

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of) Case No.: 11-O-17950-PEM
)
MARY M. DRYOVAGE,) **DECISION**
)
Member No. 112551,)
)
A Member of the State Bar.)

Introduction¹

This is a fee dispute matter that should have been the proper subject of arbitration.² But because respondent Mary M. Dryovage mishandled the problem, it escalated into a disciplinary matter. Respondent is charged with seven acts of misconduct in one client matter. The charged misconduct includes: (1) failing to maintain client funds in a trust account; (2) withdrawing disputed client funds; (3) committing acts of moral turpitude; (4) failing to render accounts of client funds; (5) failing to perform with competence; and (6) failing to inform client of significant developments.

This court finds, by clear and convincing evidence, that respondent is culpable of failing to maintain the disputed portion of settlement funds in a trust account. But she is not culpable of the other alleged counts of misconduct. In view of respondent’s single trust account violation, compelling mitigating evidence, which includes a 25-year record of practice without prior

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

² See *Bach v. State Bar* (1991) 52 Cal.3d 1201, 1207.

discipline and significant demonstration of good character, the court imposes a public reproof with conditions, including restitution payment.

Significant 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 December 7, 2012. On December 20, 2012, respondent filed a response to the NDC. On May 20, 2013, the parties filed a stipulation as to facts and admission of documents.

A six-day trial was held on June 4, 5, 11, 12, 13, and July 9, 2013. The State Bar was represented by Deputy Trial Counsel Treva R. Stewart. Respondent was represented by attorney Samuel C. Bellicini.³

On the last day of trial (July 9) respondent presented the court with an exhibit that had not been previously produced. In the interest of justice the court allowed the exhibit into evidence. Following closing arguments, the court took the matter under submission. On July 10, 2013, the State Bar made a motion to supplement its closing argument due to respondent's introduction of the exhibit for the first time on July 9. The State Bar argued it was put at a significant disadvantage and thus was deprived of the opportunity to thoroughly examine the import of the evidence. On July 15, respondent filed an opposition to State Bar's motion. On July 29, 2013, the court agreed with the State Bar and granted its motion to re-open.⁴

On July 30, 2013, the parties were informed that they could submit supplemental briefs by August 9 or proceed to a hearing on that date. On August 5, 2013, respondent made a motion to re-open the record as to a piece of evidence that was given to her on July 25, 2013; and on August 9, 2013, the State Bar filed an opposition to the motion. On August 9, 2013, the court

³ Prior to May 23, 2013, respondent represented herself and retained Mr. Bellicini on May 22, 2013, approximately two weeks before commencement of the trial.

⁴ The State Bar was taken by surprise as the exhibit was not produced in discovery.

granted respondent's motion, the matter proceeded to a hearing⁵ and following supplemental closing arguments, the court took the matter under submission.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on January 9, 1984, and has been a member of the State Bar of California at all times since that date.

Case No. 11-O-17950 – The Burrell Matter

Facts

2005 Employment Discrimination Case

In September 2004, Arrolene C. Burrell (Burrell) consulted with respondent for two hours regarding an employment discrimination claim against her employer, the Department of Veterans Affairs (DVA). She paid respondent \$500 as consulting fees. In January 2005, Burrell contacted respondent again regarding the same claim.

On January 12, 2005, respondent sent Burrell a retainer agreement,⁶ in which Burrell was to: (1) pay a retainer fee of \$5,000; (2) receive an itemized statement of costs and attorney fees on a regular basis; and (3) pay attorney fees at an hourly rate of \$420 or one-third of the recovery, whichever was greater, if the claims were resolved by settlement or judgment at or after the pre-hearing conference.

Although respondent sent Burrell the retainer agreement in January, the parties never executed the written contract and respondent did not verify whether the agreement was signed.⁷

⁵ At the August 9 hearing the State Bar recalled Milton Mullanax.

⁶ The court finds Arrolene Burrell's testimony to be not entirely credible. She denied that she received a fee agreement. At the same time, she admitted that respondent was entitled to a contingency fee. Since all reasonable doubts must be resolved in the attorney's favor (*Alborton v. State Bar* (1984) 37 Cal.3d 1, 11), the court finds that respondent sent Burrell a written fee agreement in January 2005.

⁷ To date, respondent was unable to locate a signed agreement in her client file.

