros, thereby violating rule 3-700(A)(2). However, although respondent's ongoing, albeit inadequate,

communication to and representation of the Navarros may not constitute an abandonment of their chapter 7 proceeding, he clearly abandoned Genesis when he failed to file a chapter 11 bankruptcy petition on its behalf. "The requirement of rule 2-111(A)(2) [now rule 3-700(A)(2)] that requires an attorney to take steps to avoid prejudice to his client prior to withdrawing . . . may reasonably be construed to apply when an attorney ceases to provide services, even absent formation of an intent to withdraw as counsel for the client." (*Baker v. State Bar* (1989) 49 Cal.3d 804, 816-817, fn. 5.)

F. Count 6: Rule 3-700(D)(2) - Failure to Refund Unearned Fees

We find that respondent's failure to refund any portion of the $4,000 in fees violated rule 3-700(D)(2). The fees paid by the Navarros were advances against future services, and there is scant evidence that respondent performed work of significant value on their behalf. To justify retention of his legal fees, respondent was required to perform more than minimal preliminary services of value to the client. (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 324. Accordingly, respondent was obligated to promptly return the unearned, advance fees, which he has not. (*In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 923.)

III. DISCIPLINE

The primary purpose of these disciplinary proceedings is not to punish but to protect the public, the courts, and the legal profession. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856.) No fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Rather, we determine the appropriate discipline in light of all relevant circumstances, including aggravating and mitigating circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

A. Aggravation

Respondent has two prior disciplines involving four separate matters. (Std. 1.2(b)(i).)

1. *Hofman I* (Case Nos. 96-O-08462; 97-O-11472; 97-O-12600)

Respondent's first imposition of discipline involved three separate matters. In the first matter, a client paid respondent $1,500 in legal fees in 1992, which led to a complaint filed with the State Bar. The parties entered into a mediation agreement in 1996 through the auspices of the State Bar. Subsequently, respondent stipulated that he failed to comply with the terms of the mediation agreement in violation of section 6086.14, subdivision (a) and failed to respond to client inquiries in violation of section 6068, subdivision (m).

In the second matter, a client paid respondent $1,000 in 1994 to file a chapter 7 bankruptcy petition. Respondent stipulated that he failed to file the necessary schedules and statements to perfect the bankruptcy proceeding, resulting in a dismissal of the case. Although the bankruptcy court had waived the prohibition against re-filing the petition for 180 days, it closed the case after respondent did not re-file the petition. Respondent failed to inform his client that the case had been dismissed. He stipulated to a violation of rule 3-110(A) and of section 6068, subdivision (m), due to his failure to respond to his client's numerous phone calls requesting a status report.

In a third matter, respondent violated section 6068, subdivision (d), in 1993 when he misrepresented to a Superior Court judge that he had effectuated service of a demurrer on an opposing party when he had not and, as a consequence, the court imposed a $1,000 sanction.

On August 13, 1998, the Supreme Court ordered six months' suspension and until respondent paid restitution of $1,000 plus interest to one client and $1,500 plus interest to another client, stayed, and two years' probation.

2. *Hofman II* (Case No. 99-O-12544)

In 1996, a client paid respondent a total of $5,000 to prevent foreclosure on her home. Respondent failed to initiate any action, resulting in the loss of the client's home. The client attempted to contact respondent on many occasions but he did not respond. On the day before the foreclosure sale, respondent informed his client that he would not appear in court on her behalf. The client requested the return of her files and $1,000 of the fees she had paid him. He failed to return either the files or the fee.

Respondent stipulated to culpability for the following: 1) failure to respond to his client's request for status reports and to apprise her of significant developments (§ 6068, subd. (m)); 2) failure to act with competence (rule 3-110(A)); 3) prejudicial withdrawal on the eve of the foreclosure sale (rule 3-700(A)(2)); 4) failure to return his client's files (rule 3-700(D)(1)); and 5) failure to return unearned fees (rule 3-700(D)(2)). In mitigation, the State Bar caused prejudicial delay of the disciplinary proceedings. On January 10, 2002, respondent stipulated to a private reproval.

In the instant matter, we also find that respondent committed multiple acts of wrongdoing (std. 1.2(b)(ii)), and his conduct significantly harmed his clients in that respondent's inaction exacerbated the Navarros' desperate financial situation. (Std. 1.2(b)(iv).)

