

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: 06-O-13578 -- RAH
)
LOUIS GEORGE FAZZI,) DECISION
)
Member No. 84362,)
)
A Member of the State Bar.)
_____)

INTRODUCTION

This case involves allegations of ten counts of misconduct in a single client matter. The underlying matter for which respondent Louis George Fazzi (“respondent”) was retained was an orthodontic/dental malpractice case against Jason T. Bock, D.D.S. (“Bock.”) Respondent’s client was Miaad Bushala (“Bushala”) who had been treated by Bock.

PROCEDURAL HISTORY

The Notice of Disciplinary Charges (“NDC”) was filed on June 23, 2008, and a response thereto was filed on July 9, 2008. Trial commenced on February 2, 2009. After the conclusion of the trial, the parties filed briefs, and the matter was submitted for decision on March 30, 2009.

3. **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on November 29, 1978, and since that time has been an attorney at law and a member of the State Bar of California.

B. Relevant Factual Background.

As a new attorney in 1978, respondent worked in the office of William Shernoff, a well-known trial attorney specializing in bad faith cases brought against insurance companies. He worked at that firm from 1978 to 1984, during which time he learned a rather sophisticated office case intake system. He later used this system when he opened his own practice.

The Bushala Matter.

On February 13, 2003, respondent and Miaad Bushala entered into a written contingency fee agreement under which respondent agreed to represent Bushala in an orthodontic/dental malpractice claim against Bock. The fee agreement provided for a graduated contingency fee based on the amount recovered. Further, the fee agreement set forth an additional percentage fee in the event that there was a challenge to any judgment received or an appeal. Respondent included this additional fee in the retainer agreement by mistake, since, in malpractice cases against health care providers, the amount of the contingency fee is strictly limited. (Business and Professions Code section 6146.¹)

At the time of the meeting with Bushala on February 13, 2003, and based on the information given to him by Bushala, respondent thought that the statute of limitations period

¹ The Medical Injury Compensation Reform Act of 1975 (“MICRA”) regulates malpractice litigation against health care providers, the practice of medicine, and the insurance industry. Under the Act, contingent fee contracts for representation of plaintiffs in malpractice actions against health care providers are limited to specific percentages of the total recovery.

was about to expire, but reasonably believed that this period had not yet expired.² Respondent had not yet received the dental charts or the billings from Bock to verify the information received from Bushala as to the dates of treatment. At the time, he felt the statute of limitations period would expire on about February 28, 2003.

After meeting with Bushala on February 13, 2003, respondent sent a letter to Bock informing him of the claim, and requesting that he forward the matter on to his professional liability carrier. Under Code of Civil Procedure section 364(d), this notice had the effect of extending the statute of limitations by 90 days (provided the statute had not already expired). On March 21, 2003, Albert Bushala, the client's husband, paid respondent \$500 for costs. This sum was placed in respondent's client trust account.

On May 14, 2003, respondent filed the complaint for health care provider malpractice in Orange County Superior Court, entitled *Miaad Buschala [sic] v. Jason T. Bock, D.D.S., M.S.*, case no. 03CC06714. In the complaint at page 3, respondent alleged that Bushala had been treated by Bock up to February 28, 2002.

In August 2002, Bock filed a demurrer to the complaint, which was overruled as to the general negligence claim, but sustained as to the second and third counts for misrepresentation and concealment, respectively.³ Respondent did not file an amended complaint for the second and third counts, electing to reserve these issues on appeal for strategic reasons. As a result, these counts were dismissed.

² For example, Bushala did not tell respondent that her last day of treatment was January 17, 2002; that on January 31, 2002, she had called Bock and told him she was not satisfied with his work and requested her records; and that on February 1, 2002, Bushala's husband had gone to the Bock's office and picked up all of Bushala's records.

³ The demurrer was not based on statute of limitations grounds.

On November 26, 2003, Bock filed a motion for summary judgment, arguing that Bushala could not meet her burden as to Bock's breach of the standard of care or that Bushala suffered damages caused by Bock. In the motion for summary judgment, Bock stated that the date treatment ended was January 17, 2002, not February 28, 2002, as respondent had believed. However, the statute of limitations was not raised as a separate ground for entering summary judgment. Respondent either did not notice the reference to the date treatment was completed as set forth in the summary judgment motion, or did not appreciate its significance at the time. The motion was fully and adequately briefed by the parties. By order entered April 20, 2004, the court denied the motion for summary judgment, finding triable issues of fact remained as to causation and standard of care.

Prior to January 29, 2004, respondent received Bock's dental charts. On January 29, 2004, Bock's counsel conducted the deposition of Bushala. At her deposition, she testified that on January 31, 2002, she told Bock that she was dissatisfied with his services and did not want to treat with him anymore, and that on February 1, 2002, her husband had picked up the records.

