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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **ROBERT A. TAYAC**, **Member No. 173134,** A Member of the State Bar.	**Case No. 05-O-01892-LMA (05-O-04246; 05-O-04882)** **DECISION**

I. Introduction

In this contested disciplinary proceeding, respondent **Robert A. Tayac** is charged with nine counts of misconduct in three client matters. The court finds, by clear and convincing evidence, that respondent is culpable of six counts, involving (1) failing to respond promptly to reasonable status inquiries; (2) failing to keep a client informed of significant developments; (3)failing to perform legal services with competence; and (4) an act of moral turpitude.

In view of respondent's misconduct and the aggravating and mitigating evidence, the court recommends, among other things, that respondent be suspended from the practice of law for one year, that said suspension be stayed; and that he be placed on probation for 18 months on conditions including actual suspension for 60 days.

II. Pertinent Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on January 22, 2007. Respondent filed his response to the NDC on March 15, 2007.

The State Bar was represented by Deputy Trial Counsel Tammy Albertsen-Murray. Respondent was represented by attorney Jerome Fishkin.

Trial was held on April 1-3 and April 11, 2008. Following receipt of closing briefs, the court took this proceeding under submission on May 20, 2008.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the documentary evidence and testimony introduced at this proceeding. A number of the court's findings of fact are based in large part on credibility determinations, which determinations the court carefully made after considering multiple relevant factors consistent with Evidence Code section 780.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 8, 1994, and has been a member of the State Bar of California since that time .

B. The Vogt Matter

On January 13, 2005, Norman N. Vogt (Vogt) was arrested for driving under the influence (DUI) and given notice to appear at an arraignment on February 28, 2005 at 9:00 a.m in the Santa Clara County Superior Court, located in San Jose. On January 14, 2005, Vogt contacted respondent telling respondent about the DUI arrest. Respondent was also told by Vogt that he would be moving to Maryland in May 2005, and needed to have the DUI matter resolved by then.

On January 15, 2005, Vogt hired respondent to represent him regarding the DUI charge, including the arraignment and any other Department of Motor Vehicles (DMV) proceedings related to the DUI charge. Vogt paid respondent $3,000 by credit card and informed respondent that the arraignment was set for February 28, 2005, at 9:00 a.m. in the Santa Clara County Superior Court. Respondent told Vogt that he would provide him with a DMV packet that Vogt was to fill out and return as soon as possible.

On January 15, 2005, respondent sent a letter to the DMV stating that he would be representing Vogt. In his letter, respondent also requested that a hearing be scheduled regarding the suspension of Vogt's driving privileges and that Vogt's driving privileges be stayed pending the outcome of the hearing. Vogt's letter also asked that the DMV provide him with discovery relating to the requested hearing.

Vogt did not receive the DMV packet from respondent. Between January 15 and February 3, 2005, Vogt left numerous messages, regarding the fact that he had not received the packet and seeking information regarding the DMV hearing, at the office telephone number that respondent had provided to Vogt. In those messages, Vogt requested that respondent communicate with him about the hearing and send the "packet of important documents," as respondent had said he would do. On February 3, 2005, respondent telephoned Vogt, assuring him that everything was fine and he would send the packet. On February 8, 2005, Vogt again called respondent's office. Respondent returned Vogt's call and scheduled a meeting for February 17, 2005. On February 9, 2005, respondent faxed Vogt a copy of the January 15, 2005 letter, requesting a hearing in the DUI matter.

On February 17, 2005, respondent and Vogt met at respondent's office. Respondent had Vogt sign a written fee agreement and a section 977 waiver of personal appearance for his arraignment in San Jose on February 28, 2005. Respondent assured Vogt that respondent would appear for Vogt at the arraignment. Respondent knew that Vogt's arraignment was scheduled for 9:00 a.m. in San Jose. The February 17, 2005 meeting was the one and only time that Vogt met with or saw respondent. Subsequent to February 17, 2005, respondent performed no further services of value for Vogt.

Despite having signed the waiver of personal appearance, Vogt decided that he wanted to see what happened in the courtroom on February 28, 2005. Vogt, therefore, showed up in court at about 8:00 a.m. Respondent had a hearing for another client that morning in another court in another county. At no time, however, did respondent inform Vogt or the court in which Vogt's arraignment was to take place that respondent would not be appearing or that he had any other appearances that might interfere with or delay his appearance at Vogt's arraignment. Respondent, in fact, failed to appear for Vogt's arraignment. Thus, the arraignment occurred without Vogt being represented by counsel. After the arraignment, Vogt waited for respondent to show up at the court. Vogt finally left the court at 11:00 a.m. without ever seeing respondent.

