

**PUBLIC MATTER – DESIGNATED FOR PUBLICATION**

FILED AUGUST 26, 2002

**REVIEW DEPARTMENT OF THE STATE BAR COURT**

In the Matter of	)	<b>Case No.: 97-O-15010</b>
	)	<b>98-O-02100</b>
<b>MIGUEL GADDA,</b>	)	<b>(Consolidated.)</b>
	)	
A Member of the State Bar.	)	<b>OPINION ON REVIEW</b>
_____	)	

In this original disciplinary proceeding, respondent Miguel Gadda seeks review of the recommendation of a State Bar Court hearing judge that he be disbarred. The hearing judge found that respondent repeatedly failed to perform legal services competently (Rules Prof. Conduct, rule 3-110(A)),<sup>1</sup> failed to refund unearned fees promptly upon termination of employment (rule 3-700(D)(2)), failed to adequately communicate with clients (Bus. & Prof. Code, § 6068, subd. (m)),<sup>2</sup> failed to return files and papers promptly upon a client’s request at the termination of employment (rule 3-700(D)(1)), commingled client funds with his own funds in his client trust account (rule 4-100(A)), and committed acts involving moral turpitude by issuing trust account checks without sufficient funds to cover them (§ 6106).

Our independent review of the record shows that respondent’s misconduct extended from 1994 to 1999 and that respondent was previously disciplined for similar misconduct in 1990. We agree with the hearing judge’s recommendation that disbarment is warranted under the circumstances for the protection of the public, the courts, and the legal profession.

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<sup>1</sup>All further references to rules are to the Rules of Professional Conduct of the State Bar of California unless otherwise indicated.

<sup>2</sup>All further statutory references are to the Business and Professions Code unless otherwise indicated.

## **PROCEDURAL BACKGROUND**

On July 25, 2000, the State Bar filed a Notice of Disciplinary Charges (NDC) against respondent. The State Bar filed a second NDC against respondent on August 14, 2000. After respondent filed responses to these NDCs, the cases were consolidated on September 25, 2000.

On March 5, 2001, the parties filed a stipulation of facts.

Trial in this matter commenced on March 13, 2001, and concluded on March 28, 2001.<sup>3</sup> The hearing judge filed his decision recommending respondent's disbarment on July 30, 2001. Because the hearing judge recommended disbarment, he properly ordered that respondent be involuntarily enrolled as an inactive member of the State Bar as required by section 6007, subdivision (c)(4), and Rules of Procedure of the State Bar, rule 220(c). The hearing judge's order of involuntary inactive enrollment became effective on August 2, 2001, and respondent has remained ineligible to practice law in this state since that time. Respondent filed a timely request for review on August 27, 2001.<sup>4</sup>

## **JURISDICTION OF THE STATE BAR COURT**<sup>5</sup>

Respondent initially challenges this court's jurisdiction to discipline him for his conduct in federal and immigration courts, asserting that attorney conduct standards regarding practice

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<sup>3</sup>During his opening statement at trial, respondent admitted culpability as to the charges of commingling and issuing checks drawn on account containing insufficient funds to cover them.

<sup>4</sup>In an order filed on January 25, 2002, and an order filed on May 28, 2002, we granted multiple requests for judicial notice and motions to augment the record on review filed by respondent and the State Bar. In each of those orders, we expressly reserved the issue as to the weight that should be accorded the items that we judicially noticed and the additional evidence we accepted to augment the record on review. After independently reviewing the record, we conclude that no weight should be accorded to the judicially noticed items or the additional evidence because nothing therein is relevant to any issue in this proceeding.

<sup>5</sup>We address only respondent's principal points of error on review. Any point of error or supporting argument that is not expressly addressed in this opinion has been considered and rejected.

before such courts, as well as discipline for a breach of any such standards, is within the exclusive jurisdiction of the federal government. He argues that this disciplinary proceeding in the State Bar court is an attempt by the State of California to regulate the practice of law in the federal courts or to place restrictions or limitations on persons appearing before the federal courts and agencies within the state. He contends that since he practices only immigration law, the State Bar of California does not have jurisdiction over him.

Respondent was admitted to the practice of law in California on August 4, 1975, and has been a member of the State Bar since that time. We acknowledge that, as the State Bar concedes, neither this court nor the California Supreme Court has jurisdiction to stop respondent from practicing law in federal court. (*Ex Parte McCue* (1930) 211 Cal. 57, 66.) We also acknowledge that neither this court nor the California Supreme Court may stop respondent from practicing law in or before federal agencies. (*Silverman v. State Bar of Texas* (5th Cir. 1968) 405 F.2d 410, 413-415.) However, respondent is licensed by the California Supreme Court to practice law in this state. And, based on that license, respondent applied to practice and practices law before the federal courts in this state. In addition, it is without question that respondent is permitted to practice law and represent individuals before the Board of Immigration Appeals (BIA), the immigration courts, and the Immigration and Naturalization Service (INS) only because he is licensed to practice law by the California Supreme Court.<sup>6</sup> (8 C.F.R. §§ 1.1(f), 292.1(a)(1); see also 8 C.F.R. § 292.1(e).)

The Supreme Court of California has the inherent power to discipline attorneys licensed to practice in the State of California. (*In re Paguirigan* (2001) 25 Cal.4th 1, 7; *O'Brien v. Jones*

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<sup>6</sup>The BIA, the immigration courts, and the INS are all entities within the United States Department of Justice. The BIA and the immigration courts are part of the Department of Justice's Executive Office of Immigration Review (EOIR) (8 C.F.R. §§ 3.0(a), 3.1(a)(1), 3.9, 3.10). The EOIR (including the BIA and the immigration courts) is separate from and independent of the INS (see 8 C.F.R. §§ 100.1, 100.2, 103.1; see also 8 U.S.C. § 1101(b)(4) [immigration judges “shall not be employed by the [INS]”]).

(2000) 23 Cal.4th 40, 48; *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592-593; accord, § 6100.) The State Bar Court, as an administrative arm of the Supreme Court, has the statutory authority to conduct disciplinary proceedings and make recommendations of discipline to the Supreme Court. (*In re Attorney Discipline System, supra*, 19 Cal.4th at pp. 599-600.) The focus of the disciplinary proceeding is the protection of the public, the courts, and the legal profession in California from attorneys who do not adhere to the standards and responsibilities of the legal profession as set forth in the State Bar Act (§ 6000 et seq.) and the Rules of Professional Conduct. (See Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.3; rule 1-100(A).) In this regard, the California Supreme Court clearly held more than 60 years ago that, “[i]f an attorney admitted to practice in the courts of this state commits acts in reference to federal court litigation which reflect on his integrity and fitness to enjoy the rights and privileges of an attorney in the state courts, proceedings may be taken against him in the state court. [Citations.]” (*Geibel v. State Bar* (1938) 11 Cal.2d 412, 415, see also rule 1-100(D).) We conclude that this holding should be extended to attorneys practicing before federal agencies such as the BIA, the immigration courts, and the INS. (Accord *Stroe v. I.N.S.* (7th Cir. 2001) 256 F.3d 498, 501-502, 504 [Seventh Circuit referred attorney to the Illinois Attorney Registration and Disciplinary Commission for misconduct that attorney committed before the BIA expressly because attorney was “a member of the Illinois bar”].) In fact, respondent was disciplined in 1990 by the California Supreme Court for misconduct he previously committed while practicing law before the BIA, the immigration courts, and the INS. (*Gadda v. State Bar* (1990) 50 Cal.3d 344 (*Gadda I*).)

Respondent contends that the federal regulations pertaining to discipline of attorneys practicing before the BIA, the immigration courts, and the INS (8 C.F.R. §§ 3.102 et seq., 292.3 et seq.) preempt any state attempts to discipline attorneys practicing before these federal agencies. However, we note that these federal regulations themselves state that the EOIR (of

which the BIA and the immigration courts are a part) and the INS may, in addition to or in lieu of initiating disciplinary proceedings against an attorney, notify any appropriate federal or state disciplinary agency of a complaint filed against the attorney. (8 C.F.R. §§3.106(d), 292.3(g).) These regulations also state that, if any final administrative decision is issued imposing sanctions other than a private censure, the EOIR or the INS must notify the disciplinary agency in every jurisdiction where the disciplined attorney is authorized to practice. (*Ibid.*) Thus, the regulations themselves contemplate that the disciplinary agency of a state in which an attorney is admitted to practice has authority to discipline the attorney for misconduct occurring in immigration courts.

In addition, various federal courts, as well as the BIA, have indicated that the disciplinary agencies of the states in which immigration lawyers are licensed have jurisdiction to discipline these lawyers for misconduct occurring while appearing before the BIA, the immigration courts, the INS, and the federal courts in immigration cases. For example, in *Matter of Lozada* (BIA 1988) 19 I. & N. Dec. 637, 639, the BIA held that a motion to reopen deportation proceedings on the basis of ineffective assistance of counsel should indicate, among other things, “whether a complaint has been filed with appropriate disciplinary authorities regarding [the alleged inadequate] representation, and if not, why not.” In *In Re Rivera-Claros* (BIA 1996) 21 I. & N. Dec. 599, 603-604, the BIA clarified that one reason for this requirement of filing a complaint with the appropriate state disciplinary authority is to allow the BIA (and the immigration courts) to more easily monitor the conduct of immigration attorneys, since the federal regulations in existence at that time for the disciplining of immigration attorneys were not comprehensive rules governing the practice of immigration law and since the BIA (and the immigration courts) relied on the disciplinary process of the relevant local jurisdiction as the primary means of identifying and correcting misconduct. Moreover, federal courts have held that the BIA acted within its discretion in imposing the *Lozada* requirements (see, e.g., *Saakian v. I.N.S.* (1st Cir. 2001) 252 F.3d 21, 26; *Lu v. Ashcroft* (3d Cir. 2001) 259 F.3d 127, 129, 132-133) and have specifically

approved the requirement of filing a complaint with the appropriate local disciplinary agency (e.g., *Lu v. Ashcroft, supra*, 259 F.3d at pp. 133-135; *Stroe v. I.N.S., supra*, 256 F.3d at pp. 501-502, 504).

As the foregoing authorities recognize, the ability of the BIA, the immigration courts, the INS, and the federal courts to discipline attorneys who practice only before them does not deprive a state bar of jurisdiction to discipline one of its members for engaging in misconduct while practicing before the BIA, the immigration courts, the INS, and the federal courts. We find respondent's argument in this respect to be specious.<sup>7</sup>

## **CULPABILITY**

### **Respondent's Background**

Respondent came to the United States as an immigrant, and upon becoming an attorney admitted to practice law in California, he set up an immigration practice. By the year 1996, he had 500 to 600 active cases and was working Mondays through Saturdays. He maintained approximately this case load through the year 2000.

His clients came to the office and were seen on a first come, first served basis. They arrived at 9:00 a.m., as they were told to do, and often did not see respondent until 12:00 noon or later, or did not see him at all. The client appointments lasted approximately 10 to 20 minutes.

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<sup>7</sup>Respondent also asserts that the federal regulations' one-year statute of limitations regarding ineffective assistance of counsel (8 C.F.R. § 3.102(k)) directly conflicts with the State Bar rules and that the complaints in this case "go back to 1994" and are barred. We note that Rules of Procedure of the State Bar, rule 51 provides that a disciplinary proceeding based upon a complaint alleging that an attorney violated the State Bar Act or the Rules of Professional Conduct must be initiated within five years from the date of the alleged violation, except that the five-year period is tolled when, among other things, the attorney continues to represent the complainant or a member of the complainant's family or when the attorney conceals facts constituting the violation. Respondent has failed to specify any charge barred under rule 51, and he has failed to cite any authority to establish that this court must impose a one-year limitation period for charging him with misconduct in these proceedings. In sum, we reject respondent's assertions because they are unsupported by authority and are otherwise meritless.

