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THE STATE BAR COURT

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of)	Case No. 03-O-01049-PEM
ROGER DANIEL PRICE,)	
Member No. 106203,)	DECISION
A Member of the State Bar.)	

I. INTRODUCTION

In this default matter, Respondent **ROGER DANIEL PRICE** is found culpable, by clear and convincing evidence, of three of the seven counts as charged. His misconduct involved failure to support California law as trustee of a testamentary trust, failure to obey a court order, and failure to report a civil judgment for breach of fiduciary duty to the State Bar.

The court recommends, among other things, that Respondent be suspended from the practice of law for one year, that execution of said suspension be stayed, and that Respondent be actually suspended from the practice of law for 120 days and until the State Bar Court grants a motion to terminate Respondent's actual suspension. (Rules Proc. of State Bar, rule 205.)

II. PERTINENT PROCEDURAL HISTORY

This proceeding was initiated by the Office of the Chief Trial Counsel of the State Bar of California (State Bar). The Notice of Disciplinary Charges (NDC) was properly filed and served on Respondent at his official membership records address on October 28, 2003. On November 20, 2003, Respondent filed a response to the NDC.

Due to Respondent's failure to obey the August 3, 2004 court order to answer the interrogatories by August 30, 2004, the court ordered his response stricken and entered his default

1 on September 24, 2004. Respondent was enrolled as an inactive member under Business and
2 Professions Code section 6007(e)¹ on September 27, 2004.

3 The court took this matter under submission on January 14, 2005, following the filing of
4 State Bar's brief on culpability and discipline. In the interest of justice, the State Bar's motion to
5 dismiss count one (section 6106) without prejudice is hereby granted.

6 III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

7 All factual allegations of the NDC are deemed admitted upon entry of Respondent's default
8 unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule
9 200(d)(1)(A).)

10 A. Jurisdiction

11 Respondent was admitted to the practice of law in California on December 3, 1982, and has
12 since been a member of the State Bar of California.

13 B. The Corr Testamentary Trust Matter

14 On September 30, 1987, Evelyn G. Corr created a will establishing the Evelyn G. Corr
15 Testamentary Trust (Trust). Beneficiaries of the Trust included John Corr, his wife Patricia Corr,
16 the Shriners Hospitals for Children, and the Sequoia Council Boy Scouts of America.

17 Evelyn Corr died in November 1989. On December 6, 1989, her will was admitted to
18 probate in Tulare County Superior Court, case No. 033617, and Respondent was appointed Trustee
19 of the Testamentary Trust, pursuant to the will.

20 In January 1991, the court issued a judgment settling the account, allowing commission and
21 fee and directing final distribution of the estate. Under the judgment, Respondent received cash and
22 bank accounts with a total balance of about \$294,029.76. As Trustee, he also received other assets
23 and accounts receivable to administer.

24 Under Probate Code sections 16061 and 16062, Respondent, as Trustee, was obligated to
25 report information about the Trust on request and to provide an annual accounting to the
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27 ¹All references to section (§) are to the Business and Professions Code, unless otherwise
28 indicated.

1 beneficiaries. However, Respondent neglected his obligations.

2 On March 3, 1992, John Corr wrote to Respondent requesting an issuance of a tax form
3 showing income paid under the Trust for the 1991 tax year. Respondent received the letter but did
4 not reply or provide John Corr with the requested information.

5 In March 1993, John Corr again sent two letters to Respondent requesting a tax form for the
6 1992 tax year. Respondent received the letters but did not respond or provide him with the tax
7 information.

8 John Corr died in April 1995. On February 12, 1996, Patricia Corr sent Respondent a letter
9 requesting information for the 1995 tax year. She spoke with Respondent and was told that he would
10 fax the tax information. But he did not follow through.

11 On February 13, 1996, Patricia Corr wrote to Tulare County Superior Court requesting
12 assistance regarding Respondent's lack of response.

13 In the following week, Patricia Corr again wrote to Respondent twice and requested
14 information regarding the tax status of the disbursements from the Trust and a 1099 or K-1 form for
15 the 1995 tax year. Respondent received the letters but again ignored them.

16 On March 1, 1996, a probate judge of the superior court in Visalia sent Respondent a letter
17 requesting a meeting to discuss the status of the Estate of Evelyn Corr. Respondent received the
18 letter but did not respond to the court or otherwise address Patricia Corr's concerns.