Respondent testified in this proceeding that he had two appearances on February 28, 2005. He testified that he had a hearing for another client that morning at the Alameda County court

located in Pleasanton, and then Vogt's arraignment. Respondent, however, never notified anybody that he had a conflict in two courts on February 28, 2005. He testified that he did not try to contact the court in San Jose to inform it that he was running late for Vogt's arraignment, because it is impossible to reach anyone at that time of day. Respondent further claimed that he left Pleasanton at 9:30 a.m. and arrived at court in San Jose at around 10:15 a.m., or perhaps as late as 11:00 a.m.

The State Bar's rebuttal witness, Judge Jean High Wetenkamp, presided at Vogt's arraignment. She testified that her clerks had accessible telephones at which attorneys and non-attorneys could call her department. She further testified that it was normal for clerks to inform the court that "so and so" was running late. In Judge Wetenkamp's experience, attorneys have called the court to say they are running late.

Based on the testimony of Vogt, respondent, and Judge Wetenkamp, the court finds respondent's testimony, that it would have been impossible to contact the court to inform it that he would be appearing late at the Vogt arraignment, not credible. Nor does the court find credible respondent's claim that he intended to appear at the February 28, 2008 arraignment for respondent or his claim that he showed up at the San Jose court that morning.

On February 28, 2005, Vogt left two telephone messages for respondent, asking that respondent communicate with him to explain why he had missed the arraignment hearing. Respondent, however, did not call Vogt to explain that he had missed the arraignment, nor to explain why he was not present at the arraignment.

On March 1, 2005, after not having heard from respondent, Vogt wrote a letter discharging respondent. Vogt mailed and also faxed the letter to respondent that same day. In that March 1, 2005 letter, Vogt specifically requested that respondent immediately return all papers and property to Vogt at his San Jose address which was set forth in the letter. (Ex. 8.)

On March 9, 2005, Vogt filed a complaint against respondent with the State Bar.

The evidence regarding whether respondent ever sent Vogt's file to Vogt is contradictory.

Respondent's exhibit F is a letter dated March 6, 2005 from respondent to Vogt. In that letter respondent says he is in receipt of Vogt's March 1, 2005 letter (i.e., Ex. 8). Respondent states that

he is enclosing respondent's file with the March 6, 2005 letter to Vogt, in accordance with Vogt's March 1, 2005 request for the file.

Francesca Clough, respondent's office manager in 2005, testified in this proceeding on respondent's behalf. She started working for respondent on March 1, 2005. She testified she sent Vogt's file to him as one of her first assignments.

However, on June 7, 2005, attorney Brian Getz (Getz) sent a letter (Ex. 10) to the State Bar on behalf of respondent regarding the complaint filed by Vogt. In that letter Getz states that respondent twice asked Vogt to identify his new attorney so that the file could be sent to the new attorney. The letter states that at no time did Vogt ask that the file be forwarded directly to him.

Thereafter, in exhibit 31, the Statement of Robert Tayac, dated June 2, 2006, respondent asserts that Vogt did not ask for the client file at the time he fired respondent.

Vogt testified in this proceeding that as of the day of his testimony, he still had not received the requested file from respondent. Through April 28, 2005, Vogt remained at the address he had provided in his March 1, 2005 letter to respondent. On May 1, 2005, Vogt moved to Maryland. Thereafter, on September 22, 2005, Vogt again wrote a letter (Ex. 11) to respondent. In that letter, Vogt set forth the history of his requests, both written and verbal, for his file; he again requested that respondent return his file. Vogt also asked respondent to send the file to his Maryland address, which he included in his letter.

Count 1: Failure to Communicate (Bus. & Prof. Code § 6068, Subd. (m))[1]

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

By failing to promptly respond to the numerous messages, which Vogt left for respondent between January 15 and February 3, 2005, regarding the DMV hearing and by failing to send or provide to Vogt the DMV packet that respondent told Vogt that he needed to fill out as soon as possible, by failing to inform Vogt that respondent would not be appearing at Vogt's arraignment or

[1]References to section are to the provisions of the Business and Professions Code.

that he might be late to the arraignment due to another hearing for another client in another county, and by failing to promptly respond to Vogt's requests that respondent explain his failure to appear at the arraignment, respondent failed to promptly respond to client inquiries and failed to inform his client of significant developments in a matter in which he agreed to provide legal services, in willful violation of section 6068, subdivision (m).

Count 2: Failure to Perform with Competence (Rules Prof. Conduct, Rule 3-110(A))[2]

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

Respondent intentionally and recklessly failed to perform legal services with competence, in wilful violation of rule 3-110(A), by willfully failing to perform any services for respondent after February 17, 2005, including his failure to appear at his client's February 28, 2005 arraignment of which he had knowledge.

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

Rule 3-700(A)(2) states: "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."

Respondent failed to provide services to respondent subsequent to February 17, 2005. Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of the fact that in the year 2005, there were only six days business days between February 17 and March 1. Thus, respondent's failure to perform services for six days does not amount to client abandonment or withdrawal from services.