On February 14, 2005, Burrell hired respondent to represent her in her employment related claims against DVA. On February 16, 2005, Burrell paid respondent \$5,000 in advanced fees. From 2005 until 2009, Burrell paid approximately \$25,000 in litigation costs for video depositions, court reporters, copying, and mail delivery services.

On September 20, 2007, respondent filed a lawsuit in the U.S. District Court for the Northern District of California entitled *Burrell v. Nicholson et al.*, case No. 3:07-cv-04893-JSW. On January 14, 2008, the venue was changed to the U.S. District Court for the Eastern District of California. The case was assigned a new number, 1:08-cv-00067-OWW-SMS, and subsequently renamed *Burrell v. Shinseki et al.* (DVA case).

2009 Settlement in the Employment Discrimination Case

On July 1, 2009, respondent represented Burrell at a settlement conference held in the DVA case. Burrell was also present. A settlement of \$92,676.88 was reached on September 30, 2009. On that same day, Burrell contacted respondent to discuss the specific division of the settlement funds as Burrell was not sure how the funds were to be divided. Respondent returned Burrell's call. The conversation did not go well. There was no agreement about the division of the settlement proceeds.⁸ A fee dispute ensued between the parties.⁹

On October 1, 2009, Burrell signed a Stipulation and Agreement of Compromise and Settlement and [Proposed] Order (settlement agreement) to settle the DVA case for \$92,676.88, of which included \$426.88 for additional retirement benefits. Also, as part of the settlement agreement, Burrell was to be restored to Chief, Social Work Service, GM-13, with a change in

⁸ According to Burrell, prior to September 30, 2009, the parties had not discussed division of the proceeds during the four years of litigation.

⁹ On October 1, 2009, Burrell contacted the State Bar to get information regarding a situation where there was a settlement agreement, but no clarity on how the proceeds were to be divided. The State Bar told her that U.C. Hastings had a free legal clinic twice a month on the topic of how fee disputes are handled. On October 9, 2009, Burrell attended that clinic.

her official position title and number from Social Worker 001048 to Supervisory Social Worker M01490 by issuing forms 50 and 52 with the corrected information and removal from Burrell's official personnel file certain adverse documentation regarding her employment. Furthermore, the parties agreed that the district court would retain jurisdiction over the matter for the purposes of resolving any dispute alleging a breach of the agreement.

Burrell testified that as of April 12, 2012, forms 50 and 52 had not been issued to give her back the official position title of supervisory social worker. However, the documents relating to the performance assistance were removed.

On October 19, 2009, respondent received the settlement check in the amount of \$92,676.88. The settlement check was payable to respondent and Burrell. On October 22, 2009, respondent deposited the settlement check into her Wells Fargo Bank Client Trust Account No. xxxxx9072¹⁰ (CTA) without Burrell's endorsement. On October 23, 2009, and October 30, 2009, respondent made two withdrawals from her CTA, totaling \$35,000, as attorney fees in the Burrell matter.

On November 2, 2009, respondent sent Burrell a check for \$25,676.88 from her CTA. Respondent wrote on both the check and the cover letter that the check was "payment in full."¹¹ On the same day, respondent also sent Burrell an email stating that she had been in Washington, D.C. and was out of her office and that she would be getting back to her soon.

Dispute Over Distribution of Settlement Proceeds

On November 6, 2009, Burrell received the check for \$25,676.88 but did not cash the check.¹² Instead, Burrell sent an email to respondent disputing the distribution and wrote:

¹⁰ The account number has been excluded to protect the account from identity theft.

¹¹ Respondent believes that Burrell authorized her to settle the case so long as she received \$25,000 in total from the case and that anything over \$25,000 was respondent's in attorney fees.

“Mary as you know we did not resolve distribution of the \$92,250.00 when you ended our phone call abruptly on September 30, 2009. You do not have my permission to sign this check this [sic] for me.” Based on the email, respondent knew that Burrell objected to her distribution and the amount of attorney fees.

Furthermore, on November 10, 2009, after having received two telephone calls from Burrell, a U.S. District Court Judicial Assistant sent an e-mail to respondent which clearly indicated that Burrell disputed the distribution of the settlement funds. Respondent replied that she would be sending Burrell a copy of the invoice and retainer agreement she signed on January 12, 2005.