19 On April 24, 1996, although Respondent advised Patricia Corr that he would be sending tax
20 return materials to her, he did not do so. In June and July 1996, Patricia Corr informed Respondent
21 that she had yet to receive any tax materials. Respondent did not respond or notify her of the tax
22 information.

23 In February 1997, Patricia Corr hired Bray & Bray, attorneys at law, to represent her
24 concerning the Trust. On February 24 and April 23, 1997, attorney A. F. Bray, Jr., wrote to
25 Respondent and requested the tax information on behalf of Patricia Corr. Respondent received the
26 two letters but did not respond.

27 In November 1997, Patricia Corr hired the Law Firm of Thomas E. Campagne & Associates
28 to represent her regarding the Trust. On November 11, 1997, attorney Jeffrey Heeren wrote to

1 Respondent on behalf of Patricia Corr, joined by the Shriners Hospitals for Children and Sequoia
2 Council Boy Scouts of America, confirming the prior requests for information and advising
3 Respondent that a lawsuit would be filed if he did not provide the proper information and
4 documentation. Respondent ignored the letter. On December 9, 1997, attorney Heeren noticed
5 Respondent that an action would be pursued.

6 On August 21, 1998, Patricia Corr, the Shriners Hospitals for Children and Sequoia Council
7 Boy Scouts of America filed a petition to compel Respondent to account and report Trust
8 information, for removal of Respondent as the Trustee and for appointment of Patricia Corr as the
9 successor trustee under the terms of the Trust. Respondent was served with a copy of the petition
10 but did not respond.

11 Respondent was notified of the hearing on the petition but did not appear at the hearing.
12 Consequently, on September 30, 1998, the court removed Respondent as Trustee and ordered him
13 to produce all Trust assets, a full accounting and a report of his acts as Trustee, including tax and
14 accounting information no later than October 30, 1998. The court also appointed Patricia Corr as
15 the successor trustee. Respondent did not comply with the court order.

16 On February 8, 1999, the court issued an order to show cause as to why Respondent should
17 not be held in contempt for failing to abide by the September 30, 1998 court order. The hearing was
18 set for February 17, 1999. On that day, Respondent submitted a declaration, acknowledging that he
19 had possession of \$888,185.20 in trust assets. He reported that he turned over these assets to Patricia
20 Corr, the new trustee. Respondent also provided tax returns for 1996 and 1997 and indicated that
21 he would submit the tax forms for the other years at a later date. Respondent never submitted the
22 K-1's for the years 1991-1995. Respondent produced some financial records to Patricia Corr but they
23 were incomplete.

24 Patricia Corr hired the CPA firm of Griffin & Poka to analyze all the documents that
25 Respondent produced. The firm audited the material and determined that many records were
26 missing. Based on the documents, it was unable to account for \$161,893.22 in trust funds. As a
27 result, on May 10, 2002, the beneficiaries filed suit against Respondent for breach of trust,
28 conversion, breach of fiduciary duties, breach of contract, and fraud and deceit, in *In Re Trust*

1 *Created Under the Will of Evelyn G. Corr, Deceased; Patricia Corr, as Trustee, et al. v. Roger*
2 *Price, Tulare County Superior Court.*

3 On October 2, 2002, the court ordered sanctions against Respondent in the sum of \$1,200 for
4 his failure to answer the discovery. Respondent knew about the order but did not pay the sanctions.

5 The beneficiaries requested a summary judgment. The hearing was set for January 23, 2003,
6 and was continued to February 4, 2003. Respondent did not appear at either hearing. The Tulare
7 County Superior Court granted the summary judgment motion on February 4. The court deemed
8 admitted that Respondent took and converted \$161,893.22 in trust funds for his own use. The court
9 then entered summary judgment in favor of Patricia Corr, the Shriners Hospitals for Children and
10 the Sequoia Council Boy Scouts of America for \$200,893.22, pursuant to the underlying ten causes
11 of action, including conversion, breach of fiduciary duty, negligence, breach of contract, breach of
12 implied covenant of good faith and fair dealing, tortious breach of the duty of good faith and fair
13 dealing, and fraud and deceit.

14 Although Respondent received the notice of entry of judgment, he did not report the
15 judgment to the State Bar within 30 days of the time he had knowledge of the entry of judgment or
16 anytime thereafter.