We find an additional aggravating factor, which was not considered by the hearing judge: respondent's lack of recognition of the seriousness of his misconduct, both past and present. (Std. 1.2(b)(v).) Rather than acknowledge his culpability in the instant matter, respondent has attempted to shift the blame to the Navarros, claiming that they planned to commit bankruptcy fraud and that their lack of cooperation caused the dismissal of their bankruptcy cases. The State

Bar and its prosecutors also were the target of groundless accusations of illegal conduct and "unconstitutional and un-American tactics."[6]

Respondent also maintains that his prior discipline for failure to protect a client from foreclosure was "a recommended settlement for convenience" and that there was no factual basis for his culpability. "[B]y implying . . . that his misconduct constituted a mere technical lapse, [respondent] evinces a lack of understanding of the gravity of his earlier misdeeds and the import of the State Bar's regulatory functions." (*Conroy v. State Bar* (1990) 51 Cal.3d 799, 806.) Moreover, respondent fails to see any nexus between his past and present misconduct. In his brief, he expresses dismay that the State Bar would have the "audacity" to suggest that his present misconduct is "a continuation of all the prior misconduct."

Respondent's testimony in the hearing below further reflects his lack of understanding of the consequences of his past misconduct. He testified that he did not remember the facts underlying his 1998 disciplinary proceeding and that he had agreed to the stipulated discipline in that case because the State Bar purportedly misrepresented that it would continue to operate during the 1998 shut-down. (The significance of this supposed misrepresentation eludes us.) He further testified as to his 2002 discipline: "I believe I have no culpability in that matter." Based on this record, we assign substantial additional weight in aggravation to respondent's indifference and failure to atone for his misconduct.

B. Mitigation

The hearing judge found that respondent did not establish any mitigating factors. Respondent argued below and on appeal that he was entitled to mitigation because of the order of involuntary inactive enrollment order pursuant to section 6007, subdivision (b)(1), filed on July

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[6]We find these claims to be baseless and without support in the record. Accordingly, we deny respondent's request that we direct these proceedings to the California Attorney General for review of the State Bar's conduct of this matter.

28, 2006, which was subsequently reversed by this court. The hearing judge correctly found that there is no precedent providing for mitigation for the time an attorney is erroneously enrolled inactive. We note that section 6007 does not provide for an attorney to be given credit for any period of inactive enrollment under subdivision (b). (Compare § 6007, subd. (d)(3) [expressly providing for credit for any period of inactive enrollment under subdivision (d)]; see *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192, 203-204 ["credit for time served" does not constitute a mitigating circumstance].)

Respondent offered no character witnesses and provided only his own testimony that he had cared for his elderly father for many years and that he himself had suffered from health problems. He did not provide expert testimony that these circumstances were causally related to his misconduct. We also reject respondent's claim that the State Bar had prejudicially delayed these proceedings since respondent was primarily responsible for any delay.

However, we do find respondent's uncontroverted testimony established that he has modernized his law practice by utilizing computers and a paralegal who now shares his office space. This has enabled respondent to be more responsive to his clients. Further, respondent no longer practices bankruptcy law, which has been problematic for him. He also testified about his pro bono activities on behalf of holocaust victims, including his participation in litigation against a Swiss bank on behalf of survivors to recover their assets, which were confiscated during World War II. These mitigative factors are commendable and we have given them modest weight, although they do not amount to compelling evidence in mitigation.

C. Level of Discipline

In determining the appropriate level of discipline, we look to the applicable standards and case law for guidance. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We recognize that the standards are not binding, but they are afforded great weight because " ' "they promote the

consistent and uniform application of disciplinary measures." ' [Citation.]" (*In re Silverton* (2005) 36 Cal.4th 81, 91.) There are several applicable standards, including 1.6,[7] and 2.3.[8] However, this is respondent's third disciplinary proceeding, so our focus is on standard 1.7(b), which provides for disbarment when there are two or more prior impositions of discipline, in the absence of compelling mitigation. Nevertheless, we do not apply standard 1.7(b) in a rote fashion; rather, we "examine the nature and chronology of respondent's record of discipline. [Citation.] Merely declaring that an attorney has [two prior] impositions of discipline without more analysis, may not adequately justify disbarment in every case." (*In the Matter of Miller* (Review. Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.)

Accordingly, we consider the unique facts of this case in light of other disciplinary decisions, and in particular those cases applying standard 1.7(b). The hearing judge below, citing *Conroy v. State Bar* (1991) 53 Cal.3d 495 as precedent, correctly observed that disbarment is not mandated in all cases where there are two or more prior disciplines, even if compelling mitigating circumstances do not predominate. *Conroy* is somewhat factually similar to the instant matter in that it involved an attorney with two prior disciplines, who did not establish any mitigating circumstances. In *Conroy*, the attorney failed to competently perform in a single client matter, failed to communicate with the client, engaged in acts of moral turpitude by misrepresenting to the client that he had done certain work on the case and failed to cooperate with the successor attorney. The Supreme Court imposed a one-year actual suspension because it gave significantly less weight to the attorney's second discipline, which involved failure to

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[7]Standard 1.6 provides when there are two or more acts of professional misconduct in a single proceeding, the sanction imposed will be the more severe of the applicable standards.

