PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of BENJAMIN PRESCOTT TRYK, A Member of the State Bar, No. 253299.	Case Nos. 14-O-05936-PEM (14-O- 06385; 15-O-13129) DECISION

Introduction[1]

In this disciplinary proceeding, respondent Benjamin Prescott Tryk is charged with nine counts of professional misconduct in three client matters. The charged acts of misconduct include: (1) failing to release client files; (2) failing to render accounts of client funds; (3) failing to notify client of receipt of client funds; (4) falsely endorsing client check by simulation of signature; (5) misappropriating client funds; and (6) misrepresenting the amount of client fees paid.

The court finds, by clear and convincing evidence, that respondent is culpable of seven of nine charges. In light of respondent's misconduct and the evidence in aggravation and mitigation, the court recommends, among other things, that he be actually suspended for 60 days.

[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.

Significant Procedural History

On December 29, 2016, the Office of Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC). Respondent filed a response to the NDC on January 23, 2017.

Trial was held on June 6, 7, and 8, 2017. The State Bar was represented by Supervising Senior Trial Counsel Sherrie McLetchie. Respondent was represented by Attorney Jerome Fishkin. On June 5, 2017, the parties submitted a "Stipulation as to Facts, Conclusions of Law (Partial) and Admission of Documents" (Stipulation), which was admitted into evidence. On June 11, 2017, following the submission of the parties' closing briefs, the court took this matter under submission.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 4, 2007, and has been a member of the State Bar of California at all times since that date.

Case No. 14-O-06385 – The Perez Matter

Facts

On October 17, 2012, Julia A. Perez (Perez) retained respondent on a contingency fee basis to represent her in a slip and fall matter, based on an incident that occurred in a Macy's store. On February 27, 2014, Perez met with respondent in his office. During the meeting, Perez signed a settlement agreement presented to her by respondent.

On April 2, 2014, respondent received a personal injury settlement check from Macy's on behalf of Perez. That check was made payable to both respondent and Perez in the amount of $4,500. Thereafter, on April 14, 2014, Perez received a $2,000 check from respondent. No disbursement statement or cover letter was included with the check. Respondent's employment by Perez terminated on April 14, 2014. Respondent, however, failed to render any accounting to

Perez regarding the $4,500, which he had received on her behalf, until January 2015, when he was contacted by the State Bar.

On January 8, 2015, the State Bar notified respondent that Perez had complained that she had not received her client files from respondent. Respondent told the State Bar that he had sent Perez's file to her in August 2014, to which the State Bar responded that Perez had moved in August 2014. On October 26, 2016, the State Bar provided Perez's current address to respondent's attorney. Respondent's attorney then sent a copy of the client file to Perez. Additionally, respondent did not render an accounting to Perez after termination of the attorney-client relationship on August 14, 2014, when his employment terminated. It was not until respondent was contacted by the State Bar in January 2015, that he provided his client with an accounting of the $4,500, which he had received on her behalf.

Conclusions

Count One – (Rule 3-700(D)(1) [Failure to Return Client Papers/Property])

Count One was dismissed by the State Bar at trial. The court therefore dismisses count one with prejudice.

Count Two – (Rule 4-100(B)(3) [Failure to Render Accounting])

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. By delaying to provide Perez with an accounting of the $4,500 on August 14, 2014, i.e., when his employment terminated, and then failing to provide any accounting of those funds to Perez until contacted by the State Bar in January 2015,

respondent willfully failed to provide an appropriate accounting in willful violation of rule 4-100(B)(3).[2]

Case No. 14-O-05936 – The Pacheco Matter

Facts

On November 12, 2012, Maria Pacheco (Pacheco), a native Spanish speaker, retained respondent on a contingency fee basis to represent her on a personal injury claim, stemming from an incident in which she sustained a lower back injury. The incident had occurred in an AMVETS Thrift Store (AMVETS) on November 4, 2012.