On March 1, 2005, Vogt terminated respondent's services by letter, wherein Vogt also requested the immediate release of all his papers and property. Where a client terminates an attorney's employment and demands the return of the client file, the rule of professional conduct

[2]References to rule are to the current Rules of Professional Conduct, unless otherwise noted.

regarding withdrawal from employment requires the attorney to promptly deliver the client's file. *(In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 374 , 377.) But, as discussed, *supra*, the testimony and documentary evidence regarding whether respondent promptly released Vogt's file is contradictory. There was no showing by clear and convincing evidence that respondent failed to promptly release Vogt's papers to him.

Accordingly, Count 3 is dismissed with prejudice.

C. The James Matter

On March 8, 2004, Kimmie James (James) hired respondent to represent him in seeking relief from a default judgement in a matter entitled *Kathleen Ball v. Kimmie James*, San Francisco Superior Court, case No. CGC-99-303400 (the *Ball v. James* matter). This lawsuit was filed on May 11, 1999; James' default was entered on March 23, 2000; and the default judgement was entered against James on February 6, 2001. James claimed that he had never been served with the lawsuit, which concerned an automobile accident. He maintained that his automobile had been stolen and that he was not the driver of the automobile at the time of the accident.

On March 8, 2004, respondent and James entered into a written fee agreement. Pursuant to that fee agreement, James paid respondent $5,000 to represent him. While the fee agreement authorized no attorney other than respondent to perform services for James, neither did it preclude respondent from contracting with or associating other attorneys for the purpose of delegating work in the matter that was the subject of the fee agreement. Respondent did not explain to or tell James that he might use other attorneys on his case.

On March 9, 2004, respondent appeared at James' debtor examination, which had been previously scheduled. Respondent obtained a continuance of the debtor examination to April 23, 2004. He sought the continuance because he needed time to prepare a motion to set aside the default judgment.

Between March 8 and April 23, 2004, respondent did not file the motion to set aside the default and default judgement; nor did respondent file a substitution of attorney form.

On April 21, 2004, however, respondent hired attorney Marie Appel (Appel) to appear at the April 23, 2004 debtor examination and prepare the motion to set aside the default and default judgement. Appel performed legal work on a contract basis for respondent between February 1 and July 31, 2004. She and respondent worked in the same suite of offices.

Respondent testified that on April 22, 2004, the day before the debtor examination he informed James that there was another attorney who would be working on his case. Respondent claimed that he informed James that the other attorney would be appearing for respondent at the April 23, 2004 examination. According to respondent, James gave his consent to having another attorney do the work and asked to meet the attorney. Respondent further testified that because James wanted to meet the attorney who would be doing the work, James and Appel met on April 22, 2004.

James, however, testified that he did not meet with respondent or Appel on April 22, 2004. James stated that the last time he saw respondent, prior to testifying in this proceeding, was at court on March 9, 2004. James further testified that he did not meet or know of Appel until she appeared at the April 23, 2004 debtor examination.

Appel's testimony provides corroboration for James. Appel testified that there was no meeting between her and James prior to April 23, 2004. She first met James on April 23, 2004, at court, shortly before the debtor's examination. James was surprised to see her because he thought that respondent would be appearing. Appel testified and the court finds that she drafted the motion to set aside the default and default judgment; she also drafted the reply to the plaintiff's opposition to that motion.

The court finds that both Appel and James testified credibly regarding when they first met and the circumstances of their meeting. Conversely, the court finds that respondent's testimony is not credible as to: (1) respondent having informed James that Appel would be representing him at the debtor exam; (2) James consenting to Appel appearing for respondent at the April 23, 2004 examination; and (3) there being a meeting between James and Appel on April 22, 2004.

Respondent never informed James that he could not make the appearance and would be sending someone else in his place. It was at the debtor examination, that James learned for the first time that respondent would not be appearing at that hearing and that respondent had asked Appel to appear for him.

Appel requested a continuance of the debtor examination, but the continuance was denied. The debtor examination proceeded even though Appel had not spoken with or met James prior to the day of the examination, and even though respondent was not present.

On Apri123, 2004, Appel had James sign a declaration regarding the motion to set aside the default. Appel then filed a motion to set aside the default and default judgement on behalf of James. In addition to the assertion that James had not been properly served, the motion raised the issue of James' health as an excuse for his having failed to respond to the lawsuit. The motion, however, did not provide medical records in support of this claim.

On April 27, 2004, respondent filed a substitution of attorney form in the *Ball v. James* matter. Subsequently, Appel contacted James and requested that he meet her in respondent's office. At their meeting, Appel requested that James obtain his medical records. Appel assured James that respondent would appear at the hearing on the motion to set aside the default and default judgement.

On April 30, 2004, respondent filed an Amended Notice of Motion to Set Aside Default and Default Judgement; he set the hearing for June 14, 2004. On May 27, 2004, the attorneys for the plaintiff in the *Ball v. James* matter filed an opposition to the motion to set aside the default and the default judgement. On June 8, 2004, respondent filed a reply to the opposition to the motion to set aside the default and the default judgement.

