PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case Nos. 15-O-10052 (15-O-10055; 16-O-10496)-CV
ANDREW JAMES STERN,	)	DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT
A Member of the State Bar, No. 51648.	)	

Introduction[1]

In this original disciplinary proceeding, respondent Andrew James Stern was charged with and admitted culpability on eight counts of serious misconduct. The misconduct in the first two counts involved respondent's client trust account (CTA), and the misconduct in the remaining six counts involved two separate client matters.

Specifically, respondent was charged with and admitted culpability on the following eight counts: (1) commingling and using his CTA for improper purposes for almost four years (rule 4-100(A)); (2) failing to prepare and keep proper accounting records of his receipt and handling of the client funds for almost four years (rule 4-100(B)(3)); (3) improperly representing multiple clients whose interests potentially conflicted (rule 3-310(C)(1)); (4) improperly representing multiple clients whose interests actually conflicted (rule 3-310(C)(2)); (5) engaging in acts of moral turpitude, dishonesty, or corruption by deliberately breaching his fiduciary duties and

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

committing fraud against a client (§ 6106); (6) failing to notify the State Bar that a civil judgment had been entered against him for fraud (§ 6068, subd. (o)(1)); (7) failing to obey a court order to pay $7,500 in sanctions (§ 6103); and (8) failing to notify the State Bar of the $7,500 sanction order (§ 6068, subd. (o)(3)).

As set forth *post*, in light of the seriousness of the admitted misconduct and length of its duration and the surrounding aggravating and mitigating circumstances, the court finds that only disbarment will further the goals of attorney discipline to protect the public, the courts, and the profession. Accordingly, the court recommends, inter alia, that respondent be disbarred. Moreover, the court will order that respondent be involuntarily enrolled as an inactive member of the State Bar of California under section 6007, subdivision (c)(4).

Significant Procedural History

The Office of Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding on December 28, 2016, by filing a notice of disciplinary charges (NDC) against respondent. Respondent filed his response to the NDC on January 20, 2017.

On April 18, 2017, the parties filed a partial stipulation as to facts, conclusions of law, and admission of documents (stipulation).[2] In the stipulation, the parties stipulate that respondent is culpable on each of the eight counts of misconduct charged in the NDC.

Even though the parties never sought court approval of the stipulation as required under Rules of Procedure of the State Bar, rule 5.58(A), the court made clear, at trial, that it approved the stipulation and accepted the conclusions of law that respondent is culpable on each of the eight counts of misconduct. The court approved and accepted the stipulation because it is fair to

[2] The stipulation begins: "IT IS HEREBY STIPULATED . . . in accordance with rule 5.54 of [the] Rules of Procedure of the State Bar of California . . . ." The parties' citation to rule 5.54, which authorizes and pertains to *stipulations to facts only*, is incorrect. In the interests of justice, the court deems the parties to have entered into and filed the stipulation in accordance with Rules of Procedure of the State Bar, rule 5.55, which authorizes and pertains to *stipulations to facts and conclusions of law*.

the parties and adequately protects the public (Rules Proc. of State Bar, rule 5.58(A)) and because the conclusions of law as to respondent's culpability are adequately supported by the factual record (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 409-410; cf. *In the Matter of Twitty* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 664, 676). As approved, the stipulation resolves everything in this proceeding except for the aggravating and mitigating circumstances and the appropriate level of discipline.[3]

A one-day trial was held on April 26, 2017. Following a post-trial briefing period, the court took the matter under submission for decision on May 10, 2017. Thereafter, on May 11, 2017, respondent filed a motion to reopen the record seeking to have good-character letters from four individuals admitted into evidence.[4] In an order filed on May 23, 2017, the court granted respondent's motion to reopen the record and admitted the four good-character letters into evidence over the State Bar's objections.

On May 19, 2017, the State Bar filed an addendum to its closing brief. And, on June 8, 2017, the State Bar filed a second addendum to its closing brief.

On May 31, 2017, respondent filed a second motion to reopen the record.[5] In his second motion to reopen, respondent seeks to have evidence establishing, under counts three through six, that the McGinty family home in Santa Monica, California is currently worth about $1.95

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[3] In the State Bar's closing brief, the assigned Senior Trial Counsel (STC), citing Rules of Procedure of the State Bar, rule 5.56(A)(6), included a statement to the effect that the factual stipulations in the stipulation are supported by evidence obtained in the State Bar investigation of the matters. However, as the STC acknowledges in the State Bar's closing brief, rule 5.56(A)(6) applies only with respect to stipulations filed under rule 5.56 (i.e., a stipulation to facts, conclusions of law, and disposition). Moreover, rule 5.56(A)(6) authorizes such a statement to be included in a stipulation to facts, conclusions of law, and disposition only "if requested by the Court." In any event, the court has deemed the stipulation to have been filed under rule 5.55, not rule 5.56. Thus, the court disregards the STC's statement concerning the evidentiary support for the factual stipulations.

[4] Respondent incorrectly titled his motion to reopen the record as a motion to augment.

[5] Respondent incorrectly titled his second motion to reopen the record as a supplemental motion to reopen and augment the record.

million admitted into evidence. According to respondent, this evidence is relevant because it establishes that his misconduct did not harm the McGinty family or the McGinty Family Revocable Trust. The court cannot agree. As the State Bar aptly notes in its opposition to respondent's second motion to reopen the record, the fact that the value of the McGinty family home, like many homes in Southern California, has continued to dramatically increase over the last four or five years since respondent's misconduct in the McGinty matter does not vitiate or ameliorate any of the significant harm that respondent's misconduct clearly caused in the McGinty matter.