On November 10, 2009, respondent sent Burrell a copy of the preliminary invoice for fees and costs and an unsigned retainer agreement. The invoice detailed the professional services performed by respondent of over 500 hours from September 2004 to November 2009 and the costs incurred on her behalf. On November 11, 2009, respondent sent an e-mail to Burrell acknowledging Burrell's dispute of the distribution of the settlement funds. She wrote: “It sounds like you believe you have a fee dispute with me. The appropriate forum for resolving that issue is through the State Bar Mandatory Fee Arbitration Program. Here is their website where you can read more information.”¹³

Between March 9 and July 2, 2010, respondent made seven additional withdrawals totaling \$32,000 from her CTA as attorney fees in the Burrell matter. In total, respondent withdrew \$67,000 from her CTA as attorney fees from the funds maintained on behalf of Burrell.

¹² Burrell did not cash the check because she thought since the check said "payment in full," she would in cashing the check be implicitly agreeing that she was paid in full.

¹³ It appeared that Burrell declined to submit to fee arbitration.

Fee Dispute Negotiations

On March 18, 2010, attorney Greg Mullanax (Mullanax) sent a certified letter to respondent, informing her that Burrell disputed her distribution of the settlement funds. As a compromise, he offered respondent 40% of the settlement funds as her attorney fees. In the four-page letter, Mullanax gave a specific amount that Burrell would agree to resolve the matter amicably. She was willing to settle the disputed amount for \$55,606.13, which was 60% of the settlement amount of \$92,676.88. He directed respondent to send Burrell an additional check for \$29,929.25 along with a release of all claims. He also reminded respondent what her professional responsibilities were under the Rules of Professional Conduct.

In a March 29, 2010 reply letter to Mullanax, respondent expressed the belief that at no time did Burrell tell her that she did not want to sign the retainer agreement. She also admitted that while she did not have a signed retainer agreement, she trusted Burrell to be an honorable person and that an agreement was actually signed. At the same time, respondent made it clear that without the signed agreement she would be entitled to quantum meruit for the value of her services.

After receiving the March 29 letter, Mullanax sent respondent an email informing her that her response indicated that she did not want to resolve the matter and that he would appreciate a follow-up letter that firmly stated her position with regard to the dispute. He did not receive a follow-up letter that firmly stated her position.

On October 8, 2011, Burrell filed a complaint with the State Bar. Subsequent to the complaint, she filed a request from the client security fund to be reimbursed \$67,000. At the time she filed the request, she had not cashed the check for \$25,676.88 that she had received from respondent.

On January 19 and March 2, 2012, a State Bar Investigator wrote to respondent regarding the Burrell complaint. In her responses to the State Bar, respondent stated that: (a) she sent an invoice to Burrell on November 10, 2009; (b) on July 1, 2008, Burrell authorized settling her case for \$25,000; and (c) before signing the Dismissal Stipulation, she determined that Burrell was restored to chief social worker, GM-13, by issuing the proper forms with the corrected information.

In September 2012, respondent contacted Mullanax and told him that she was willing to resolve the matter and would send Burrell a check for \$55,606.¹⁴ During that phone call, Mullanax said he would do whatever he could do to help settle the case. After Mullanax received the phone call, he emailed Burrell and told her that he had received a phone call from respondent and that she was going to send a check. He asked Burrell if she would come by his office and get the check when sent. Burrell sent Mullanax an email stating that he did not have authority to act on her behalf as he was no longer her attorney.

On September 27, 2012, Mullanax sent respondent an email stating that he did not have authority to act on Burrell's behalf. He told respondent that if she had not already sent the check, she should not send it, and that if she had already sent the check, he would send the check back to her when he received it and would send a copy of the check to Burrell. On September 28, 2012, respondent sent a check for \$55,606.13 payable to Burrell, with a promise to put a stop order on the previously sent check of \$25,676.88.¹⁵

¹⁴ Although an Early Neutral Evaluation Conference is confidential, respondent waived its confidentiality by testifying that (1) at the conference, she was told that she had to maintain any disputed client funds in trust until the matter was resolved; and (2) as a result of the conference, she contacted Mullanax in an attempt to resolve the dispute. (Rules Proc. of State Bar, rule 5.30(D).)

¹⁵ Quite possible that she did not receive Mullanax's email until after she sent the check.

On September 29, 2012, respondent sent an email stating: "Thank you for informing me. Unfortunately, I did send it to your office via US Mail – Express Mail. It should arrive on Monday. Could you call her again and ask her to pick up the letter and check, unopened, from you? If that is not ok, just refuse it and send it back to me." Mullanax opined that in March of 2010, Burrell would have accepted a check for \$55,606 as settlement of the case.