On August 27, 2013, Jennifer Brown (Brown) a claims adjustor for Philadelphia Insurance Indemnity Company (PIIC), the insurer for AMVETS, sent a letter to respondent requesting information regarding Pacheco and the incident. In her letter, Brown stated that the insured maintained $20,000 of medical payment coverage, regardless of fault or liability. On September 3, 2013, respondent replied to Brown's letter, providing her with basic information regarding Pacheco and respondent's theory of liability in the matter.

Shortly after March 6, 2014, respondent received a check in the amount of $3,974 from PIIC. The check was made payable to both respondent and Pacheco. Respondent did notify Pacheco that he had received the funds from PIIC on her behalf. On March 18, 2014, however, respondent signed Pacheco's name to the check and caused the $3,974 check to be deposited into his CitiBank attorney client trust account (CTA).

When respondent signed Pacheco's name to the check, he believed he had a right to do so under the attorney client fee agreement, which reads as follows:

[2] In paragraph 23 of the parties' June 5, 2017 Stipulation, Respondent stipulated to the facts and the conclusion of law set forth in Count Two.

> **POWER OF ATTORNEY**: Upon agreed settlement, Client(s) give a Power of Attorney to endorse client's name on all documents, drafts and check [sic] in order to effectuate the settlement. Attorney shall deposit settlement proceeds into Attorney-Client Trust Account and after deduction and payment of Attorney's fees and all liens and costs Attorneys shall send the balance to Client.
>
> State Bar, Exhibit. 3, p. 000012.)

The State Bar argues that it was improper for respondent to sign Pacheco's name to the check because there had been no "settlement" involved in the case, which respondent knew when he endorsed the check. In his testimony, however, respondent credibly testified that he believed that he had the right to endorse the $3,974 check from PIIC, which was made out to him and Pacheco, by signing Pacheco's name as granted under the Power of Attorney clause in the Retainer Agreement in order to facilitate its deposit into the CTA.

This court has no doubt, based on respondent's demeanor and explanation that his act of endorsing the check by signing Pacheco's name, was based on respondent's sincerely held beliefs and understanding, which although mistaken and not objectively reasonable, were honestly held. Thus, the court finds that respondent did not have a dishonest or wrongful intent when he endorsed the check with Pacheco's signature.

On August 18, 2014, several months after having received the $3,974 check from PIIC and depositing it into his CTA, respondent withdrew from his CTA $1,323 as attorney fees, $105 as reimbursement for the cost of ordering Pacheco's medical records, and $250 as a case opening fee." In total, respondent withdrew $1, 678 of the $3,974, he had received on behalf of Pacheco as attorney fees, costs, and as a "case opening fee" i.e., expenses incurred by respondent relating to the opening of the case. First Health Medical Center, as a lienholder, then received the remaining balance of $2,296.

On September 14, 2014, with no settlement having been negotiated, respondent stated in writing to Pacheco that it was no longer feasible for him to represent her, but he would charge her no fees. He also said that she could pick up her original file or, he could mail it to her and/ or her new attorney. Respondent acknowledged in his testimony that the written statement that he would charge no fees had been sent out by his office without his signature – which was a "big mistake."

After Pacheco received respondent's September 14th letter, she contacted several attorneys, including Roger Bonakdar (Bonakdar), whom she later hired. Pacheco went to Bonakdar's office with a disengagement letter and limited material. Thereafter, Pacheco and Bonakdar telephoned respondent's office requesting Pacheco's file. Bonakdar does not recall whether he sent respondent a letter requesting the file. Respondent never received a written request from Bonakdar for Pacheco's client file. Bonakdar never received Pacheco's client file from respondent, other than the "limited materials" that Pacheco provided to Bonakdar in late October 2014, when Pacheco went to Bonakdar's office. However, there is no evidence before this court as to whether the "limited materials" and the disengagement letter, that Pacheco provided to Bonakdar did or did not include all documents which comprised respondent's client file, as maintained by respondent during his representation of Pacheco.