In short, the consideration of the new fact or facts that respondent seeks to have admitted into evidence in his second motion to reopen the record would not lead to a different result or change any of the court's findings. Respondent's second motion to reopen the record is, therefore, DENIED. (Rules Proc. of State Bar, rule 5.113(B)(3).)

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based on the stipulation and the documentary and testimonial evidence admitted into evidence at trial.

Jurisdiction

Respondent was admitted to the practice of law in this state on January 5, 1972, and has been a member of the State Bar of California since that time.

Case Number 15-O-10052 — CTA Matter

Facts

On 72 occasions during the almost four year period from August 13, 2011, through June 22, 2015, respondent deposited personal funds, including earned legal fees, totaling $606,800 into his CTA. Respondent thereafter withdrew or disbursed those amounts as needed. Moreover, at trial, respondent admitted that, during this same period of almost four years, he also

deposited into, maintained in, and disbursed from his CTA client funds. In addition, respondent failed to maintain any of the accounting records required under rule 4-100(B)(3) for the client funds that he deposited into, maintained in, or disbursed from his CTA during this same period of almost four years.

Conclusions of Law

Count One —Rule 4-100(A) (Commingling and Misuse of CTA)

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited into a client trust account and that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith except for limited exceptions not applicable here. "The rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit." (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23.) "An attorney violates [rule 4-100(A)] when he or she fails to deposit and manage funds in the manner delineated by the rule, even if this failure does not harm the client. [Citation.]" (*Murray v. State Bar* (1985) 40 Cal.3d 575, 584.)

Respondent willfully violated rule 4-100(A) for a period of almost four years from August 2011 through June 2015 by commingling and by depositing into, maintaining in, and dispersing from his CTA for personal expenses $606,800 in personal funds.

Count Two —Rule 4-100(B)(3) (Maintain Records of Client Funds)

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. Rule 4-100(C) provides: "The Board of Governors of the State Bar [now the Board of Trustees of the State Bar] shall have the authority to formulate and adopt standards as to what 'records' shall be maintained by members and law firms in accordance with [rule 4-100](B)(3). The standards formulated and adopted by the

Board . . . shall be effective and binding on all members." The Trust Account Record Keeping Standards as adopted by the Board effective January 1, 1993, are as follows:

> (1) A member shall, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintain:
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> (a) a written ledger for each client on whose behalf funds are held that sets forth:
>
> (i) the name of such client,
>
> (ii) the date, amount and source of all funds received on behalf of such client,
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> (iii) the date, amount, payee and purpose of each disbursement made on behalf of such client, and
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> (iv) the current balance for such client;
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> (b) a written journal for each bank account that sets forth:
>
> (i) the name of such account,
>
> (ii) the date, amount and client affected by each debit and credit, and
>
> (iii) the current balance in such account;
>
> (c) all bank statements and canceled checks for each bank account; and
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> (d) each monthly reconciliation (balancing) of (a), (b), and (c).
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> (2) A member shall, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written journal that specifies:
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> (a) each item of security and property held;
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> (b) the person on whose behalf the security or property is held;
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> (c) the date of receipt of the security or property;
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> (d) the date of distribution of the security or property; and
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> (e) person to whom the security or property was distributed.

Respondent willfully violated rule 4-100(B)(3) by failing to maintain any of the records required under the foregoing Trust Account Record Keeping Standards for the client funds that he received during the period of almost four years from August 2011 through June 2015.

Case Number 15-O-10055 —The McGinty Matter

Dolores McGinty was the mother of Kathleen McGinty, Timothy McGinty (McGinty), and Michael McGinty. McGinty and his sister, Kathleen, are dependent adults as defined by Welfare & Institutions Code section 15610.23.[6]

In September 2006, Dolores McGinty established the McGinty Family Trust (Trust) with Dolores McGinty the trustor, McGinty the trustee, and Jeanne Haworth as the successor trustee. Haworth is Dolores McGinty's niece and the cousin of McGinty, Kathleen McGinty, and Michael McGinty. Attorney Joseph C. Girard prepared the Trust documents. Under the Trust's "statement of intent," any funds distributed from the Trust to Kathleen McGinty had to be placed in a special needs trust for her protection given her status as a dependent adult.[7]

The Trust's primary asset is the McGinty family home in which Dolores McGinty and Kathleen McGinty resided. The McGinty family home is a small, less than 1,500 square foot, three bedroom, one bath house with a garage in the City of Santa Monica, California (Property).

Dolores McGinty died in May 2009. McGinty moved into the home with Kathleen after their mother's death. At that time, the Los Angeles County Tax Assessor assessed the value of the Property at $890,000 ($668,000 for the land plus $222,000 for improvements). In January 2010, the only encumbrance on the Property was a lien for $32,946.76.

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[6] Welfare & Institutions Code section 15610.23 provides, in part, that a "dependent adult" is a person between the ages of 18 and 64 years who has mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights.

[7] Respondent is familiar with such trusts having prepared revocable and irrevocable trusts. Respondent was aware of the Trust provision which required that all distributions to Kathleen McGinty be placed in a special needs trust. (See exhibit 13 at p. 43.)