Trial was set to commence on June 7, 2004. Respondent informed Bushala that he needed to retain expert witnesses to testify on various issues. He advised her that he estimated it would cost approximately \$10,000 to retain the experts. This amount was paid by Mr. and Mrs. Bushala and was deposited in respondent's client trust account ("CTA") on April 22, 2004. At that point, the balance of the CTA was \$10,764.51.

On April 23, 2004, respondent made a telephone withdrawal from the CTA in the amount of \$5,762.33 unrelated to the Bushala matter. After a charge was imposed for handling this transaction over the telephone, the balance of the CTA was \$4,998.18. On May 6, 2004, a check was paid out of CTA funds to court reporters for the deposition of Bock. Between April 30,

2004 and June 24, 2004, respondent made various transfers unrelated to the Bushala matter out of his CTA. On June 30, 2004, the ending balance in the CTA was \$162.32.

In approximately April 2004, respondent sought to retain an expert. Respondent consulted with a well-known professor of dentistry at the University of Southern California dental school, Michael Mulvahill, D.D.S., who, after reading the records, concluded that Bushala would not be successful in proving that Bock performed at a level below the standard of care. As such, he refused to act as an expert in the case. He returned, uncashed, a check given to him by respondent for \$5,000 for his fees as an expert. There was no evidence that this check was drawn on respondent's client trust account. Respondent then attempted to contact Dr. Soona B. Jahina, Bushala's then current treating dentist. Respondent credibly testified that, after several attempts to contact her, and several conversations with her office assistant, he believed that he had an agreement with Dr. Jahina for the doctor to serve as an expert in the case.

On April 19, 2004, respondent served his client's exchange of expert witness information, listing five non-retained experts: Bock; Soona B. Jahina, D.D.S.; Katha Phair; David Plocki, D.D.S.; and Jon Peterson, D.D.S.

Apparently, Bushala spoke with Dr. Jahina and learned that Dr. Jahina was in fact unwilling to act as an expert. Approximately one week before the date scheduled for trial, Bushala and her husband approached respondent and demanded a refund of \$8,379.28⁴ from the \$10,000 deposit for expert witness fees.

On June 4, 2004, three days before the date scheduled for the commencement of trial, Bock filed two motions for nonsuit. In one motion, Bock argued that the failure to produce an expert was grounds for a finding that the plaintiff could not prove the standard of care. In the other motion, Bock raised the statute of limitations defense. Respondent did not respond to

⁴ This reflected a reduction of \$1,620.80, which had been previously paid to a court reporter for Dr. Bock's deposition.

either of these motions. While respondent first became consciously aware of the significance of the statute of limitations claim on the filing of the motion for nonsuit on this ground, he knew of the date the statute of limitations started at least by January 29, 2004, the date of Bushala's deposition. In the deposition, she testified as to the last date of treatment; however, he apparently did not appreciate the significance of her testimony with respect to a statute of limitations defense.⁵

On June 6, 2004, respondent sought to refund a portion of the \$10,000 paid by the Bushalas by issuing a client trust account check for \$7,500 to the Bushalas. This check was returned because of non-sufficient funds. At the time of the issuance of the check, only \$1,377.38 was in respondent's client trust account. Respondent obtained funds from his daughter in order to cover the check. After \$7,500 was deposited, a second check issued by respondent cleared.

On June 7, 2004, the date set for trial, the case was called in Department C8 of the Orange County Superior Court. Respondent announced that he was not ready, and made a motion for continuance, which was opposed. Respondent stipulated to have the motions for nonsuit heard, but before the court ruled, respondent made an oral motion to dismiss the remaining count for general negligence. The motion to dismiss was granted and the case was dismissed without prejudice.

Bushala did not appear at the trial.⁶ At some time during the proceedings on the date of trial, respondent called Bushala and advised her that the case was not ready for trial. Respondent did not want to have an order of nonsuit in the file, so he decided it would be best to dismiss the matter before the court ruled. Respondent told Bushala that he planned to dismiss the negligence

⁵ In fact, respondent testified he was in possession of Bushala's dental records before the deposition, but the record is not clear as to the exact date he received these records.

⁶ Bushala lived near the courthouse, so by arrangement, she was on-call to come to court when the matter was sent out for trial.

count because of the statute of limitations problem, and then proceed with the appeal of the court's earlier ruling on the misrepresentation and concealment counts for which demurrers had been sustained. Because of a longer statute of limitations, the misrepresentation and concealment counts were not time-barred. After advising Bushala, respondent dismissed the remaining negligence count.