As set forth, *ante*, shortly after March 6, 2014, respondent received the $3,974 check from PIIC, which was made payable to him and Pacheco. Respondent did not provide an accounting of the $3,974, upon terminating his employment with Pacheco on September 14, 2014, or at any time previous to his termination date. Respondent only provided an accounting to Pacheco, after he had been contacted by the State Bar in January 2015. Thereafter, respondent also refunded to Pacheco, the sum of $1,678, which is the amount that respondent had taken as fees, costs, and expenses incurred in the Pacheco matter.

Conclusions

Count Three – (Rule 4-100(B)(1) [Failure to Notify Client of Receipt of Client Funds]

Rule 4-100(B)(1) requires an attorney to notify a client promptly of the receipt of the client's funds, securities, or other properties. Shortly after March 6, 2014, respondent received a check on behalf of Pacheco in the amount of $3,974 from PIIC, the insurer for AMVETS. Respondent did not inform Pacheco that he received the funds from PIIC upon receipt of the funds or promptly thereafter. By failing to promptly inform Pacheco of respondent's receipt of the $3,495 check from PIIC, respondent failed to promptly notify a client of respondent's receipt of funds on the client's behalf, in willful violation of rule 4-100(B)(1).

Count Four – § 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. Here, the State Bar argues that when respondent endorsed the check he received from PIIC for the benefit of his client, respondent knew he did not have the client's permission to sign her name. Respondent asserts he believed that he was acting in accord with the Power of Attorney in his attorney-client fee agreement. As noted above, although this court finds that while respondent's belief was mistaken and objectively unreasonable, in that respondent failed to strictly construe the language in the retainer agreement, which he had drafted and/or chosen, and with which he should have been familiar, the evidence does not support that respondent acted dishonestly. Here, the court finds *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 321,332-333, and in *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 10-11, instructive. In those cases, the courts found that attorney Sternlieb and attorney Klein did not act with any dishonest or wrongful intent, although the conduct of each of those attorneys was found to be objectively unreasonable and mistaken. However, as their improper conduct was based on beliefs and understandings that

were sincerely and honestly held by the attorneys, the courts concluded that those attorneys did not commit acts of moral turpitude. Here, respondent's conduct, like the conduct at issue in *Sternlieb* and *Klein* was improper conduct. Nonetheless, that conduct was based on beliefs and understandings, which although mistaken and objectively unreasonable, were found to be honestly and sincerely held beliefs and understandings, which do not rise to the level of moral turpitude.

Thus, this court concludes that respondent, herein, did not commit an act involving moral turpitude, dishonesty or corruption when he signed his client's name to the check received from PIIC, given his honest and sincere belief that he had the authority to do so based on the Power of Attorney granted to him in the operative Retainer Agreement.

Accordingly, Count Four is dismissed with prejudice.

Count Five – § 6106 [Moral Turpitude – Misappropriation]

Misappropriation is defined as "[t]he application of another's property or money dishonestly to one's own use." (Black's Law Dict. (8th ed. 2004) p. 1019, col. 1.) "[A]n attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation. [Citation.]" (*Baca v. State Bar* (1990) 52 Cal.3d 294, 304.) Further, as held in *Most v. State Bar* (1967) 67 Cal.2d 589, 597, "**[a]n attorney may not unilaterally determine his own fee and withdraw funds held in trust for his client in order to satisfy it, without the knowledge or consent of the client.**" (Emphasis added.)

Here, respondent was required to maintain $3,794 in trust on Pacheco's behalf. By withdrawing $1,678 of the $3,794, which he had received for Pacheco's benefit as payment of attorney fees, as costs, and as a "case opening fee," respondent with gross negligence misappropriated the $1,678, and thereby committed an act involving moral turpitude and dishonesty, in willful violation of section 6106.