In August 2010, the City of Santa Monica sent McGinty a compliance order stating that he was to repair or replace the garage roof, which had been damaged in a fire. On September 23, 2010, McGinty used the Property as collateral to borrow the sum of $75,000 to make improvements to the Property, including repairing the garage. McGinty paid $16,480 to a construction company to repair the garage, but that company did not perform any work. Respondent was fully aware of McGinty's dispute with the construction company because respondent represented McGinty in that dispute.

On June 3, 2011, McGinty entered into a construction contract to remodel the Property with Ness Adam, Inc. (Ness Adam), a construction company. The contract price was $397,000 ($186,000 to remodel the house plus $153,000 to build a guest house; and $58,000 to repair and remodel the garage).

Ness Adam is owned and operated by Noam Bouzaglou, who was also a salesman for the construction company to which McGinty had previously paid $16,480 and that failed to perform any of the work to repair the garage. Respondent began representing Bouzaglou and Ness Adam on various legal matters in late July 2011.

On June 6, 2011, McGinty paid $24,000 to Bouzaglou. At that time, however, Bouzaglou was entitled to collect only $1,000 from McGinty under Business and Professions Code section 7159.5. Section 7159.5, subdivision (a)(3), restricts the down payment on a home improvement contract, such as McGinty's contract with Ness Adam, to the lesser of $1,000 or 10 percent of the total contract amount. And section 7159.5, subdivision (a)(5), provides that, "[e]xcept for a down payment, the contractor may neither request nor accept payment that exceeds the value of the work performed or materials delivered."

On August 12, 2011, McGinty used the Property as collateral to borrow $400,000 at an annual interest rate of 10 percent with monthly-interest-only payments of $3,333.33 and a final

payment of $403,333.33. Out of the proceeds of the $400,000 loan, Ness Adam was to receive $270,000, and McGinty was to receive $55,000 for expenses. However, after deducting the closing costs and paying off the then existing $75,000 loan, the $400,000 loan generated only approximately $294,300 in cash.

On August 23, 2011, Bouzaglou told respondent about Ness Adam's construction contract with McGinty and McGinty's $400,000 loan. Bouzaglou asked respondent to receive the cash proceeds from McGinty's $400,000 loan into respondent's CTA and to distribute the proceeds for the remodel and to pay McGinty's expenses. Respondent agreed and thereby undertook the joint/concurrent representation of Bouzaglou and McGinty.

On August 23, 2011, respondent asked Bouzaglou and McGinty to sign a letter titled "representation," which stated, in part: (a) that, if a conflict arose, respondent could continue to represent Bouzaglou; (b) that respondent was not "giving any legal [advice] or … representing McGinty, either now or in the future"; and (c) "[a]ny legal services which may be construed to have been performed on behalf of McGinty are at the request of Bouzaglou and any payments for the services rendered by this office which may be deducted from monies held by this office in trust for McGinty are being made pursuant to instructions of Bouzaglou and with the express consent of McGinty." (See exhibit 5.)

On August 25, 2011, respondent obtained McGinty's written authorization to disburse $270,000 from the proceeds of McGinty's $400,000 loan to Ness Adam upon receipt of the funds in deliberate violation of Business and Professions Code section 7159.5. Respondent knew, before he distributed any of the proceeds of the $400,000 loan, that section 7159.5 sets the maximum down payment on a home improvement contract at $1,000 and prohibits the contractor from thereafter requesting or collecting any additional payments that exceed the value of the work performed or materials delivered. (See exhibits 6 and 27.)

On August 26, 2011, respondent received the $294,354.88 cash proceeds from McGinty's $400,000 loan into his CTA. On August 29, 2011, respondent disbursed $270,000 of those proceeds to Bouzaglou even though respondent knew that $270,000 significantly exceeded the value of the work that Ness Adam had completed at the time. (See exhibit 7.) After the $270,000 disbursement to Bouzaglou, respondent held a balance of $24,354.88 (approximately $294,300 less $270,000) in trust for McGinty. On September 27, 2011, McGinty and Ness Adam entered into an extra work order for construction services costing an additional $228,500, which increased the total contract price to $625,500 ($397,000 plus $228,500).

On December 2, 2011, January 5, 2012, March 3, 2012, and April 4, 2012, respondent made the monthly interest payments of $3,333.33 (for a total of $13,333.32) on the $400,000 loan. After those interest payments, respondent held $11,021.56 ($24,354.88 less $13,333.32) in trust for McGinty. (See exhibit 7.)

On January 6, 2012, McGinty signed a "Special Power of Attorney" prepared by respondent that gave Bouzaglou unlimited authority to act as McGinty's "Attorney-in-Fact" with regard to the Property, including but not limited to renting, selling, releasing, conveying, mortgaging, signing deeds, etc., which was returned to respondent after it was recorded by the Los Angeles County Registrar-Recorder/County Clerk ("County Recorder"). (See exhibit 8.)

On February 14 and 16, 2012, respondent billed McGinty 1.8 hours for conducting a conference with Bouzaglou regarding the "Trust and various property issues on McGinty property," and reviewing the Trust. (See exhibit 13 at p. 59.) From November 2011 through March 12, 2012, respondent billed McGinty $907.50 for legal services respondent performed for McGinty. Respondent collected the $907.50 out of the funds that he held in trust for McGinty. These facts further belie respondent's claims that he did not owe any fiduciary duties to McGinty.