On July 2, 2004, respondent wrote a letter to the Bushalas. In that letter, he notified the Bushalas of several matters, including his upcoming surgery, which would preclude him from handling the appeal; the cost bill they faced; and his attorney's fees, and a potential lien for those fees. Finally, in closing this letter, respondent complained that it was the conduct of the Bushalas that caused his NSF check when he initially sought to reimburse the Bushala's for the balance of their \$10,000 expert witness advance. In this regard, respondent stated the following:

As I had already started spending this money on witnesses and had to either demand refunds of the money or to put stop payments on checks I had written to my process server and for witness fees to other witnesses, I was not able to make out a good check on Albert's immediate demand for return of this trust money which was earmarked for trial, despite the fact that he demanded an immediate payment without any warning and without giving me any opportunity to obtain return of the funds I had paid out so that my trust account was left short of funds. ... Albert put me in the impossible position of having to try and retrieve money I had already written checks on, and demanded on the day that I refund all the trust funds which were to be used for witnesses, trial costs and other necessities, not just expert witnesses. ... You had no right at the last minute to demand return of those funds, which were so critical to our ability to prosecute the case that I was left with no other alternative than to dismiss the case because I could not produce the witnesses necessary to win the case.

In conclusion, either produce the receipt I provided, or I will file the lien, and I will begin compiling the costs for cancelled checks I incurred to get that money back into my trust account to cover the check I wrote, plus NSF fees I incurred because you put me in that position in the first place with your unprofessional conduct which caused me unbelievable embarrassment with not only the witnesses I promised payment, but also in court when I was unable to proceed due to lack of the cost necessary to proceed, and with my bank when I was left with insufficient funds because of your conduct, and I will file legal action

against you for the damages you have caused me by your conduct.

In fact, it was not true that respondent had paid other witnesses. Further, it was not true that the demand for the refund by the clients caused the NSF check. Respondent had spent the money deposited in his trust account on matters unrelated to the Bushala case. It was also not true that the demand for refund resulted in respondent's inability to prevail at trial. The nonsuit that prompted the dismissal on the day of trial was based on two grounds: respondent's prior inability to secure witnesses to prove the breach of the standard of care; and the statute of limitation problem which was unrelated to respondent's attempts at securing experts.

With the negligence case dismissed, the only alternative left for Bushala to pursue was the appeal of the court's order sustaining the demurrer as to the misrepresentation and concealment counts. As such, on July 30, 2004, Bushala's husband gave respondent a check for \$1,000 for the costs of an appeal. Respondent deposited this check into his CTA. Respondent immediately withdrew \$100 of that amount in cash to cover messenger costs for delivery of the Notice of Appeal to the Court of Appeal, which was filed on August 6, 2004.⁷ On August 2, 2004, respondent withdrew \$400 from his CTA to pay himself "fees for appeal prep." (Exhibit 17, page 2.) On August 6, 2004, a \$100 check was drawn on respondent's CTA for "deposit for clerk's tra...", as well as a \$655 check for "Appeal Filing Fee." (Exhibit 17, p. 2.) On October 4, 2004, another check was drawn in the amount of \$358.50 for "clerk's transcript fees." (Exhibit 17, p. 2.)

Beginning in June 2004, respondent wrote checks from his CTA to pay personal bills, including his mortgage payment, Direct TV payments, and an auto repair bill. Between August 6, 2004 and March 30, 2005, respondent deposited personal funds into the CTA. Thereafter, either respondent or his long-time secretary wrote several checks out of the trust account for the

⁷ Although the record is not completely clear on this issue, it appears that the \$100 was a "less cash" transaction associated with the deposit.

payment of personal expenses. Respondent credibly testified, however, that these payments and deposits were mistakes and in some cases, resulted from mistaken automatic preauthorized bill payments being made from the wrong account. In the case of the mortgage payment in the amount of \$15,547.89, this was made by mistake by his secretary during the time he was in the hospital after his surgery. There was no evidence that client funds were used for any of these payments. When these mistakes were discovered by respondent, he immediately took steps to correct the problems.

On October 19, 2004, respondent sent a letter to Bushala, which, among other things, requested a \$15,000 flat rate retainer for handling the appeal “which amounts to payment in advance for 60 hours of work at the rate of \$250 per hour.”⁸ Respondent then followed up this proposal with the following: “If this meets with your agreement, kindly sign the copy of this letter and return it along with your check for the \$15,000 plus the money for costs I mentioned above. Enclosed is a self-addressed envelope for your convenience.” Respondent then stated the following:

Should you wish to discuss this matter, please call me as soon as possible, as the court has set out a briefing schedule which must be met. Our Opening Brief is due to be filed no later than November 8, 2004, with the Respondent’s Brief due 30 days thereafter, and the Reply Brief due 20 days after Respondent’s Brief is filed. So you can see that there is a lot of work which has to be done within the next few weeks, and it is imperative that we work out a suitable arrangement for the continued handling of the appeal as soon as is [sic] possible.

Bushala received this letter, but neither Bushala nor her husband responded to it. At this point, respondent stopped working on the case. No substitution of attorney was filed, nor was a motion to be relieved filed to replace respondent.

