PUBLIC MATTER

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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of ANDREW E. BENZINGER, A Member of the State Bar, No. 219380.	)	Case No. 16-C-13435-PEM DECISION AND ORDER

Introduction[1]

This matter is before the court on an order of reference filed by the Review Department of the State Bar Court on March 1, 2017; and served on respondent on March 2, 2017. The matter was referred for a hearing and decision as to whether the facts and circumstances surrounding the misdemeanor violation of Penal Code section 148, subdivision (a)(1) (resisting or obstructing a police officer) of which Andrew E. Benzinger (respondent) was convicted, involved moral turpitude or other misconduct warranting discipline, and, if so, what the appropriate level of discipline should be.

For the reasons stated below, the court finds that the facts and circumstances surrounding respondent's commission of the offense do not involve moral turpitude, but do constitute other misconduct warranting discipline. Based on the facts and circumstances, as well as the applicable

[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.

mitigating and aggravating factors, the court concludes that the appropriate discipline for respondent's misconduct is a private reproval.

Significant Procedural History

On July 18, 2016, respondent pled nolo contendere to a misdemeanor violation of California Penal Code 148, subdivision (a)(1) (resisting or obstructing a police officer).

On February 2, 2017, the Office of Chief Trial Counsel of the State Bar of California (State Bar) transmitted evidence of finality of respondent's conviction to the Review Department. Respondent filed his Answer to Notice of Hearing on Conviction on March 29, 2017. In accordance with the Review Department's referral order, this case proceeded to trial in the Hearing Department of the State Bar Court on June 20, 2017. The State Bar was represented by Supervising Attorney Susan Kagan and Deputy Trial Counsel Hans Moore. Respondent represented himself.

Following closing arguments, the court took this matter under submission for decision on June 20, 2017.

Findings of Fact and Conclusions of Law

Respondent is conclusively presumed, by the record of his conviction in this proceeding, to have committed all of the elements of the crimes of which he was convicted. (Bus. & Prof. Code, § 6101, subd. (a); *In re Crooks* (1990) 51 Cal.3d 1090, 1097; *In re Duggan* (1976) 17 Cal.3d 416, 423; and *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588.) However, "[w]hether those acts amount to professional misconduct . . . is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction." (*Id.* at p. 589, fn. 6.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 3, 2002, and has been a member of the State Bar of California at all times since that date.

B. Findings of Facts

1. Respondent's Conviction

Pursuant to a felony indictment filed May 20, 2016, in the Sacramento County Superior Court, respondent was charged with one felony violation of Penal Code § 455 (willfully and maliciously attempting to set fire to or attempt to burn a structure or property). Respondent was also charged with one misdemeanor violation of Penal Code § 148, subdivision (a)(1) (resisting or obstructing a police officer in the discharge of his or her office).

On July 18, 2016, respondent entered into a plea of nolo contendere to a misdemeanor violation of Penal Code § 148, subdivision (a)(1). The felony charge of Penal Code §455 was dismissed. The court sentenced respondent to three years formal probation with standard conditions, including that respondent: obey all laws; pay all fines assessed; abstain from alcohol use; and complete 28 hours of community service work by November 14, 2016.

2. Facts and Circumstances

On May 18, 2016, respondent and his wife (now respondent's ex-wife) received a letter ordering them to vacate their home of 13 years by May 26, 2016. Upon receipt of the letter, respondent got upset and began drinking, because the lender previously had agreed to a May 31, 2016 foreclosure date. Consequently, respondent, relying on the May 31, 2016 foreclosure date, made arrangements for new housing and for a U-Haul.

When respondent read the lender's letter, respondent became extremely upset and began drinking. Soon thereafter he grabbed a can of lighter fluid and left the house with his wife. His wife called the police and told the police that when respondent left the home, he had said that if he

could not have the home, no one could have it and that he was going to burn the house down. As police officer Patricia Varozza (Varozza) was in the area, she responded to the wife's call. When Varozza saw the person, who she believed to be respondent, she surmised that he was very upset and angry. She called out his name and began talking to him. But, she was unable to engage respondent as he started to jog away from her and toward his home. Varozza told him to stop on numerous occasions; but, respondent did not heed her calls.

