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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **KRISTOFER W. BIORN**, **Member No. 160100,** A Member of the State Bar.	)	**Case No. 05-O-02466-LMA** **DECISION**

I. Introduction

Fee disputes are a proper subject of arbitration but they do not belong in the State Bar's disciplinary system. "This court does not sit in disciplinary matters as a collection board for clients aggrieved over fee matters." (*Bach v. State Bar* (1991) 52 Cal.3d 1201, 1207; Bus. & Prof. Code, § 6200 et seq.)

In this contested disciplinary proceeding, an aggrieved client complains that he had to pay respondent **KRISTOFER W. BIORN** $25,000 in legal fees and costs to handle two litigation matters against his former fiancee when the client accepted a settlement valued at only $35,000. As a result, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) charged respondent with seven counts of professional misconduct, including (1) failing to avoid interests adverse to a client; (2) failing to maintain client funds in trust account; (3) failing to promptly pay client funds; (4) misappropriation; (5) failing to refund unearned fees; (6) collecting an unconscionable fee; and (7) committing an act of moral turpitude.

Of the seven charged acts of misconduct, the court finds, by clear and convincing evidence, that respondent is culpable of one act of professional misconduct – failing to maintain the disputed portion of trust funds in the client trust account for about five months. The court dismisses the remaining six counts with prejudice.

The State Bar requests that respondent be actually suspended while respondent urges an admonition. In view of respondent's minor trust account violation, compelling evidence in mitigation which includes no prior record of discipline in 12 years of practice, significant character witnesses and cooperation with the State Bar, and an uncharged violation of failing to provide a written fee agreement, the court has determined that a private reproval is the appropriate level of discipline.

II. Pertinent Procedural History

The State Bar initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on February 7, 2007. The State Bar was represented by Deputy Trial Counsel Manuel Jimenez. Respondent was represented by attorney Jerome Fishkin.

Trial was held on November 13 and 14, 2007. The court took this case under submission for decision on November 14, 2007.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the evidence and testimony introduced at this proceeding, in large part on credibility determinations and on the parties' stipulation as to facts.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on November 30, 1992, and since that time has been a member of the State Bar of California.

B. The Heinrichs Matter

After an acrimonious breakup in June 2003, Kenneth Heinrichs' former fiancee, Cynthia Schroeder, sought to evict Heinrichs from the house they lived in by filing an unlawful detainer action in *Schroeder v. Heinrichs*, Santa Clara County Superior Court case No. DC 03-440176. Even though they purchased the house together, its title was in Schroeder's name alone. Heinrichs, a general building contractor for about 20 years, hired respondent to represent him in the unlawful detainer action and a related litigation matter to quiet title and for quantum meruit.

Heinrichs proposed to pay respondent's legal fees on a contingency basis but respondent declined. Respondent advised Heinrichs that litigation could be expensive and that he did not

control the opposing party. They then agreed to respondent's standard hourly fee of $285 for his legal services.

On June 20, 2003, Heinrichs paid respondent $4,500 as advanced fees. At the time he was hired, respondent knew that the attorney fees would exceed $1,000. But he did not provide Heinrichs with a written fee agreement.

On July 16, 2003, after filing an answer to the unlawful detainer action on Heinrichs' behalf, respondent filed a complaint to quiet title and for quantum meruit against Schroeder to recover Heinrichs' claimed share of the value of the house (the quantum meruit action) in Santa Clara County Superior Court, case No. 1-03-CV-001085. He also filed a request to consolidate the unlawful detainer and the quantum meruit actions. But it was denied. On the same day, the unlawful detainer trial commenced and resulted in a judgment by stipulation. This judgment required Heinrichs to move out of the residence and to pay Schroeder the sum of $4,624.12, which was stayed pending resolution of the quantum meruit action.

Meanwhile, respondent continued to work diligently on Heinrichs' behalf in the quantum meruit action and billed Heinrichs monthly for his hourly fees plus costs.

On October 1, 2003, respondent served form interrogatories, requests for production of documents, and a notice of deposition of Schroeder. On November 18, 2003, respondent attended a case management conference. On January 15, 2004, respondent took the deposition of Schroeder.