In September 2012, respondent restored the disputed funds back into her trust account – after she was told that she was obligated to return the disputed funds to her trust account.

On October 17, 2012, respondent sent Burrell a replacement check for \$25,676.88 to her residence without the words "payment in full." Burrell cashed the check.

60% to Burrell and 40% to Respondent

More than four years after the employment discrimination settlement in 2009 and after six days of trial in this proceeding, the fee dispute remains. Burrell believes that she is still owed 33% of the settlement proceeds and respondent still believes that she owes Burrell nothing more than \$25,676.88. The court finds that because the parties had originally agreed to settle the dispute in March 2010, albeit tentatively, under Mullanax's advice, wherein Burrell agreed to accept \$55,606 as her share of the settlement proceeds (40% of \$92,676), and because respondent had paid her \$25,676.88 in October 2012, respondent still owes Burrell in the amount of \$29,930, the remaining balance of \$55,606 ($\$55,606 - \$25,676 = \$29,930$).

Conclusions

Counts 1 and 2 – (Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account])

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions. 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.

A client's objection to respondent taking any legal fee from a settlement triggered the provision of rule 4-100(A)(2) requiring respondent to retain disputed funds in a trust account pending a resolution of the dispute. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 349.)

On September 30, 2009, as soon as a settlement of \$92,676.88 was reached in the DVA case, Burrell disputed with respondent on the telephone as to the specific division of the settlement funds. Thus, when she received and deposited the funds in the trust account in October 2009, respondent was aware that Burrell disputed the extent of her entitlement to the portion of the settlement funds. Ignoring the dispute, respondent sent Burrell a check for \$25,676.88 on November 2, 2009, as "payment in full." When respondent learned of the fee dispute, she was obligated to maintain the entire disputed portion in the CTA until the conflict was resolved. Yet, she removed from the CTA a total of \$67,000 as attorney fees: \$35,000 in October 2009 and \$32,000 between March and July 2010.

Respondent argued that Burrell was only entitled to \$25,676.88 as Burrell directed her to settle for any amount that would give her at least \$25,000 after her attorney fees were covered. She believed that Burrell's claim of more than \$40,000 was unreasonable and that she was entitled to the disputed funds under their oral agreement before the settlement conference.

As respondent wrote in her November 10, 2009 letter to Burrell, along with the preliminary invoice, "at the conclusion of the settlement conference, you authorized me to resolve your case for \$25,000 plus the back pay obtained ... I agreed to forego on full payment and take the remainder of the settlement agreement. I confirmed that agreement with you before I accepted the government's counter-offer. You agreed to this arrangement ... However, if that

deal is not acceptable, we can go back to the original terms of the retainer agreement, which provide for my hourly rate to be paid ..."

Knowing that there was a fee dispute, respondent even directed Burrell to the State Bar's fee arbitration website the next day, which Burrell declined. To date, the parties have not resolved their fee dispute.

Although respondent sent Burrell a check for \$25,676.88 in November 2009, Burrell never cashed it. When she sent Burrell a second check for \$25,676.88 almost three years later in October 2012, Burrell cashed it. But Burrell still believes that she is still owed 33% of the settlement funds of \$92,676.88, which is \$30,583.37. She thus believes that she is entitled to a total of \$56,260.25 ($\$25,676.88 + \$30,583.37$) as her share of the settlement funds or about 60.7% of the settlement funds. Thus, the disputed amount is \$30,583.37.

Respondent ignored Burrell's demand and withdrew from the CTA \$30,583.37 in disputed funds. Respondent was obligated to redeposit the entire disputed portion into the CTA until the conflict was resolved. She did not do so until September 2012. In fact, rather than redepositing the funds, respondent withdrew portions of the disputed funds on nine occasions. Respondent withdrew a total of \$67,000 but not all of \$67,000 was disputed. Thus, respondent failed to maintain the balance of funds received for the benefit of a client in the CTA, withdrew client funds from the CTA before the dispute is finally resolved, and failed to restore the entire disputed amount until September 2012, almost three years later, in willful violation of rule 4-100(A) in count 1.

The State Bar alleged that respondent violated rule 4-100(A) in count 1 and rule 4-100(A)(2) in count 2. However, rule 4-100(A)(2) is not a separate violation from rule 4-100(A), but rather, it's a subset of and an exception within rule 4-100(A). The same facts underlie both counts 1 and 2; it is not necessary to separate the rules and find her culpable of both. Little, if

any, purpose is served by duplicative allegations of misconduct. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.) The appropriate resolution of this case does not depend on how many rules of professional conduct or statutes proscribe the same conduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.)