Within three to five minutes Varozza caught up with respondent, who had reached the front yard of his home. Respondent squirted the light fluid toward Varozza; but, it did not touch her. Varozza used her taser on respondent, although it did not appear to have any effect on him. However, another officer, Marcus Frank (Frank), who had arrived on the scene, deployed his taser, which hit respondent twice on the back. Frank testified that the only knowledge he had regarding the lighter fluid, was based on the statement of respondent's wife. Frank said he noted that respondent's eyes were watery and he had a moderate odor of alcohol. But, respondent was calm and compliant.

Varozza described respondent as being completely different after being tased. She testified that it was as if respondent were a completely different person. He became compliant, seemed very calm, and was polite. Varozza testified that although respondent had a lighter with him, she never saw him light it. Varozza credibly testified that respondent was never disrespectful. When paramedics arrived on the scene, respondent was taken to the hospital, where it was determined that he had 0.27% blood alcohol content.

On May 20, 2016, respondent was charged by way of criminal complaint with the following charges:

1. Attempting to set fire to or attempting to burn or to aid. . .the burning of .any structure . . . land or property, or . . . any act preliminary thereto. . . ., in violation of Penal

Code section 455; and

2. Resisting or obstructing officer . . .in violation of Penal Code section 148, subdivision (a)(1).

On July 18, 2016, respondent pled nolo contendere to and was convicted of violating Penal Code section 148, subdivision (a)(1) [Resisting Police Officer]. He was sentenced to, among other things three years of informal probation with conditions, that he obey all laws, pay all fines assessed, abstain from alcohol use, and complete 28 hours of community service work by November 14, 2016.

Thereafter, at the trial in this matter, respondent credibly testified that (among other things) he should have stopped and obeyed the command of the police officers and that he that he did not intend to burn his home. Clearly, had there been evidence that respondent intended to burn his home down, the Penal Code § 455 charge, which had been filed against him, would not have been dismissed.

C. Conclusions of Law

As noted, *ante*, the Review Department referred the present matter to the Hearing Department for a hearing and decision as to whether the facts and circumstances surrounding respondent's criminal conviction involved moral turpitude or other misconduct warranting discipline and, if so found, a recommendation as to the discipline to be imposed. This court finds, that while the facts and circumstances of the present matter do not involve moral turpitude, they do involve other misconduct warranting discipline. This conclusion is based on the circumstances surrounding respondent's conviction.

As stated, respondent is conclusively presumed to have committed all of the elements of the crime of which he was convicted. (*In re Duggan*, *supra*, 17 Cal.3d. at p. 423). In the instant case, respondent pled guilty to resisting arrest. The fact that respondent pled guilty to resisting

arrest does not necessarily determine the outcome of the disciplinary matter. However, in examining the circumstances giving rise to the offense, the court is not restricted to examining the elements of the crime. It also may consider the entire course of an attorney's conduct, in reaching a determination as to the attorney's ability to practice law.

Aggravation

No factors in aggravation have been found.

Mitigation[2]

No Prior Record (Std. 1.6(a).)

Respondent has no prior record of discipline in 14 years of practice prior to engaging in the present misconduct. (Std. 1.2(e)(i).) Practicing law for 14 years before committing misconduct constitutes significant consideration as a mitigating circumstance. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596; *In the Matter of Murray* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 479, 489 [more than 10 years of discipline-free practice entitled to significant mitigation].)

Lack of Harm (Std. 1.6(c).)

Respondent's misconduct caused no actual harm to any person or property. (*In re Kelley*, *supra*, 52 Cal.3d at p. 498; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443.) Although respondent had considered doing harm to property, he did not do so. As he explained that was a line he did not cross. Respondents are not and should not be disciplined for "bad thoughts." In the instant matter, even when respondent had a blood alcohol content (BAC) of 0.27%, and was upset and distraught, he exercised self-control and did not allow his baser instincts to take over.

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[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.

Extreme Emotional/Physical/Mental Disabilities (Std. 1.6(d).)