By the end of December 2003, Heinrichs owed respondent $3,285.34 in fees and costs. On January 13, 2004, Heinrichs paid respondent an additional $5,000 toward his fees.

Subsequently, respondent requested additional payment for his services, continued to send monthly bills to Heinrichs for hourly fees and costs and continued to render legal services.

For examples, respondent attended several case management conferences (April 8, May 25, August 10, and November 18, 2004) and Heinrichs's deposition (May 24, 2004). On August 4, 2004, the parties agreed to mediate the quantum meruit action.

Meanwhile, the legal fees were mounting. Respondent and Heinrichs then agreed to an exchange of services as a form of partial fee payment. In August 2004, they agreed that Heinrichs would convert respondent's basement into a wine cellar. Heinrichs also offered to remodel a closet in respondent's home and to perform other remodeling services for respondent. There was no written contract for the wine cellar project. They agreed that respondent would apply Heinrichs' bill as an offset to respondent's outstanding bill for legal services. They also agreed that Heinrichs would charge respondent $80 an hour.

Heinrichs began working on the wine cellar in August 2004 and completed the work in the same month.

On October 1, 2004, respondent and Heinrichs attended the mediation. Heinrichs and Schroeder agreed to settle all of their outstanding disputes. The settlement required Schroeder to pay Heinrichs $30,000 and to vacate the unlawful detainer judgment of $4,624.12, resulting in a settlement valued at almost $35,000.

On December 1, 2004, Schroeder's attorney mailed respondent an executed settlement agreement and a $30,000 settlement check.

On December 3, 2004, respondent sent Heinrichs a bill for $15,267.41 in hourly fees and costs.

On December 6, 2004, respondent and Heinrichs met in person. Heinrichs presented his bill for work performed on the wine cellar for $4,480, which they agreed would be fully credited against the legal bill. They then discussed additional billings and credits. They agreed that respondent would pay himself the sum owed him for outstanding legal bills and pay the difference to Heinrichs. Also, on that same day, respondent deposited the $30,000 settlement proceeds into his firm's client trust account at Private Bank of the Peninsula.

Apparently, the trust account had a monthly limit on the number of checks to be issued and that limit had been met for that month. Thus, on December 13, 2004, respondent transferred $30,000 from the client trust account into his firm's business account at Bridge Bank in order to issue a check to pay Heinrichs and the firm, as agreed upon on December 6.

Respondent had sent Heinrichs a total of 13 monthly statements between November 2003 and December 2004. Each statement clearly identified the legal services rendered and the costs and expenses incurred. By December 7, 2004, the total outstanding bill was $10,987.16. The settlement proceeds were thus disbursed as follows:

Settlement	$30,000.00
Outstanding legal bill	– $10,987.16
Balance to Heinrichs	$19,012.84

On December 14, 2004, Heinrichs and respondent sent letters to each other, and they each received the other's letter. Among other things, respondent's letter included a check to Heinrichs in the amount of $19,012.84. But Heinrich's letter demanded the entire $30,000. By the time respondent received Heinrich's letter, respondent had already disbursed the $19,012.84 to Heinrichs.

On December 20, 2004, Heinrichs sent respondent another letter asking for the remaining funds of $10,987.16.

On December 29, 2004, respondent sent Heinrichs a letter acknowledging receipt of Heinrichs' December 14, 2004 letter. Respondent offered to settle their dispute by waiving the mediator's $1,200 fee that was inadvertently omitted in previous bills and reimbursing Heinrichs $1,500. In other word, respondent offered to give Heinrichs an additional deduction in the bill valued at $2,700.

But Heinrichs rejected the offer. On January 12, 2005, he sent respondent another letter again asking for the remaining funds of $10.987.16. Heinrichs also asserted that it was his understanding that all funds must be released and if there were any attorney fees due, which Heinrichs disputed, those fees had to be billed separately and not taken from the $30,000 settlement funds.

On January 28, 2005, respondent sent Heinrichs a letter acknowledging receipt of Heinrich's January 12, 2005 letter and offering to discuss with Heinrichs this matter further.