Count Six – § 6106 [Moral Turpitude – Misrepresentation]

On September 14, 2014, when respondent stated in writing to his client, Pacheco, that it was no longer feasible for him to represent her, but that he would charge her no fees, respondent was grossly negligent in not knowing that he had already taken $1,678 as fees, costs, and expenses from the $3,974 he had deposited into his CTA, on Pacheco's behalf. By writing to Pacheco that he would charge her no fees, when respondent was grossly negligent in not knowing that he already had taken fees, costs, and expenses from the funds deposited into his CTA on her behalf and, thus, that his September 14, 2014, written statement was false, respondent committed an act involving moral turpitude, in willful violation of Business and Professions Code, section 6106.

Count Seven – Rule 3-700(D)(1) [Failure to Return Client Papers/Property][3]

The State Bar charged respondent with failing to promptly release Pacheco's file upon respondent's termination of employment with Pacheco and upon Pacheco's request to respondent for the file. Respondent's employment with Pacheco terminated on September 14, 2014. In October 2014, Pacheco made a request to respondent for the return of her file. Respondent contends that he sent the file to Pacheco in October 2014. Pacheco contends she never received the file. Upon engagement of a new attorney after terminating respondent, Pacheco went to the office of Bonakdar, her new attorney and him with a disengagement letter from respondent and certain other "limited material." Thereafter, Pacheco and Bonakdar telephoned respondent's office to request Pacheco's file. Bonakdar does not recall whether he sent respondent a letter requesting the file. Respondent says that he never received a written request from Bonakdar for

[3] Rule 3-700(D)(1) requires an attorney, upon termination of employment, to promptly release to the client, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. This includes pleadings, correspondence, exhibits, deposition transcripts, physical evidence, expert's reports and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

Pacheco's client file. Bonakdar never received Pacheco's client file from respondent, other than the "limited materials" that Pacheco provided to Bonakdar in late October 2014, when Pacheco went to Bonakdar's office. However, there is no evidence before this court as to whether the "limited materials" and the disengagement letter, that Pacheco provided to Bonakdar, were in fact the total contents of respondent's file in the Pacheco matter.

Given the lack of clear and convincing evidence as to whether respondent sent a file to Pacheco, the lack of clear and convincing evidence as to what documents were included in Pacheco's client file, and the lack of evidence as to whether the limited documents Pacheco provided to Bonakdar were in fact the documents which would have comprised her client file, the court finds that the evidence presented fails to clearly and convincingly demonstrate that respondent failed to provide Pacheco with her client file.

Accordingly, Count Seven is dismissed with prejudice.

Count Eight – (Rule 4-100(B)(3) [Failure to Render Accounting])

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. By failing to provide Pacheco with an accounting of the $3,954, which respondent received shortly after March 6, 2014, from PIIC, until being contacted by the State Bar in January 2015, respondent willfully failed to provide an appropriate accounting in willful violation of rule 4-100(B)(3). [See, "Stipulation. . . ," p. 4, ¶23.)

Case No. 15-O-13129 – The Crozier Matter

Facts

Mark Crozier (Crozier) attempted to obtain a copy of a video of a December 2013 incident, which involved a City of Fresno bus. He was told by the Fresno police department that he needed an attorney in order to obtain the video. To that end, on January 7, 2014, Crozier

employed respondent to get the video showing the incident giving rise to Crozier's claim and to represent him in a claim against the City of Fresno.

Respondent received discovery from the City of Fresno. Included in the discovery turned over to respondent, was a DVD of the incident from which Crozier's claim arose. Thereafter, in late October 2014, respondent and Crozier viewed the DVD together in respondent's office. After viewing the DVD with Crozier, respondent came to the conclusion that Crozier did not have a viable case. According to Crozier, the DVD appeared to have been edited. In fact, on October 28, 2014, Crozier called respondent's office and inquired if the DVD had been edited. On the following day, i.e., October 29, 2014, Crozier again telephoned respondent's office and asked for a copy of the DVD. Respondent made a copy of the DVD from an electronic file on his computer.

On February 2, 2015, respondent moved to withdraw as Crozier's counsel. On April 6, 2015, respondent gave a DVD to Crozier, who signed a receipt for the DVD. Respondent did not check to see if the DVD was viewable. In fact, the DVD was not viewable. On April 13, 2015, Crozier telephoned respondent's office and notified respondent that the DVD was not viewable. Respondent did not respond to Crozier's telephone message.