[8]Standard 2.3 provides: "Culpability of a member of an act of moral turpitude . . . shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law."

timely take the Professional Responsibility Examination. The court found that this violation was unrelated to the misconduct in the first proceeding, and thus did not constitute a repetition of misconduct or a common thread. (*Id.* at pp. 507-508; see also *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 241-242 [30 days' actual suspension for unauthorized practice of law and three prior disciplines, but with the absence of a common thread or continuing misconduct of increasing severity and the presence of compelling mitigation].)

Conroy v. State Bar, supra, 53 Cal.3d 495 is distinguishable from the instant case because respondent's prior two disciplines in 1994 and 1996 both involved incompetence, client neglect and/or abandonment, which in large measure mirror his present misconduct. Moreover, the current misconduct repeats another theme – that of dishonesty, since he misled his clients about the status of their cases and previously he misled a judge about his service of a pleading on an opposing party.

Disbarment has often been imposed when there has been a repetition of offenses such that it has been deemed a 'pattern" of misconduct. For example, in *Kent v. State Bar, supra,* 43 Cal.3d 729, the Supreme Court disbarred an attorney whose dilatory conduct resulted in the dismissal of a personal injury action against his clients, a husband and wife, and who deceived his clients about the status of their lawsuit. (*Id.* at pp. 730-731.) The attorney was found culpable of failure to perform with competence, failure to communicate and moral turpitude. The attorney had three prior disciplines, including two private reprovals for failing to prosecute claims and a one-year actual suspension for similar misconduct. A total of six clients were harmed. (*Id.* at p. 735.) The court found disbarment was consistent with standard 1.7(b) because there were no compelling mitigating circumstances and the attorney's abandonment of his clients' cause in the proceeding before the court evidenced a pattern of misconduct rather than an isolated instance. (*Id.* at p. 738; see also *Gary v. State Bar, supra,* 44 Cal.3d 820, 829

[disbarment warranted for "pattern" of improper withdrawal, willful client neglect and failure to return entrusted funds in three prior proceedings and matter under review]; *Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 551 [disbarment imposed for "perpetual misconduct" involving serious comingling and/or willful misappropriation in three discipline proceedings].)

Even in the absence of a clear pattern of wrongdoing, disbarment has been recommended if there is a common thread or a recurring theme of misconduct. In *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, we recommended disbarment for an attorney, who had been disciplined four times previously, although he had received no actual suspension. We found Shalant culpable of committing an act involving moral turpitude because of the abusive manner in which he modified his contingent fee agreement on the eve of his client's deposition and his threats to withdraw if the client did not pay an additional fee. He was also culpable of collecting an illegal fee, which was aggravated by client harm and indifference toward rectification. Shalant's four prior disciplines involved trust account violations, failure to perform competently, failure to communicate with clients, improper communication with represented parties, and violation of a court order. We observed that his prior misconduct, together with the misconduct at issue reflected a "disturbing repetitive theme." (*Id.* at p. 841.)

In *In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, we recommended disbarment because we found that the attorney's current offenses of disobeying a court order, failing to report judicial sanctions, engaging in the unauthorized practice of law and failing to comply with probation conditions echoed his prior record of discipline. We observed that the attorney had continuously been on probation or before this court since 1993, and had received a one-year stayed suspension in 1994, a two-year stayed suspension in 1997, a 30-day actual suspension in 2001, and was on probation at the time he committed the misconduct then at issue. The repeat offenses for which the attorney was disciplined involved continued disregard

of court orders, failure to report court-ordered sanctions and the unauthorized practice of law. We found his misconduct was surrounded by bad faith, dishonesty, and concealment, and he had not accepted responsibility for his actions.

In *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, the attorney inadequately represented several clients in separate criminal matters. Even though we did not find his past and present offenses constituted a pattern of misconduct, we were greatly concerned with its recurrence, noting that the attorney committed misconduct in 1985, 1987, 1988, 1991, and 1992, and that the matters under review represented the attorney's second and third disciplinary matters. (*Id.* at p. 79/) We found no mitigating circumstances to counter the attorney's multiple acts of misconduct, failure to cooperate with the State Bar, significant harm to a client and significant harm to the administration of justice. In view of the prior misconduct, we concluded that disbarment was appropriate because the risk of future misconduct was so great. (*Ibid.*)

All of the above-cited cases applied standard 1.7(b) and imposed disbarment, and have involved more serious misconduct and/or a greater number of prior disciplines than in the instant case. Even though respondent's present wrongdoing to a great extent mimics his past disciplinable offenses, it does not approach the severity of the misconduct in these cases. Moreover, respondent has taken his first, albeit modest, step at reforming his practice to address the problems that have in part caused his recurring misconduct. We note, too, that while respondent has been disciplined twice before, the prior sanctions have been lenient – a six months' stayed suspension and a private reproval.