Therefore, the court dismisses count 2 with prejudice.

Count 3 – (§ 6106 [Moral Turpitude])

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

The State Bar alleged that because respondent took \$67,000 of disputed funds and used them for her own benefit, respondent misappropriated \$67,000 from Burrell, and thereby respondent committed an act of moral turpitude, dishonesty or corruption.

This court cannot agree. This was a fee dispute. Respondent honestly believed that she had successfully settled Burrell's employment discrimination case against DVA, which took more than four years; that Burrell agreed to accept \$25,000 as her share of the settlement proceeds and any remaining balance would be respondent's attorney fee payment; and that she had a right to receive what she took from her in fees.

On the other hand, Burrell reasonably believed that based upon a retainer agreement (although unsigned), in addition to the \$25,676.88 that she had already received, respondent still owed her \$30,583.37. Mishandling of disputed fees does not constitute misappropriation.

There is no clear and convincing evidence establishing that respondent's failure to set aside the disputed portion involved moral turpitude, dishonesty or corruption in willful violation of section 6106. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 349.) An attorney's reasonable or unreasonable but honest belief of entitlement to fees from trust funds constitutes an offense or misappropriation violating only rule 4-100(A) and not also

section 6106. (*Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, 1099; *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 332.) Thus, respondent's removing trust funds based on a good faith but unreasonable belief of entitlement to such funds did not constitute misappropriation and did not violate section 6106.

Count 4 – (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])

Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds, securities, and other properties coming into the attorney's possession and render appropriate accounts to the client regarding such property.

The State Bar alleged that respondent at no time provided an accounting to Burrell for funds received on her behalf and thus had failed to render appropriate accounts to Burrell regarding all funds coming into respondent's possession.

On the contrary, soon after respondent received the settlement check in October 2009, respondent sent Burrell a very detailed invoice for professional services rendered throughout the litigation period of more than four years, albeit with a few accounting errors. At the same time, based on the retainer agreement, respondent was supposed to provide an itemized statement of costs and attorney fees on a regular basis. But the agreement was never executed by either party. Moreover, Burrell reimbursed respondent for litigation costs only after respondent had either sent her invoices or communicated with her that the bills were due. Thus, those funds that came into respondent's possession were clearly accounted for with Burrell's knowledge.

Therefore, there is a lack of clear and convincing evidence to support the charge that respondent failed to render an accounting to Burrell in violation of rule 4-100(B)(3). (See *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, 710.)

Count 5 – (Rule 3-110(A) [Failure to Perform Legal Services with Competence])

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

The State Bar alleged that at the time respondent filed the Stipulation of Dismissal, the DVA had not complied with all terms of the settlement agreement and Burrell had not given her authorization for the stipulation of dismissal, and that by filing the Stipulation of Dismissal without her client's authorization, and causing the DVA case to be dismissed before all terms of the settlement had been fulfilled by the DVA, respondent recklessly failed to perform legal services with competence.

This court disagrees. The settlement agreement clearly provided that in consideration of the receipt of the settlement funds, Burrell agreed to immediately execute a stipulation of dismissal upon execution of the settlement agreement and that the stipulation would be filed upon receipt by respondent of the settlement funds. More importantly, the agreement further provided that the "District Court shall retain jurisdiction over this matter for the purposes of resolving any dispute alleging a breach of this agreement." In other word, if any terms of the settlement were not fulfilled, the case could always be reopened to enforce the settlement. Such retention of jurisdiction is by no means automatic. The court finds respondent's ability to negotiate this provision which protected the client was indeed a competent act.

Therefore, respondent did not fail to perform competently in violation of rule 3-110(A).

Count 6 – (§ 6068, subd. (m) [Failure to Communicate])

Section 6068, subdivision (m), provides that an attorney has a duty to promptly respond 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.

The State Bar argued that between October 30 and November 10, 2009, Burrell made a total of 11 telephone calls to respondent and left messages requesting a status of her matter and receipt of the settlement check and that respondent received Burrell's messages and did not respond to any of her messages.