On March 1, 2012, McGinty and Ness Adam entered into another Extra Work Order for construction services costing an additional $214,500, which increased the total contract price to $840,000 ($625,500 plus $214,500). McGinty's handwritten note on the Order states that "this contract was actually signed @ March 22 but contractor asked me to sign '3-1-12.' "

On March 2, 2012, McGinty and his sister, Kathleen, vacated the Property to allow it to be remodeled and moved into an apartment that Bouzaglou had found for them in Encino, California for $1,595 per month. Neither McGinty nor Kathleen could afford to pay the monthly rent.

On April 24, 2012,[8] McGinty was admitted to BHC Alhambra Hospital on a 72-hour hold as a danger to himself pursuant to Welfare and Institutions Code section 51550, which authorizes a qualified officer or clinician to involuntarily confine a person suspected to have a mental disorder that makes them a danger to themselves, a danger to others, and/or gravely disabled. During his hospitalization, BHC Alhambra Hospital reported that:

> a. on April 25, 2012, McGinty was admitted because he had attempted to commit suicide by overdosing on Lamictal [an anti-epileptic medication used to treat seizures in adults and children who are at least two years old] and Seroquel [an antipsychotic medicine used to treat schizophrenia in adults and children who are at least 13 years old], and had impaired insight and judgment;
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> b. on April 25, 2012, McGinty stated that he "lives with his sister but he is upset because they may lose their home. He will have no place to live.";
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> c. between April 28 and 30, 2012, McGinty stated he had auditory hallucinations; and
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> d. on May 4 and 6, 2012, McGinty stated that he had suicidal ideation.

Respondent claims that he had no knowledge of any of the facts set forth in the preceding paragraphs (a through d) until after February 13, 2013, when he was named as a defendant in a lawsuit by Haworth, which is discussed *post*.

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[8] Presumably, this date should be April 25.

Respondent repeated his claim that he did not know of McGinty's 72-hour hold until after February 13, 2013, when he testified at the April 26, 2017, trial in this disciplinary proceeding. In addition, respondent testified that he did not know that McGinty was a dependent adult until after February 13, 2013. After carefully observing respondent testify before it and after carefully considering, among other things, his demeanor while testifying; the character of his testimony; and his interests in the outcome of this proceeding, and after carefully reflecting on the record as a whole, the court finds that respondent's testimony on this issue is not credible. (See, generally, Evid. Code, § 780, subd. (c); *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 736-737.) Of course, the court's rejection of respondent's testimony " 'does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.' " (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343, quoting *Estate of Bould* (1955) 135 Cal.App.2d 260, 265; *In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 785.) Nonetheless, the record in this proceeding establishes, by clear and convincing circumstantial evidence (*In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 237), that respondent knew, upon first meeting McGinty, that McGinty was a dependent adult. Without question, as a dependent adult, McGinty could not and did not give informed consent to respondent's joint/concurrent representation of Bouzaglou and himself with respect to remodeling the Property, which was a matter in which Bouzaglou's and his interest both potentially conflicted and actually conflicted. (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2016) ¶ 4:82.5, p. 4-44.)

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On April 25, 2012,[9] McGinty and Ness Adam entered into a third Extra Work Order for construction services costing an additional $29,220.13, which increased the total contract price for Ness Adam to remodel a small 1,440 square foot home, adding a guest house, and repairing and presumably updating a detached garage to a total of $869,220.13 ($840,000 plus $29,220.13).

On May 9, 2012, McGinty was discharged from BHC Alhambra Hospital. BHC Alhambra Hospital reported that McGinty "had reached the maximum benefit from this treatment modality. The patient denied suicidal or homicidal ideation. The patient was discharged after fifteen days in stable condition." McGinty's "Psychiatric Discharge/Aftercare Plan" instructed him to obtain care from San Fernando Valley Community Mental Health Center or the Los Angeles County Department of Health Services – San Fernando Health Center.

On May 15, 2012, respondent prepared a Property Transfer Agreement (PTA) that transferred ownership of the Property from the Trust to Bouzaglou at the request of Bouzaglou. The PTA provides, in part, that:

a. "no lender will provide the funds to finish the remodeling . . . unless [Bouzaglou] is the title holder to the Property";

b. Bouzaglou would be responsible to pay all monies necessary to complete the building and remodeling estimated to be approximately $450,000;

c. Bouzaglou would pay the mortgage payments;

d. Bouzaglou would advance up to $2,400 per month to McGinty for rent and living expenses;

e. McGinty would transfer title to Bouzaglou via Quit Claim Deed; and

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[9] The parties do not know why the document was dated April 25, 2012, which was the day McGinty was hospitalized, but that is the date on the document.

f. the Trust would receive a share from the sale of the Property after the remodeling was complete.

Bouzaglou and McGinty signed the PTA. (See exhibit 9.) On May 15, 2012, respondent prepared an Addendum to Property Transfer Agreement (Addendum to PTA) at the request of Bouzaglou. The Addendum to PTA provides, in part, that any amount received by the Trust from the sale of the Property would be reduced by all sums Bouzaglou was required to pay as interest or procurement fees for monies borrowed by Bouzaglou to pay the construction costs or Promissory Notes. Bouzaglou and McGinty signed the Addendum to PTA. (See exhibit 10.)

On May 16, 2012, respondent prepared a Quit Claim Deed transferring title for the Property from the Trust to Bouzaglou. McGinty signed the Deed, which was returned to respondent after it was recorded by the County Recorder. (See exhibit 11.)