⁸ The letter is somewhat unclear as to whether this was a true flat rate retainer amount, or an hourly amount with an estimate of \$15,000.

On November 30, 2004, the Court of Appeal ordered the dismissal of Bushala's appeal for failure to file an opening brief. Despite receiving notice of the dismissal, respondent did not advise Bushala of the dismissal. On February 4, 2005, the Court of Appeal issued a Remittitur and the dismissal order became final. Again, despite having notice, respondent did not notify his client of this order. On August 17, 2005, the Orange County Superior Court issued a Judgment of Dismissal of Bushala's case and awarded Bock \$11,419.30 in costs. Respondent did not notify Bushala of this information. On October 5, 2005, Bock recorded an abstract of judgment for the amount of the costs against real property owned by Bushala. In fact, this judgment, plus interest, was paid out of the proceeds of the sale of Bushala's house in October 2006. As noted below, respondent was comatose for much of the time, from August 27, 2005 to November 13, 2005.

Respondent's medical problems.

During much of the relevant period set forth above, respondent suffered from severe medical and psychological problems. While much of the medical evidence is relevant mitigating evidence, in some cases, it is also relevant in evaluating culpability.

In 1978, after finishing law school and preparing for the Bar Examination, respondent had an accident on the way home from his bar review course. As a result, he had neck and head problems. He was prescribed muscle relaxant medication, and, over time, became addicted to pain drugs. In 1990, he entered an addiction program at Pomona Valley Hospital and began attending Alcoholics Anonymous. In 2000, he again had an accident at his home, crushing vertebrae in his neck. Again he was put on medications, and received medical care from the VA hospital in Loma Linda, California.

In August 2003, respondent's wife and adult daughter left him. He became terribly depressed and, eventually, suicidal.

In February 2004, he began seeing a psychiatrist, who placed him on antidepressant medication. He continued to have serious pain as a result of his accidents, so he was again placed on pain killers, including Oxycodone and Acetaminophen (Percocet.) At one point, the prescribed dosage of Percocet was up to 14 tablets a day, which was far in excess of the generally recommended dosage. In July 2004, he began using fentanyl patches to further manage the pain. He continued to have debilitating headaches.

On August 2, 2004, respondent had neck surgery. Prior to the surgery, he executed a power of attorney to his long-time secretary, Candace Gillespie, to allow her to complete settlement transactions that needed attention while he was hospitalized or otherwise incapacitated. His secretary moved into his home while he was in the hospital and recuperating thereafter, from August to October 2004. Prior to this period, respondent paid certain pre-authorized personal bills out of his client trust account, including payments on June 22 and 23, 2004 to Bill Matrix, Water Utility Services, and Southern California Edison Co. During the period of his surgery, Ms. Gillespie paid other personal bills out of respondent's funds held in his client trust account, including his mortgage payment, Earthlink, Direct TV, and Fix Auto - Anaheim.

In August 27, 2005, respondent had another car accident. He was unconscious in a comatose state after the accident until October 2005, and remained in the hospital until November 13, 2005. He woke up to find that he had a metal frame attached to his skull. His neurosurgeon recommended that he go home and remain away from work until approximately January 2006. When he got home, he discovered that all his revolving credit accounts had been terminated and his cell phone, office phone, and house phone had all been disconnected for failure to pay the bills. The Bushalas did not know that respondent was in the hospital during this period of time, and in or around October 2005, Bushala made approximately 20 telephone

calls to respondent at his office. Respondent did not respond to any of these calls because he was either unconscious or recovering from his coma.

Respondent currently does not take any pain medication or antidepressant medication. He is able to practice law without a problem, but does notice some minor remaining cognitive deficits related to his prior use of the medication. He continues to be active in The Other Bar and the State Bar of California's Lawyer Assistance Program, and has recently received a certificate indicating at least one year of stability from LAP.

Count One – Rule 3-110(A) of the Rules of Professional Conduct⁹

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

The Office of the Chief Trial Counsel asserts that respondent failed to comply with his duties as set forth in rule 3-110(A) by not properly investigating the statute of limitations and the standard of care and causation issues; by failing to file an amended complaint alleging fraudulent misconduct; by not finding an expert; by failing to file an opening brief; and by allowing the appeal to be dismissed.

Respondent was led to believe that the statute of limitations period commenced at a later date than was actually the case. This was based on Bushala's statements to respondent as to the end of her treatment with Bock. Nevertheless, respondent was aware that time was of the essence, and he moved quickly to serve the letter pursuant to section 364(d) of the Code of Civil Procedure, which had the effect of extending the statute of limitations by 90 days. During that period of time, he filed the lawsuit. Nevertheless, the lawsuit was untimely filed. However, even if respondent had filed the case immediately upon being retained, the lawsuit would have been untimely filed, since the one-year statute of limitations would have commenced, at the

⁹ Unless otherwise indicated, all further references to rule(s) refer to the Rules of Professional Conduct of the State Bar of California.

latest, on February 1, 2002, when Albert Bushala picked up the file from Bock.¹⁰ Respondent was not retained until February 13, 2003, several days after the one-year statute of limitations had expired. While respondent may have been negligent in not discovering the statute of limitations issue earlier, the court finds no clear and convincing evidence that his actions rose to the level of a rule 3-110(A) violation.