17 In the State Bar's brief on culpability and discipline and motion to dismiss count one of the
18 NDC, Deputy Trial Counsel Robin Haffner submitted that the State Bar had hired attorney Gary
19 Motsenbocker, an independent expert in probate and accountings for probate matters and trusts, to
20 review all materials presented to Respondent at his deposition and to render an expert opinion related
21 to the fiduciary duties, account performance standards, and misappropriation of funds regarding the
22 Trust. Attorney Motsenbocker was able to trace almost all of the items that Griffin and Poka were
23 unable to trace, with some minor exceptions he attributed to a missing page of one schedule and
24 some bank account statements. Attorney Motsenbocker was able to track and account for
25 \$191,894.33 of funds that were in question. Of the funds that Motsenbocker was able to trace, he
26 opined that they were appropriately distributed according to the Summary of Accounts and that there
27 was no mishandling or misappropriation of these funds. (Declaration of Motsenbocker.)

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1 **Count 1: Moral Turpitude (§ 6106)**

2 In the interest of justice, count one is dismissed without prejudice pursuant to the State Bar's
3 request.

4 **Count 2: Failure to Perform (Rule 3-110(A) of the Rules of Professional Conduct)²**

5 Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail
6 to perform legal services with competence.

7 The State Bar alleges that Respondent failed to perform, in wilful violation of rule 3-110(A),
8 by failing to respond to the numerous requests for information and accounting from John and Patricia
9 Corr and by failing to account for the monies in the Trust.

10 The court cannot conclude, by clear and convincing evidence, that Respondent failed to
11 perform legal services on behalf of the Trust or the beneficiaries. It has not been clearly shown that
12 the Trust or the beneficiaries were Respondent's clients or that the alleged offense was committed
13 in the practice of law. Rather, Respondent failed his duties as a trustee, not as an attorney. Thus,
14 Respondent did not perform both legal and non-legal professional services for a client, and
15 accordingly, Respondent is not subject to the Rules of Professional Conduct with respect to those
16 services.

17 Respondent was appointed as Trustee of the Trust established under the will of Evelyn Corr.
18 The services that Respondent were required to perform were to be performed in his capacity as a
19 trustee, not as an attorney. As such, trustees are not required to be attorneys and are not subject to
20 the Rules of Professional Conduct of the State Bar. (*Layton v. State Bar* (1990) 50 Cal.3d 889, 904
21 ["An executor is not required to be an attorney, and executors are not, as such, subject to the Rules
22 of Professional Conduct that govern attorneys."].)

23 In *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, the respondent
24 there served both as executor of the estate and as attorney to the estate. "[W]here an attorney
25 occupies a dual capacity, performing, for a single client or in a single matter, along with legal
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27 ²References to rule are to the current Rules of Professional Conduct, unless otherwise
28 noted.

1 services, services that might otherwise be performed by laymen, the services that he renders in the
2 dual capacity all involve the practice of law, and he must conform to the Rules of Professional
3 Conduct in the provision of all of them.” (*Layton v. State Bar* (1990) 50 Cal.3d 889, 904.)

4 In *In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473, the Review
5 Department held that summary disbarment may be recommended based on victimization of a client
6 even when the crime was not committed in the course of the practice of law, and even though the
7 betrayal of the client’s trust occurred after the client’s death. Because the client was a former or
8 deceased client, the respondent who was appointed executor of the former client’s estate was held
9 to have violated the trust and confidence of the former client.

10 Unlike *Lilly* and *Layton*, there is no clear and convincing evidence that Respondent occupied
11 a dual capacity as Trustee and as attorney for the Trust. That is, there is no clear and convincing
12 evidence that the beneficiaries or the Trust were Respondent’s clients, that Respondent’s misconduct
13 was committed in the practice of law or that the decedent was Respondent’s former client.

14 While the trust may have had paid attorney fees to Respondent in 1991³ and between 1993
15 and 1998,⁴ this court cannot conclude by clear and convincing evidence that Respondent was the
16 attorney for the Trust or that he provided any legal services for the Trust.⁵ Attorney Motsenbocker’s
17 narrative is only an attempt to trace the funds based on the materials he was given. His expert
18 opinion is not clear and convincing evidence on the issue of whether Respondent was the attorney
19 for the trust or the beneficiaries. Furthermore, although summary judgment in the civil matter was
20 entered into against Respondent, the facts alleged were deemed admitted due to Respondent’s failure
21 to appear at the hearing and were not conclusive by clear and convincing evidence. Therefore, the
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23 ³Exhibit 3, Table 5 – Attorney Motsenbocker’s Narrative of Tracking of Estate to
24 Funding of Trust.