Instead of further discussion, on March 16, 2005, Heinrichs filed a complaint with the State Bar regarding this fee dispute. On May 3, 2005, the State Bar wrote to respondent regarding the complaint.

On May 15, 2005, respondent issued a check from his firm's business account to his client trust account in the amount of $10,987.16, on account of Heinrichs. The amount represented the disputed portion of the settlement. Those funds remain in trust.

On June 17, 2005, respondent served Heinrichs with a notice of right to fee arbitration.

Heinrichs asked respondent that fee arbitration be delayed until this disciplinary proceeding is concluded. Respondent agreed.

Count 1: Avoiding Interests Adverse to a Client (Rules Prof. Conduct, Rule 3-300)[1]

Rule 3-300 provides that an attorney must not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless the transaction or acquisition is fair and reasonable to the client, is fully disclosed to the client, the client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to do so, and the client thereafter consents in writing to the transaction or acquisition.

The State Bar alleges that respondent entered into a business transaction with Heinrichs when they decided to apply Heinrichs' wine cellar services of $4,480 toward respondent's legal services without complying with the requirements of rule 3-300.

Respondent argues that rule 3-300 does not apply to this type of bartering transaction.[2]

The court agrees with respondent. Rule 3-300 is intended to apply where the attorney wishes to obtain an interest in client's property in order to secure the amount of the attorney's past due or future fees. Here, respondent did not acquire any ownership, possessory, security or other pecuniary interest adverse to Heinrichs. (See *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439 [no violation where respondent did not acquire an interest in

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[1]References to rules are to the Rules of Professional Conduct, unless otherwise noted.

[2]Barter is the exchange of one commodity for another without the use of money. (Black's Law Dict. (7th ed. 1999) p. 145, col.1.)

the client's property].) In a goodwill gesture, respondent was willing to offset Heinrichs' mounting legal bill with Heinrichs' contractor services. The bartering was mutual, fair and reasonable; respondent clearly did not obtain any interest in Heinrichs' property or enter into any improper business transaction with the client. Thus, respondent may accept Heinrichs' services without complying with rule 3-300. Therefore, the equal exchange of the value of legal services for the value of wine cellar building services in the amount of $4,480 between respondent and his client does not violate rule 3-300. Count 1 is hereby dismissed with prejudice.

Count 2: Failing to Maintain Client Funds in Trust Account (Rules Prof. Conduct, Rule 4-100(A))

Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith. In the case of funds belonging in part to a client and in part presently or potentially to the attorney or the law firm, the portion belonging to the attorney or law firm must be withdrawn at the earliest reasonable time after the attorney's interest in that portion becomes fixed. But when the right of the attorney to receive a portion of trust funds is disputed by the client, the disputed portion must not be withdrawn until the dispute is finally resolved.

The State Bar alleges that respondent violated rule 4-100(A) by transferring the $30,000 from the client trust account to his business account, by failing to maintain the funds in the client trust account and by failing to reimburse the client trust account with the disputed funds for about five months.

Respondent argues that once the funds were properly withdrawn from the trust account, there was no duty to restore the disputed funds to the account.

Pursuant to rule 4-100(A), the portion belonging to respondent must be withdrawn at the earliest reasonable time after his interest in that portion became fixed and as agreed upon on December 6. Thus, within a week, based on his understanding that Heinrichs had authorized him to disburse the funds, respondent properly transferred the $30,000 to his business account on

December 13 so that he may pay Heinrichs's share of the settlement proceeds and his firm's outstanding bill.

Unbeknownst to respondent and despite their agreement of disbursement, Heinrichs disagreed with respondent's right to receive a portion of the proceed and demanded the entire sum of $30,000. When respondent learned of the fee dispute, he should have redeposited the disputed portion into the client trust account until the conflict was resolved. Instead, he tried to settle the dispute by offering to deduct $2,700 from the bill, albeit in good faith.

In May 2005, when he finally realized that the client refused to negotiate and had filed a complaint against him with the State Bar regarding this fee dispute, respondent immediately redeposited the disputed portion into the client trust account. The funds have remained in the account.

Nevertheless, the fact that respondent did not initially restore the disputed portion of the fund to the trust account and those funds were not maintained in the account for about five months, respondent technically violated rule 4-100(A), albeit a minor violation.