Respondent did not appear at the June 14, 2004, hearing on the motion to set aside the default. Instead, he sent Appel, who argued the motion.

Respondent testified that he did never informed James that he would not be appearing at the motion to set aside the default and the default judgment, because James had consented and agreed that Appel would handle every aspect of the matter. Yet, during her testimony, when asked why it

was she, who argued the June 14, 2004 motion and not respondent, Appel answered that she did not know.

The court finds respondent's testimony that James was informed of and agreed to Appel handling the entire case not credible. That Appel would not have known there was an agreement for her to handle the entire case, including arguing the motion to set aside the default and default judgment, if such an agreement had existed, is implausible. Yet, as set forth, *supra*, Appel did not know why respondent was not arguing the motion to set aside the default and the default judgment. Moreover, James testified that he spoke with respondent after the hearing on the motion to set aside the default, asking why respondent had not appeared at the hearing. James's question was not that of someone who agreed to have Appel appear in lieu of respondent. The court finds James' testimony credible.

On June 14, 2004, Appel requested a continuance of the hearing on the motion to set aside the default, in order that the still missing medical records could be obtained. Appel's request was denied by the court. Subsequently, the court denied the motion to set aside the default and the default judgement. James testified that medical records arrived about two days after the hearing.

After the motion was denied, Appel explained to James what having his motion denied meant. Appel explained that he could appeal but it had to be soon.

Respondent testified that he and James had a phone conversation in which he informed James that his motion had been denied. Respondent also testified that he wrote a letter to James about 10 days after the hearing on the motion in which he again informed James that the motion had been denied and that he would not represent James in an appeal of the matter.

About two weeks after losing the motion, James requested arbitration regarding a fee dispute. The arbitration took place in May 2005. Respondent, however, did not participate in the arbitration. When he tried to file his briefs for the arbitration he was informed that they were late and would not be accepted. James received an arbitration award in May 2005.[3]

[3]Business and Professions Code section 6204, subdivision (e) states, " Except as provided in this section, the award and determinations of the arbitrators shall not be admissible nor operate as collateral estoppel or res judicata in any action or proceeding. Section 6204, subdivision (e)

After the May 2005 arbitration, James called respondent and asked respondent when he would be getting the money that had been awarded to him in the arbitration. Respondent told James that the award was non-binding and James had to take further steps to collect. On September 7, 2005, James sent a letter of complaint to the State Bar regarding respondent. Respondent was contacted by the State Bar in October 2005, and informed that it had opened an investigation, based on James' complaint. (Ex. 25.) After being informed of the State Bar investigation, respondent sent a $5,400 check to James in November 2005.

Count 4: Failure to Perform with Competence (Rules Prof. Conduct, Rule 3-110(A))

The State Bar alleges that by failing to file the substitution of attorney form and the motion to set aside the default promptly, respondent failed to act with reasonable diligence, thereby failing to perform legal services with competence. Respondent was retained in March 2004 to seek relief from the default judgment that had been entered against his client three years prior. The substitution of attorney form and the motion to set aside the default on behalf of his client were filed in April 2004. The State Bar offered no clear and convincing evidence that showed the denial of the motion to set aside the default was due to the timing of the filing of the moving papers or anything lacking in the moving papers. Nor was there evidence offered to show that the oral argument in support of James' motion to set aside the default was lacking in any way.

The State Bar also alleges that by failing to obtain certain medical records of his client in time for the hearing on the motion to set aside the default, respondent failed to perform with competence. First, the State Bar offered no evidence of what, if any, steps respondent could or should have taken to speed up the arrival of the medical records. The medical records had already been requested of Kaiser; they were received from Kaiser two days after the hearing. At the hearing on the motion to set aside the default, contract attorney Appel requested that the court grant a continuance in order to obtain James' medical records; but, the court denied the request. Moreover,

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only precludes the admission into evidence of the award itself or the determinations of the arbitrator in any proceeding. It does not preclude the admission of evidence, which would show that an arbitration occurred, when it occurred, or that an award was made.

the evidence offered is not clear and convincing that the medical records could or would have changed the outcome of the hearing on the motion to set aside the default.

The State Bar further alleges that respondent failed to discuss the legal options available to James after the motion to set aside the default and default judgment was denied. But, after the motion was denied, respondent's contract attorney, Appel, did have a conversation with James in which she explained to him what it meant to have the default motion denied. She also explained to James that he could appeal the court's ruling; she told him the appeal had to be soon. Respondent telephoned James and told him that his motion had been denied. About 10 days after the hearing on the motion, respondent also wrote to James, again informing him that his motion had been denied. Thus, the evidence is not clear and convincing that James did not have his legal options explained to him.