On May 30, 2012, Bouzaglou used the Property as collateral to execute two "Promissory Note[s]" agreeing to pay the sums of $95,000 and $105,000 to another construction company on or before December 1, 2012. The Promissory Note for $95,000 required the construction company to: lay the foundation and frame the Property, install plumbing, and install electrical wiring and fixtures.

On October 16, 2012, McGinty died at age 49 from natural causes. Thereafter, Haworth was appointed successor trustee. On October 18, 2012, Bouzaglou entered into a "California Residential Purchase Agreement and Joint Escrow Instructions" to sell the Property to certain buyers for $1,530,000.

On November 1, 2012, Attorney Girard, who prepared the McGinty Family Trust for Dolores McGinty, filed a lis pendens on the Property for Haworth as the successor trustee. The next day, he filed a complaint against Bouzaglou in the Los Angeles County Superior Court for Haworth (*Haworth v. Bouzaglou*) seeking rescission based on undue influence, constructive

trust, constructive fraud, and quiet title. Respondent represented Bouzaglou in the litigation. (See exhibit 12.)

On February 13, 2013, Attorney Girard filed a verified First Amended Complaint in *Haworth v. Bouzaglou* that added Ness Adam and respondent as defendants for rescission, constructive trust, fraud, negligent misrepresentation, quiet title, breach of fiduciary duty, aiding and abetting breach of trust, financial abuse of dependent adult, etc. (See exhibit 13.) Respondent represented Bouzaglou, Ness Adam, and himself in the litigation.

In March 2014, a 10-day jury trial was held in *Haworth v. Bouzaglou*. Respondent and Bouzaglou both testified that they were not aware that McGinty had any mental limitation or disability that would impair his ability to carry out normal activities or to protect his rights or that McGinty had a history of psychiatric and substance abuse treatment. Defendants presented 10 emails written by McGinty that were well-written and grammatically correct that demonstrated no intellectual impairment.

The Trust's medical expert Franklin C. Milgrim, M.D., testified in the civil litigation that McGinty had a long history of depression that was exacerbated by the death of his mother. McGinty had a long history of bipolar disorder and was going through a major depressant disorder at the time of his hospitalization in 2012. McGinty had significant depressive symptomology ranging back many years, causing him to be suicidal, extremely depressed, to abuse alcohol, and to self-medicate. He would become so depressed that he would be psychotic, delusional (hearing voices, seeing things), and paranoid, and he was very ill. At the time of his 2012 hospitalization, McGinty's mental health had been deteriorating for probably at least three years, since his mother's death. McGinty should not have been released from the hospital on May 9, 2012, as he was still psychotic. This implies that he was severely depressed and hallucinating. In Dr. Milgrim's opinion, respondent's mental health issues would have been

evident to anyone who came in contact with McGinty. In fact, McGinty was still having auditory hallucinations a month later. McGinty should have remained hospitalized for another two-to-four weeks, perhaps longer. Although he was made to sign the PTA by respondent on May 16, 2012, at that time, McGinty lacked the capacity to synthesize, analyze, and comprehend the PTA and whether it was in his best interest to sign it. His mother's death was a major stressor, and he had increasing difficulties when his home was "red-tagged." (Testimony of Dr. Milgrim - Exhibit 31.) McGinty also gained nearly 50 pounds during the time between his mother's death and his 2012 hospital admission.[10] Respondent did not offer the testimony of an expert to dispute the testimony of Dr. Milgrim.

The jury in *Haworth v. Bouzaglou* found that respondent knowingly made a false statement of material fact to McGinty that he intended McGinty to rely upon, which was a substantial factor in causing harm to either the Trust or Kathleen McGinty, but awarded no damages to the Trust or to Kathleen McGinty. The jury also found that respondent acted as legal counsel and preformed legal services for McGinty or the Trust, that respondent was professionally negligent in providing those services, and that respondent's negligence was a substantial factor in causing harm to the Trust or Kathleen McGinty, but awarded no damages to the Trust or Kathleen McGinty. The jury also found by "clear and convincing evidence" that respondent acted with recklessness, malice, and fraud. (See exhibits 14 and 15.) But these findings are of little value in this disciplinary proceeding for a number of reasons. First, the State Bar failed to introduce, into evidence in this proceeding, the definitions of the terms recklessness, malice, and fraud that the superior court instructed the jury to use when making its findings. (Compare *In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 207-208 & fn. 8.) Second, the State Bar failed to make a timely request that the court apply

[10] It is for these reasons that the court does not find credible respondent's testimony that he was unaware that McGinty had any mental limitation or disability.

principles of collateral estoppel to give the jury's adverse findings made under the clear-and-convincing-evidentiary standard preclusive effect in this proceeding so as to provide respondent with a meaningful opportunity to prove, if he can, that it would be unfair to apply collateral estoppel against him in this proceeding.

On April 4, 2014, respondent filed, on his own behalf, a Motion for Judgment Notwithstanding the Verdict in *Haworth v. Bouzaglou*. The Motion was based, in part, on respondent's argument that pursuant to Code of Civil Procedure section 629, there could be no finding of fraud or professional negligence if there was no finding of damages. The superior court denied the motion.

On April 4, 2014, respondent filed, on behalf of Ness Adam, a Motion for Judgment Notwithstanding the Verdict in *Haworth v. Bouzaglou*. The motion was based, in part, on Ness Adam's argument that the evidence did not support a finding of fraud against it. The superior court denied the motion.