Count 3: Failure to Promptly Pay Client Funds (Rules Prof. Conduct, Rule 4-100(B)(4))

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver any funds or properties in the possession of the attorney which the client is entitled to receive.

The State Bar alleges that respondent failed to pay promptly any funds in his possession which Heinrichs was entitled to receive by failing to promptly remit the entire $30,000 settlement to the client and by misappropriating $10,987.16 of those funds.

On the contrary, respondent had promptly, within a week, disbursed $19,012.84 which Heinrichs was entitled to receive. The remaining balance of $10,987.16 is a disputed sum, which the client was not entitled to receive promptly. Furthermore, respondent did not misappropriate the funds as they remain in the account. Therefore, there is no clear and convincing evidence that respondent violated rule 4-100(B)(4). Count 3 is hereby dismissed with prejudice.

Count 4: Moral Turpitude (Bus. & Prof. Code, § 6106)[3]

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

The State Bar alleges that by misappropriating the disputed portion of the funds, respondent committed an act involving moral turpitude, dishonesty or corruption in willful violation of section 6106.

As found in count 3, respondent did not misappropriate any client funds. Thus, he did not commit any act involving moral turpitude in willful violation of section 6106. Count 4 is hereby dismissed with prejudice.

Count 5: Failure to Return Unearned Fees (Rules Prof. Conduct, Rule 3-700(D)(2))

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund unearned fees.

The State Bar alleges that by failing to deliver the disputed portion to the client, knowing that the client did not authorize him to take the funds, disputed his attorney fees, and had exercised his right under section 6148 to void any fee agreement that existed between respondent and the client, respondent willfully failed to refund promptly any part of a fee that has not been earned.

Under section 6148, if it is reasonably foreseeable that the total expense to a client, including attorney fees, will exceed $1,000, the contract for services must be in writing. Failure to comply with a written fee contract renders the agreement voidable at the option of the client, and the attorney will be entitled to collect a reasonable fee.

Here, there is no allegation or evidence that the attorney fees of $10,987.16 were not earned. But rather, the client disputed respondent's right to receive these funds. Although respondent did not provide an initial written fee contract to Heinrichs, he diligently performed legal services for about 18 months, charging the agreed hourly rate of $285, and his 13 monthly

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

invoices clearly identified the services rendered and the costs and expenses incurred. Even if Heinrichs voided the oral fee agreement of $285/hour, respondent is entitled to collect a reasonable fee for his services in the two litigation matters. Therefore, since the fee dispute has not been resolved and the unearned amount, if any, has not been determined, there is no clear and convincing evidence that respondent willfully failed to refund promptly any part of a fee that has not been earned in willful violation of rule 3-700(D)(2). Count 5 is hereby dismissed with prejudice.

Count 6: Unconscionable Fee (Rules Prof. Conduct, Rule 4-200(A))

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

The State Bar alleges that respondent charged and collected an unconscionable fee by collecting $25,000 for recovering $30,000, without the informed consent of the client and which fees were disproportionate to the value of the services rendered and to the amount involved and the results obtained.

Based on the 13 monthly invoices, there is clear and convincing evidence that the fee arrangement in these two litigation matters is not on a contingency basis but rather, on an hourly basis. Given the services performed, i.e., multiple pleadings filed, case management conferences, depositions, trial and mediation, there is no clear and convincing evidence that the fees charged and collected were disproportionate to the value of the services rendered.

The court does not find the client's testimony of noninformed consent to the fee to be credible. In view of the 18 months' attorney-client relationship between respondent and Heinrichs and the 13 monthly invoices, Heinrichs knew or should have known that the fee arrangement was based on an hourly rate and not contingent upon the outcome of the settlement.

"[I]n general, the negotiation of a fee agreement is an arm's-length transaction." (*Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913.) However, the right to practice law "is not a license to mulct the unfortunate." (*Recht v. State Bar* (1933) 218 Cal. 352, 355.) Fees are not unethical or prohibited "simply because they are substantial in amount." (*Baron v. Mare* (1975) 47 Cal.App.3d 304, 311.) "The test is whether the fee is 'so exorbitant and wholly

disproportionate to the services performed as to shock the conscience.'" (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 563.)