By order filed May 14, 2015, respondent's employment by Crozier terminated. Crozier continued to request the DVD from respondent. On July 17, 2015, respondent provided Crozier with another copy of the DVD on a CD. Immediately thereafter, Crozier brought the CD that respondent had given him to Matt Andronicous (Andronicous), an investigator for the law firm of Wagner Jones Kopfman Artenian. The CD had zero megabytes of data on it. The video had obviously not been burned onto it. Andronicous was not able to obtain another CD with the video on it from respondent. Consequently, his firm was unable to take Crozier's case, as the video was indispensable to case. Respondent stated that he did not ask the City of Fresno for

another copy of the DVD, because he was uncomfortable asking for another copy. The State Bar subpoenaed the DVD from the City of Fresno and it was viewable.

Conclusions

Count Nine – Rule 3-700(D)(1) [Failure to Return Client Papers/Property]

After termination of respondent's employment on May 14, 2015, respondent did not release to Mark Crozier the video footage, which had been provided to respondent in discovery in late October 2014, and which Crozier had begun requesting from respondent on October 28, 2014, and continued to request through July 2015. By failing to release Crozier's property, i.e., the video to Crozier, despite the many requests made to respondent, respondent failed to release promptly, upon termination of employment, to the client, at the request of the client, all the client papers and property, in willful violation of rule 3-700(D)(1)

Aggravation[4]

Multiple Acts (Std. 1.5(b).)

Respondent's misconduct evidences multiple acts of wrongdoing, including failing to release client files and property, failing to render accounts of client funds, failing to notify client of receipt of client funds, misappropriating client funds, and making a misrepresentation to a client.

Harm to Client/Public/Administration of Justice (Std. 1.5(j).)

Respondent's misconduct caused significant harm to his client, Crozier. Crozier suffered significant and irreparable harm because he lost his cause of action and day in court. Crozier was told by law offices other than respondent's that without the ability to see the incident video, they were not interested in taking his case.

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

High Level of Victim Vulnerability (Std. 1.5(n).)

Standard 1.5(n) provides that "high level of vulnerability of the victim" is an aggravating circumstance. The special responsibility an attorney has toward a client has been long recognized. "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." *Beery v. State Bar* (1987) 43 Cal.3d 802, 813.

Here, Pacheco was not simply a "native Spanish speaker." She was an immigrant of "modest means" and little schooling. By failing to give Pacheco a copy of the fee agreement in Spanish she was placed at a significant disadvantage. However, despite her vulnerability, Pacheco did show the where-with-all to retain a lawyer, who was able to secure a recovery for her. Thus, the aggravating factor of a high level of victim vulnerability warrants moderate consideration in aggravation.

Mitigation

No Prior Record (Std. 1. 6(a).)

Standard 1.6(a) provides that "absence of any prior record over many years of practice coupled with present misconduct, which is not likely to recur" is a mitigating circumstance. Here, respondent was admitted to practice on December 4, 2007 (Stipulation, p. 1, lines 24-25), and the first stipulated misconduct occurred shortly after March 6, 2014, six years and three months after his date of admission.

Absence of prior discipline over a period of seven years or less has been considered of slight or no mitigating value (*Smith v. State Bar* (1985) 38 Cal.3d 525, 540 [six years in practice prior to start of misconduct not a strong mitigating factor]; *In the Matter of Aguiluz* (Review

Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32 [seven years in practice prior to start of misconduct only accorded slight weight in mitigation].)

Accordingly, the court finds that respondent's six-plus years is a factor warranting slight weight in mitigation.

Candor/Cooperation to Victims/State Bar (Std. 1.6(e).)

Respondent entered into a stipulation with the State Bar, which is extensive as to undisputed facts. Two of the counts in the NDC were dismissed. Respondent stipulated to culpability as to three of the seven remaining counts in the NDC.