The immigration judges (IJs) who testified in the hearing department stated that respondent frequently missed court appearances and frequently seemed unprepared.

Respondent hired other attorneys on a contract basis to make court appearances for him and to file appeals. One such attorney was William R. Gardner.

There were signature stamps for respondent and for attorney Gardner for use by respondent's office staff.

Between the years 1998 and 2000, due to medical problems, respondent started working mostly at home, going to the office to see clients only on Tuesday and Thursday afternoons and some Saturdays.

### **The Saba matter**

On or about October 4, 1991, the four Saba children, Anita, Perfecto, Samson, and Mariam, applied for political asylum. On May 14, 1993, the INS denied their political asylum applications because they failed to establish either past persecution or fear of future persecution. Sometime before November 2, 1993, the Saba children retained respondent to represent them before the immigration court. Respondent dealt mainly with their father. On November 2, 1993, respondent filed a notice of appearance on their behalf with the immigration court.

On November 3, 1993, the Saba children requested a de novo reconsideration of their applications for political asylum by the immigration court. However, on September 25, 1995, respondent represented them at an immigration court hearing, at which time the Saba children withdrew their asylum applications, and the IJ ordered them to voluntarily depart from the United States by September 6, 1996.

On June 18, 1996, Mrs. Saba became a naturalized citizen. Through error on the part of his office, respondent failed thereafter to take any action to adjust the status of the Saba children based on their mother's citizenship. As of June 18, 1996, the Saba children were all under the age of 21 and were minors for immigration law purposes.

On September 6, 1996, respondent filed a motion to reopen deportation proceedings on behalf of the Saba children to apply for adjustment of status to lawful permanent residents. Respondent also requested an extension of time for the Saba children to depart voluntarily, which request was denied. Although the IJ initially granted the motion to reopen deportation proceedings on October 22, 1996, on December 16, 1996, the IJ vacated the order granting the motion and entered a new order denying the motion.

On January 15, 1997, the last possible day, respondent filed a notice of appeal with the BIA. On January 22, 1997, the BIA rejected the appeal because it was not accompanied by the \$110 filing fee. On January 31, 1997, respondent resubmitted the appeal with the required fee, but on January 23, 1998, the BIA again dismissed the appeal as untimely.

On November 25, 1997, Mr. Saba became a naturalized citizen. On April 29, 1998, respondent filed a petition on behalf of the Saba children for a stay of deportation until the conclusion of the school year. At some point during the proceedings regarding this petition, respondent left the Saba children and their parents unrepresented before an INS officer. Upon respondent's advice, the Saba children signed a statement that they would voluntarily depart the United States before the stay expired, and Mr. and Mrs. Saba signed statements that they understood that the Saba children would have to leave the United States at the expiration of the stay and that they would make arrangements for their children's departure. A stay was granted until August 1, 1998, but the Saba children did not depart the United States on or before that time. Respondent told them that he was taking care of everything. Respondent agreed to file an appeal of the BIA decision.

On August 18, 1998, respondent instructed attorney Gardner to file a petition for a writ of habeas corpus and a stay of deportation on behalf of the Saba children in the United States

District Court for the Northern District of California.<sup>8</sup> Respondent routinely employed Gardner on a contract basis to make master calendar hearing appearances in the immigration courts and to handle Ninth Circuit matters. Respondent only occasionally looked at Gardner's federal court pleadings before they were filed, although Gardner had gained all of his experience in federal court through respondent's office. Respondent did not supervise Gardner because he believed that Gardner did not need any supervision, as he was admitted to practice law in California, the federal district court, and the Ninth Circuit.

On August 24, 1998, the Saba children were ordered to report for deportation on September 21, 1998. On respondent's advice, they did not comply with this order.

Pursuant to respondent's request, at some point Gardner filed a petition for writ of habeas corpus on behalf of the Saba children. On September 24, 1998, the federal district court issued an order to show cause and a stay of deportation to permit a hearing on the writ. On February 8, 1999, the district court issued a decision ordering the deportation order vacated and remanding the matter to the immigration court with instructions to reopen deportation proceedings and to evaluate the children's eligibility for adjustment of status.

The district court remanded the matter upon its sua sponte finding of ineffective assistance of counsel, stating that among the egregious series of errors, going beyond mere procedural defects, "Petitioners [the Saba children] did not file for an adjustment of Petitioners' status within a reasonable time after Mrs. Saba became a naturalized citizen, which was three months before the last day to depart voluntarily. As immediate relatives of a citizen, Petitioners would have been given priority and their application expedited. Instead, the application was filed on the last day to depart, which caused Petitioners to disobey the voluntary departure order, which in turn led to the deportation order." (*Saba v. I.N.S.* (N.D. Cal. 1999) 52 F. Supp.2d 1117,

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<sup>8</sup>As Gardner explained while testifying at trial in the hearing department, respondent made this request because the time for filing an appeal of the BIA decision in the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) had expired.

1126.) “But for counsels’ ineffectiveness, the outcome of the proceedings would probably have been different: Petitioners would have become permanent U.S. residents.” (*Ibid.*)

On October 6, 1999, respondent appeared on behalf of the Saba children at an immigration court hearing. At that time, the IJ refused to allow respondent to represent the Saba children and continued the matter to allow the children to obtain new counsel. Thereafter, the Saba children retained attorney Juliette Topacio Sarmiento.

In June 2000, after submitting supplemental documentation, the adjustment of status hearing was held for Samson and Mariam, the children who were still minors, and their adjustment of status was granted. Attorney Sarmiento testified in the hearing department that, had the application for adjustment of status been filed at the time Mrs. Saba became a naturalized citizen, all the Saba children would have qualified for adjustment of status because they were minors. Instead, the cases of Anita and Perfecto were still in deportation proceedings.

Over the course of respondent’s representation, the Saba children paid respondent over \$3,000. Although attorney Sarmiento requested that respondent refund this money to the Saba children, respondent had not refunded any fees as of the time of trial in this matter.

### The Hearing Judge's Conclusions<sup>9</sup>

As to this matter, respondent was charged with two counts of violating rule 3-100(A), which provides that an attorney “shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” Respondent was also charged with one count of violating rule 3-700(D)(2), which provides that a member whose employment has terminated shall promptly refund any unearned fee. The hearing judge determined that the State Bar proved by clear and convincing evidence that respondent willfully committed all of the charged acts of misconduct.

### Discussion

Upon our independent review of the record, including the stipulation of facts, we conclude that, as to this matter, respondent is culpable of the two charged counts of recklessly and repeatedly failing to perform legal services with competence in willful violation of rule 3-110(A). We conclude that respondent performed legal services incompetently: (1) by leaving the children alone, unrepresented, in the middle of a hearing before an immigration officer and advising them to sign a voluntary departure form; (2) by failing to advise the Saba children to depart voluntarily on or before September 6, 1996; (3) by failing to move to reopen deportation proceedings until September 6, 1996; (4) by failing to file a petition for review with the Ninth

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<sup>9</sup>Respondent alleges that the hearing judge did not understand immigration law sufficiently to be able to render a just decision. “We will not discredit the decisions of the [hearing judge] on unsupported allegations” such as this. (*Chang v. State Bar* (1989) 49 Cal.3d 114, 126.) Moreover, as the State Bar points out in its appellee’s brief, even assuming the hearing judge did not understand immigration law, the hearing judge had the benefit of hearing testimony from Angela Bean, a certified specialist in immigration law, seven IJs, and three INS trial attorneys, as well as several other attorneys who practice immigration law. In view of the extensive evidence presented below regarding immigration law, we conclude that the hearing judge had sufficient evidence to support his conclusions in this case. And, in any event, respondent’s specious allegation that the hearing judge did not sufficiently understand the relevant provisions of immigration law to render a just decision on respondent’s culpability is mooted by our independent review of the record, wherein we must independently make the appropriate findings of fact and conclusions of law. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 346-347, citing *In re Morales* (1983) 35 Cal.3d 1, 7.)

Circuit; (5) by failing to file for adjustment of status for the children within a reasonable time after Mrs. Saba became a naturalized citizen on June 18, 1996, and instead filing for adjustment of status on the children's last day to depart voluntarily, approximately three months later; and (6) by failing to supervise Gardner in filing a petition for writ of habeas corpus.

Respondent contends that the hearing judge should have found that the failure to perform legal services competently in this matter was partly or entirely the fault of Gardner, since the mistakes occurred primarily in federal court. We disagree. The record establishes that respondent repeatedly and recklessly failed to represent the Saba children competently prior to the time Gardner became involved in the matter.<sup>10</sup>

We also conclude that respondent failed to refund unearned fees promptly upon termination of employment in willful violation of rule 3-700(D)(2). To justify retention of legal fees, respondent was required to perform more than he did (i.e., minimal services that were of no value to the client). (Cf. *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 229.) Here, the record fails to support a conclusion that respondent performed services worth over \$3,000, the amount the Saba children paid. The only arguably competent actions respondent took in providing legal services to the Saba children were (1) filing a new application for political asylum, (2) obtaining a stay of deportation until August 1, 1998, and (3) filing a petition for a writ of habeas corpus. Respondent testified that he charged about \$1,500 to \$2,000 for representing clients in political asylum proceedings, which representation would include appearing at all asylum hearings, but in this case, the record indicates he merely filed the

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<sup>10</sup>We note that, on review, respondent repeatedly argues facts, without citing to supporting evidence as expressly required by Rules of Procedure of the State Bar, rule 302(a) and State Bar Court Rules of Practice, rule 1320. Many of these asserted "facts" are in contradiction to the facts found by the hearing judge based on the testimony of respondent's clients and other witnesses. On the record before us, respondent's iteration of his version of the facts does not provide us with a basis to disturb the hearing judge's adverse findings. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 846, citing *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 775.)

application for asylum and subsequently appeared at a hearing and withdrew it. Thus, he could not have earned \$1,500 for that representation and must have earned far less, at most \$500. Respondent also testified that he charged \$250 to \$500 or more for proceedings such as motions to reopen, depending upon the number of court appearances required. Because it appears from the record that respondent had to make only one court appearance and one appearance before an immigration officer for the petition for stay of deportation, we determine that respondent earned at most \$500 for these proceedings. Finally, respondent testified that he paid attorney Gardner \$1,000 to \$1,500 to file the petition for a writ of habeas corpus. Gardner, however, testified that respondent gave him only \$200 after the writ hearing. Even assuming that Gardner was paid \$1,500, respondent and Gardner still only earned *at most* \$2,500 for their legal services, and respondent was entitled to far less if he paid Gardner only \$200 for the writ proceedings.

Significantly, respondent's failure to act competently in providing legal services to his clients was, as we have concluded, reckless and repeated, rather than the result of simple negligence. Moreover, although we have estimated the amount which respondent may have earned at most in this matter, we need not determine the precise amount which respondent and Gardner earned in this case, as we have concluded that respondent did not earn the entire amount of attorney fees the Sabas paid to him but failed to refund any of the Sabas' fees as of the time of trial in this matter and thereby violated rule 3-700(D)(2). (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 324.)