That respondent had a contract attorney file pleadings and appear for respondent without his client's consent does not amount to a per se failure to perform with competence. "The courts long ago took judicial notice that in California it is custom for attorneys... to hire attorneys as employees to assist in performing legal work for which the employing attorney ... has been retained.[Citation] We could just as confidently take judicial notice that it is also the custom in California for attorneys of record to associate independent attorneys or firms to assist in that representation. Although the client is not liable for the expense of the associated counsel absent an express agreement [citations], it appears that the attorney of record is authorized to delegate work to associated counsel, if it is not at the client's expense [citation]." (*Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 446 fn. 3.) Thus, since an attorney of record is authorized to delegate work to associated counsel, the fact that respondent hired attorney Appel to draft and file pleadings and appear for him without the client's consent, in and of itself,[4] does not amount to a failure to perform. (But, see count 5, *infra*, regarding the failure to communicate.)

[4]There was no clear and convincing evidence presented in this proceeding to show that Appel failed to competently perform the legal services that respondent delegated to her. Nor was their evidence offered to show that respondent failed to adequately supervise Appel.

Therefore, absent clear and convincing evidence, the court does not find that respondent failed to competently perform legal services in violation of rule 3-110(A), as alleged in count 4.

Accordingly, count 4 is hereby dismissed with prejudice.

Count 5: Failure to Communicate (Bus. & Prof. Code § 6068, Subd. (m))

By failing to explain to or tell James that he might use other attorneys in the case, by failing to inform James that he would not be appearing at the April 23, 2004 debtor examination and that another attorney would be filing the motion to set aside the default and appearing on his behalf at the April 23, 2004 debtor examination, by failing to inform James that he would not be drafting the motion to set aside the default and that another attorney would be drafting that motion and the reply to the plaintiff's opposition, as well as arguing the motion, and by failing to inform James that he would not be appearing at the June14, 2004 hearing on the motion to set aside the default and default judgement and that another attorney would be appearing on his behalf, respondent failed to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

Count 6: Improper Withdrawal from Employment (Rule 3-700(A)(2))

The State Bar alleges that upon termination of employment respondent failed to take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, by failing to promptly return unearned fees. Specifically, the State Bar alleges that respondent did not earn his fees based on: (1) respondent's failure to *personally* perform the legal services for which he had been hired; (2) respondent's failure to obtain his client's *consent* to have another attorney perform services for him; and (3) respondent failure to *advise* his client that another attorney would be performing services for him.

The State Bar's contends that because respondent did not personally perform certain legal services, but rather delegated the work to his contract attorney, respondent did not earn his fees. The State Bar offered no law or facts to support its contention. Nor did the State Bar offer clear and convincing evidence to show that the fees were not earned because respondent's contract attorney

failed to competently perform the legal services in James' matter that were delegated to her. Nor was evidence offered to show that respondent failed to adequately supervise his contract attorney.

Moreover, as discussed, *supra*, the State Bar provided no evidence to support its contention that respondent was required to obtain his client consent prior to delegating work to other counsel in the client matter. (*Streit v. Covington & Crowe*, *supra*, 82 Cal.App.4th at p. 446 fn. 3.) Thus, the State Bar failed to show by clear and convincing evidence that by not obtaining his client's consent to use other counsel to assist in performing the legal work for which he was retained, respondent failed to earn the fee he had received from his client. In count 6, the State Bar also contends that respondent failed to earn the fee he received from respondent by failing to advise his client that another attorney was performing services for him. However, the finding in count 5, that respondent is culpable of failure to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services, is based on the same misconduct as alleged in count 6, i.e., respondent's failure to advise his client that another attorney would be performing services for him and would be appearing at hearings in his stead. Thus, these charges in count 6, are duplicative of those in count 5.

It is generally inappropriate to find redundant charged allegations. The appropriate level of discipline for an act of misconduct does not depend on how many rules of professional conduct or statutes proscribe the misconduct. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [There is "little, if any, purpose served by duplicative allegations of misconduct."].)

Accordingly, the court rejects a separate finding of culpability in count 6, under rule 3-700(A)(2), based on that same misconduct as that alleged in count 5.

The State Bar further alleges in count 6 that upon termination of employment, respondent failed to take reasonable steps to avoid prejudice to his client by failing to promptly return unearned fees pursuant to an arbitration award. In this proceeding, evidence was offered which showed that respondent's client requested arbitration regarding a fee dispute. Respondent did not participate in the arbitration. The client received an arbitration award in May 2005. The client phoned respondent to find out when he would be receiving payment based on the award. Respondent informed the

client that the award was non-binding and the client would need to take further steps to collect. Thereafter, the client filed a complaint with the State Bar regarding the respondent. In October 2005, the State Bar contacted the respondent and informed him that it opened an investigation based on the client's complaint. In November 2005, respondent sent a check to the client for $5,400.

But, the State Bar failed to show by clear and convincing evidence that respondent did not earn the fee he had received from his client. Section 6204, subdivision (e) provides that "evidence of the arbitration award and the determinations of the arbitrators "shall not be admissible nor operate as collateral estoppel or res judicata in any action or proceeding." Thus, neither the arbitration award, nor the determinations of the arbitrators were admitted into evidence in this proceeding. Yet, the State Bar offered no independent evidence to show that respondent failed to pay unearned fees.