Respondent's stipulation as to facts and culpability is a significant mitigating factor. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 [extensive weight in mitigation given to those who admit culpability and facts].)

Accordingly, respondent's cooperation with the State Bar and his admission to both extensive facts and culpability warrants significant mitigating credit.

Good Character (Std. 1.6(f).)

Respondent presented character testimony from nine witnesses – four of whom testified during the hearing in this matter, while the remainder submitted declarations to the court. Respondent's character witnesses consisted of seven attorneys, a court reporter, and a doctor of chiropractic medicine.

Respondent's character witnesses demonstrated a general understanding of the alleged misconduct. They attested to the fact that they had read the Notice of Disciplinary Charges filed in this matter and respondent's response thereto. The attested to his honesty, good character, and hard work. Several attested to his devotion to his clients. Many mentioned that when they spoke with respondent he was contrite, remorseful, and knew he had made mistakes. Many of the

witnesses stated that they believed that respondent's conduct was not motivated by dishonesty or moral turpitude

As eight of the nine witnesses/declarants were affiliated with the legal community, it cannot be said that profession-wise they represented a wide range of references from both the general and legal community. Therefore, the weight afforded respondent's character evidence is diminished by the fact that his character witnesses do not represent a wide range of references from the general and legal communities. (*In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476-477 [character evidence entitled to limited weight where it was not from wide range of references].) That said, respondent did present an impressive collection of character witnesses. Thus, respondent's character testimony standing on its own would warrant moderate weight in mitigation.

However, respondent has also engaged in significant community work. He designed a website for the Central Valley Trial Lawyers Association in 2013-2014, of which about 50 hours was pro bono work.

Accordingly, when considering both the character evidence provided in this matter and the evidence of respondent's pro bono community work, the court finds that substantial mitigating credit is warranted.

Remorse/Recognition of Wrongdoing (Std. 1.6(g).)

Respondent recognizes that he has made serious mistakes in his representation of the three clients referred to in this Decision and in his office procedure and office management.

Respondent was made aware of the fact that a letter that he had written, but hadn't signed was inadvertently sent to Pacheco by his office. The letter stated that respondent would not charge Pacheco any fees for the case. However, when respondent learned that Pacheco already had been charged for fees, costs, and expenses, he immediately refunded the money previously

charged to Pacheco. When Respondent was told that Perez had moved and not received the client file because respondent had sent it to him during Perez's move, respondent immediately sent another copy of the file to Perez. Both of those acts are evidence of an attorney who is remorseful and making an immediate effort to correct the problem. Respondent's corrective acts are evidence of an attorney who acknowledges his errors/wrongful conduct and is making an immediate effort to correct them. (*Baker v. State Bar*, (1989) 49 Cal.3d 804,822, fn.7; *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 331. 18

In addition, respondent also acknowledges that his office procedures were deficient and thus has made and is making changes designed to avoid similar problems in the future. Respondent has recognized that it is his responsibility and duty to oversee and correct any problems in his office. He is taking steps to rectify the deficiencies that existed in his practice. And, he has made changes in office procedures designed to avoid future problems. Following are some of the changes respondent has or is making:

- He no longer claims attorney fees for med pay;
- An attorney meets with the client to be sure that the breakdown of fees, costs, and liens are understood;
- When a client is terminated, an attorney meets with the client and explains why employment is being terminated; and, a copy of the file is routinely given to the client;
- Better screening methods have been implemented and are being used;
- File notes are made contemporaneously; and
- The power of attorney agreement to allow respondent to sign checks for deposit into the trust account has been made clearer.

Through the corrective actions that respondent has and is implementing, he acknowledges the office problems which existed and which were his responsibility to oversee. Most importantly, respondent is taking corrective measures to ensure that this type of wrongful conduct at issue in this case will not recur.

The court finds that respondent's recognition of wrongdoing and the steps he is taking to ensure that such wrongdoing does not recur warrant significant mitigating credit.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d. 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d. 1016, 1025; Std. 1.1.)