On September 18, 2014, the superior court signed the Judgment on Jury Verdict and Judgment and Order Cancelling Deed and Rescinding Contracts in *Haworth v. Bouzaglou*. (See exhibit 16.) The Judgment included, but was not limited to, the following:

a. Bouzaglou was found guilty of fraud and the Trust was awarded $803,280 in compensatory damages and Kathleen McGinty was awarded $17,000. Bouzaglou was found to have acted with recklessness and malice.

b. Ness Adam was found guilty of fraud and the Trust was awarded $1,331,609.77 in compensatory damages. Ness Adam was found to have acted with recklessness and malice.

c. Respondent was found guilty of fraud, but no compensatory damages were awarded. Respondent was found to have acted with recklessness and malice.

d. Respondent was found to have acted with professional negligence with regard to the Trust, which was found to be a substantial factor in the harm to the trust and Kathleen McGinty, but no compensatory damages were awarded.

e. Bouzaglou, Ness Adam, and respondent were all found guilty of financial abuse of a dependent adult.

f. Punitive damages were awarded against Bouzaglou of $8,032,800 and against Ness Adam of $13,316,087.70.

g. The quit claim deed was cancelled, the Property was returned to the Trust, and the Trust did not have to restore defendants for any benefits the Trust received.

h. The plaintiffs were entitled to recover attorney's fees from Bouzaglou and Ness Adam.

On October 8, 2014, respondent filed, on behalf of Bouzaglou and Ness Adam, a Motion for Judgment Notwithstanding the Verdict in *Haworth v. Bouzaglou.* The motion was based, in part, on Bouzaglou and Ness Adam's argument that: (a) they had been prevented from having a fair trial because the superior court failed to grant a motion in limine precluding evidence questioning the value of the construction contracts; (b) the compensatory and punitive damage awards were excessive; and (c) the superior court failed to afford Bouzaglou with any credit for its construction services when it rescinded the PTA. The superior court denied the motion.

Respondent did not appeal, and the judgment against him is final. On November 17, 2014, a Notice of Appeal was filed on behalf of Bouzaglou and Ness Adam in *Haworth v. Bouzaglou* by an appellate attorney. The Judgment was affirmed and is now final against Bouzaglou and Ness Adam. (See exhibit 17.)

On January 28, 2015, Attorney Girard filed, on behalf of Kathleen McGinty and the Trust, a Motion for an Order Awarding Attorney's Fees in *Haworth v. Bouzaglou*, which was

opposed by respondent on behalf of the defendants. The motion was granted and the superior court awarded attorney's fees of $561,379.10 against Bouzaglou and Ness Adam. (See exhibit 18.)

Respondent did not notify the State Bar that a judgment for fraud and professional negligence had been entered against him. Respondent did not believe that he was required to notify the State Bar in addition to the superior court having done so.

Conclusions of Law

Count Three —Rule 3-310(C)(1) (Representation of Adverse Interests)

Rule 3-310(C)(1) provides that an attorney must not, without the informed written consent of each client, accept representation of more than one client in a matter in which the clients' interests potentially conflict. In count three, the State Bar charges that McGinty's and Bouzaglou's interests potentially conflicted because (A) McGinty was a dependent adult; (B) respondent required McGinty to agree that if a conflict arose, respondent could continue to represent Bouzaglou; (C) "[a]ny legal services which may be construed to have been performed on behalf of McGinty are at the request of Bouzaglou and any payments for the services rendered by this office which may be deducted from monies held by this office in trust for McGinty are made pursuant to instructions of Bouzaglou and with the express consent of McGinty"; and (D) respondent represented Bouzaglou and himself in litigation brought against Bouzaglou and himself by the successor trustee regarding the Property. The NDC also alleged that respondent failed to inform McGinty of the potential conflicts and of the actual and reasonably foreseeable adverse consequences to McGinty and to the Trust; and that respondent, therefore, willfully violated rule 3-310(C)(1) by failing to obtain McGinty's informed written consent to respondent's joint/concurrent representation of McGinty and Bouzaglou. The record clearly supports respondent's stipulated culpability on count three.

Count Four—Rule 3-310(C)(2) (Representation of Adverse Interests)

Rule 3-310(C)(2) provides that an attorney must not, without the informed written consent of each client, accept or continue representation of more than one client in a matter in which the clients' interests actually conflict. The factual basis of the rule 3-310(C)(2) violations charged in count four is duplicative of the factual basis of the section 6106 violations charged in count five. Because the appropriate level of discipline for an act of misconduct does not depend on how many rules or statues proscribe the misconduct, it is unnecessary, if not inappropriate, to find duplicative violations. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148; see also *In the Matter of Van Sickle* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 980, 992.) Accordingly, count four is DISMISSED with prejudice as duplicative of count five.

Count Five—§ 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. In count five, respondent is charged with deliberately violating his fiduciary duties to his client McGinty on multiple occasions. Without question, the deliberate breach of a fiduciary duty by an attorney involves moral turpitude. (*In the Matter of Kittrell*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 208.) Concomitantly, an attorney's repeated breaching of his or her fiduciary duties deliberately involves not only moral turpitude, but also corruption. The record clearly supports respondent's stipulated culpability on count five to engaging in the following acts deliberately breaching his fiduciary duties to McGinty, which involved moral turpitude and corruption in willful violation of section 6106. Respondent deliberately breached his fiduciary duties to McGinty by obtaining McGinty's uninformed consent to pay Bouzaglou $270,000 out of the proceeds from the $400,000 loan proceeds. Respondent knowingly and deliberately violated section 7159.5,

subdivision (a)(5), when he disbursed the $270,000 to Bouzaglou on August 29, 2011, because respondent admits that he knew that the value of the work performed on August 29, 2011, was significantly less than $270,000.