#### **The Garcia Matter**

J. Sacramento Garcia, Maria Luisa Garcia, and Noel C. Garcia entered the United States without inspection in 1989. In May 1996, the Garcias met with Charles Stephens, a nonattorney immigration consultant, to obtain legal residency. Stephens advised the Garcias to file for political asylum, and the Garcias did so with Stephens's assistance. After becoming aware of the Garcias' illegal entry from their asylum application, the INS issued an order to show cause on

September 6, 1996. On September 6, 1996, the matter was continued to November 12, 1996, to allow the Garcias to retain an attorney.

Stephens referred the Garcias to respondent. The Garcias met respondent immediately before the master calendar hearing on November 12, 1996. Respondent agreed to represent them for \$1,000, and they paid him \$500 that day.

At the hearing on November 12, 1996, respondent appeared with the Garcias, and the immigration court scheduled an individual hearing for January 22, 1997.<sup>11</sup> The Garcias did not understand what was going on and heard the judge and the clerk mention many dates. They thought they heard February 17, 1997, and understood this to be their hearing date. They received no letter or telephone call from respondent as to the next hearing date.

Respondent appeared at the hearing on January 22, 1997, but the Garcias did not, and the IJ ordered their deportation in absentia.

On or about February 6, 1997, the Garcias paid the remaining \$500 to respondent.

At some point after the hearing of January 22, 1997, the Garcias received a telephone call from respondent's office telling them that they had missed their hearing date and were ordered deported. They went to see respondent immediately, and respondent told them to go directly to the IJ to explain why they had missed the hearing. They went without respondent, and the IJ told them to see their attorney, who would know what to do.<sup>12</sup>

On February 10, 1997, respondent filed a motion to reopen with the immigration court on the ground that the Garcias misunderstood the correct hearing date. The IJ denied the motion on

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<sup>11</sup>At an individual, or regular, hearing, the IJ takes testimony and receives documents regarding the merits of the alien's asylum claim. At the conclusion of the hearing, the IJ usually issues a ruling regarding the asylum application.

<sup>12</sup>Angela Bean, an immigration law specialist, credibly testified at trial in the hearing department that a competent attorney would not send clients to visit an IJ to plead their case on their own after an order of deportation in absentia.

February 26, 1997.

On June 11, 1997, respondent filed an appeal with the BIA and moved the court to reopen the matter on the ground that, at the hearing on January 22, 1997, the IJ failed to give the Garcias the proper admonitions regarding a failure to appear. The BIA denied the motion to reopen on January 28, 1999, and dismissed the appeal.

Prior to February 26, 1999, the Garcias terminated respondent's services. Respondent has not returned to the Garcias any of the fees they paid him. On February 26, 1999, attorney Donald Unger filed with the BIA on behalf of the Garcias a motion to reopen and motion to reconsider based on ineffective assistance of counsel. On the same date, he also filed a petition for review of the BIA's decision of January 28, 1999, in the Ninth Circuit. The petition for review has been denied, but the motion before the BIA was pending at the time of trial in this matter.

#### The Hearing Judge's Conclusions

As to this matter, respondent was charged with one count of violating rule 3-110(A) and one count of violating rule 3-700(D)(2). He was also charged with one count of violating section 6068, subdivision (m), which provides that it is the duty of an attorney "[t]o 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." Specifically, the NDC charged respondent with violating section 6068, subdivision (m): (1) "[b]y failing to inform the [Garcias] that they had to appear at the January 22, 1997 hearing or they would be deported"; (2) by "failing to inform [the Garcias] that [respondent] provided ineffective assistance of counsel"; and (3) "[b]y failing to respond to the [Garcias'] telephone calls of January 27, 1997, January 30, 1997, February 1, 1997, February 3, 1997[,], and February 4, 1997." The hearing judge determined that the State Bar proved by clear and convincing evidence that respondent willfully violated rule 3-110(A) but concluded that the State Bar had failed to present clear and convincing evidence that respondent had willfully failed to return

unearned fees or to respond promptly to the Garcias' reasonable status inquiries. The hearing judge also declined to find that respondent had failed to keep the Garcias reasonably informed of significant developments in their case by failing to advise them of their hearing date because that misconduct was part of the basis of his conclusion that respondent violated rule 3-110(A).

#### Discussion

Upon our independent review, we conclude that respondent recklessly failed to perform legal services competently in willful violation of rule 3-110(A) in this matter: (1) by failing to give his clients proper notice of the hearing of January 22, 1997; and (2) by failing to prepare his clients for their hearing of January 22, 1997.

Respondent contends that the hearing judge's conclusion of culpability in the Garcia matter was erroneous, since (1) respondent gave the Garcias notice of the hearing, and in any event the Garcias received a written notice of the hearing and received independent verbal notice from the immigration court, through an interpreter; and (2) respondent advised the Garcias to come to his office to prepare for the hearing, but the Garcias failed to appear at the office.

In making the first argument, respondent unconvincingly relies on his own version of the events. Contrary to respondent's argument, the Garcias testified that they did not see the court's written notice until they went to respondent's office after they had missed the hearing and that there was no interpreter at the master hearing to inform them of the date of their next hearing. They testified that since they were not given notice of the next hearing, they had to rely on the date they thought they heard the judge give, which date was February 17, 1997. They said they were in a state of shock when they learned that they had been ordered deported in absentia on January 22, 1997.

In making his second argument, respondent contradicts his trial testimony. At trial, respondent testified that the Garcias came to his office prior to the hearing and that he spent 30 to

45 minutes at a minimum preparing them for their individual hearing. We give great weight to the hearing judge's implied determination that respondent's testimony in this respect was not credible, which determination is supported by the contradiction indicated above.

We also conclude, consistent with the hearing judge's conclusion, that the State Bar failed to present clear and convincing evidence that respondent violated section 6068, subdivision (m), by failing to return the Garcias' telephone calls.<sup>13</sup>

We agree in part with the hearing judge's conclusion that the charge of failing to keep the Garcias reasonably informed of significant developments in this case is duplicative of the charge of failing to perform legal services competently, since respondent's failure to inform the Garcias of their hearing date of January 22, 1997, is one of the bases of our conclusion of culpability of rule 3-110(A). Because "little, if any, purpose is served by duplicative allegations of misconduct" (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060), we decline to conclude for purposes of discipline that respondent is additionally culpable of violating section 6068, subdivision (m) in this respect.

Moreover, respondent's alleged failure to inform the Garcias that he provided ineffective assistance of counsel formed the basis for both the charge of failing to perform legal services competently and that of failing to keep the Garcias reasonably informed of significant developments in this case. We have concluded, however, that the State Bar failed to prove by clear and convincing evidence that this alleged failure constituted a violation of either charge.

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<sup>13</sup>Mrs. Garcia testified that after she and her husband tried to explain to the IJ why they had failed to appear for their individual hearing, they called respondent's office many times to speak to respondent, but their calls were not returned. In contrast, respondent testified that he returned the Garcias' telephone calls personally. It appears that the hearing judge either found respondent's testimony in this respect to be credible, found Mrs. Garcia's testimony in this respect to be incredible, or was unable to resolve the issue of credibility and resolved this reasonable doubt in respondent's favor. (See, generally, *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 19.)

As set forth above, the NDC additionally charges that respondent failed to keep the Garcias reasonably informed of significant developments in their case by failing to notify them that they would be deported if they did not appear at their individual hearing. We note that Mr. Garcia testified in this proceeding that nobody told him what would happen to his family if he did not appear at their individual hearing and that he did not understand what he was supposed to do after the master hearing. However, respondent's failure to inform the Garcias in this respect was not a failure to notify them of a development in their case; rather, respondent failed in this respect to provide legal services competently.<sup>14</sup> Upon our review of the record, we conclude that the State Bar failed to establish by clear and convincing evidence a basis for this charge that was independent of the basis for any other charge.

As previously stated, the hearing judge concluded that respondent was not culpable of violating rule 3-700(D)(2), and as we will discuss, along with our discussion of the charge that respondent committed moral turpitude by habitually disregarding clients' interests, we do not consider culpability of this charge in determining the appropriate level of discipline in this case.

In short, we hold that respondent willfully violated rule 3-100(A) as charged but dismiss the charged violations of section 6068, subdivision (m), and of rule 3-700(D)(2) with prejudice.

#### **The Haesbaert Matter**

In November 1995, Sergio Haesbaert, who is from Brazil, filed an application for political asylum, which application had been prepared by a nonattorney. On or about March 25, 1996, he employed respondent to represent him and his family on his political asylum application. Respondent charged \$1,000 for the representation, to be paid in installments. Haesbaert paid a total of \$500 in installments.

Respondent reviewed the political asylum application and found it to be satisfactory.

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<sup>14</sup>Because this failure to provide legal services competently was not charged in the NDC, we do not consider it as an additional ground of culpability but as an aggravating circumstance.

Respondent was informed that a master calendar hearing was scheduled for April 17, 1996.

On April 17, 1996, respondent did not appear. The court scheduled another master calendar hearing for June 12, 1996.

At the hearing on June 12, 1996, attorney Gardner appeared for respondent, and the IJ set the matter for a regular hearing on September 9, 1996.

On or about September 6, 1996, Haesbaert went to respondent's office because he had had no communication with respondent regarding the hearing of September 9, 1996. Haesbaert made an appointment for September 7, 1996. On September 7, 1996, the Saturday before the Monday hearing, Haesbaert met with respondent for about 15 minutes and was assured by respondent that everything was in order.<sup>15</sup>

On September 9, 1996, respondent appeared with Haesbaert at the hearing. Haesbaert did not know what questions would be asked of him by respondent, the judge, or the attorney representing the government. Moreover, some of the documents in support of the asylum application were excluded from evidence at the hearing because they had not been translated into English and their relevance was unclear. At the end of the hearing, the immigration court found that Haesbaert had failed to establish either past persecution or a well-founded fear of future persecution and denied the asylum application.

Haesbaert discharged respondent soon after this hearing. Haesbaert employed attorney Geri Kahn who, upon review of the file, filed a notice of appeal on October 8, 1996. On August 21, 1998, she filed a motion to remand with the BIA based on ineffective assistance of counsel so that Haesbaert could introduce additional evidence that was not presented at the September 9, 1996, hearing. Kahn attached substantial additional documentation with the motion. Kahn determined that the asylum application was poorly done and that no evidence had been submitted

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<sup>15</sup>According to Haesbaert, he had to force his way into respondent's office because respondent's staff denied that he had an appointment, and he was given approximately 15 minutes with respondent.

at the hearing regarding the conditions in Brazil. Although Haesbaert had documents regarding the conditions in Brazil, they had not been translated into English and therefore had not been admitted into evidence. From the record of the proceedings on September 9, 1996, Kahn also noted that respondent did not ask questions of Haesbaert to elicit testimony in support of Haesbaert's contention of fear of future persecution.

The BIA granted the motion to remand on October 27, 1998, and remanded the matter back to the immigration court.

On or about December 29, 1999, Haesbaert sent respondent a letter requesting the return of the \$500 in fees he had paid. Respondent returned the money on or about March 15, 2000.

#### The Hearing Judge's Conclusions

As to this matter, respondent was charged with one count of violating rule 3-110(A), one count of violating rule 3-700(D)(2), and one count of failing to respond promptly to Haesbaert's reasonable status inquiries in violation of section 6068, subdivision (m). The hearing judge determined that the State Bar proved by clear and convincing evidence that respondent willfully violated rule 3-110(A) and rule 3-700(D)(2) but concluded that the State Bar had failed to present clear and convincing evidence that respondent had violated section 6068, subdivision (m).