Respondent did investigate the standard of care and causation issues. Unfortunately for his client, the results of that investigation were not positive. This, however, was not respondent's fault. While it is true that he could have moved quicker to learn this result, he nevertheless did not violate rule 3-110(A) by this delay. Further, his proceeding on the assumption that he could produce the required evidence by Dr. Jahina was certainly not unreasonable given his frequent contacts with her office.

Respondent credibly testified that he made a strategic decision to delay filing the appeal of the court's order sustaining the demurrer to the counts alleging misrepresentation and concealment. As respondent testified, he felt that reserving the challenge to this ruling until the end of the case would give his client an advantage. The Office of the Chief Trial Counsel did not produce any evidence that this strategy was flawed or otherwise inappropriate. Further, there was no evidence that Bushala was harmed by this strategic decision in her case. As such, the failure to file an amended complaint does not, on the evidence, presented, constitute a violation of rule 3-110(A).

Respondent did fail to find an expert. However, he made proper attempts to retain Michael Mulvahill, D.D.S., but was unsuccessful. Dr. Mulvahill would not agree to testify on

¹⁰ While the relevant triggering dates were set forth in pleadings filed later in the case, respondent did not notice their significance. However, it appears that neither did the opposing counsel, since it was not until the eve of trial that a motion was brought on statute of limitations grounds. When the motion was filed and the issue squarely before him, respondent realized that the facts on this issue were against him.

the issue of liability after reviewing Bushala's charts. When respondent learned that Dr. Mulvahill would not testify, he sought to obtain the testimony of Dr. Jahina, Bushala's treating dentist. After multiple telephone conferences with her office staff, respondent concluded that Dr. Jahina had agreed to testify in the case. Since the Office of the Chief Trial Counsel did not produce Dr. Jahina to testify as to the nature of these conversations, the only evidence that she was not willing to do so was from Mr. and Mrs. Bushala who related a conversation they had with her. Based on the evidence presented, the court finds that respondent reasonably felt that he had an expert, until notified otherwise by Mr. and Mrs. Bushala. As such, the court finds that the failure to obtain an expert was not a violation of rule 3-110(A).

Respondent did fail to file an opening brief in the appeal. Arguably, he did not have a duty to do so, as was made clear to the Bushalas in his October 19, 2004 letter. The Bushalas failed to respond to this letter, preferring to rely on the language of the original retainer agreement, calling for an additional contingency fee agreement for the appeal. While this additional contingency fee was unenforceable, the conflicting arrangements were confusing, to say the least. Whether it was reasonable for the Bushalas to rely on the earlier retainer as the arrangement between the parties is questionable. However, it is the attorney's duty to provide clarity in this situation. (Cf. *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782 ["Adequate communication with clients is an integral part of competent professional performance as an attorney."] As such, by respondent's intentional or reckless conduct in not clarifying his obligations with respect to the appeal and allowing it to be dismissed without assuring himself his clients understood his position, he willfully violated rule 3-110(A).

Count 2 - Rule 4-200(A)

Rule 4-200(A) provides that "[a] member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee."

Respondent included in his retainer agreement language from another retainer agreement which covered traditional non-medical negligence cases. In such cases, it would not have been improper to charge an additional contingency fee for post-trial work or appeals. However, because this was a case falling under the provisions of MICRA, respondent acknowledged that these additional fees were improper.

He noticed his error, and never attempted to collect an additional contingency fee for post-trial work or appeals. Rather, he sent a letter that clearly specified that his further work was on either an hourly or flat fee basis. Nevertheless, the rule imposes culpability for “entering into” such fee agreements, so the fact that he eventually did not charge or collect the improper fee does not eliminate his culpability. As such, the court finds that respondent violated rule 4-200(A) with respect to this provision of his retainer agreement.

In addition, the Office of the Chief Trial Counsel alleges that respondent violated rule 4-200(A) after the unsuccessful conclusion of the case, by his attempt to charge an additional \$15,000 fee for handling the appeal. The Office of the Chief Trial Counsel argues that holding in *Yates v. Law Offices of Samuel Shore* (1991) 229 Cal.App.3d 583 precludes this additional arrangement. In respondent’s view, *Yates* should not be read to prevent respondent from charging an additional hourly fee since MICRA only applies, by its terms, to contingent fee agreements. Further, respondent also argues that he did not recover his contingent fee because his prosecution of the case was unsuccessful, and, as such, he is not violating MICRA by the subsequent fee agreement.