In determining the level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d. 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628). Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d. 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.7 provides that if a member commits two or more acts of misconduct and the standards specify different sanctions for each act, the most severe sanction must be imposed. Standard 1.7 further states that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors.

In this case, the standards call for a broad range of sanctions. (See standards 2.1(b); 2.2(b); 2.11; and 2.19.) The most severe sanction is found at standard 2.11, which provides that disbarment or actual suspension is appropriate for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of a material fact..

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

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Ct. Rptr. 980, 994.) It has long been held that the court is "not bound to follow the standards in a 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.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges, among other things, that respondent should be actually suspended for 90 days. Respondent, on the other hand, argues that a stayed suspension and a period of probation would be the appropriate discipline in this matter.

Turning to the case law, it is difficult to find a case directly on point In determining the appropriate discipline to be recommended in this matter, the court has found some guidance in *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465. In *Giovanazzi,* the respondent was found culpable of misappropriating client fuds, misleading a court by filing a false pleading and conflict of interest without complying with rule 5-101. The misappropriation charge arose from the attorney's retention of approximately $2,450 from a settlement to pay an investigator's fee. The money was placed in the attorney trust account, but not paid to the investigator or the client. During the three-year period following the deposit of the money the trust account balance dropped to approximately $2,100. The Supreme Court held that the misappropriation resulted from respondent's poor management of his client trust account and careless supervision. (*Id.* at p. 475.) Additionally, Giovanazzi was found culpable of misleading a court by false pleading, misappropriating a client's funds through poor management and careless supervision of his staff and involving a client in business transactions adverse to the client's best interests. The Court imposed three years stayed suspension and thirty days actual suspension.

The misconduct of the attorney in *Giovanazzi* is similar, although hardly identical with that of respondent herein. Although it is mentioned that the attorney had entered a stipulation to the facts supporting the charges and facts asserted in mitigation. However, there neither mitigating or aggravating circumstances were specified. It is clear, however, that *Giovanazzi* predates the current standard. The misconduct in *Giovanazzi* is somewhat less extensive than that of respondent herein, but not significantly less.

Having considered the evidence, the standards, and the case law, the court concludes that, among other terms and conditions, a period of actual suspension of 60 days is sufficient to protect the public, the courts, and the legal profession.

Recommendations

This court recommends that respondent Benjamin Prescott Tryk, State Bar number 253299, be suspended from the practice of law in the State of California for one year, that execution of the one-year period of suspension be stayed, and that respondent be placed on probation[5] for a period of two years subject to the following conditions:

1. Respondent Benjamin Prescott Tryk is suspended from the practice of law for the first 60 days of probation.

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.

3. 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.

[5] 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.) Respondent is cautioned that failing to strictly comply with the terms and conditions of his probation could result in involuntary inactive enrollment (Rules Proc. of State Bar, rule 5.315; Bus. & Prof. Code, § 6007, subdivision (d)) and further discipline. (See Rules Proc. of State Bar, rules 5.310, 5.312.)

4. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

5. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

7. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. 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.)

8. Within 30 days after the effective date of the discipline herein, respondent must develop a law office management/organization plan which must be approved by respondent's probation monitor, or, if no monitor is assigned, by the Office of Probation. This plan must include procedures for sending periodic reports to clients, documentation of telephone messages received and sent, file maintenance, meeting deadlines, withdrawing as attorney, whether of record or not, when clients cannot be contacted or located, and training and supervision of support personnel.

At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multistate Professional Responsibility Examination

The court further recommends that Benjamin Prescott Tryk be required to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of his passage to the State Bar's Office of Probation in Los Angeles within that same time period. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

Costs

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and such costs are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: October 6, 2017

Pat McElroy

PAT McELROY
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on October 6, 2017, I deposited a true copy of the following document(s):

DECISION

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

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

JEROME FISHKIN
FISHKIN & SLATTER LLP
1575 TREAT BLVD STE 215
WALNUT CREEK, CA 94598

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Sherrie B. McLetchie, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on October 6, 2017.

George Hue
Case Administrator
State Bar Court