#### Discussion

We determine, upon our review of the record, that respondent is culpable of willfully violating rule 3-110(A), recklessly and repeatedly failing to perform legal services competently: (1) by failing to present additional evidence, both documentary and testimonial, to support Haesbaert's claim for political asylum; (2) by failing to have Haesbaert's documents translated into English for the asylum hearing; and (3) by failing to prepare Haesbaert adequately for the asylum hearing.

Respondent contends that the hearing judge's finding of culpability in this matter was erroneous for several reasons. He first asserts that the hearing judge's finding that he did not

prepare Haesbaert for the asylum hearing was erroneous, since respondent met and prepared with Haesbaert, his wife and daughter several times, and with Haesbaert at least three times, before the asylum hearing.

Although Haesbaert testified in this proceeding that he met with respondent a *total* of three times, he also testified that he went to respondent's office to make an appointment on September 6, 1996, because he had not spoken with respondent since the master calendar hearing and his individual hearing was scheduled for September 9, 1996. He further testified that he met with respondent for about 15 minutes on September 7, 1996, the Saturday before the Monday hearing, after forcing his way into respondent's office, and respondent assured him that everything was fine. Based on the hearing judge's findings and conclusion of culpability, it is apparent that the hearing judge found Haesbaert's testimony in this respect to be credible, and we must give this credibility determination great weight. (Rules Proc. of State Bar, rule 305(a).) We therefore reject respondent's factual assertion that he prepared Haesbaert for the asylum hearing.

Respondent next contends that he could not have translated Haesbaert's documents himself, as he has no knowledge of the Portuguese language, and he asked Haesbaert several times to gather as much evidence as possible and to have documents translated for the hearing, since no one in respondent's office could do it. However, as the attorney in charge of this matter, respondent bore the ultimate responsibility to have Haesbaert's documents translated so that they might be offered into evidence. Respondent also contends that there was insufficient evidence that he could have presented additional evidence supporting Haesbaert's asylum claim since: (1) the IJ testified in this matter that she could not even determine whether it was an asylum case; (2) although the IJ testified that she supplements respondent's examination of his witnesses with questions of her own, the IJ also testified that she asks questions to supplement the record more than other IJs, and the IJ did not specifically refer to the Haesbaert matter in testifying that

respondent did not adequately prepare witnesses; (3) it was impossible to obtain additional witnesses, as Haesbaert told respondent that they were in Brazil and probably could not come to the United States; and (4) the INS normally presents evidence of conditions in a given country. However, we note that Kahn was able to attach additional documentation with the motion to remand, and Kahn credibly testified in these proceedings that respondent failed to ask Haesbaert any questions regarding a fear of future persecution. We therefore reject these contentions and conclude, as noted above, that clear and convincing evidence establishes that respondent could have, but failed to, present additional evidence to support Haesbaert's asylum application.

Respondent also contends that Kahn failed to raise the issue of ineffective assistance of counsel in her notice of appeal and was therefore barred from raising the issue in the BIA on appeal. We note that respondent has pointed to no legal authority to support this contention. In any event, we do not base our determination of professional misconduct in this matter on the BIA's finding of ineffective assistance of counsel. Instead, we have independently concluded, based on the evidence before us, that respondent failed to perform legal services competently.

We agree with the hearing judge's conclusion that there is no clear and convincing evidence in the record to prove that respondent violated section 6068, subdivision (m), by failing to respond promptly to Haesbaert's reasonable status inquiries. Therefore, the hearing judge correctly dismissed this charge with prejudice, and we adopt that dismissal.

We disagree with the hearing judge's conclusion that respondent willfully violated rule 3-700(D)(2). Although respondent ultimately refunded the fee paid by Haesbaert approximately two months after Haesbaert requested the refund, respondent asserts, and we conclude, that there was no clear and convincing evidence that the value of the services he provided was less than the \$500 he was paid. Although the asylum application was already filed at the time respondent agreed to represent Haesbaert, Haesbaert admitted at trial in this matter that respondent met with him three times before the asylum hearing. In addition, respondent appeared at the individual

asylum hearing and elicited testimony from Haesbaert in support of the asylum application. Although respondent failed to present all of the evidence which he could have presented in support of Haesbaert's claim, in view of the work respondent performed on Haesbaert's behalf, as well as respondent's testimony that he earned the fee that he charged Haesbaert, we conclude that respondent may have believed he had rendered valuable services to Haesbaert and that under these circumstances respondent did not violate rule 3-700(D)(2) by waiting two months to refund the \$500. Accordingly, we reverse the hearing judge's culpability conclusion that respondent violated rule 3-700(D)(2) and dismiss that charge with prejudice.

### **The Flores Matter**

In March 1998, Jose Flores and Johana Flores employed respondent to file applications for political asylum for them and to represent them before the INS on their applications. Respondent charged \$2,000, to be paid in installments. The Floreses paid \$600 when they employed respondent, and respondent filed applications for political asylum with the INS on April 24, 1998.<sup>16</sup> On June 1, 1998, the Floreses were interviewed by an INS asylum officer. Thereafter, their applications for political asylum were denied, and they were ordered to appear in the immigration court on July 2, 1998, to show cause why they should not be deported.

On July 2, 1998, at the master calendar hearing, attorney Gardner appeared for respondent. The IJ served Gardner and the INS attorney with a notice of hearing in removal proceedings indicating that an individual hearing was set for September 10, 1999. In August 1999, respondent met with the Floreses and, upon a review of the file, informed them that he would seek to continue the September 10, 1999 hearing to November 11, 1999, because they lacked sufficient evidence to support their claims for asylum. Respondent asked the Floreses for

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<sup>16</sup>Although the parties' stipulation states that the asylum applications were filed on June 17, 1998, the exhibits establish that the applications were actually filed on April 24, 1998. In addition, the stipulation and the exhibits establish that the INS asylum interview took place on June 1, 1998, which date was necessarily *after*, not *before*, the asylum applications were filed.

documentation on Mr. Flores's father and his political rank in El Salvador. Respondent also informed the Floreses that, because respondent would seek a continuance, they did not need to attend the hearing on September 10, 1999.

On September 2, 1999, respondent filed a motion to continue the individual hearing to allow the Floreses to obtain additional evidence to support their asylum request. On September 3, 1999, the court sent respondent a letter denying his motion and stating that the hearing remained scheduled for September 10, 1999. The Floreses were not informed that the motion to continue was denied.

The Floreses did not appear at the hearing of September 10, 1999, and the court ordered their removal in absentia. The court served respondent with a copy of that order that same day. Respondent told the IJ (1) that he had spoken to the Floreses two weeks earlier, (2) that they were trying to get documents from El Salvador, and (3) that he had told the Floreses to be at the hearing. The judge reminded respondent that notice to counsel is notice to the clients.

On September 13, 1999, respondent sent the Floreses a letter asking them to contact his office as soon as possible. This letter did not inform the Floreses that they had been ordered removed. On October 7, 1999, respondent sent the Floreses a second letter requesting that they contact his office and attached a copy of the removal order. The attached order indicated that the Floreses were to report to the INS for removal on October 20, 1999.

On October 11, 1999, the Floreses consulted with attorney Mario Bautista. On October 19, 1999, Bautista filed a motion to reopen and rescind the removal order due to exceptional circumstances. This motion was based on respondent's ineffective assistance of counsel. Bautista also reviewed the asylum application and determined that it was insufficient to support a finding of past political persecution or a well-founded fear of future persecution.

On December 17, 1999, the IJ granted the motion to reopen and scheduled a new individual hearing to be held in October 2002. As of the time of trial in the hearing department,

the Floreses were eligible to apply for temporary protective status and could obtain employment.

#### The Hearing Judge's Conclusions

As to this matter, respondent was charged with one count of violating rule 3-110(A), one count of violating rule 3-700(D)(2), and one count of failing to inform the Floreses of significant developments in their case in violation of section 6068, subdivision (m). The hearing judge determined that the State Bar proved by clear and convincing evidence that respondent willfully violated rule 3-110(A) by recklessly and repeatedly failing to competently perform legal services and that respondent violated section 6068, subdivision (m) by failing to notify the Floreses immediately when the motion for continuance was denied. But the hearing judge concluded that the State Bar had failed to present clear and convincing evidence that respondent violated rule 3-700(D)(2).

#### Discussion

We conclude, upon our independent review, that the State Bar established by clear and convincing evidence that respondent willfully violated rule 3-110(A) because he repeatedly and recklessly failed to perform legal services competently: (1) by failing to file an application with sufficient evidence to support a claim of political asylum; (2) by failing to inform the Floreses that the motion to continue had been denied; and (3) by failing to inform the Floreses that it was mandatory for them to appear at the scheduled hearing of September 10, 1999, instead telling them that they need not attend the hearing.

Respondent contends that the hearing judge made erroneous factual findings and an erroneous culpability conclusion as to this charge, since (1) respondent informed the Floreses that he would try to get a continuance but that they still had to show up in court; (2) respondent informed the Floreses that the motion to continue had been denied; (3) there is no evidence that respondent did not try to contact his clients immediately when they failed to appear at their individual hearing and, in any event, there is no rule or statute requiring an attorney to attempt to

contact clients immediately; (4) respondent asked the clients to submit all documentation, affidavits and witnesses from this country (i.e., the United States) and their country of origin to support their asylum claim; and (5) respondent attempted to make the best case possible for the Floreses.

Respondent again relies on his version of the events to support his factual assertions. Respondent testified in these proceedings that he met many times with the Floreses, that they needed time to gather the documents he asked for, and that he told the Floreses that the motion to continue was denied and that they should appear at the hearing. No evidence was presented to corroborate his testimony that he told the Floreses that the motion to continue was denied and that they should appear on September 10, 1999. The Floreses testified that respondent told them he would be requesting a continuance of the individual hearing, so that they did not have to make an appearance at that hearing.

As indicated by our culpability determination, we adopt the hearing judge's express finding, consistent with the Floreses' testimony, that respondent told them that they need not attend the individual hearing because he would get a continuance. It is also clear, and consistent with the Floreses' testimony, that respondent never told them that his motion for a continuance was denied, that their attendance at the individual hearing was mandatory, and that their case must proceed on the merits at that hearing.

We note that respondent filed the Floreses' petition on April 24, 1998, yet it was not until August 1998 that he again reviewed the petition and made the determination that he did not have sufficient evidence to support the petition. Only then did he seek further documentation from the Floreses notwithstanding that the hearing was scheduled for September 10, 1998.<sup>17</sup>

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<sup>17</sup>Because we do not adopt the hearing judge's determination that respondent is culpable of failing to provide legal services competently due to the failure to attempt to contact the Floreses immediately when they did not appear at their individual hearing, we do not address respondent's assertions as to this issue.

We also conclude that two of the charged grounds for violating section 6068, subdivision (m) (i.e., (1) respondent's failure to inform the Floreses immediately when the motion to continue was denied and (2) respondent's failure to inform the Floreses that their appearance was required at their individual hearing) are included in the violation of rule 3-110(A). We therefore decline to find additional culpability under section 6068, subdivision (m). We agree with the hearing judge's conclusion that there was no clear and convincing evidence that respondent failed to keep the Floreses informed of significant developments in their case by failing to inform them immediately that they had been ordered deported in absentia and that they were to report for deportation on October 20, 1999, in view of the fact that respondent sent the Floreses letters on September 13, 1999, and October 7, 1999. In sum, we dismiss the charged section 6068, subdivision (m), violation with prejudice.