25 ⁴Attachment 18 – February 4, 2003 Summary Judgment.

26 ⁵Similarly, it was deemed admitted in the summary judgment that Respondent took and
27 converted the \$161,893.22 for his own use. But because this was not shown by clear and
28 convincing evidence, which was the underlying basis for the misappropriation charge under
count 1, the State Bar requested that count 1 be dismissed without prejudice.

1 fees for Respondent's legal services were shown by a preponderance of the evidence.

2 Moreover, whether an attorney is providing legal services, thus subject to the Rules of
3 Professional Conduct, does not depend upon whether the attorney charges for the service. But rather,
4 the issue depends on whether the attorney is performing a service that is performed as part of the
5 practice of law and would constitute the practice of law if performed by a non-lawyer. Here, there
6 is no clear and convincing evidence that Respondent rendered legal services for the Trust as part of
7 the practice of law. Providing an accounting or tax information does not involve the rendition of any
8 legal services. (See *Layton v. State Bar, supra*, 50 Cal.3d 889, 904.)

9 In short, because the preponderance of the evidence standard of proof in a civil trial is lower
10 than the clear and convincing evidence standard of proof in a disciplinary proceeding, the
11 conclusions reached by the civil court in an action against Respondent are not dispositive of
12 disciplinary charges. (See *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct.
13 Rptr. 335.)

14 Furthermore, there is no alleged fact in the NDC that Respondent failed to perform
15 competently as the Trust's attorney or that Respondent served as both Trustee and attorney for the
16 Trust. In fact, when he failed to perform his duties as Trustee, Patricia Corr and other trust
17 remaindermen petitioned the court to remove Respondent as Trustee of the Trust, not as the Trust's
18 attorney. Throughout the correspondence between John and Patricia Corr and Respondent, the
19 beneficiaries were seeking tax information and accounting from Respondent as Trustee of the Trust,
20 not as the attorney for the Trust. Whether Respondent's failure to provide services in his capacity
21 as a trustee should categorically be treated the same as an attorney's failure to perform legal services
22 in the course of the practice of law is one that is better addressed to the Legislature. (See *In the*
23 *Matter of Lilly, supra*, 2 Cal. State Bar Ct. Rptr. 473, 477.)

24 Therefore, although Respondent repeatedly failed to provide the requested tax information
25 and accounting to Patricia Corr, in violation of his duties as Trustee, Respondent did not fail to
26 perform legal services in wilful violation of rule 3-110(A). Trustees are not bound by the Rules of
27 Professional Conduct, only attorneys acting as attorneys are.

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1 **Count 3: Failure to Respond to Status Inquiries (Bus. & Prof. Code, § 6068, subd. (m))**

2 Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly
3 to reasonable status inquiries of clients and to keep clients reasonably informed of significant
4 developments in matters with regard to which the attorney has agreed to provide legal services.

5 The State Bar alleges that Respondent failed to respond promptly to reasonable status
6 inquiries of his client, in wilful violation of section 6068, subdivision (m), by failing to respond to
7 the numerous requests for information and accounting from John and Patricia Corr and by failing
8 to account for the monies in the Trust.

9 As discussed in count 2, Respondent was the Trustee and not the attorney for the Trust. John
10 and Patricia Corr were not Respondent's clients. Thus, Respondent did not violate section 6068,
11 subdivision (m), by failing to respond to John and Patricia Corr's numerous requests for Trust
12 information since they were not his clients.

13 **Count 4: Failure to Render Accounts (Rule 4-100(B)(3))**

14 Rule 4-100(B)(3) provides that an attorney shall maintain records of all funds of a client in
15 his possession and render appropriate accounts to the client.

16 The State Bar alleges that Respondent failed to render appropriate accountings to a client
17 regarding all funds, securities and other properties of the client coming into Respondent's
18 possession, in wilful violation of rule 4-100(B)(3).

19 Similarly, as found in count 2, the Rules of Professional Conduct do not govern the duties
20 of a trustee. Respondent's failure to provide an accounting of the Trust funds did not violate rule
21 4-100(B)(3).