Respondent concedes that, during the trial in *Haworth v. Bouzaglou*, Haworth's expert testified that the value of the work performed at the time respondent disbursed the $270,000 to Bouzaglou was only about $109,000. Moreover, respondent concedes that he did not present any expert testimony to dispute Haworth's expert's $109,000 valuation of the work performed.

In light of this undisputed/unrebutted expert testimony from the trial in *Haworth v. Bouzaglou*, the court concludes, that the value of the work performed on August 29, 2011, was $109,000. However, respondent was not authorized to pay Bouzaglou the full $109,000 because Bouzaglou had previously collected $23,000 from McGinty in violation of section 7159.5. Thus, the most respondent could have legally disbursed to Bouzaglou under section 7159.5, subdivision (a)(5), was not $109,000, but only $86,000 ($109,000 less $23,000). In short, on August 29, 2011, respondent paid $184,000 ($270,000 less $86,000) to Bouzaglou in knowing violation of section 7159.5, subdivision (a)(5).

Respondent also deliberately violated his fiduciary duties as charged in count five (1) when he prepared the "Special Power of Attorney" for McGinty to sign and that McGinty signed appointing Bouzaglou to act in place of McGinty and/or the Trust with regard to the improvement to the Property; (2) when he prepared the "Property Transfer Agreement" for McGinty to sign and that McGinty signed transferring ownership of the Property to Bouzaglou that was not fair and reasonable to McGinty,[11] was not written in a manner that could have

[11] The PTA and Addendum to PTA were neither fair nor reasonable to the Trust, in part, because: (a) one of the primary duties of Trustees is to not waste trust assets; (b) the amount that the Trust would receive from the sale of the Property was vague and ambiguous; (c) the distribution of the proceeds from the sale of the Property was unfair and unreasonable to the Trust; and (d) there was no guarantee that the Trust would receive anything, because the Trust

reasonably been understood by McGinty, and falsely stated that "no lender will provide the necessary funds to finish the remodeling and building additions unless Bouzaglou was the title holder to the Property; (3) when he assisted Bouzaglou in getting McGinty to quit claim the Property from the Trust to Bouzaglou; and (4) when he represented multiple parties, including one who was a dependent adult, with regard to the improvement to the Property and in so doing compromised his duty of loyalty to and defrauded McGinty.

Count Six—Section 6068, Subd. (o)(1) (Failure to Report Fraud Judgment)

Section 6068, subdivision (o)(1), requires that attorneys report various adverse judgments such as Haworth's fraud judgment against respondent to the State Bar. The record clearly supports respondent's stipulated violation of section 6068, subdivision (o)(1), but it merits little discipline in light of the fact that respondent did not report the fraud judgment because he knew that the superior court would and did report it to the State Bar. (See, e.g., *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 176 [attorney's awareness that the superior court was notifying the State Bar "substantially mitigated" the 6068, subdivision (o)(3), violation].)

Case Number 16-O-10496 — BHP Room Acquisitions Matter

Facts

On August 29, 2014, respondent filed a complaint against Sage DMC, LLC and others in the Los Angeles Superior Court for his client BHP Room Acquisitions (*BHP v. Sage*). (See exhibit 19.) On September 25, 2014, respondent filed a first amended complaint.

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would be responsible for the cost of construction, paying off the loans and promissory notes, and reimbursing Bouzaglou for the amounts that he paid for the mortgage payments and monthly advances. (See exhibits 9 and 10.)

In November 2014, Attorney Darren J. Quinn filed a Motion to Transfer Venue to San Diego County on behalf of one of the defendants in *BHP v. Sage.* Attorney Quinn also filed a motion for attorney's fees and costs.

On February 9, 2015, the superior court granted the Motion to Transfer Venue in *BHP v. Sage* but continued the Motion for Attorney's Fees and Costs for supplemental briefing and a hearing on May 13, 2015. (See exhibit 20.)

On April 20, 2015, Attorney Quinn filed a declaration in support of his motion for attorney's fees and costs, and a request for judicial notice on behalf of one of the defendants in *BHP v. Sage*. On April 27, 2015, respondent filed an opposition to the attorney's fees motion. On May 13, 2015, Quinn filed a supplemental memorandum and declaration. (See exhibit 19.)

On May 13, 2015, respondent and Attorney Quinn appeared for the hearing on the Motion for Attorney's Fees and Costs. The superior court granted the motion and ordered that "Defendant's request for sanctions under CCP 396b(b) is GRANTED in the amount of $7,500.00 as against [respondent]." The Court ordered Attorney Quinn to give notice, but the Clerk also served notice on respondent and Attorney Quinn. (See exhibit 21.) Respondent received notice of the ruling but did not appeal the sanctions, request additional time to pay the sanctions, or otherwise contest the imposition of sanctions, and the sanctions order has long been final.

On May 21, 2015, July 27, 2015, December 1, 2015, and January 12, 2016, Attorney Quinn sent respondent emails requesting, inter alia, payment of the sanctions. Attorney Quinn also reminded respondent to report the sanctions to the State Bar and even sent respondent a copy of the State Bar form for reporting sanctions. (See exhibit 22 at pp. 3-4.) Respondent received the emails but did not respond to them, pay the sanctions, or report the sanctions to the State Bar.