We also agree with the hearing judge's determination that the State Bar failed to prove by clear and convincing evidence that respondent did not return unearned fees to the Floreses. The Floreses paid respondent \$600 to file an asylum application on their behalf and to represent them in related proceedings. While the asylum application itself lacked sufficient evidence to support the relief requested, that fact in and of itself was not fatal to the asylum claim, since respondent could have supplemented the application and the evidence in support thereof after it was filed. Respondent had attorney Gardner appear for him at the master calendar hearing, and respondent met with the Floreses in August to prepare them for their individual hearing. Respondent's office then prepared a motion to continue, and respondent appeared at the individual hearing. In view of this work performed on behalf of the Floreses and respondent's testimony that he earned the entire \$600 paid, we agree with the hearing judge's conclusions that respondent may have believed he had rendered valuable services and that under such circumstances respondent was not required to refund the \$600 absent a demand for a refund by the Floreses or someone on their behalf. Therefore, we dismiss the charged section 6068, subdivision (m) violation with

prejudice.

**The Santiago Matters**<sup>18</sup>

Zenaida Santiago

In March 1993, Zenaida Santiago employed respondent to file a petition for political asylum, to represent her before the INS on her petition, and to obtain and renew annually her employment authorization document. Ms. Santiago paid respondent \$2,000 in 25 installments for his representation. Soon after he was employed, respondent filed a petition for political asylum and a request for employment authorization on behalf of Ms. Santiago. In September or October 1993, Ms. Santiago received her employment authorization document.

In 1994, Ms. Santiago moved to Reno, Nevada. In or about August 1994, she telephoned respondent to obtain assistance in renewing her employment authorization document and to inquire about the status of her asylum application. She left a message for respondent to return her telephone call.

On or about August 4, 1994, Ms. Santiago sent respondent a letter notifying him of her new address in Reno and requesting a status update on her asylum application. In August 1994, Ms. Santiago completed a renewal application for her employment authorization with the assistance of an INS officer.

From 1994 through 1998, Ms. Santiago telephoned respondent and left messages for him on several occasions inquiring about the status of her asylum application but received no response. She testified at her deposition that she had not seen or spoken to respondent since the initial interview. The only people she had spoken to since that time were George (Jorge Ureta), respondent's assistant, and the receptionist. Further, the only correspondence she had received from respondent were the monthly reminders of the fee payment.

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<sup>18</sup>We discuss our culpability conclusions in the matters of Mr. Arturo Santiago and Ms. Zenaida Santiago together.

On June 7, 1999, Ms. Santiago terminated respondent's services by sending him a letter via facsimile requesting the return of her file and a refund of the fees she had paid, since respondent did nothing to assist her with her employment authorization document renewal or with her asylum matter. She stated in the letter that she needed her file because she had a hearing before the INS the following week.

On July 2, 1999, Ms. Santiago sent respondent a second letter, again requesting her file and a refund of unearned fees, and attached her letter of June 7, 1999. On July 26, 1999, respondent returned the file. On July 29, 1999, Ms. Santiago sent respondent a third letter requesting a refund of unearned fees but received no response. She filed a complaint against respondent with the State Bar in October 1999.

On or about January 18, 2000, the State Bar notified respondent that Ms. Santiago had filed a complaint against him. Thereafter, on February 21, 2000, respondent refunded only \$1,500 of the \$2,000 to Ms. Santiago.

#### The Hearing Judge's Conclusions

As to this matter, respondent was charged with one count of violating rule 3-110(A), one count of violating rule 3-700(D)(2), and one count of failing to respond promptly to reasonable status inquiries in violation of section 6068, subdivision (m). He was additionally charged with one count of violating rule 3-700(D)(1), failing to release client papers and property promptly upon request of the client. The hearing judge determined that respondent willfully violated rule 3-110(A): (1) by failing to assist Ms. Santiago when she requested assistance with her employment authorization renewal; and (2) by failing to inform Ms. Santiago that the matter could be transferred to Reno, Nevada. The hearing judge also determined that respondent failed to refund unearned fees promptly to Ms. Santiago, failed to respond to Ms. Santiago's reasonable status inquiries, and failed to release Ms. Santiago's file promptly upon her request, instead waiting for over six weeks to release the file after Ms. Santiago had informed respondent, in her

first request for the file, that she needed her file the following week.

Arturo Santiago

In or about January 1998, Arturo Santiago, Zenaida Santiago's husband, employed respondent. Respondent advised him that his only option was to file an application for political asylum. Respondent requested \$2,500. Mr. Santiago paid \$750 at the time he employed respondent.

In March 1998, Mr. Santiago received a written notice from the INS in San Francisco that he had an interview with an INS asylum officer on April 14, 1998, at 9:00 a.m. Mr. Santiago was instructed to bring his entire family. Mr. Santiago notified respondent's office and requested an appointment with respondent to discuss the interview. He spoke to George, respondent's assistant, who instructed him to come to respondent's office at 3 p.m. on April 13, 1998, to prepare for the interview.

On April 13, 1998, Mr. Santiago and his family flew to San Francisco from Reno to meet with respondent. However, when they arrived at respondent's office that day, respondent was not there. George told them that respondent would meet them the following morning at 8:00 a.m. at the INS office.

Respondent failed to meet with the Santiagos prior to the interview. After waiting until approximately 11:00 a.m., the Santiagos appeared at Mr. Santiago's INS interview without counsel. The INS asylum officer denied Mr. Santiago's asylum application and offered to transfer their files to the Reno office for a hearing before the immigration court.<sup>19</sup>

On June 25, 1998, Mr. Santiago sent respondent a letter via facsimile requesting a refund of the \$750 he had paid to respondent. Respondent, however, did not refund the \$750 until after

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<sup>19</sup>Immigration law expert Angela Bean testified that a competent immigration law attorney would not send a client to an asylum interview without counsel because the interviews are wide open and because frequently, after the immigration officer is finished, the attorney is invited to cover areas that may not have been adequately covered by the questioning.

Mr. Santiago filed a complaint with the State Bar.

### The Hearing Judge's Conclusions

As to this client matter, respondent was charged with, and the hearing judge determined that respondent was culpable of, one count of failing to perform legal services competently in violation of rule 3-110(A).

### Discussion

Our independent review of the record convinces us that in these two matters, respondent willfully violated rule 3-110(A): (1) by failing to inform the Santiagos that their cases could be transferred to Reno, where they resided; (2) by failing to assist Ms. Santiago with her renewal of her employment authorization; (3) by failing to meet with the Santiagos on the day before and the day of Mr. Santiago's interview; and (4) by failing to appear at the asylum interview on April 14, 1998, leaving the Santiagos without counsel for the interview.

We also determine that respondent is culpable of willfully violating rule 3-700(D)(2) by the delay in refunding unearned fees upon Ms. Santiago's request and termination of respondent's employment until after respondent learned of Ms. Santiago's complaint to the State Bar. We find that respondent did nothing for Ms. Santiago except for filing the political asylum application and obtaining the initial work authorization, which work was not worth \$2,000. We further determine that respondent is culpable of willfully violating section 6068, subdivision (m), by failing to answer Ms. Santiago's many telephone calls and letters and of willfully violating rule 3-700(D)(1) by failing to promptly return Ms. Santiago's file upon request in time for her court hearing.

With respect to Ms. Santiago's matter, respondent asserts that he recommended to her that she should retain another attorney in Reno once she moved there but that she refused to do so. He also asserts that he and his office staff responded to her inquiries and that her file was returned to her late due to an office miscommunication but that no harm was done. He

additionally asserts that he provided services of value to her during the many years he worked for her but nevertheless refunded her fees.

Respondent also asserts that, once the Santiagos married, he advised both of them that it would be better to retain counsel in Reno and to file a political asylum application there but that they both refused. He contends that he did meet with Mr. Santiago and prepared him the day before the INS asylum interview. According to respondent, at that time, he informed the Santiagos that he was scheduled to be in court at the time of their interview and offered to reschedule their interview, but the Santiagos refused, saying they wanted to go to the interview by themselves since they had flown to San Francisco from Reno.

In support of these assertions, respondent appears to again rely solely on his testimony that he met with the Santiagos for about an hour when they flew in from Reno the day before their asylum interview and that they went to the interview by themselves as agreed upon. He explained that he prepares clients for their asylum interviews but tells them to go to the interviews by themselves because an attorney cannot say anything at an interview. He also testified that he advised the Santiagos that they should find another attorney in Reno. He testified that he spoke to Ms. Santiago on the telephone, that she came to the office on one or two occasions, and that he responded to her inquiries on the status of the asylum application, though he could not recall whether he ever responded in writing. He further testified that after receiving a letter from Ms. Santiago requesting her file, he had given instructions, presumably to his office staff, to have the file copied and sent to her, but the file was not sent until almost two months after respondent received the letter.

However, it is clear from the hearing judge's culpability determinations that he rejected respondent's credibility as to these matters and accepted the credibility of the Santiagos. We give these credibility determinations great weight.

### **The Obis Matter**

In or about October 1994, Alejandro Alberto Obis employed respondent to represent him regarding his political asylum application. Obis paid respondent at least \$1,800 in attorney fees for representation through a regular hearing.

On June 21, 1995, respondent accompanied Obis to his asylum interview with the INS officer. Respondent left during the interview, stating he had to attend a court hearing. The interview continued without respondent. The officer denied the application, and the matter was referred to the immigration court for a hearing on September 7, 1995.

On September 7, 1995, attorney Gardner appeared at the hearing for respondent as counsel for Obis. The IJ set the case for a regular hearing on March 5, 1996. Respondent represented Obis at the March 5, 1996, hearing. At the conclusion of the hearing, the IJ denied Obis's asylum application but granted his request for voluntary departure by June 1, 1996. The IJ's finding was based upon Obis's failure to establish past persecution or a well-founded fear of future persecution.

At the conclusion of the hearing, Obis asked respondent what had happened.

On March 11, 1996, respondent filed a notice of appeal with the BIA, and on June 21, 1996, respondent filed a brief in support of Obis's appeal. On June 3, 1997, the BIA affirmed the IJ's decision and dismissed the appeal. Respondent failed to inform Obis that the BIA had dismissed his appeal.

In June 1997, Obis received a telephone call from respondent's office requesting that Obis come to the office for a meeting. Obis went to respondent's office, and respondent informed him that he would have to file an appeal in the Ninth Circuit. Respondent charged Obis \$3,000 for the appeal, and Obis agreed to pay the money in installments. Obis paid respondent \$1,500 on or about June 17, 1997.

On December 17, 1997, the Ninth Circuit dismissed the matter for failure to file an

opening brief.<sup>20</sup> Respondent's office received a copy of the dismissal order. Respondent failed to inform Obis that this appeal had been dismissed.

On January 24, 1998, Obis received a letter from the INS stating that his application for employment authorization was denied because his asylum application had been dismissed on June 3, 1997, and no appeal was filed.

After conducting further research, Obis learned that he was going to be ordered deported. On February 5, 1998, Obis returned to respondent's office and again questioned respondent about what would happen in his case.

In or about February 1998, Obis employed attorney Elif Keles to represent him. Keles notified respondent that Obis would be filing a motion based upon ineffective assistance of counsel. On or about March 5, 1998, respondent issued Obis a refund in the amount of \$1,500.

On April 3, 1998, Keles filed a motion to recalendar scheduling order for petitioner's brief with the Ninth Circuit, requesting that the court recall its dismissal order due to ineffective assistance of counsel. On August 4, 1998, the Ninth Circuit reinstated the case. On May 18, 1999, the court held that Obis had demonstrated at his regular hearing that he had suffered from past persecution and had shown a well-founded fear of future persecution. The court remanded the case to the BIA.