22 **Count 5: Failure to Obey the Law (§ 6068, subd. (a))**

23 Section 6068, subdivision (a), provides that it is the duty of an attorney to support the
24 Constitution and laws of the United States and of California. It is a conduit by which attorneys may
25 be charged and disciplined for violations of other specific laws which are not otherwise made
26 disciplinable under the State Bar Act, including a violation of: (1) a statute not specifically relating
27 to the duties of attorneys; (2) a section of the State Bar Act which is not, by its terms, a disciplinable
28 offense; and (3) an established common law doctrine which is not governed by any other statute.

1 (See *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487.)

2 The State Bar alleges that Respondent violated his duties under Probate Code sections 16440⁶
3 and 16441 by failing to account for the trust funds to the beneficiaries. And therefore, by failing to
4 abide by the Probate Code sections 16440 and 16441, Respondent failed to support the laws of this
5 state, in wilful violation of section 6068, subdivision (a).

6 As discussed in count 2, the conclusions reached by the civil court in the summary judgment
7 against Respondent are not dispositive of disciplinary charges. (See *In the Matter of Respondent K*,
8 *supra*, 2 Cal. State Bar Ct. Rptr. 335.)

9 However, Respondent's breach of trust to the beneficiaries has been proven by clear and
10 convincing evidence in that he failed to perform his trustee's duties and had repeatedly refused to
11 provide information and accounting to John and Patricia Corr despite their numerous demands
12 through the years in the 1990's. His failure to comply with his duties as trustee violates Probate
13 Code sections 16061, 16062, 16440 and 16441, and thereby wilfully violated section 6068,
14 subdivision (a), by failing to support the California probate law.

15 ***Count 6: Failure to Obey the Law (§ 6068, subd. (a))***

16 The State Bar further alleges that Respondent violated his common law fiduciary duties as
17 trustee to the trust beneficiaries in wilful violation of section 6068, subdivision (a), by failing to
18 account for funds.

19 There is no need for duplicative allegations charging the same misconduct. (*Bates v. State*
20 *Bar* (1990) 51 Cal.3d 1056, 1060.) Since Respondent has been charged and found culpable of
21 violating section 6068, subdivision (a), in count 5 for failing to comply with his trustee's duties in
22 violation of the probate law, "little, if any, purpose is served" (*ibid.*) by charging that Respondent
23 violated his common law fiduciary duties as trustee. Therefore, count 6 is duplicative and is hereby
24 dismissed with prejudice.

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28 ⁶Probate Code sections 16440 and 16441 provide that if the trustee commits a breach of trust, the trustee may be liable for damages.

1 **Count 7: Failure to Obey Court Orders (§ 6103)**

2 Section 6103 requires attorneys to obey court orders and provides that the wilful disobedience
3 or violation of such orders constitutes cause for disbarment or suspension.

4 By not paying the October 2, 2002 court ordered sanctions of \$1,200, Respondent wilfully
5 disobeyed and violated the court order requiring him to do an act connected with or in the course of
6 Respondent's profession which he ought to have done in good faith in wilful violation of section
7 6103.

8 **Count 8: Failure to Report Civil Court Judgment re Breach of Duty (§ 6068, subd. (o)(2))**

9 Section 6068, subdivision (o)(2), requires an attorney to report to the State Bar, in writing,
10 within 30 days of the time the attorney has knowledge of the entry of judgment against the attorney
11 in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence
12 committed in a professional capacity.

13 The summary judgment was entered into against Respondent for conversion, breach of
14 fiduciary duty, negligence, breach of contract, breach of implied covenant of good faith and fair
15 dealing, breach of the duty of good faith and fair dealing, and fraud and deceit.

16 Given Attorney Motsenbocker's opinion that the missing trust funds were accounted for, the
17 underlying causes of action in the summary judgment may not have been completely meritorious in
18 that fraud and deceit may not have been committed. Nevertheless, Respondent did breach his
19 fiduciary duty to the beneficiaries by failing to perform his trustee's duties. Therefore, Respondent
20 was obligated to report the February 4, 2003 civil judgment to the State Bar and his failure to do so
21 was a wilful violation of section 6068, subdivision (o)(2).

22 **IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES**

23 **A. Mitigation**

24 No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds.
25 for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁷

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28 ⁷All further references to standards are to this source.