There is no evidence to support State Bar's allegations. During the ten-day period, respondent and Burrell were in communications, either by mail or email. Soon after Burrell signed the settlement agreement, respondent received the settlement funds and distributed \$25,676.88 to Burrell. On November 2, 2009, respondent sent Burrell a check for \$25,676.88, a letter from Ben Hall with a signed copy of settlement agreement, a letter of recommendation, a set of documents removed from Burrell's file, and a signed stipulation and order re: settlement agreement. And in response to Burrell's email, respondent replied on November 2, 2009, that she had been in Washington D.C. and that she would be getting back to Burrell soon.

Furthermore, based on the settlement agreement, the parties understood and agreed that the stipulation of dismissal was to be filed immediately upon receipt of settlement funds. Whether respondent specifically told Burrell that she had filed it three weeks after the settlement funds were received is not an ethical or disciplinable issue. Had respondent not filed the stipulation of dismissal as agreed upon, then that would have been a disciplinable matter.

Therefore, respondent did not fail to communicate with her client or inform her of any significant developments in violation of section 6068, subdivision (m).

Count 7 – (§ 6106 [Moral Turpitude])

The State Bar alleged that respondent made misrepresentations to the U.S. District Court Judicial Assistant and to the State Bar.

Specifically, in respondent's November 10, 2009 response to the U.S. District Court Judicial Assistant, she stated in pertinent part: "Of course, I will sending (sic) her another copy

of the invoice and retainer agreement she signed on January 12, 2005." The State Bar argued that respondent knew that no copy of the invoice was sent to Burrell prior to November 10, 2009, and no signed fee agreement existed. The State Bar contended that her statement was knowingly false.

There is no clear and convincing evidence that respondent's statement was false. On the same day¹⁶ that she sent the Judicial Assistant an email, she wrote to Burrell: "[A]t the conclusion of the settlement conference, you authorized me to resolve your case for \$25,000 ... and I agreed to forego on full payment and take the remainder of the settlement agreement. ... However, if that deal is not acceptable, we can go back to the original terms of the retainer agreement.... Let me know if you are renegeing and I will prepare a more complete invoice for your consideration." In other word, respondent reasonably and honestly believed that the retainer agreement existed; that they had modified the terms such that Burrell would get \$25,000 and she was to receive the remaining balance of the settlement agreement; and that if Burrell disagreed with the preliminary invoice, respondent would prepare another invoice for her consideration. Thus, her statement to the judicial assistant was similar to her statement to Burrell in that she would send Burrell another invoice if there was a disagreement and that there was a retainer agreement.

Hence, there is no clear and convincing evidence that respondent intentionally lied to the judicial assistant. Even if she had misspoken, such a mistake does not rise to the serious charge of committing an act of moral turpitude.

The State Bar further alleged that on October 13, 2011, when the State Bar received a complaint from Burrell against respondent (Burrell complaint), the State Bar investigator wrote

¹⁶ The letter to the judicial assistant was dated November 10 but was apparently postmarked November 12. The court finds the substance of the letter to be significant but not the two dates.

to respondent on January 19 and March 2, 2012, and respondent's response was dishonest because respondent stated:

- a. That she sent an invoice to Burrell on November 10, 2009;
- b. That on or about July 1, 2008, Burrell authorized settling her case for \$25,000; and
- c. That before signing the Dismissal Stipulation that she determined that Burrell was restored to Chief Social Worker, GM-13 by issuing the proper forms with the corrected information.

The court does not find her January 21 and March 11, 2012 responses dishonest as respondent honestly and reasonably believed in good faith that (1) she sent an invoice to Burrell on November 10, 2009, as her letter to Burrell was dated November 10, 2009; (2) Burrell had authorized her to settle the case for \$25,000; and (3) Burrell had been restored to Chief Social Worker. Respondent had done everything to protect Burrell by making sure that under the terms of the settlement agreement, the District Court retain jurisdiction over this matter for the purposes of resolving any dispute alleging a breach of this agreement.

It is well settled that any reasonable doubts in proving a charge of professional misconduct must be resolved in the accused attorney's favor. (*Ballard v. State Bar* (1983) 35 Cal.3d 274, 291.)] Therefore, there is no clear and convincing evidence that respondent committed acts involving moral turpitude, dishonesty or corruption in her responses to the judicial assistant or to the State Bar in willful violation of section 6106 in count 7.

Aggravation¹⁷

Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)

Respondent's mishandling of a disputed fee deprived Burrell of her funds.

¹⁷ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Indifference Toward Rectification/Atonement (Std. 1.2(b)(v).)

Even after Mullanax in March 2010 and after the court at the Early Neutral Evaluation Conference in August 2012 had advised her to redeposit any disputed client funds in trust until the matter was resolved, respondent's failure to take immediate corrective action is clear evidence of her indifference.

