

FILED

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STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

NOT FOR PUBLICATION
PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 15-O-12701-YDR
)	
MICHAEL JAY BERGER,)	DECISION AND ORDER
)	
Member No. 100291,)	
)	
<u>A Member of the State Bar.</u>)	

Introduction¹

In this disciplinary proceeding, Michael Jay Berger (Respondent) is charged with a single count of failing to cooperate in a disciplinary investigation (§ 6068, subd. (i)).

The court finds, by clear and convincing evidence, that Respondent is culpable of the charged misconduct. Based on the present misconduct and the factors in mitigation and aggravation, the court recommends, among other things, that the appropriate level of discipline is a private reproof.

Significant Procedural History

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) on December 29, 2015. On January 22, 2016, Respondent filed a response to the NDC.

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.

A single-day trial began on April 26, 2016. The State Bar was represented by Senior Trial Counsel William Todd. Respondent represented himself. On May 2, 2016, the court took this matter under submission. The State Bar filed its closing argument brief on May 16, 2016.

Findings of Fact and Conclusions of Law

Jurisdiction

Respondent was admitted to the practice of law in California on December 1, 1981, and has been a member of the State Bar of California since that date.

Findings of Fact

On August 14, 2015, a State Bar investigator sent a letter to Respondent's membership records mailing address requesting Respondent's written response to the State Bar's investigation into alleged misconduct in case No. 15-O-12701. The August 14, 2015 letter sought information regarding Respondent's handling of a Chapter 11 bankruptcy petition on behalf of George and Nansee Lanning in 2010. The investigator asked Respondent to respond to three questions and to provide certain supporting documents by August 28, 2015. Respondent did not respond to the August 14 letter by the date requested.

A second letter was sent to Respondent's membership records mailing address by a State Bar investigator on September 16, 2015. The second letter again requested that Respondent provide a written response to the State Bar's investigation into alleged misconduct in case No. 15-O-12701. The State Bar investigator requested that Respondent forward a written response and certain documents by September 30, 2015. Respondent did not respond by the date requested.

On September 22, 2015, a State Bar investigator spoke with Respondent by telephone. The State Bar investigator mentioned the letters he had previously sent to Respondent, and

Respondent agreed to provide a response to those letters. However, Respondent did not provide a response.

On November 6, 2015, the State Bar sent Respondent a letter advising him that it intended to charge Respondent with failing to participate in a State Bar investigation. Respondent did not respond to the State Bar's letters until December 4, 2015, when the parties participated in an Early Neutral Evaluation Conference.

Conclusions

Count One – § 6068, subd. (i) [Failure to Cooperate In State Bar Investigation]

Section 6068, subdivision (i), provides that an attorney has a duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney. By failing to provide a written response to George Lanning's allegations of misconduct being investigated by the State Bar, Respondent failed to cooperate in the disciplinary investigation pending against him, in willful violation of section 6068, subdivision (i).

Aggravation²

The State Bar must establish aggravating circumstances by clear and convincing evidence. (Std. 1.5.) The record here establishes one factor in aggravation.

Prior Record of Discipline (Std. 1.5(a).)

Respondent has one prior record of discipline, which is an aggravating factor. On July 23, 1997, the California Supreme Court issued order S061331, suspending Respondent from the practice of law for one year stayed, with an 18-month probationary period, including a 45-day actual suspension. The discipline stemmed from Respondent's willful misconduct in two client

² All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

matters. In the first matter, Respondent obtained a settlement on behalf of a client and deposited the funds into his client trust account (CTA). Respondent withdrew his fees and then later disbursed additional funds to himself as attorney's fees owed for past legal services performed in different matters on the client's behalf. Respondent disbursed a settlement check to the client, but the client objected to the amount, did not cash the check and requested Respondent pay him additional funds. Respondent did not pay his client. Instead, Respondent withdrew more of his client's settlement funds from Respondent's CTA. For two years, the client requested Respondent pay him a disputed amount of settlement funds, but Respondent failed to comply with his request and failed to keep the disputed funds in his CTA. The fee dispute was litigated in superior court and Respondent received two separate judgments against his client totaling \$14,565.50. Respondent stipulated that he failed to maintain disputed client funds in trust, in willful violation of rule 4-100(A)(2).

In the second client matter, Respondent failed to notify his client about and failed to appear at two properly noticed depositions. Later, Respondent settled his client's claim to his client's satisfaction. Respondent stipulated that he was culpable of violating section 6068, subdivision (m), by failing to keep his client reasonably informed of significant developments. In mitigation, Respondent had engaged in 15 years of discipline-free practice before the charged misconduct. There were no aggravating factors.