The court in *Yates* faced a group of plaintiffs who had been successful in a medical malpractice case. The underlying case was filed on behalf of a group of heirs to the estate of the decedent who had suffered from the medical malpractice. When the plaintiffs’ attorney, Shore, sought to collect as fees more than the heirs thought he was entitled to receive, they brought an

action against him to recover the excessive amounts. The trial court, and later the Court of Appeal, found that Shore was not permitted to receive the amounts he claimed. The portion of the case relevant to the issues here involved the fees for an appeal which was handled by an attorney that Shore brought into the case for that purpose. The court found that Shore could not collect those fees, but was limited by the fee calculation set forth in MICRA. Approving of the trial court's holding, the Court of Appeal noted as follows:

The primary rationale of the trial court's holding was that section 6146 fixes the maximum allowable contingent fee for a medical malpractice action as a whole, including an appeal after judgment, and the limitation may not be avoided by charging separate fees for segments of the case or by charging both contingent and hourly fees.

(*Id.* at p. 591.)

Respondent is limited to his contracted-for fee, calculated according to the provisions of MICRA. Had he conducted the appeal and been successful, he could have recovered that fee. But he may not enhance the contracted-for fee at the unsuccessful conclusion of the case by adding a new fee, whether contingent or hourly.¹¹ As such, the Office of the Chief Trial Counsel has sustained its burden of proof by clear and convincing evidence that respondent willfully violated rule 4-200(A).

Count 3 and 4 – Section 6068, Subdivision (m)¹²

Section 6068, subdivision (m) provides that it is an attorney's duty "[t]o respond promptly to reasonable status inquires 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."

¹¹ There was insufficient evidence of any violation of rule 3-300 arising out of the proposed contractual arrangement for the \$15,000 appellate fee. As such, this court makes no finding of aggravation on that theory.

¹² Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

In count 3, the Office of the Chief Trial Counsel contends that respondent violated section 6068, subdivision (m) by failing to inform the Bushalas that the appeal had been dismissed for his failure to file an opening brief. Respondent did fail to inform Buschala that the appeal had been dismissed as a result of the failure to file an opening brief. Given the ambiguity created by respondent's failure to provide Buschala with a clear retainer arrangement, respondent was responsible for either filing the opening brief, or making other arrangements. He did neither, and failed to inform Buschala of the consequences of his inaction. As such, he is culpable of failing to keep his client reasonably informed of significant developments in the case.

In count 4, the Office of the Chief Trial Counsel contends that respondent violated section 6068, subdivision (m) by failing to respond to Bushala's repeated attempts to contact him in or around October 2005. However, it is unclear when in October 2005 Bushala attempted to contact respondent. As noted earlier, respondent was comatose as a result of an automobile accident until October 2005. There is no evidence as to the exact date when respondent's comatose state ended. As such the court finds that there is no clear and convincing evidence that respondent willfully failed to respond to Bushala's messages on or after October 14, 2005. Count 4 is therefore dismissed with prejudice.

Counts 5 - Rule 4-100(A) and Count 6 - Section 6106

Rule 4-100(A) requires that all funds received or held for the benefit of clients, including advances for costs and expenses, must be deposited and maintained in an identifiable bank account which is properly labeled as a client trust account, and no funds belonging to the attorney or law firm may be deposited therein or otherwise commingled with such client funds.

Section 6106 provides that the commission of any act involving moral turpitude, dishonesty or corruption constitutes a cause for suspension or disbarment.

Respondent failed to maintain the balance of Bushala's \$10,000 funds paid for costs to retain experts in his trust account in willful violation of rule 4-100(A), and willfully misappropriated \$8,216.88 of those funds by using them for purposes unrelated to the Bushala matter. Respondent's willful misappropriation of the funds was either intentional or the result of gross negligence. As such, respondent's misappropriation of the funds constitutes an act of moral turpitude, dishonesty or corruption in violation of section 6106.

Counts 7 – Rule 4-100(A) and Count 8 - Section 6106.

In count 7, the Office of the Chief Trial Counsel proved by clear and convincing evidence that respondent willfully violated rule 4-100(A) by failing to maintain the balance of the \$1,000 in client funds paid for the costs of appeal in respondent's CTA from July 30 through August 2, 2004.

In Count 8, the Office of the Chief Trial Counsel proved by clear and convincing evidence that respondent willfully misappropriated client funds by withdrawing \$400 of the \$1,000 paid by Bushala's husband for the costs of an appeal to pay himself fees in preparation for the appeal. Respondent's willful misappropriation of \$400 of Bushala's funds which had been paid for costs was either intentional or the result of gross negligence. As such, respondent's willful misappropriation of the funds constitutes an act of moral turpitude, dishonesty or corruption in violation of section 6106.