Mitigation

No Prior Record (Std. 1.2(e)(i).)

Respondent does not have a prior record of discipline. She was admitted to practice in 1984, and her misconduct occurred in 2009. Thus, she practiced law discipline-and-misconduct-free for more than 25 years. Respondent is currently an Administrative Law Judge with the California Occupational Health and Safety Appeals Board since January 2012. Prior to that position, she was a solo practitioner.

Respondent's 25 years of discipline-free practice preceding her misconduct is a very compelling mitigating circumstance. "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.)

Good Faith (Std. 1.2(e)(ii).)

In order to establish good faith as a mitigating circumstance, an attorney must prove that her beliefs were both honestly held and reasonable. To conclude otherwise would reward an attorney for her unreasonable beliefs and for her ignorance of her ethical responsibilities. (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966.)

Here, respondent had an honest belief that she had a signed fee agreement with Burrell and that she was entitled to the portion of the settlement funds less \$25,000. Her good faith belief was honestly held but was reasonable only to a certain extent. Her refusal to redeposit the

disputed funds in the trust account was reasonable only for a brief period under her mistaken belief that she did not have to. But when Burrell disputed the disbursement in October 2009 and when opposing attorney Mullanax pointed out to her in his March 18, 2010 four-page letter that she was in violation of her professional duties, respondent had an obligation to verify whether she was indeed in noncompliance with the Rules of Professional Conduct and should have realized that she was not entitled to take any money out of her trust account as it related to Burrell. She should have quickly determined that she was mishandling her dispute with Burrell. Instead, in her March 29, 2010 response to Mullanax, she acknowledged that Burrell never returned the signed fee agreement but insisted that Burrell was entitled to \$25,676.88 and nothing more. In September 2012, even after she had agreed to settle the dispute and sent Burrell 60% of the proceeds (\$55,606) in care of Mullanax, she changed her mind when she found out Mullanax no longer represented Burrell. Instead, she sent Burrell a replacement check for \$25,676.88 in October 2012.

Therefore, respondent's good faith belief is undercut by her behavior after she received the letter from Mullanax and is given nominal weight in mitigation.

Community Service (Std. 1.2(e)(vi).)

Respondent presented substantial evidence of her pro bono work in the legal community.

Respondent has been active in various legal organizations for more than 20 years, including the American Bar Association, Labor & Employment Rights Section and Individual Rights Section; National Employment Lawyers Association (founded Federal Employee Rights Committee in 1991 and served as co-chair between 1992 and 2006); California Employment Lawyers Association (Chair of Board and served on the Board between 1992 and 2002); and American Association for Justice, formerly American Trial Lawyers of America (Representative and Chair from 2005 to 2010).

Respondent is also active as a member of many legal, civil rights and bar associations concerned about the enforcement and enactment of employment rights laws, including AFL-CIO Lawyers Coordinating Committee, California State Bar Labor & Employment Law Section, and San Francisco Trial Lawyers Association (SFTLA).

Respondent has lectured at various conferences and law schools on such topics as sexual harassment, retaliation and disability discrimination; Whistleblower Protection Act; Workers Compensation and the American with Disabilities Act; and representing federal employees.

Respondent has also published many articles regarding employment law in various legal and educational institutions, such as the Berkeley Journal of Employment and Labor Law, Federal Merit Systems Reporter, and the SFTLA Trial Lawyer Magazine.

Good Character (Std. 1.2(e)(vi).)

Respondent submitted compelling evidence of good character. Eight witnesses testified and two declarations attested to her good character, including three judges and seven attorneys. Favorable character testimony from employers and attorneys are entitled to considerable weight. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) Because judges and attorneys 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.)

The witnesses all attested to her high moral character, integrity, honesty, and dedication. Many have known respondent for many years and find her to be an extremely dedicated lawyer. They believed that she may have been negligent in not making sure she got the signed retainer agreement and agreed that respondent did not handle the fee dispute correctly. One witness testified that respondent had a very busy small practice and those things happen. But that did not overall change their opinion of her.