Additionally, the fact that the motion to set aside the default judgment was unsuccessful is not evidence that respondent did not earn the fee he received for representing his client.

Thus, the court finds that the State Bar failed to show by clear and convincing evidence that respondent failed to earn the fee he received. Accordingly, count 6 (rule 3-700(A)(2)) is hereby dismissed with prejudice.

C. The Blissett Matter

In May 2004, Caroline Blissett (Blissett) hired respondent to represent her in a wrongful death action stemming from the shooting death of her son, D'Angelo Scott. Blissett's son was shot on January 23, 2004, by a security guard for the San Francisco Housing Authority.

On July 20, 2004, respondent filed a notice of claim with the San Francisco Housing Authority (the Housing Authority), which was denied on August 18, 2004. In the August 18, 2004 letter, which was sent to respondent, in addition to denying Blissett's claim, it was stated that Blissett had six months from the date of the letter to file a lawsuit against the Housing Authority. On August 22, 2004, respondent met with Blissett, informing her that the claim against the Housing Authority had been denied; he also gave her a copy of the August 18, 2004 denial of claim letter. Respondent stated that he was going to sue the Housing Authority.

Between May through October 2004, respondent conducted some research and caused some investigation to be conducted regarding the wrongful death action he had agreed to undertake on behalf of Blissett.

From time to time respondent met with Blissett and gave her some updates on her case. As evidenced by Exhibit Y, respondent met with Blissett during the period from May 2004 through September 2004. Thereafter, respondent started meeting Blissett on an infrequent basis. In March 2005, respondent had two meetings with Blissett. He then met with her on June 28, 2005 and again on July 7, 2005.

Respondent testified that he believed that his client had "cognitive" problems. Yet, the only document that respondent drafted and provided to his client was the letter of disengagement from legal representation. In 16 months, respondent never provided Blissett with any written updates regarding her case. Respondent testified that at the June 28, 2005 meeting, he decided that Blissett was not going to be a good witness; therefore, he did not want to take the case. There was also a meeting, between respondent and Blissett in which he informed her that there was a two year statute of limitations regarding the filing of a wrongful death action, which meant that if a wrongful death action were to be filed it must be done before January 23, 2006.

Thus, it took respondent over one year to evaluate the case and make a determination that he would not represent Blissett in pursuing a wrongful death action. Respondent filed no wrongful death action against the security guard who shot his client's son, nor did he file a wrongful death action against the security agency. Respondent took no substantive action to advance a wrongful death action on behalf of his client and performed no service of benefit to his client.

On September 23, 2005, 16 months after he was retained by Blissett, 11 months after respondent conducted or caused to be conducted investigation work regarding the matter for which he had been retained, and 13 months after receiving the Housing Authority's August 18, 2004 letter, which stated that Blissett had six months from the date of that letter to file a lawsuit against the Housing Authority, respondent sent Blissett a letter of "[d]isengagement from legal representation." (Ex. 15.) Respondent merely stated that he had decided not to represent Blissett any further. His

letter provided no reason for his withdrawal. He provided her with her file. He wrote, "Time is critical in a case such as yours. There are many deadlines and statutes of limitations, which if not met, will preclude you from pursuing your action. It is important that you obtain an attorney without delay if you are interested in pursuing a lawsuit. . . ." Respondent did not inform Blissett that the deadline for filing the lawsuit against the Housing Authority, as set forth in its August 18, 2004 letter, had passed without respondent filing suit against the Housing Authority.

Thus, in his September 23, 2005 disengagement letter, respondent did not inform Blissett that the deadline for filing the lawsuit against the Housing Authority, as set forth in its August 18, 2004 letter, had passed without his having filed suit against the Housing Authority. He also did not advise her of the dates by which a wrongful death action had to be filed. Despite respondent's belief that Blissett had cognitive problems, he never informed her in writing of the dates by which a wrongful death action had to be filed.

Count 7: Failure to Communicate (Bus. & Prof. Code § 6068, Subd. (m))

By telling Blissett that he would be filing a lawsuit against the San Francisco Housing Authority, and thereafter, by failing to inform her that the deadline for filing the lawsuit, as set forth in the Housing Authority's August 18, 2004 letter had passed without his having filed the lawsuit, and by terminating his employment with his client, whom he believed to have cognitive problems, without ever informing her in writing of the dates by which a wrongful death action had to be filed, respondent failed to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

Count 8: Failure to Perform with Competence (Rules Prof. Conduct, Rule 3-110(A))

By failing to file a lawsuit against the Housing Authority as he told his client he would do, by failing to file a wrongful death action at any time during his representation of his client, and by having performed no service of benefit to his client during the 16 months he represented her, respondent, intentionally, recklessly, and repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).