For several reasons, the court affords no significant weight to Respondent's prior discipline. First, the last act of misconduct in the prior occurred in 1994, twenty-one years before the misconduct in the current matter. Second, the former and current misconduct are different. Finally, while Respondent's prior misconduct involved a trust account violation, his mishandling of disputed funds did not cause any client harm, and Respondent did not take any funds that were not owed to him. Looking at the totality of Respondent's prior misconduct, the

court does not deem it to be serious. (*In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, 713 [prior misconduct that was not serious and occurred over 17 years before first misconduct in present case did not warrant significant aggravation].)

Mitigation

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.6.) The record establishes one factor in mitigation by clear and convincing evidence.

Character Evidence (Std. 1.6(f).)

Respondent presented character testimony from nine witnesses, including five attorneys. All witnesses attested to Respondent's good character. Respondent is entitled to significant mitigation credit for the character witness testimony as they represented a wide range of references from the legal and general communities, and they were aware of the full extent of the misconduct charged in the instant matter. (See *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Rptr. 297, 305).

Respondent's significant mitigation for good character far outweighs the slight aggravating effect of his prior discipline.

Discussion

In determining the appropriate discipline in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.1 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; maintenance of high professional standards; and preservation of public confidence in the legal profession." In addition, the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the applicable standards are standard 1.8(a) and standard 2.12(b). Standard 1.8(a) states, "If a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust." Standard 2.12(b) provides that a "reproval is the presumed sanction for a violation of . . .section 6068(i) . . ."

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.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

Here, for about three-and-half months, Respondent failed to respond to the State Bar regarding a complaint that the State Bar ultimately determined lacked merit. Considering the instant misconduct and Respondent's prior in 1997, the State Bar has requested that Respondent, among other things, be actually suspended for 90 days. Respondent, on the other hand, argued that attendance and passage of Ethics School constitutes the appropriate level of discipline.

In this case, the court finds that recommending greater discipline than that imposed in Respondent's prior would be "manifestly unjust." (Std. 1.8(a).) As stated above, Respondent's prior wrongdoing was remote in time (21 years ago) and was "not serious enough" to warrant greater discipline than the 45-day actual suspension previously imposed. Thus, the court considers the presumed sanction of a reproval to be the appropriate level of discipline, as outlined in standard 2.12(b).

In addition to the standards, the case of *In the Matter of Hanson, supra*, 2 Cal. State Bar Ct. Rptr. 703, is instructive. In *Hanson*, the attorney was disciplined for misconduct in a single client matter. The attorney failed to promptly refund unearned fees, and once he was discharged by his clients, he failed to take steps to avoid foreseeable prejudice to them. The attorney had one prior discipline for the failure to act competently, failure to communicate and failure to release a client's file, for which he received a private reproof. Because the court deemed the prior misconduct minimal and the last act of misconduct in the prior occurred 17 years before the acts of misconduct in the instant proceeding, the aggravating weight of the prior was not significant. (*Id.* at p. 713.) There were no mitigating circumstances. The court determined that it would be "manifestly unjust" to impose greater discipline based solely on former std. 1.7(a)³ and imposed a public reproof with conditions. While Respondent's misconduct was not similar to the type of wrongdoing in *Hanson*, it was on par with the level of seriousness.

In considering the facts of this case, the determination that Respondent's good character evidence far outweighs the effect of Respondent's prior discipline, the standards, and relevant case law, this court concludes that a private reproof is the appropriate level of discipline.

Disposition and Order

It is ordered that respondent Michael Jay Berger, State Bar Number 100291, is privately reproofed. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, the private reproof will be effective when this decision becomes final. Furthermore, pursuant to rule 9.19(a) of the California Rules of Court and rule 5.128 of the Rules of Procedure, the court finds that the interest of Respondent and the protection of the public will be served by the

³ Former std. 1.7(a) provided that "the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust."

following specified condition being attached to the private reproof imposed in this matter.

Failure to comply with any condition(s) attached to the private reproof may constitute cause for a separate proceeding for willful breach of rule 1-110 of the State Bar Rules of Professional Conduct. Respondent is ordered to comply with the following conditions attached to his private reproof following the effective date of the private reproof:

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.)

Dated: July 27, 2016



YVETTE D. ROLAND
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 Los Angeles, on July 28, 2016, I deposited a true copy of the following document(s):

DECISION AND ORDER

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 Los Angeles, California, addressed as follows:

MICHAEL JAY BERGER
9454 WILSHIRE BLVD 6TH FL
BEVERLY HILLS, CA 90212

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

William S. Todd, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on July 28, 2016.



Angela Carpenter
Case Administrator
State Bar Court