The judges and many of her colleagues praised her to be a person with a good heart and a woman of integrity. They testified that she is always willing to help other attorneys and puts her client's interest above her own. Respondent is committed to helping the underdog. Her reputation in the legal community is exceptional and excellent. They testified that respondent is one of the most passionate civil rights attorney in the country and that she has worked tirelessly for the employment rights of federal employees. She has the highest level of honesty and veracity. Another witness declared that she has great respect for respondent because of her dedication to helping other attorneys and her willingness to provide guidance in complex or frustrating federal employment litigation. She sticks with her clients, even if it takes many years, in order to obtain a positive result for them. She really cares about her clients and works her heart out to get a positive result. She does not compromise her integrity for money. In their opinion, respondent has the highest moral character.

The court finds that these 10 character witnesses represent a strong demonstration of respondent's good character attested to by a wide range of references in the legal community and who are aware of the full extent of the member's misconduct.

Therefore, testimony of many character witnesses attesting to respondent's high moral character, high integrity and dedication on behalf of clients, as well as substantial community service, commitment to employment rights, and pro bono activities are given significant weight in mitigation. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456.)

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 addition, 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.

Standard 2.2(b) provides that commingling or another violation of rule 4-100 must result in at least a three-month actual suspension, irrespective of mitigating circumstances.

The standards, however, “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 long been held that the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] 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.)

The State Bar urged that respondent be disbarred based on the most serious allegation that she had misappropriated client funds. Because respondent has not been found culpable of misappropriation or any acts of moral turpitude, disbarment would be unduly harsh and inappropriate in this matter.

Respondent, on the other hand, argued that a public reproof would be adequate.

The court finds the following cases to be instructive:

In *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 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 reprovved.

In *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, the attorney was privately reprovved 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.

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 reprovval 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.)

Here, respondent's misconduct involved a significant sum of disputed fees and thus caused more harm than that of the attorneys in *In the Matter of Respondent K* and *In the Matter of Respondent E*. A private reproof would not be adequate under the facts and circumstances in this matter. Respondent wrongly and unreasonably refused to put the disputed funds in a trust account even after she was advised to do so. The court believes that her misconduct was not surrounded by bad faith, but rather by misguided stubbornness. After all, she had spent more than four years, more than 500 hours, litigating against the government on behalf of Burrell without compensation. And when the case finally settled, she spent the next three years embroiled in a fee dispute with the client based on her belief that the client had agreed to a settlement amount of \$25,000 and that she was entitled to the remaining balance of the settlement funds. Unfortunately, the fee dispute had escalated into a disciplinary matter, involving the aberrational mishandling of disputed client funds.

Nevertheless, respondent's mitigating circumstances significantly outweigh the aggravating factors, demonstrating that she 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. She has exhibited excellent moral character and extensive pro bono activities. Her misconduct was an aberration and contributed to by her poor judgment, obstinacy, and overzealous advocacy on her own behalf. She has now accepted responsibility for her malfeasance and has redeposited the disputed funds in the trust account, albeit late.

The court is mindful that the proper objectives of attorney discipline do not include punishment of the errant attorney; rather, they are “protection of the public, the profession, and

the courts, maintenance of high professional standards, and preservation of public confidence in the legal profession.” (*Rose v. State Bar* (1989) 49 Cal.3d 646, 666.)

It would be manifestly unjust to recommend disbarment, as urged by the State Bar, or even an actual suspension in this matter. It is unnecessary. Although respondent should have immediately rectified the matter by returning the disputed fee in the trust account but instead, she failed to properly and reasonably resolve an acrimonious fee dispute with her client, her substantial services to her client and her lengthy period of discipline-free practice of law mitigate the need to place her on any period of suspension.

In light of the case law and after balancing all relevant factors, including the underlying misconduct, the aggravating factors, the compelling mitigating circumstances that included good character, community services, and no prior record in 25 years of practice, the court has determined that a departure from the standards is justified and that imposing a public reproof would be appropriate to protect the public and to preserve public confidence in the profession.

Discipline

Respondent Mary M. Dryovage is hereby ordered publicly reproofed, subject to the following conditions:

1. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct.
2. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent’s current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar’s Office of Probation.

3. Within one month of the effective date of the reproof, respondent must make restitution to Arrolene C. Burrell in the amount of \$29,930 (or reimburse the Client Security Fund to the extent of any payment from the fund to Arrolene C. Burrell, 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. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).
4. Within one year of the effective date of the reproof, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and of the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)
5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's conditions contained herein.
6. Respondent must take and pass the Multistate Professional Responsibility Examination (MPRE) within one year of the effective date of the reproof and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

Costs

It is 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: October _____, 2013

PAT McELROY
Judge of the State Bar Court