Count 9: Moral Turpitude (Bus. & Prof. Code, § 6106)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty, or corruption.

On September 23, 2005, respondent sent Blissett a letter terminating his services. The only substantive information he provided her about her case was to tell her "[t]ime is critical in a case such as yours" and "[t]here are many deadlines and statutes of limitations, which if not met, will preclude you from pursuing your action." Respondent did not disclose what those statutes and deadlines were. Moreover, respondent purposely implied that the deadlines had not yet passed, although he knew that the deadline, set forth in the Housing Authority's August 18, 2005 letter regarding the filing of a lawsuit against the Housing Authority, had passed. Concealment is an act of dishonesty, involving moral turpitude. (*Crane v. State Bar* (1981) 30 Cal.3d 117, 124; *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 125.) By failing to disclose that the deadline, which was set forth in the Housing Authority's August 18, 2004 letter had passed, respondent willfully engaged in an act of concealment and dishonesty in violation of section 6106.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[5]

The absence of a prior disciplinary record over many years of practice is a mitigating circumstance. (Std. 1.2(e)(i).) Respondent was admitted to the practice of law in December 1994 and has no prior record of discipline. While the nine years and three months of trouble-free practice at the time of respondent's misconduct in 2004, is a mitigating factor, it does not merit significant weight. (Cf. *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 295.)

[5]All further references to standards are to this source.

Respondent testified as to his pro bono work and community service. He testified that he takes three to five pro bono cases per year and also takes reduced fee cases. He also attested to having volunteered in excess of 2000 hours on behalf of the United Indian Nation.

Respondent presented 12 mitigation witnesses; three of whom are attorneys, some of whom are former girlfriends, some of whom are friends and former co-workers. (Standard 1.2(e)(vi).) The witnesses included: Nors Davidson, Richard Shikman, Brian Larsen, Alan McCann, Christine McCann, Douglas Kunkel, Nora Kristin Kunkel, Sally Gallegos, Cynthia Val Adams, Katherine Tarantino, Michael Zurcher, and Deonne Kunkel. Favorable character testimony from employers and attorneys are entitled to considerable weight. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541,547.) The witnesses all attested to respondent's good moral character; they believe respondent to be honest and trustworthy. Nors Davidson (Davidson), has been an attorney for six years and has been employed by respondent since 2005. Prior to being employed by respondent, Davidson was employed by the San Francisco's public defender's office. Respondent praised respondent's legal skills and testified that he greatly admired respondent.

Richard Shikman (Shikman), a criminal defense attorney, testified that he met respondent about 18 to 20 years ago, when respondent was a police officer. Respondent and Shikman are now friends. Respondent gave Shikman a brief statement regarding the allegations involved in this matter; Shikman read the parties' pre-trial briefs. He testified that respondent is a good lawyer, has impeccable character, and that his reputation for honesty in the community is excellent.

Alan McCann (McCann), a former police officer, met respondent when they worked for the San Francisco Police Department (SFPD). Since 2007, McCann has been working as an investigator for respondent. He testified that respondent was honest and praised respondent's integrity. McCann said he would do anything for respondent.

Douglas Kunkel, works in computer software development. Kunkel testified that he read the pre-trial statements. He knows respondent through his church and because eight years ago respondent dated his daughter for two years. Kunkel testified that respondent is kind to a fault, very generous, and always straightforward and honest.

Sally Gallegos (Gallegos) is the executive director for the United Indian Nation, a Bay Area non-profit, that helps native Americans. Respondent, who has been involved with the United Indian Nation since he was a youth, has been on the Board of Directors for 15 years. He is the longest serving board member. Respondent has not accepted the stipend paid to members of the Board. Moreover, he does pro bono work as an attorney for the United Indian Nation. Gallegos testified that respondent is always available the Native American community. She read the pre-trial statements in this matter and found them not to be consistent with the respondent she knows.

Katherine Tarantino (Tarantino) started dating respondent two and one-half years ago, but she is no longer respondent's girlfriend. She testified that respondent is an honorable man, a wonderful partner, and very supportive. He is letting her stay at his house even though they are not together. She read the pretrial statements of the parties before testifying and was given the NDC to read in court. She testified that if the charges in the NDC were proven true, it would not change her mind about respondent. Michael Zurcher, a sergeant with the SFPD, is respondent's friend. He testified that respondent is a straightforward, solid individual, who always does what he says he is going to do. After reading the NDC, Zurcher testified that if the allegations are proven true, his opinion of respondent would not change.

The testimony offered by many of respondent's character witnesses, however, did not demonstrate an awareness of the full extent of respondent's misconduct Such testimony is insufficient to award the strongest mitigation credit, in that it fails to meet the requirement that a member's character witnesses must be aware of the full extent of the member's misconduct.

B. Aggravation

The record establishes there is one aggravating factor. (Std. 1.2(b).)

Respondent committed multiple acts of wrongdoing, including failing to perform services, failing to communicate, and committing an act of dishonesty. (Std. 1.2(b)(ii).)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible

professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.)