#### The Hearing Judge's Conclusions

As to this client matter, respondent was charged with violating rule 3-110(A) and with failing to inform Obis of significant developments in his case in violation of section 6068, subdivision (m). The hearing judge determined that the State Bar had proved all charges by clear

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<sup>20</sup>Gardner testified at trial in this matter that he did not file the Obis petition for review in the Ninth Circuit and did not prepare, dictate, or authorize the petition. Gardner identified the signature on the pleading as his "stamped signature." He noted that the petition is made up of two sentences, which is the way Jorge Ureta, respondent's assistant, routinely drafts them. This document was drafted without Gardner's knowledge.

and convincing evidence.

### Discussion

We conclude upon our independent review of the record that the State Bar proved by clear and convincing evidence respondent's culpability of willfully violating rule 3-110(A): (1) by leaving Obis unrepresented in his interview with the INS officer; (2) by failing to file a timely opening brief in the Ninth Circuit; and (3) by failing to file a motion to reopen the Ninth Circuit appeal upon receiving notice of its dismissal.

We also conclude that respondent willfully violated section 6068, subdivision (m): (1) by not informing Obis of the BIA's dismissal of his appeal; and (2) by not informing Obis of the Ninth Circuit's dismissal of his appeal due to respondent's failure to file a timely opening brief.

Respondent contends that the hearing judge's finding of culpability of failing to perform legal services competently is erroneous because (1) although the hearing judge found respondent left his client in the middle of an INS interview to attend to another case, the client had previously waived respondent's presence after respondent had given the client the option of rescheduling the interview and (2) the hearing judge denied respondent due process by failing to indicate clearly in his decision whether respondent's alleged failure to take appropriate action on appeal was during the appeal before the BIA or during the appeal before the 9th Circuit.

Respondent testified in this matter that he had an agreement with Obis that he would be leaving during the interview due to a conflict and that Obis did not want to reschedule the hearing, so he completed it without counsel. However, Obis testified that he didn't remember respondent telling him beforehand that he would be leaving in the middle of the interview. Consistent with the hearing judge's implied finding, we find lacking in credibility respondent's testimony that Obis agreed to continue the interview without counsel.

In view of our duty to independently review the record and make findings of fact and conclusions of law, any alleged denial of due process by the hearing judge's failure to clearly

identify respondent's misconduct in this case will be remedied by our issuance of an opinion that supersedes the hearing judge's decision (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81, 87). Therefore, respondent's due process contention is rendered moot, and we do not address it on the merits. (*In the Matter of Respondent K, supra*, 2 Cal. State Bar Ct. Rptr at pp. 346-347.)

Respondent additionally appears to assert that, as to the Ninth Circuit appeal, it was attorney Gardner who failed to file a timely opening brief. Gardner testified, however, that he never knew about the Ninth Circuit petition for review until it had been dismissed and never received money for handling an appeal for Obis. We conclude that respondent was responsible for seeing to it that a brief was timely filed for Obis in the Ninth Circuit. In view of Gardner's testimony, we also determine that respondent is not culpable of failing to perform legal services competently by reason of his lack of supervision of Gardner but is culpable, as indicated above, for failing to file a Ninth Circuit brief.

Respondent also asserts that the hearing judge made the erroneous factual finding that respondent failed to inform Obis of the BIA's dismissal of his appeal. Respondent asserts that if he had not advised Obis of the BIA's dismissal of the appeal, Obis could not have consented to file a petition for review and that, therefore, there would not have been a Ninth Circuit petition to review the BIA decision. However, Obis's declaration attached to the motion to recalendar the scheduling order that was filed in the Ninth Circuit indicates that respondent never even told Obis that he was filing the BIA appeal and that, after the appeal was dismissed, he merely told Obis that he would have to file an appeal, not that he would have to file a new appeal with the Ninth Circuit because the BIA appeal had been dismissed. Based on the evidence, we agree with and adopt the hearing judge's finding that respondent did not inform Obis of the dismissal of the BIA appeal and conclude that this omission constituted a willful violation of section 6068, subdivision (m).

### **The Robles-Meza Matter**

On or about April 30, 1996, Roberto Robles-Meza was placed in deportation proceedings because the INS alleged that he entered the United States without inspection in May 1987. Robles-Meza paid nonattorney immigration consultant Charles Stephens to prepare an application for suspension of deportation. Robles-Meza appeared for hearings before the immigration court on June 19, 1996, July 3, 1996, and September 9, 1996. At the last of these hearings, the IJ set a regular hearing for October 25, 1996, and required any notice of representation to be filed by September 16, 1996.

On September 16, 1996, respondent filed his notice of entry of appearance as attorney and filed and served the application for suspension of deportation.

On October 25, 1996, respondent appeared on behalf of Robles-Meza. During the hearing, the IJ indicated for the record that, based upon Robles-Meza's answers to questions at the hearing regarding dates he was out of the United States during the previous 13 years, some of the information on the application for suspension of deportation was incorrect. At the conclusion of the hearing, the court issued an oral decision (1) denying Robles-Meza's application for suspension of deportation on the ground that he failed to establish extreme hardship and (2) permitting Robles-Meza to depart the United States voluntarily.

Robles-Meza employed attorney Robert Yarra to appeal the court's order of October 25, 1996. On September 26, 1997, Yarra filed in the BIA a motion to remand based on ineffective assistance of counsel or, in the alternative, respondent's brief in support of appeal. Yarra argued in part that respondent failed to present substantial evidence that Robles-Meza met the extreme hardship criteria for suspension of deportation. Yarra then set forth the evidence that would have established extreme hardship had respondent presented it at the hearing. Based upon Yarra's argument, the BIA found that Robles-Meza had met the criteria and therefore granted his request to suspend deportation.

### The Hearing Judge's Conclusions

As to this client matter, respondent was charged with, and the hearing judge determined respondent was culpable of, one count of violating rule 3-110(A).

### Discussion

Based on our independent review of the record, we conclude that respondent willfully violated rule 3-110(A) by: (1) failing to correct errors in the application for suspension prepared by a nonattorney; (2) failing to properly prepare Robles-Meza for the hearing to establish the hardship requirement for suspension of deportation; and (3) failing to review the evidence for sufficiency to support his application. We do not find respondent's testimony as to his preparation to be credible.

Respondent contends that there is no evidence in the record to support the hearing judge's finding that respondent's questioning at the hearing showed a lack of preparation. Respondent testified in this matter that he spent about an hour and a half with Robles-Meza going over the application for suspension of deportation, that they discussed the necessary witnesses and documentation, that he believed he checked all supporting documents to be sure they were translated into English, and that he prepared Robles-Meza for the individual hearing.

On the other hand, Robles-Meza testified that he met with respondent twice, the first time for 10 or 15 minutes and the second time, prior to the hearing of October 25, 1996, for about half an hour. He testified that respondent told him that the papers prepared by nonattorney Charles Stevens were fine and that he was asked to bring letters from the church and the green cards from his father and brother. He further testified that, at the second meeting with respondent, they did not discuss what questions would be asked of him in the individual hearing, and there was never a discussion of witnesses to bring to court to support the application.

Moreover, Immigration Judge Phan Quang Tue testified at trial in the hearing department that untranslated documents in Spanish and unsigned or undated affidavits were returned to

respondent. Immigration Judge Tue also testified that respondent was not very well prepared and failed to solicit some of the information necessary to support the application for suspension of deportation.

Based upon our independent review of the evidence, we conclude that the testimony of Robles-Meza and Immigration Judge Tue clearly establish that respondent recklessly and repeatedly failed to perform legal services competently in willful violation of rule 3-110(A).

### **The Franco Matter**

In April 1996, Jose Franco was placed in deportation proceedings because the INS learned that he had entered the United States in October 1979 without inspection. Franco appeared at his first immigration court hearing on April 9, 1996, without an attorney and requested a continuance to employ an attorney. The court continued the matter to June 18, 1996.

In approximately April 1996, Franco employed respondent to represent him in the deportation proceedings. Respondent advised Franco to gather further documentation. Franco gathered the documentation and provided it to respondent before the hearing of June 18, 1996. Respondent prepared and submitted an application for suspension of deportation with supporting documentation.

On June 18, 1996, attorney Gardner entered an appearance for Franco. At the hearing of that date, the IJ set the matter for a regular hearing on March 17, 1997.

Respondent did not appear on March 17, 1997. When Franco appeared at that hearing, the IJ informed him that he needed additional documentation to support his application for suspension from deportation. The IJ rescheduled the hearing for October 9, 1997. However, neither respondent nor Franco appeared at that hearing, and Franco was ordered deported in absentia.

Franco thereafter employed attorney Robert Jobe to represent him in his deportation proceedings. On March 2, 1998, Jobe filed a motion to reopen based in part on ineffective

assistance of counsel. The motion was unopposed, and the IJ granted the motion on March 9, 1998. Attorney Jobe submitted substantial documentation to support the suspension of deportation proceedings in Franco's case. However, Franco died on July 8, 1999, before the final hearing on the application for suspension of deportation.

#### The Hearing Judge's Conclusions

As to this client matter, respondent was charged with one count of violating rule 3-110(A). The hearing judge concluded that the State Bar had failed to present clear and convincing evidence of this violation.

#### Discussion

We agree with the hearing judge's statement in his decision that any reasonable doubts must be resolved in respondent's favor (see, e.g., *Young v. State Bar* (1990) 50 Cal.3d 1204, 1216), and we conclude that, in view of Franco's death, we do not know the extent of respondent's preparation of and advice to Franco. We also agree with the hearing judge's conclusion that, notwithstanding the apparent lack of sufficient documentation attached to the original application for suspension of deportation, we cannot know what additional evidence respondent may have intended to present at the individual hearing. We therefore dismiss with prejudice the charge that respondent violated rule 3-110(A). As we will further discuss along with the charge that respondent committed acts of moral turpitude by habitually disregarding his clients' interests, we do not consider culpability in this matter in determining the appropriate level of discipline in this case.

#### The Bracamonte-Reyes Matter

In March 1997, Gladis Bracamonte-Reyes illegally entered the United States through Texas and was taken into custody by the INS. Her matter was referred to the immigration court in Texas. She retained Texas attorney Thelma Garcia, who assisted her in obtaining a change of venue to the immigration court in San Francisco. Before Bracamonte-Reyes left for San

Francisco on May 9, 1997, Garcia's office suggested that she obtain counsel in San Francisco but did not recommend anyone in particular.

Bracamonte-Reyes provided Garcia's office with a forwarding address so that all documentation received from the immigration court in San Francisco could be forwarded to her. Bracamonte-Reyes decided she would wait until she received the notification of her initial hearing date in San Francisco before employing an attorney in San Francisco.

On May 22, 1997, the immigration court in San Francisco sent a notice of hearing for Bracamonte-Reyes to "William R. Gardner, Law Office of Miguel Gadda." The notice indicated that a master calendar hearing was set for August 26, 1997. Respondent's office received this notice in error, since no one at his office had notified the court that he was representing Bracamonte-Reyes. Bracamonte-Reyes did not receive notice of this hearing.

On August 26, 1997, John Pearson, a contract attorney for respondent, appeared at the master calendar hearing upon respondent's instructions. Pearson filed a Form EOIR-28, a notice of entry of appearance as attorney of record, indicating that respondent represented Bracamonte-Reyes. Bracamonte-Reyes did not appear at the hearing, Pearson never saw Bracamonte-Reyes, and Bracamonte-Reyes at no time paid respondent any fees. Pearson obtained a continuance of the hearing to September 16, 1997. Pearson returned to respondent's office and directed the staff to contact Bracamonte-Reyes, but she never received notification of the continued hearing date.