We believe that *Blair v. State Bar* (1989) 49 Cal.3d 762 and *In the Matter of Miller, supra,* 1 Cal. State Bar Ct. Rptr. 131 support a recommendation of actual suspension rather than disbarment. In its decision in *Blair*, the Supreme Court acknowledged the applicability of 1.7(b)

by reason of the attorney's three prior disciplines, all of which involved willful misappropriations and multiple acts of misconduct, but the court nevertheless imposed a two year-actual suspension rather than disbarment. The conduct under review was more serious than the instant case, because it involved a failure to perform services competently in three client matters. The court characterized Blair's misconduct as "serious" and reflected a habitual disregard of his clients' interests, which, when combined with his failure to communicate, constituted moral turpitude. (*Blair v. State Bar, supra,* 49 Cal.3d at p. 777.) The court also acknowledged "the near total lack of mitigation" (*ibid.*) and significant aggravation arising from harm to clients, lack of candor and cooperation and failure to recognize his problems. (*Id.* at p. 781-782.)

In *In the Matter of Miller, supra,* 1 Cal. State Bar Ct. Rptr. 131, we recommended a one year actual suspension for an attorney with two prior disciplines: one involving client abandonment and a second discipline for failing to pass the MPRE. The third matter before the court was a default proceeding in which the attorney was found culpable again of client abandonment and repeated misrepresentations to the clients as to the status of their case, which constituted moral turpitude. (*Id.* at p. 135.) The attorney also failed to respond to two letters from the State Bar investigator. We rejected the hearing referee's decision recommending disbarment under standard 1.7(b) because we found the attorney's record of misconduct did not justify such a severe discipline. (*Id.* at pp. 136-137.) Our decision was guided by Supreme Court precedent, including *Blair v. State Bar, supra,* 49 Cal.3d 762, discussed above.

On balance, we find that the nature and extent of respondent's past and present misconduct, as well as the decisional law, justify a departure from the disbarment recommended by standard 1.7(b) and suggest that instead a lengthy actual suspension, followed by an even lengthier probationary period, will adequately protect the public. We further recommend the

added element of protection in requiring respondent, prior to relief from actual suspension, to offer proof, satisfactory to the State Bar Court, of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii).

We caution respondent that his demonstrated lack of appreciation of his wrongdoing and of the harm he caused his clients causes us serious concern. As we aptly said in *In the Matter of Miller, supra,* 1 Cal. State Bar Ct. Rptr. 131, 137: "That we consider disbarment as too severe here neither excuses respondent's acts nor signals that attorneys found culpable of repeated misconduct can escape appropriate discipline for their acts." But, in spite of these misgivings, in light of the totality of the misconduct that has occurred here, we believe two years actual suspension and until respondent has fully paid restitution and has established the showing required in standard 1.4(c)(ii) is consistent with the purposes of attorney discipline.

IV. RECOMMENDATION

We recommend that respondent, Richard A. Hofman, be suspended from the practice of law in the State of California for five years, that execution of that suspension be stayed, and that respondent be placed on probation for five year on the following conditions:

1. Respondent be actually suspended from the practice of law in the State of California during the first two years of probation and until he has satisfied each of the following conditions:

   (a) Respondent shall make restitution to Jacqueline Navarro in the amount of $4,000 plus 10% interest per annum from April 13, 2002, the date respondent received these fees (or to the Client Security Fund to the extent of any payment from the fund to Jacqueline Navarro, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d);

   (b) Respondent shall provide satisfactory proof of such restitution to the State Bar's Office of Probation; and

   (c) Respondent's actual suspension shall remain in effect until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.

3. Respondent must maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation in Los Angeles, his current office address and telephone number, or if no office is maintained, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will not be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4. Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and must certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

   (a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

   (b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

   During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

6. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for two years will be satisfied, and the suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of actual suspensions and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 9.20

We further recommend that respondent be ordered to comply with rule 9.20, California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule, within thirty (30) and forty (40) days, respectively, from the effective date of the Supreme Court order herein.

Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.

VII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

EPSTEIN, J.

We concur:

REMKE, P. J.

STOVITZ, J.*

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*Hon. Ronald W. Stovitz, Retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge.

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; 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 January 7, 2009, I deposited a true copy of the following document(s):

OPINION ON REVIEW FILED JANUARY 7, 2009

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:

RICHARD ALAN HOFMAN
LAW OFFICES OF RICHARD A.
HOFMAN
30423 CANWOOD ST STE 201
AGOURA HILLS, CA 91301

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

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

Joseph R. Carlucci, Enforcement, Los Angeles

Christine Ann Souhrada, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on January 7, 2009.

Milagro del R. Salmeron
Case Administrator
State Bar Court