1 **B. Aggravation**

2 There are several aggravating factors. (Std. 1.2(b).)

3 Respondent has a prior record of discipline. (Std. 1.2(b)(i).) On October 27, 2004, the State
4 Bar Court recommended that Respondent be suspended for one year, execution of the suspension
5 stayed, and that he be actually suspended for 90 days and until he pays specified sanctions and until
6 he complies with rule 205 of the Rules of Procedure of the State Bar for one client abandonment and
7 failure to comply with a court order (State Bar Court case No. 04-O-10024).⁸

8 Respondent committed multiple acts of wrongdoing. (Std. 1.2(b)(ii).) He failed to comply
9 with a court order, failed to support the California probate law, and failed to report the summary
10 judgment to the State Bar.

11 Respondent harmed the beneficiaries, causing undue delay in their tax returns and significant
12 expenditure of time and money in the Trust litigation. (Std. 1.2(b)(iv).)

13 Respondent's failure to participate in the Trust litigation demonstrates indifference toward
14 rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).)

15 Respondent's failure to participate in this disciplinary matter before the entry of his default
16 is also a serious aggravating factor. (Std. 1.2(b)(vi).)

17 **V. DISCUSSION**

18 The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect
19 the public, to preserve public confidence in the profession and to maintain the highest possible
20 professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v.*
21 *State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

22 Respondent's misconduct involved failure to support the California probate law, failure to
23 comply with a court order, and failure to report the summary judgment to the State Bar. The
24 standards provide a broad range of sanctions ranging from suspension to disbarment, depending upon
25 the gravity of the offenses and the harm to the victim. (Stds. 1.6, 1.7, and 2.6.)

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28 ⁸The case is currently pending before the Supreme Court, awaiting for its approval and
finality. (Rules Proc. of State Bar, rule 216.)

1 Standard 1.7 provides that the degree of discipline imposed in the current proceeding must
2 be greater than that imposed in the prior proceeding unless the prior discipline imposed was so
3 remote in time to the current proceeding and the offense for which it was imposed was so minimal
4 in severity that imposing greater discipline in the current proceeding would be manifestly unjust.

5 Here, in the prior matter, discipline has yet to be imposed and its misconduct occurred in
6 2003 while the instant misconduct took place from the 1990's through 2003. Therefore, the prior
7 matter is not so remote in time.

8 The standards, however, are only guidelines and do not mandate the discipline to be imposed.
9 (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) “[E]ach
10 case must be resolved on its own particular facts and not by application of rigid standards.” (*Id.* at
11 p. 251.)

12 The State Bar urges three years stayed suspension and one year actual suspension. In support
13 of its recommended discipline, the State Bar cited *In the Matter of Lilley* (Review Dept. 1991) 1 Cal.
14 State Bar Ct. Rptr. 476; *Layton v. State Bar* (1990) 50 Cal.3d 889;⁹ and *Clark v. State Bar* (1952)
15 39 Cal.2d 161.

16 In *In the Matter of Lilley*, the attorney, who had no prior record in 13 years of practice,
17 defaulted and was actually suspended for 30 days for one client abandonment, failure to cooperate
18 and failure to submit a change of address. He failed to perform legal services for an estate, forcing
19 the administrator of the estate to hire another attorney to complete work on the estate and the ensuing
20 delay imposed a financial burden on the beneficiary.

21 In *Layton v. State Bar*, the Supreme Court imposed 30 days actual suspension for a
22 respondent, who was acting as attorney for a trust and an estate for which he was also the executor,
23 and who failed through neglect and inattention to fulfill important and material requirements of his
24 office as executor for over five years, which ultimately resulted in his removal from office by the
25 probate court. Aggravating factors included significant harm to the estate and a beneficiary and

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27 ⁹Based on the discussion in the State Bar’s brief, the court concludes that the case law
28 cited was in reference to *Layton v. State Bar* (1990) 50 Cal.3d 889 and not *In the Matter of*
Layton (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366. (Brief, p. 8, lines 4-5 and 12-24.)

1 indifference toward rectification. In mitigation, the court considered the attorney's 30 years of
2 blemish-free practice, the lack of personal gain from the misconduct and the emotional and physical
3 strain of caring for his terminally-ill mother.

4 Finally, in *Clark v. State Bar*, the Supreme Court actually suspended the attorney for six
5 months for intentionally including a large sum of money in his final account to the court under an
6 entry designed to mislead the court and for acts of gross negligence in his performance of his duties
7 as guardian of an estate. However, in the dissenting opinion, Justice Carter opined that because the
8 petitioner was not the attorney for the estate or incompetent, there was no attorney-client relationship
9 between the attorney and the one toward whom he was negligent and therefore, he should not have
10 been suspended when the negligence occurred when he was acting in a capacity other than as an
11 attorney. Justice Carter further wrote that he would have dismissed the proceeding against the
12 attorney. "Because an attorney is a poor businessman in his dealings with another's property, of
13 which he has control, but not as an attorney, should not be ground for disbarment." (*Id.* at p. 176.)