At the hearing of September 16, 1997, the IJ ordered Bracamonte-Reyes deported in absentia after she failed to appear. As Immigration Judge Laura Ramirez testified in this matter, because a notice of hearing appeared to have been mailed to counsel of record, Judge Ramirez had no discretion to do anything but order the deportation in absentia when Bracamonte-Reyes failed to appear in court.

In approximately September 1997, Bracamonte-Reyes contacted Garcia's office in Texas because she had not received any notification of her hearing date. Garcia's office informed her

that she had missed her hearing of August 26, 1997, and that she was represented by an attorney in San Francisco.

On September 23, 1997, Bracamonte-Reyes employed attorney Sharon Dulberg to represent her in the matter. Attorney Dulberg obtained a copy of the immigration court file and learned that respondent's office had made an appearance on behalf of Bracamonte-Reyes although Bracamonte-Reyes had never spoken with respondent and had not authorized such appearance.

Dulberg tried unsuccessfully to contact respondent by telephone and by letter but did finally obtain a copy of Bracamonte-Reyes's file from respondent. On November 25, 1997, she filed a motion to reopen deportation proceedings on behalf of Bracamonte-Reyes based on respondent's unauthorized representation of Bracamonte-Reyes. The court granted the motion.

#### The Hearing Judge's Conclusions

As to this client matter, respondent was charged with one count of violating section 6104. That section provides that "[c]orruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension." The hearing judge concluded that the State Bar had failed to present clear and convincing evidence of this violation.

#### Discussion

Bracamonte-Reyes testified at trial in the hearing department that she had never met respondent, attorney Gardner, or attorney Pearson before that day in State Bar Court proceeding and that she had never been to respondent's law office before she hired attorney Dulberg.

Respondent, however, testified that, upon her arrival from Texas, Bracamonte-Reyes came to his office requesting representation and that he saw her after she failed to appear at the master calendar hearing. He testified that he also saw her at the INS building after the second scheduled hearing, that she told him she had just arrived two hours late, and that he spoke to her

and asked her to come to his office.

Inasmuch as there is a direct conflict in the testimony of the parties and as there is no other evidence to support the parties' contentions except the notice of hearing sent to respondent's office, we adopt the hearing judge's conclusion that the State Bar failed to prove that respondent violated section 6104. The hearing judge either found respondent's testimony credible, found Bracamonte-Reyes's testimony incredible, or was unable to resolve the conflicting testimony and gave respondent the benefit of reasonable doubt. Accordingly, the charge of violating this section is dismissed with prejudice.

### **Moral Turpitude - Habitual Disregard of Client Interests**

In this charge, the State Bar incorporated all the facts set forth in all of the foregoing client matters and alleged that respondent committed acts involving moral turpitude by habitually disregarding the interests of his clients.

### **The Hearing Judge's Conclusions**

The hearing judge concluded that the State Bar failed to present clear and convincing evidence to establish a violation of section 6106.

### **Discussion**

Upon our independent review, it appears that the record may very well contain clear and convincing evidence to support the charged section 6106 violations. “ ‘[H]abitual disregard by an attorney of the interests of his or her clients combined with failure to communicate with such clients constitute acts of moral turpitude justifying disbarment. [Citations.]’ [Citations.]” (*Kent v. State Bar* (1987) 43 Cal.3d 729, 735.) “ ‘Even when such neglect [of clients] is grossly negligent or careless, rather than willful and dishonest, it is an act of moral turpitude and professional misconduct, justifying disbarment . . . .’ ” (*Simmons v. State Bar* (1970) 2 Cal.3d 719, 729, quoting *Grove v. State Bar* (1967) 66 Cal.2d 680, 683-684; see also *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 385.)

In addition, it also appears to us, upon our review of the entire record, that there may be clear and convincing evidence of respondent's culpability of violating rule 3-700(D)(2) in the Garcia matter, as it does not appear that respondent earned the fee paid by the Garcias, and of violating rule 3-110(A) in the Franco matter by failing to appear, without notice or an explanation to Franco or the immigration court, at Franco's individual hearing.

However, neither the State Bar nor respondent has addressed these issues on review. In light of the very extensive misconduct and aggravating circumstances (including a prior record of discipline for very similar misconduct) that are clearly established by the record, we conclude that any further findings of culpability on these additional charges would not affect in any way our discipline recommendation in this case. Accordingly, this is one of the rare instances in which we need not and therefore do not independently determine whether the record establishes respondent's culpability on any of these additional charges. (Cf. *Himmel v. State Bar* (1973) 9 Cal.3d 16, 23.)

#### **The Castro Matter**

Nelly Castro, who is the spouse of a United States citizen, attempted to enter the United States as an intending immigrant without a valid immigrant visa or other valid entry document. The INS detained her for a hearing before an IJ.

In December 1996, Castro employed respondent to assist her in obtaining the status of legal permanent resident. Respondent advised her that the IJ could adjust her status in the exclusion proceedings currently pending. This advice was incorrect, as an alien can adjust status only if inspected and admitted or if granted advanced parole into the United States. Respondent charged Castro \$1,000, which amount Castro paid at or near the time she employed respondent.

On December 12, 1996, attorney Gardner appeared for respondent at a master calendar hearing. Gardner was unfamiliar with the case and attempted to file an application for permanent resident status, which made Castro excludable as charged. The IJ continued the matter to May

12, 1997, so that Gardner could discuss the case with respondent. On May 12, 1997, Gardner appeared and obtained another continuance.

On December 2, 1997, respondent's office filed on Castro's behalf an application to register permanent residence or adjust status.

On December 15, 1997, respondent appeared on behalf of Castro. The IJ explained for the record that Castro was in exclusion proceedings and could not obtain an adjustment of status in those court proceedings. Respondent admitted that Castro was excludable as charged and requested to withdraw Castro's application for adjustment of status so that Castro could go back to Mexico and get a valid visa. The INS trial attorney indicated that respondent would have to obtain the consent of the INS district director to withdraw Castro's application for adjustment of status. Respondent then requested additional time to contact the INS district director to obtain this consent. The IJ continued the matter to March 2, 1998, to give respondent time to do so.

On March 2, 1998, respondent appeared on Castro's behalf and again attempted to withdraw the application for adjustment of status. The INS trial attorney again objected to the withdrawal of the application absent the consent of the district director, and the IJ once again explained to respondent that he did not have jurisdiction to decide an adjustment of status in an exclusion proceeding. Respondent continued to request that the court permit Castro to withdraw her application for adjustment of status, and the IJ reiterated that respondent was required to obtain the INS district director's consent in order for the court to do that. The IJ then ordered Castro excluded and deported from the United States since respondent had failed to reach a resolution with the INS district director.

On March 16, 1998, respondent filed a notice of appeal to the BIA on the ground that the IJ abused his discretion by advising Castro to file an adjustment of status application.

In or about March 1998, Castro terminated respondent's representation and employed attorney Stephen Shaiken, and respondent refunded the entire \$1,000 fee to Castro. Shaiken filed

a motion to reopen based upon ineffective assistance of counsel.

As Shaiken testified in these proceedings, when an alien is ordered excluded, he or she is barred from obtaining a visa without first obtaining a waiver. Further, serious penalties can be imposed on an alien who remains in the United States for an extended period of time without authorization. For instance, if an alien remains in the United States without permission for more than one year, and then leaves, there is a 10-year bar on re-entry.

#### The Hearing Judge's Conclusions

As to this matter, respondent was charged with violating rule 3-110(A) and section 6104. The hearing judge concluded that the State Bar had proved by clear and convincing evidence that respondent willfully violated rule 3-110(A). The hearing judge also determined, however, that the State Bar had failed to present clear and convincing evidence of this violation of section 6104.

#### Discussion

Upon our independent review of the record, we determine that respondent willfully violated rule 3-110(A) by repeatedly and recklessly failing to perform legal services competently. Despite the fact that the IJ advised respondent (1) that the IJ did not have jurisdiction in exclusion proceedings to adjust an alien's status and (2) that respondent had to obtain the INS district director's permission before Castro could withdraw her application for adjustment of status, respondent continued to attempt to withdraw the application for adjustment of status without proof of the district director's permission and to request that the IJ consider Castro's application to adjust status in the exclusion proceedings. Moreover, respondent incorrectly advised Castro that the IJ could adjust her status in the exclusion proceedings. In addition, respondent was aware or should have been aware that if Castro remained in the United States for a sufficient amount of time, she was subject to being barred from the entering the United States

for up to 10 years unless she obtained a waiver. Respondent nevertheless failed to attempt to terminate the exclusion proceedings and instead obtained several continuances. Respondent also filed a frivolous appeal with the BIA, stating as a basis for the appeal that the IJ had erroneously advised Castro to file an application to adjust status in the exclusion proceedings.

Respondent asserts that Castro would not cooperate with him, as she refused his advice to return to Mexico to get her visa there and instead insisted on trying to obtain an adjustment of status in the United States. He also contends that he requested that the INS district director allow Castro to withdraw her application for adjustment of status or admit Castro to the United States, but the district director rejected these requests. Respondent asserts that he acted in the best interests of the Castros in every respect.

However, the record clearly establishes that respondent did not understand the proper procedure to pursue on behalf of Castro. He repeatedly tried to withdraw Castro's application for adjustment of status without the district director's consent. He requested that the IJ consider Castro's application to adjust her status in the exclusion proceedings notwithstanding that the IJ had told him that the relief he was pursuing was not available to Castro under the circumstances. Finally, he obtained continuances of the hearing dates in spite of the fact that respondent was aware that the continuances were likely to result in serious sanctions being imposed upon Castro due to the length of her unauthorized stay in the United States. Moreover, respondent falsely stated in his appeal to the BIA that the IJ gave Castro incorrect advice, when the transcripts establish that the IJ repeatedly gave Castro and respondent correct advice. We conclude that respondent's arguments as to this issue lack merit.

As to the charge of violating section 6104 by filing an appeal to the BIA without obtaining the Castros' authority, we give great weight to the hearing judge's apparent credibility determination based on respondent's testimony that Mr. Castro authorized respondent to file the appeal. We therefore adopt the hearing judge's determination that respondent is not culpable as

to this charge, and we dismiss this charge with prejudice.

### **The Villalta Moran Matter**

On or near October 6, 1999, Alexev Villalta Moran employed respondent to represent him in removal proceedings. Respondent filed a notice of appearance as attorney with the immigration court on October 6, 1999. On October 20, 1999, respondent was served with a notice of a master hearing on January 24, 2000.

On January 24, 2000, respondent appeared, but Villalta Moran failed to appear. The IJ ordered Villalta Moran removed in absentia.

On May 12, 2000, respondent filed a motion to reopen. The motion stated that the reason Villalta Moran failed to appear was that he had not received notice of the hearing of January 24, 2000. On June 13, 2000, the IJ granted the motion to reopen based upon her sua sponte finding of ineffective assistance of counsel. She noted that it was clear that respondent had received notice of the hearing and failed to notify Villalta Moran of the hearing. Since notice to the attorney is notice to the client (8 C.F.R. § 292.5(a)), she found respondent's motion to be frivolous but granted it, as indicated, based on ineffective assistance of counsel.

### **The Hearing Judge's Conclusions**

As to this client matter, respondent was charged with violating rule 3-110(A) and with failing to inform Villalta Moran of significant developments in his case in violation of section 6068, subdivision (m). The hearing judge concluded that the State Bar had failed to present clear and convincing evidence of either of these violations.