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.3 , 2.4(b), and 2.6(a) apply in this matter.

Standard 2.3 provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or of another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law."

Standard 2.4(b) provides that culpability of a member of willfully failing to perform services in an individual matter or matters, not demonstrating a pattern of misconduct, or culpability of a member of willfully failing to communicate with a client must result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6(a) provides for discipline ranging from suspension to disbarment for violations of sections 6068, subdivision (m), depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3.

Respondent has been found culpable of misconduct in three client matters , including failing to communicate, failing to competently perform legal services, and an act of dishonesty involving concealment. Respondent, argues that discipline is not warranted and that the entire matter should be dismissed. Assuming that respondent is actually culpable of all nine charges of misconduct, the State Bar requests that respondent be actually suspended for 90 days. The State Bar cites the following cases, among others, in support of the position that an actual suspension is appropriate: *Matthew v. State Bar* (1989) 49 Cal.3d 784, [60 day actual suspension for three failures to perform]; *Stuart v. State Bar* (1985) 40 Cal.3d 838 [30 day actual suspension for failure to perform and improper withdrawal in one matter]; *Franklin v. State Bar* (1986) 41 Cal.3d 700 [45 days actual suspension for two failure to perform and misrepresentation]; *Gold v. State Bar* (1989) 49 Cal.3d 908 [30 day actual suspension for two failures to perform and misrepresentation].

The court finds *Matthew v. State Bar, supra*, 49 Cal.3d 784; *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, and *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831 to be instructive.

In *Matthew v. State Bar*, the attorney was actually suspended from the practice of law for 60 days with a three-year stayed suspension and a three year probation for his failure to perform legal services and failure to return unearned fees in three client matters. The court found no mitigating circumstances. In aggravation, the court found that respondent significantly harmed his clients. While the court did not specifically state that it was finding respondent's multiple acts as an aggravating circumstance, it did discuss that his misconduct was not a single isolated incident and therefore merited actual suspension.

In *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, the attorney who had no prior record of discipline in 11 years of practice was actually suspended for 30 days with a two-year stayed suspension and a two-year probation for his abandonment of two clients and

failure to return unearned fees of $2,000 to one client. Aggravating factors included multiple acts of misconduct, client harm, and failure to cooperate with the State Bar. The instant case merits greater discipline than *Kennon*, because it involved three clients and respondent's misconduct was more extensive than that of the attorney in *Kennon*. Respondent, herein, also engaged in an act of moral turpitude. *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831, discipline consisting of 18 months stayed suspension, two years probation and 90 days actual suspension was imposed for mishandling two client matters. The attorney was found culpable of failing to perform, failing to communicate, failing to return client files, improperly withdrawing from representation, violating a court order, failing to maintain respect for the court, and failing to cooperate with the disciplinary investigation. No mitigating circumstances were found. Client harm was an aggravating factor. The court did not discuss multiple acts of misconduct as an aggravating factor, but clearly the attorney's misconduct did not consist of only a single act of misconduct. Although *Greenwood* involved only two client matters, the attorney's misconduct was far more extensive than that of the respondent herein. While there were no mitigating circumstances, client harm was found as an aggravating factor in *Greenwood*. In the instant matter, not only are there fewer aggravating circumstances, but there is mitigation. Unlike the respondent, who has participated in these disciplinary proceedings, the attorney in *Greenwood* defaulted in his disciplinary proceedings. Thus, the instant case merits lesser discipline than *Greenwood*.

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) Respondent's failure to competently perform legal services, failure to communicate, and his act of dishonesty toward a client reflect a blatant disregard of professional and ethical responsibilities. A departure from the standards would not be justified.

In view of respondent's misconduct, the case law, the aggravating evidence, and the mitigating factors, the court concludes that, like *Matthew*, placing respondent on an actual suspension for 60 days would be appropriate to protect the public and to preserve public confidence in the profession.

VI. Recommended Discipline

Accordingly, the court hereby recommends that respondent **Robert A. Tayac** be suspended from the practice of law for one year, that said suspension be stayed, and that respondent be placed on probation for 18 months on the following conditions:

1. Respondent must be actually suspended from the practice of law during the first 60 days of probation.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.
3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in San Francisco, his current office address and telephone number or, *if no office is maintained,* an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in San Francisco, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.
4. Respondent must report, in writing, to the State Bar's Office of Probation in San Francisco no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

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

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

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

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

6. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, rule 3201.) If respondent resides in another jurisdiction and is unable to attend State Bar Ethics School, he may seek authorization to attend a comparable remedial education course offered through a certified provider in the other jurisdiction by obtaining the prior approval of the Office of the Chief Trial Counsel and final approval of the State Bar Court. (Rules Proc. of State Bar, rule 290.)

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

VII. Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: August 18, 2008

LUCY ARMENDARIZ
Judge of the State Bar Court