Here, the $285 hourly rate agreed at the time of the oral contract was not exorbitant or disproportionate to the value of the legal services to be performed. The fee does not "shock the conscience."

Therefore, there is no clear and convincing evidence that respondent is culpable of charging or collecting an unconscionable fee in violation of rule 4-200(A). Count 6 is hereby dismissed with prejudice.

Count 7: Moral Turpitude (Bus. & Prof. Code, § 6106)

The State Bar alleges that respondent committed an act involving moral turpitude by charging and collecting an unconscionable fee.

Since respondent did not charge or collect an unconscionable fee in count 6, respondent did not commit an act involving moral turpitude in willful violation of section 6106. Accordingly, count 7 is hereby also dismissed with prejudice.

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).)[4]

Respondent's 12 years of practice without a record of prior discipline when he failed to maintain the disputed portion of the fund in the client trust account in December 2004 is a mitigating factor. (Std. 1.2(e)(i); *Edwards v. State Bar* (1990) 52 Cal.3d 28 (mitigative credit given for almost 12 years of discipline-free practice despite intentional misappropriation and commingling).)

Respondent was candid and cooperative to the State Bar during disciplinary investigation and proceedings, including agreeing to an extensive stipulation. (Std. 1.2(e)(v).) Moreover, as

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

soon as he learned of his obligation to retain the disputed funds in the client trust account, respondent took spontaneous steps and immediately redeposited the funds to the account. He also offered to Heinrichs to settle the fee dispute by deducting $2,700 from the outstanding bill.

Respondent presented seven character witnesses, some of whom have known him since he was a child and are his friends as well as his clients. The witnesses included two judges (Hon. James Barton Phelps and Judge Rosemary Phipps Pfeiffer), three attorneys (Bryan Sinclair, Michael Desmarais and Edward Donal Thirkell), and friends (Dr. Benjamin Maser and Scott Glissmeyer). They laudably praised respondent's integrity, dedication and honesty. The witnesses also attested to his high moral character, to his outstanding reputation in the community, to his dedication to clients and superlative lawyering skills, and to his long record of community work at the YMCA. (Std. 1.2(e)(vi).) Respondent's character evidence is an extraordinary demonstration of good character by a wide range of references in the legal and general communities and who are aware of the full extent of the charges against respondent. Because attorneys and judges have a "strong interest in maintaining the honest administration of justice" (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319), "[t]estimony of members of the bar . . . is entitled to great consideration." (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.) Furthermore, respondent's pro bono work at the YMCA, including serving on the Board of Directors, also merits significant weight.

The State Bar did not rebut any of the mitigating evidence submitted.

B. Aggravation

There is one aggravating factor. (Std. 1.2(b).)

Respondent did not provide a written fee contract to the client when it was reasonably foreseeable that the total expense to the client will exceed $1,000, an uncharged violation of section 6148. (Std. 1.2(b)(iii).) "The written fee agreement not only protects clients and helps to ensure that a fair and understandable fee agreement is reached for specified services (see *Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569, 1572-1573), it can also aid the attorney as well in proving the terms of engagement." (*In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, 715.) Respondent admitted to the State Bar's allegation

that he failed to provide Heinrichs with a written fee agreement, as required by section 6148. Respondent testified that there should have been two written fee agreements for the two litigation matters but that he was unable to find them. Because violation of section 6148 is not by its terms a disciplinable offense, section 6068, subdivision (a) (duty to support the laws of California), should also have been pled as a conduit for a violation of section 6148. (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 276.) Therefore, respondent committed the uncharged violations of sections 6068, subdivision (a), and 6148, for failing to comply with his obligation to provide a written fee agreement at the time Heinrichs hired him.

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 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) But the standards "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has been long-held that the court "is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) While the standards are entitled to great weight (*In re Silverton* (2005) 36 Cal.4th 81, 92), they do not provide for mandatory disciplinary outcomes. Although the standards were established as guidelines, "ultimately, the proper recommendation of discipline rest[s] on a balanced consideration of the unique factors in each case." (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Here, respondent's misconduct involved a technical trust account violation. Standard 2.2(b) provides that the commission of a violation of rule 4-100 must result in at least a three-month actual suspension, irrespective of mitigating circumstances.