At the time of his misconduct, respondent was experiencing extreme family and emotional difficulties associated with his marital separation. Respondent and his wife were experimenting with a trial separation. Although, respondent had custody of his daughter, his wife was trying to obtain custody (which his wife was ultimately denied). At the same time the family home was being placed in foreclosure and respondent was paying for his wife's housing, as well as for the housing for himself and his child. Respondent credibly testified as to how all of those problems reached a climax on May 18, 2016, when he received a letter from his lender, which unilaterally advanced the date of foreclosure, despite the fact that respondent and the lender had entered an agreement, which had set a specified date for the foreclosure. The confluence of all of the stressors and problems in combination with an excess consumption of alcohol by respondent, apparently led respondent to his irrational behavior.

Clearly, respondent and his wife were involved in a disastrous marriage, which resulted in an extremely contentious custody dispute. At the same time the lender notified respondent that the agreed upon foreclosure date was being accelerated. Yet, despite this series of unfortunate events, respondent even in his inebriated state, somehow found the emotional strength to withdraw from the brink of disaster on May 18th. He did not burn any property; and he calmed himself down and interacted with the police officers in a calm and respectful way.

Thereafter, respondent entered therapy, divorced his wife, won the custody dispute, and moved 50 miles away from his wife in order to avoid the stressors of what clearly was a toxic relationship. (It should be noted that the information which had been provided to the police officers who had responded to the May 18, 2016 phone complaint regarding respondent's behavior was based solely on information provided to the police by respondent's wife.) Yet, despite all of the hardships with which respondent was confronted, there is no evidence that respondent ever

caused any client harm or that he ever allowed his problems to impact on his law practice. Thus, this court affords respondent's family and emotional issues some weight in mitigation.

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

Respondent has admitted that his actions on May 18, 2016, were wrong. He has not asked this court to dismiss this matter. He recognizes that he was playing some sort of (possibly alcohol induced) linguistic mind-game with himself, when he ignored Officer Varozza's words to stop running and speak with her. At some level respondent understood, that the words being directed to him by a police officer, were more than a request for a chat. Respondent credibly testified that he now recognizes that his failure to comply with the lawful demand of Officer Varozza to "Stop" created a potential danger to himself and others, and also interfered with Varozza's ability to carry out her duties as a police officer. He admits that he had a serious lapse in judgment. Respondent's recognition of wrongdoing and acknowledgement of the harm that he caused (primarily to himself) and the harm that potentially could have befallen others as a result of his conduct is a significant step in the rehabilitative process. Accordingly, respondent is granted mitigation for acknowledgment and recognition of wrongdoing.

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*, supra, 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 2.16 provides that suspension or reproval is the presumed sanction for a final misdemeanor conviction not involving moral turpitude, but involving other misconduct warranting discipline.

The State Bar argued that respondent's misconduct warrants a public reproval. Respondent, on the other hand, argued that the present misconduct warrants a private reproval.

The State Bar turned to *In re Kelley* (1990) 52 Cal.3d 487 for guidance. In *Kelley*, the Supreme Court publicly reproved an attorney and placed her on disciplinary probation for a period of three years subject to conditions which included her referral to the State Bar's Program on Alcohol Abuse. The attorney had two criminal convictions for driving under the influence. The attorney's blood alcohol content (BAC) in the second conviction matter was between 0.16% and 0.17%. The second violation was a violation of a court order directed specifically to the attorney and demonstrated the attorney's complete disregard for the conditions of her probation, the law and the safety of the public. The Court thus determined that the attorney's discipline should include a public reproval and a long period of probation based on its finding that the attorney was still in denial of her problems with alcohol, had two DUI convictions, a history of violating the terms of her criminal probation, and had been dishonest and uncooperative with the arresting officers.

In the instant matter, respondent's misconduct, like the misconduct by the attorney in *Kelley,* occurred while intoxicated. However, unlike Kelley, who engaged in repeated misconduct, there is no evidence that respondent, herein, has engaged in any further misconduct since the May 18, 2016 incident. And, unlike Kelley, respondent did not engage in any dishonesty. Although respondent initially did not stop when commanded to do so by Officer Varozza, respondent, after

being tased, was neither violent nor disrespectful to the officers. Both Officers Varozza and Frank described respondent as compliant, calm and polite. In fact, Officer Varozza noted that respondent was never disrespectful during their encounter. Thus, respondent merits significantly less severe discipline than that which was imposed in the *Kelley* case.

This court finds no case law directly on point with the instant matter. However, the court considers *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52, which is somewhat analogous to the instant matter.