14 More than 50 years had passed since the *Clark* opinion. In 1990, the Supreme Court in
15 *Layton* clearly supported the dissent opinion in finding that the attorney must be acting in dual
16 capacity, as attorney and as trustee/executor, before the attorney could be held culpable of violating
17 any Rules of Professional Conduct. Otherwise, as discussed above, "[a]n executor is not required
18 to be an attorney, and executors are not, as such, subject to the Rules of Professional Conduct that
19 govern attorneys." (*Layton v. State Bar, supra*, 50 Cal.3d 889, 904.)

20 In view of the case law, whose level of discipline ranges between 30 days and six months of
21 actual suspension, the court believes an actual suspension of one year for Respondent's misconduct
22 is excessive and punitive, contrary to the purpose of State Bar disciplinary proceedings. The
23 gravamen of Respondent's misconduct is his dereliction of his responsibilities as Trustee, not as an
24 attorney, his failure to pay sanctions and his failure to inform the State Bar of the summary judgment
25 entered against him.

26 However, failing to appear and participate in this hearing shows that Respondent
27 comprehends neither the seriousness of the charges against him nor his duty as an officer of the court
28 to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) His

1 failure to participate in this proceeding leaves the court without information about the underlying
2 cause of Respondent's misconduct or of any mitigating circumstances surrounding his misconduct.
3 Thus, it is the court's primary justification for recommending greater discipline than that was
4 recommended in the prior matter (90 days actual suspension and until restitution).

5 Balancing all relevant factors, Respondent's misconduct, the case law and the aggravating
6 evidence, placing Respondent on an actual suspension for 120 days would be appropriate to protect
7 the public and to preserve public confidence in the profession.

8 VI. RECOMMENDED DISCIPLINE

9 Accordingly, the court hereby recommends that Respondent **ROGER DANIEL PRICE** be
10 suspended from the practice of law for one year, that said suspension be stayed, and that Respondent
11 be actually suspended from the practice of law for 120 days and until he files and the State Bar Court
12 grants a motion to terminate his actual suspension. (Rules Proc. of State Bar, rule 205.)

13 It is also recommended that Respondent be ordered to comply with any probation conditions
14 hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.
15 (Rules Proc. of State Bar, rule 205(g).)

16 It is also recommended that if Respondent is actually suspended for two years or more, he
17 will remain actually suspended until he has shown proof satisfactory to the State Bar Court of his
18 rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard
19 1.4(c)(ii).

20 It is further recommended that Respondent take and pass the Multistate Professional
21 Responsibility Examination within one year after the effective date of this order or during the period
22 of his actual suspension, whichever is longer. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891,
23 fn. 8.) However, if Respondent is ordered to take and pass the Multistate Professional Responsibility
24 Examination in his prior record of discipline, State Bar Court case No. 04-O-10024, it is not
25 recommended that he take and pass the exam again in this matter.

26 It is also recommended that the Supreme Court order Respondent to comply with rule 955,
27 paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the
28 effective date of its order imposing discipline in this matter.

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VII. COSTS

The court recommends that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10, and paid in accordance with section 6140.7.

Dated: April 8, 2005



PAT McELROY
Judge of the State Bar Court

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

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on April 11, 2005, I deposited a true copy of the following document(s):

DECISION, filed April 11, 2005

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

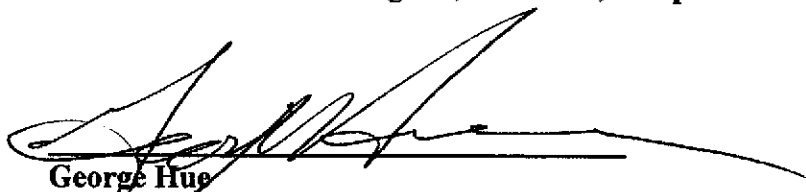
- [X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**ROGER DANIEL PRICE
204 N FLORAL #B
VISALIA CA 92391**

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

ROBIN HAFFNER, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **April 11, 2005**.



George Hue
Case Administrator
State Bar Court