Count 9 – Rule 4-100(A)

The Office of the Chief Trial Counsel alleges that respondent violated rule 4-100(A) by commingling funds belonging to respondent in his CTA and paying personal expenses from the CTA on specified days. There is no real dispute as to whether there was commingling of these funds. However, respondent suggests that these payments were minor, and that many occurred during the time that he underwent surgery and his secretary inadvertently took the funds from the

wrong account. Others were mistakes that resulted from automatic preauthorized bill payments that were set up on the wrong account. There was no evidence that any of these payments involved the use of client funds.

While respondent's hospitalization and surgery, on August 2 through August 5, 2004, explains why he was not focusing on his trust account during that period, it does not fully explain, nor does it justify his commingling of funds that continued from June 22, 2004 through March 30, 2005. As is frequently stated, respondent had a non-delegable duty to assure that his client trust fund was being properly handled during the time he was incapacitated. (*In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627, 635.)

By his acts in depositing personal funds and paying personal expenses between June 22, 2004 and March 30, 2004, respondent willfully violated rule 4-100(A).

Count 10 – Section 6106, Misrepresentation

The Office of the Chief Trial Counsel alleges that respondent made several misrepresentations to his client regarding the reasons that the \$7,500 check had been returned NSF. In summary, respondent stated in his July 2, 2004 letter that he had worked very hard to obtain Dr. Jahina's consent to testify, and that she had agreed upon the sum of \$6,000 for her fee.¹³ He then stated:

As I had already started spending this money on witnesses and had to either demand refunds of the money or to put stop payments on checks I had written to my process server and for witness fees to other witnesses, I was not able to make out a good check on Albert's immediate demand for return of this trust money which was earmarked for trial, despite the fact that he demanded an immediate payment without any warning and without giving me any opportunity to obtain return of the funds I had paid out so that my trust account was left short of funds. ... Albert put me in

¹³ At trial, the Office of the Chief Trial Counsel contended that this was also a misrepresentation, because respondent had never spoken to Dr. Jahina, and, in fact, had not obtained her agreement to testify. However, respondent credibly testified that he thought he had obtained her consent, after many conversations with her office manager. As such, the court finds no misrepresentation as to the "retention" of Dr. Jahina.

the impossible position of having to try and retrieve money I had already written checks on, and demanded on the day that I refund all the trust funds which were to be used for witnesses, trial costs and other necessities, not just expert witnesses.

In fact, the statements in this letter set forth above were not true. Respondent had not written checks on the funds to experts in the Buschala matter, but had taken the funds either for his personal use or for use in other matters. The reason for the NSF order was, put simply, due to respondent's misappropriation. As such, respondent misrepresented material facts to his client, thereby committing acts of moral turpitude.

LEVEL OF DISCIPLINE

A. Factors in Mitigation

Respondent was admitted to the practice law on November 29, 1978, and has no prior record of discipline. He therefore practiced law for over 24 years prior to his first act of misconduct in this matter. "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269 [20 years of practice without complaints or other disciplinary proceedings].) (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e)(i) ("standard").)

During his handling of the Bushala matter, respondent suffered severe mental and physical health issues. (Standard 1.2(e)(iv).) Respondent was on considerable medication during his representation of Bushala. However, he currently does not take any pain or antidepressant medication, and he continues to be active in The Other Bar and the State Bar of California's Lawyer Assistance Program (LAP). The LAP provided a certificate that respondent has maintained mental health and stability for at least one year.

Respondent's pro bono activities constitute a mitigating circumstance. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667.) Respondent was honored by the State Bar of California for his pro

bono work as a volunteer at the Western San Bernardino County Bar Association's senior citizen legal aid clinic.

Although respondent submitted the declarations of two individuals who attested to respondent good character, such evidence is given very little weight in mitigation, as there is no evidence that the declarants were aware of the full extent of respondent's misconduct.

Furthermore, two such declarations do not constitute a wide range of references as required by Standard 1.2(e).

B. Factors in Aggravation

Respondent engaged in multiple acts of misconduct. (Standard 1.2(b)(ii).)

The Office of the Chief Trial Counsel alleges that as a further mitigating circumstance, Bushala was harmed by the fact that respondent's failure to timely recognize that the statute of limitations had expired, and thus his continuation of the litigation, led to a \$11,419.30 costs judgment being awarded against Bushala. However, the court declines to find this as an aggravating circumstance in this matter, as the court finds that respondent's failure to recognize the statute of limitations issue was solely the result of negligence, and not misconduct.

DISCUSSION

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*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 Brown* (1995) 12 Cal.4th 205, 220), they do not provide for mandatory disciplinary outcomes. “[A]lthough the [s]tandards 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.)

Standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards provide for the imposition of sanctions ranging from reproof to disbarment. (Standards 2.2(a), 2.2(b), 2.3, and 2.4(b).) However, standard 1.6(a) states, in pertinent part, “If two or more acts of professional misconduct are found or acknowledged in a single disciplinary proceeding, and different sanctions are prescribed by these standards for said acts, the sanction imposed shall be the more or most severe of the different applicable sanctions.” In this case, the most severe sanction is set forth in standard 2.2(a), which provides that culpability of willful misappropriation must result in disbarment, unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case discipline must not be less than an actual suspension of one-year, irrespective of mitigating circumstances.

In this matter, respondent has been found culpable in one client matter of failing to perform legal services with competence; entering into an agreement for, and attempting to

charge, an illegal fee; failing to keep his client reasonably informed of significant developments in the client's case; commingling; engaging in an act of moral turpitude by making a material misrepresentation to a client; two counts of failing to maintain the balance of client funds in a client trust account; and two counts of moral turpitude based on the willful misappropriation of client funds.

The State Bar recommends, among other things, that respondent be actually suspended from the practice of law for a period of two years. Respondent did not provide a recommendation as to the appropriate discipline in this matter. After considering the facts and conclusions of law found in this matter, the aggravating and mitigating circumstances, the applicable standards, and case law,¹⁴ the court does not concur with the State Bar's discipline recommendation. Rather, after considering that: (1) the misconduct in this matter involved only a single client;¹⁵ (2) respondent has a very lengthy history of unblemished practice; (3) the misconduct occurred during a period when respondent was suffering from significant mental and physical health issues which are not currently a factor in his practice of law; (4) respondent has engaged in significant pro bono service to the legal community; (5) respondent made restitution of the majority of the misappropriated funds prior to the initiation of this disciplinary proceeding; and (6) the minimal aggravating circumstance in this matter, the court believes that the appropriate discipline to recommend in this matter is that set forth by standard 2.2(a), which provides that culpability of willful misappropriation must result in not less than an actual suspension of one-year if compelling mitigating circumstances clearly predominate.

RECOMMENDED DISCIPLINE

¹⁴ In determining the discipline to recommend in this matter, the court reviewed *In the Matter of Trillo* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 59, *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, and *Edwards v. State Bar* (1990) 52 Cal.3d 28.

¹⁵ See e.g., *In the Matter of Davis*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 596; *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 385.

According, the court recommends that Louis George Fazzi, State Bar Number 84362, be suspended from the practice of law in California for three years, that execution of that period of suspension be stayed, and that he be placed on probation for three years subject to the following conditions:

1. Louis George Fazzi is suspended from the practice of law for the first year of probation;
2. During the probation period, respondent must comply with the State Bar Act and the Rules of Professional Conduct of the State Bar of California;
3. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California 94105-1639, and to the Office of Probation in Los Angeles, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by Business and Professions Code section 6002.1;
4. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the probation period. In each report, respondent must state, under penalty of perjury, whether respondent has complied with the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period;

5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with these probation condition(s);
6. Within one (1) year after the effective date of the Supreme Court's disciplinary order in this matter, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar of California's Ethics School and passage of the test given at the end of that course. The State Bar of California's Ethics School is held periodically at either the State Bar of California's office in San Francisco or Los Angeles, California. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287 and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201);

7. Unless respondent has already done so,¹⁶ respondent must make restitution to Albert Bushala in the amount of \$400 plus 10 percent interest per annum from August 2, 2004 (or reimburse the Client Security Fund¹⁷ to the extent of any payment from the fund to Albert Bushala, in accordance with Business and Professions Code section 6140.5) and furnish satisfactory proof to the State Bar's Office of Probation in Los Angeles;¹⁸
8. The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.); and
9. At the expiration of the period of probation, if Louis George Fazzi has complied with all conditions of probation, the three-year period of stayed suspension will be satisfied and that suspension will be terminated.

It is also recommended that Louis George Fazzi take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court's disciplinary order in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

It is further recommended that Louis George Fazzi comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's disciplinary order in this matter. Failure to do so may result in disbarment or suspension.

COSTS

¹⁶ Although the Office of the Chief Trial Counsel has not sought restitution, the court finds it appropriate to recommend restitution in this matter, unless respondent has previously paid restitution and provided satisfactory proof of such to the Office of Probation.

¹⁷ Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d).

¹⁸ With respect to the \$8,216.88 misappropriated by respondent, the court notes that respondent returned at least a sizable portion of these funds to the Bushalas. The Office of the Chief Trial Counsel has not sought the restitution of any funds in connection with this misappropriation, and there is no evidence that the Bushalas sought the return of any additional funds from respondent. As such, the court finds no clear and convincing evidence that further restitution is due the Bushalas in connection with this misappropriation.

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.

Until costs are paid in full, Louis George Fazzi will remain actually suspended from the practice of law unless relief is obtained under rule 282 of the Rules of Procedure of the State Bar of California.

Dated: June _____, 2009

RICHARD A. HONN
Judge of the State Bar Court