### **Discussion**

Upon our independent review of the record, including the stipulation, we adopt the hearing judge's conclusion that the State Bar failed to present clear and convincing evidence that respondent willfully violated either rule 3-110(A) or section 6068, subdivision (m). The NDC charged that respondent violated rule 3-110(A) by (1) failing to inform Villalta Moran of the

hearing on January 24, 2000; (2) failing to inform Villalta Moran that respondent provided ineffective assistance of counsel; (3) failing to advise Villalta Moran to seek new counsel to file a motion to reopen based upon ineffective assistance of counsel; and (4) failing to state in his motion to reopen that he provided ineffective assistance of counsel. The NDC charged that respondent violated section 6068, subdivision (m), by failing to inform Villalta Moran that respondent provided ineffective assistance of counsel.

The hearing judge impliedly found credible respondent's testimony that he sent the notice to the address of Villalta Moran's mother, where he had been told Villalta Moran would be living. Under these facts, respondent did all he could to inform Villalta Moran of his hearing and did not provide ineffective assistance of counsel. Therefore, the counts charged as to this matter are dismissed with prejudice.

#### **The Trust Account Matter**

Beginning sometime before January 1, 1999, and continuing until December 31, 1999, respondent maintained an attorney-client trust account at Bank of America. Respondent maintained his personal funds in this trust account.

Between March 9, 1999, and October 6, 1999, respondent issued at least 24 checks on the trust account for personal and non-client business expenses. In addition, between about March 1999 and September 1999, respondent repeatedly issued checks drawn on his trust account against insufficient funds when he knew or should have known that there were insufficient funds in the account to pay them.

#### **The Hearing Judge's Conclusions**

As to this matter, respondent was charged with: (1) commingling personal and client funds in his trust account and using his trust account for personal purposes in violation of rule 4-100(A); and (2) committing acts involving moral turpitude in violation of section 6106 by issuing checks from his trust account when he knew or should have known that there were

insufficient funds in the trust account to pay them. The hearing judge concluded that the State Bar presented clear and convincing evidence that respondent committed both violations.

#### Discussion

On the first day of trial in this matter, March 13, 2001, respondent admitted culpability as to these charges, and respondent also admitted culpability in his opening brief on review. Upon our independent review of the record, we adopt the hearing judge's conclusion that respondent is culpable of committing the two violations charged in this matter.

Respondent asserts that at the time of these violations, he had a new bookkeeper and was out of his regular office checks. However, respondent had a duty to adequately supervise his staff (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 681-682), and the evidence that the violations lasted for months establishes that respondent did not comply with this duty. Therefore, the fact that respondent had a new bookkeeper at the time constitutes no defense to these charges.

#### **DISCIPLINE**

##### **Mitigation**

The hearing judge found no evidence of mitigating circumstances. However, the record reflects that respondent suffers from painful maladies called torticollis and dysphonia, which have caused respondent to miss many court appearances, and he has been diagnosed with Parkinson's disease. In addition, respondent has been going through an emotional divorce, and his mother and father died a couple of years ago, causing him to suffer from depression. Respondent has also suffered from financial difficulties lately and owes the Internal Revenue Service approximately \$20,000. However, we note that standard 1.2(e)(iv) directs that, in order for us to consider these kinds of emotional difficulties and physical disabilities mitigating, respondent was required (1) to establish through expert testimony that his emotional difficulties and physical disabilities were directly responsible for his misconduct and (2) to establish through

clear and convincing evidence that he no longer suffers from the difficulties and disabilities. There is no expert testimony in the record to establish that respondent's depression, his physical maladies, and his financial difficulties were directly responsible for his misconduct. Similarly, there is no evidence in the record to establish that respondent no longer suffers from these difficulties and disabilities or even that he can take, and is taking, steps to overcome them. We therefore decline to find these circumstances mitigating.

Respondent contends that his cooperation with the State Bar during the proceedings below and his remorse are also mitigating factors. Respondent entered into an extensive stipulation of facts and freely admitted the trust account violations in this case, for which conduct respondent is entitled to some mitigation. (Std. 1.2(e)(v).) In addition, he returned the fee Castro had paid immediately upon Castro's termination of his services, demonstrating some recognition of misconduct in that client matter. We give respondent some mitigating credit for this conduct as well. (Std. 1.2(e)(vii).)

Respondent next contends that there was no harm to clients in the trust account matter. Again, we give respondent some mitigating credit for the apparent lack of harm to clients resulting from his misuse of his trust account. (Std. 1.2(e)(iii).)

### **Aggravation**

As noted above, respondent has a prior record of discipline. (Std. 1.2(b)(i).) In *Gadda I*, respondent was given two years of stayed suspension and three years of probation on conditions including an actual suspension lasting six months and until respondent paid restitution to two immigration clients. In that case, the Supreme Court found that respondent had been dishonest; had failed to protect the interests of his immigration law clients by failing to perform legal services competently; and had blamed his own misconduct on his independent contract attorney, for whom respondent failed to take responsibility. The misconduct occurred between late 1980 and 1984.

In the present case, the misconduct spanned the period between 1994 and 1999. Although respondent argues that his prior discipline was remote in time and therefore should not have been considered as an aggravating circumstance, we previously determined that a prior record of discipline was not too remote in time to be considered as aggravating where the prior discipline had been imposed 14 years before the imposition of discipline in the more recent case and 7 years before the commission of misconduct in the more recent case. (*In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) We conclude that in this case, particularly because the prior misconduct was very similar to that found in the present case, respondent's prior record of discipline must be considered to be a serious aggravating circumstance, made even more serious as the prior discipline in *Gadda I* did not serve to rehabilitate respondent and prevent the misconduct we now review.

The record in this case establishes that respondent engaged in multiple acts of misconduct over an extended period of time. (Std. 1.2(b)(ii).)

As further aggravation, we adopt the hearing judge's determination that respondent's misconduct caused significant harm to the Saba children, the Garcias, the Floreses, Obis, and Castro. (Std. 1.2(b)(iv).) We additionally determine that respondent's misconduct significantly harmed Z. Santiago, A. Santiago, and Robles-Meza. (*Ibid.*)

We also determine in aggravation that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) Respondent continues to deny responsibility by blaming others (i.e., his contract attorney Gardner, who was not given any guidance or information; his staff; his clients for missing their hearing dates when they were not informed of these dates; and his new bookkeeper for causing his trust account violations).

Although respondent denies having sent the Garcias to see the immigration judge without him, Mr. and Mrs. Garcia both testified that respondent did so, and we find their testimony to be

credible.

### **Level of Discipline**

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.) Instead, we determine the appropriate discipline in light of all relevant circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

As previously indicated, the hearing judge recommended disbarment as the only appropriate discipline to be imposed in this matter for the protection of the public, the courts, and the legal profession. (Std. 1.3; *In re Morse* (1995) 11 Cal.4th 184, 205.)

Under the circumstances reflected by this record, we also doubt that any discipline less than disbarment can adequately protect the public against future acts of misconduct of the type which respondent has repeatedly committed. We are confronted here with a continuing course of misconduct over a period of six years, coupled with prior discipline for very similar misconduct. There is no evidence that respondent is cognizant of the seriousness of his misconduct. Instead, respondent continues to rationalize his conduct by blaming others. He refuses to take responsibility for his conduct.

The record reflects that five of respondent's clients were ordered deported in absentia by the immigration court due to respondent's misconduct. That this happened once was considered very serious by the Supreme Court in *Gadda I, supra*, 50 Cal.3d at pages 354-355. Moreover, there were at least six instances of courts finding ineffective assistance of counsel on respondent's part. Respondent argues that the issue of ineffective assistance of counsel has been refined by immigration courts and that this issue is used as a loophole when there is no other avenue for relief for an alien and comforts attorneys and judges alike. Immigration law expert Angela Bean disagreed with respondent's analysis however. She testified at trial in this matter that it is not easy to have a case reopened by making a claim of ineffective assistance of counsel.

She testified that a court would have to find that the representation was so poor that it affected the fundamental rights of the client and that the client's right to due process was denied. She further testified that sometimes ineffective assistance of counsel is the only issue an attorney can argue because it is the only thing that prevented the client from having his or her rights protected.

The hearing judge remarked that, despite respondent's serious misconduct, he is liked by everyone; that witnesses brought to testify against him had good things to say about him; and that he was courteous to the court and to opposing counsel. We agree with the hearing judge, however, who opined that being a nice guy is not enough and stated that respondent must learn that being a lawyer means complying with certain professional standards, duties, and responsibilities.

In determining the appropriate level of discipline, we are guided by *Cannon v. State Bar* (1990) 51 Cal.3d 1103. In that case, Cannon had a large immigration practice and relied on his office staff to take calls and process incoming mail. He was found culpable in five different matters of, among other things, failing to refund unearned fees upon termination of employment, failing to perform competently the services for which he was retained, withdrawing from employment without taking steps to avoid prejudice to the client, and failing to return telephone calls. Although Cannon had no prior record of discipline, and no other aggravating factors were specified, there was also no mitigation. The Supreme Court found disbarment to be appropriate for multiple instances of misconduct involving moral turpitude, i.e., repeatedly refusing to return unearned fees, even after judgment was taken against him; issuing checks against insufficient funds; and failing to maintain communication with clients.

In the present case, we have determined that respondent is culpable of a total of 17 charged counts of misconduct in eight client matters and the trust account matter, far more misconduct involving far more clients than were involved in *Cannon*. He is culpable of 10 counts of failing to perform legal services competently, 1 count of failing to return a client's file

promptly upon request at the termination of employment, 2 counts of failing to return unearned fees promptly at the termination of employment, 2 counts of failing to respond promptly to reasonable status inquiries from clients or failing to notify clients of significant developments in their cases, 1 count of commingling, and 1 count of committing an act of moral turpitude by issuing checks on an account which respondent knew or should have known had insufficient funds to cover them. Moreover, as indicated, respondent was already disciplined once for the same type of misconduct; yet it appears that he did not learn from his prior discipline. In addition, the record reflects that respondent committed numerous additional acts which constitute a failure to perform legal services competently, demonstrated indifference toward rectification of or atonement for the consequences of his misconduct, and significantly harmed clients. We therefore determine that respondent's overall misconduct is more serious than that found in *Cannon*. (See also *In the Matter of Phillips, supra*, 4 Cal. State Bar Ct. Rptr. 315 [disbarment recommended where, over a period of nearly 4 years, attorney committed 13 acts of misconduct involving 5 separate clients and 2 separate non-clients as well as 10 different rule and code violations in a case with slight mitigation and serious, extensive aggravation].)

The violations taken together in this case show a "clear disrespect for [respondent's] clients." (*In the Matter of Phillips, supra*, 4 Cal. State Bar Ct. Rptr. at p. 346.) Although there are fewer aggravating circumstances in this case than there were in *Phillips*, the aggravating circumstances in the present case nevertheless outweigh the mitigating circumstances.

In view of all of the circumstances of this case, we conclude that the public and the courts deserve the greater protection of a formal reinstatement proceeding before respondent is again entitled to practice law in this state. We therefore adopt the hearing judge's recommendation that respondent be disbarred.

#### **RECOMMENDATION**

For the foregoing reasons, we recommend that respondent Miguel Gadda be disbarred

from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of persons admitted to practice in this state. We further recommend that respondent be ordered to comply with the provisions of California Rules of Court, rule 955 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend that the State Bar be awarded its costs in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

WATAI, J.

We concur:

STOVITZ, P. J.

EPSTEIN, J.

**Case No. 97-O-15010**

***In the Matter of Miguel Gadda***

**Hearing Judge**

Eugene E. Brott

**Counsel for the Parties**

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