However, in *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, the Supreme Court rejected the application of standard 2.2(b) as requiring three months' actual suspension. The court concluded that public reproval was the appropriate discipline under the facts of the case. The attorney honestly believed that the clients had given him permission to retain their settlement funds, even though he was culpable of willful commingling and failing to promptly pay out client funds.

"[W]here appropriate, the Supreme Court will not hesitate to impose a level of discipline lower than that specified by a standard's seemingly mandatory language, even when the standard expressly provides for a minimum discipline 'irrespective of mitigating circumstances.'" (*In the Matter of Van Sickle, supra,* 4 Cal. State Bar Ct. Rptr. 980, 996.)

Ultimately, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059.)

Assuming that respondent is culpable of all seven alleged charges of misconduct, the State Bar requests that respondent be actually suspended for six months and until he returns the balance of the $30,000 settlement to his client. The State Bar cited several cases in support of its recommended discipline, including *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335.

Respondent, on the other hand, argues that an admonition would suffice in light of his compelling mitigating evidence and minor trust account violation, citing *In the Matter of Respondent C, supra,* 1 Cal. State Bar Ct. Rptr. 439 and *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442 in support of his arguments. He is further wary that the client may use this disciplinary case as a club in the fee dispute and contends that the Rules of Professional Conduct "were not intended as a protection for clients who wrong their lawyers." (*In re Kirsh* (1962) 973 F.2d 1454, 1461.)

In *In the Matter of Respondent C*, based on his 32 years of practice without a prior record of discipline and minimal harm to the client, the attorney was admonished for his failure to communicate with a client. Here, respondent has had 12 years of blemish-free practice and committed a more serious misconduct than that of the attorney in *Respondent C*.

In *In the Matter of Respondent V*, the attorney was admonished for a single instance of sending a misleading employment solicitation letter to a potential personal injury client. There were no aggravating circumstances. Here, respondent was found culpable of uncharged violations of sections 6068, subdivision (a), and 6148 (written fee agreement), as an aggravating factor.

Accordingly, the court concludes that an admonition would not be an appropriate disposition of this matter.

The court finds *In the Matter of Respondent K* and *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716 to be instructive. In *In the Matter of Respondent K*, the attorney was found culpable of failing to keep a portion of a disputed legal fee in a trust account until the dispute was resolved. In aggravation, it was found that he made misleading statements in negotiating a settlement, that the misconduct was surrounded by bad faith and that he committed an uncharged violation of conflict of interest. There were substantial mitigating factors, however, including good faith, candor and cooperation, no harm to client, community service, a long period of blemish-free practice after the misconduct and some weight afforded for good character evidence. The attorney was privately reproved.

In *In the Matter of Respondent E*, the attorney was privately reproved for his aberrational negligence in handling a client's check. When he discovered the mistake nearly three years later, he failed to promptly put the disputed funds in a trust account. Instead, the attorney delayed for a year in resolving the matter, treating it as part of an ongoing fee dispute and leaving the disputed sum of $1,754 in his general account. He had several mitigating circumstances, including no prior record of discipline during long years of practice, extensive pro bono activities and community involvement, and testimony from a great number of character witnesses about the attorney's impeccable honesty and reliability.

Respondent's misconduct is very similar to that of the attorneys in *In the Matter of Respondent K* and *In the Matter of Respondent E* – aberrational mishandling of disputed client funds. And like those attorneys, respondent's mitigating circumstances significantly outweigh the aggravating factors, demonstrating that he is able "to adhere to acceptable standards of professional behavior." (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316-317.) Thus, respondent is not likely to commit such misconduct in the future. He has exhibited good moral character and his violations are aberrational. It would be manifestly unjust to recommend an actual suspension in this matter. A private reproval would be appropriate to protect the public and to preserve public confidence in the profession.

VI. Discipline

Based on the foregoing, the court hereby orders that respondent **Kristofer Biorn** be privately reproved.

Dated: February ___, 2008

LUCY ARMENDARIZ
Judge of the State Bar Court