In *Stewart*, an attorney was visiting with his 18-month-old son, but the electricity in his apartment had been turned off. He then took his son to his estranged wife's apartment and requested that he be allowed to conduct his visit there. When she refused, the attorney, who was under the influence of alcohol, intimidated his way into his wife's apartment by citing Penal Code sections. Two uniformed police officers arrived on the scene, and the attorney refused to leave the apartment without his son. When the officers attempted to escort the attorney out of the apartment, he jerked away. The attorney and one of the officers then got into a physical altercation causing them both to sustain cuts and bruises. The attorney was handcuffed and arrested. He then became abusive towards the officers, using profanities and racial epithets.

The attorney subsequently received a misdemeanor conviction of battery on a police officer. In aggravation, the attorney: (1) demonstrated a lack of insight and indifference to the seriousness of his misconduct; (2) had a prior record of discipline; and (3) committed additional uncharged criminal conduct, including trespass. No mitigating circumstances were found. The Review Department recommended, among other things, that the attorney be suspended from the practice of law for two years, stayed, with two years' probation, and a 60-day actual suspension.

The instant matter is somewhat analogous to *Stewart*. Like the attorney in *Stewart*, respondent was highly intoxicated, failed to acquiesce with multiple commands from a police

officer, and failed to comply with police directives. However, in the instant matter, respondent never used or attempted to use physical force against the police officers. Respondent was not disrespectful of the police. In fact, the testimony of the officer support a finding that respondent was polite, compliant, and never disrespectful. While no aggravating circumstances were found in the instant matter, extensive mitigating factors exist. Thus, it is clear that the misconduct in the present case is considerably less egregious than the misconduct of the attorney in *Stewart.* Balancing all factors, the instant case warrants a significantly lower level of discipline than that imposed in the *Stewart* matter.

Respondent's conduct on May 18, 2016, appears to have been the result of a singular lapse in judgment, which occurred when respondent was emotionally distraught due to the overwhelming family and emotional problems confronting him. Moreover, respondent has since taken steps to eliminate the possibility of being once again overwhelmed by eliminating many of the stressors that caused him to feel beaten down. As noted, respondent changed his residence to a location, which is 50 miles away from his ex-wife's residence. He obtained sole custody of his child, and he has entered therapy.

Considering and balancing all of the relevant factors, the court has determined, and orders, as outlined below, that respondent receive a private reproval with reproval conditions attached.

DISCIPLINE ORDER

It is ordered that respondent **Andrew E. Benzinger**, State Bar Number 219380, is privately reproved. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, the private reproval 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 interests of respondent and the protection of the public will be served by the following specified conditions being attached to the private reproval imposed in this matter.

Failure to comply with any condition(s) attached to the private reproval 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 reproval for one year following the effective date of the private reproval:

1. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions attached to respondent's reproval.

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 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 attached to his private reproval. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the one-year period in which respondent's reproval conditions are in effect, respondent must promptly meet with the probation deputy as directed and upon request.

4. During the period in which these conditions are in effect, 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 period in which these conditions are in effect. 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 conditions attached to his reproval 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 the reproval 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 period in which these conditions are in effect and no later than the last day of that period.

5. 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 the conditions attached to this reproval.

6. Respondent must comply with all conditions of respondent's criminal probation and must so declare under penalty of perjury in any quarterly report required to be filed with the Office of Probation. If respondent has completed probation in the underlying criminal matter, or completes it during the one-year period in which these reproval

conditions are in effect, respondent must provide to the Office of Probation satisfactory documentary evidence of the successful completion of the criminal probation in the quarterly report due after such completion. If such satisfactory evidence is provided, respondent will be deemed to have fully satisfied this condition of reproval.

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. The period during which these conditions are in effect will commence upon the date this decision imposing the private reproval becomes final.

In light of the level of discipline imposed, it is not ordered that respondent take and pass the Multistate Professional Responsibility Examination.

Dated: September 12, 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 September 12, 2017, 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 San Francisco, California, addressed as follows:

ANDREW E. BENZINGER
5716 FOLSOM BLVD # 250
SACRAMENTO, CA 95819

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

Susan I. Kagan, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on September 12, 2017.

Lauretta Cramer
Case Administrator
State Bar Court