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On January 13, 2016, Attorney Quinn emailed and faxed respondent a copy of a letter that he sent to the State Bar complaining of respondent's failure to pay the $7,500 sanctions. (See exhibit 22.) Respondent received the copies of Attorney Quinn's complaint letter but did not respond to it, pay the sanctions, or report the sanctions to the State Bar.

On March 9, 2016, and August 15, 2016, the State Bar sent letters to respondent concerning the sanctions. (See exhibits 23 and 25.) Respondent received the letters. And, on April 1, 2016, and September 19, 2016, respondent sent letters to the State Bar responding to the State Bar's letters explaining his conduct. (See exhibits 24 and 26, without attachments.) The State Bar received the letters. As of the date of the April 26, 2017, trial in this proceeding, respondent has not paid the $7,500 sanctions to Attorney Quinn or his client.

Conclusions of Law

Count Seven—Section 6103 (Duty to Obey Court Orders)

Section 6103 provides: "A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." The record clearly supports respondent's stipulation to culpability on count seven. Respondent's purported belief that he did not have to pay the $7,500 in sanctions unless he continued to prosecute the complaint against Sage and the other defendants, and unless the lawsuit was actually transferred to and litigated in San Diego, is neither credible nor plausible. Moreover, even if respondent lacks the ability to pay the sanctions, he is still culpable of violating section 6103 and may still be disciplined for that violation because he never sought relief from the order from the superior court based on an inability to pay. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868, fn. 4.)

Count Eight—Section 6068, Subd. (o)(3) (Failure to Report Sanctions)

Section 6068, subdivision (o)(3), provides that within 30 days of knowledge, an attorney has a duty to report, in writing, to the State Bar the imposition of judicial sanctions against the attorney of $1,000 or more which are not imposed for failure to make discovery. The record clearly supports respondent's stipulation to culpability on count eight for not promptly reporting the $7,500 in sanctions to the State Bar.

Aggravation[12]

The State Bar must prove aggravating circumstances by clear and convincing evidence. (Std. 1.5.) The court finds the following with respect to aggravating circumstances.

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

Respondent has a prior record of discipline. On March 30, 1994, the Supreme Court filed an order in Supreme Court case No. S037534 (State Bar Court case No. 91-O-01622; 91-O-06701; 92-O-15375; 93-O-12878 (Cons.)) suspending respondent from the practice of law for three years, staying execution of that suspension, and placing respondent on probation for three years subject to certain probation conditions, including a 90-day actual suspension and attendance at and passage of the test given at the conclusion of State Bar Ethics School and the State Bar Ethics School Client Trust Account Record-Keeping Course. Respondent entered into a stipulation with the State Bar in this prior disciplinary matter. Respondent admitted that by writing checks drawn on his CTA when he knew or should have known that he did not have sufficient funds in the account when he wrote the checks, he misappropriated client funds to his own use and purpose in willful violation of rule 4-100(A) and section 6106. The misappropriations were caused by inexcusable and serious violations of respondent's duties to oversee client funds which were entrusted to his care and to keep detailed

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

records of such funds. Respondent also acknowledged and admitted that he was grossly careless and negligent in managing his CTA. Respondent further admitted that he willfully violated rule 4-100(A) by depositing his personal funds into his CTA and also violated rule 4-100(A) by depositing monies into his CTA which belonged in part to respondent and in part to two non-clients, thereby commingling non-client and personal monies with client funds.

In aggravation, respondent engaged in multiple acts of wrongdoing. In mitigation, respondent (1) did not have a prior record of discipline; (2) was candid and cooperative with the State Bar; and (3) no clients involved complained to the State Bar against respondent or lost any funds due to respondent's conduct.

Although respondent's prior misconduct is remote in time, the misconduct was serious and bears a striking similarity to certain misconduct in this current disciplinary matter. The court notes that even after being required to attend the State Bar's remedial client trust accounting course in his prior disciplinary matter, respondent, over a prolonged period of time, again improperly commingled personal funds in his client trust account and failed to maintain appropriate records of client funds. This is the same conduct involved in respondent's prior disciplinary matter. Accordingly, the court gives great weight in aggravation to respondent's prior disciplinary record. (Compare *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 444-445 [prior misconduct similar to that found in current matter is serious aggravation]; with *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96, 105 [no significant aggravation for prior discipline in which misconduct occurred 20 years earlier, was unrelated to current misconduct, and resulted in private reproval].)

Multiple Acts of Misconduct (Std. 1.5(b).)

Respondent's misconduct in case Nos. 15-O-10055 and 16-O-10496 evidences numerous acts of serious misconduct. Such numerous acts of misconduct are a serious aggravating factor.

Significant Harm (Std. 1.5(j).)

The State Bar established by clear and convincing evidence that respondent's misconduct in the McGinty matter caused significant harm.[13] Respondent's misconduct harmed McGinty, as he attempted suicide, in part, as a result of the housing problems he experienced due to the conduct of respondent and Bouzaglou.

Respondent's misconduct also harmed Haworth and Kathleen McGinty. After McGinty, died, Haworth became the successor trustee of the Trust. As a result, Haworth is now responsible for the trust assets and for her mentally disabled cousin, Kathleen.[14] Haworth's role is to keep Kathleen from being homeless. Kathleen and Timothy had been living in the family home for free. After Bouzaglou moved them out of the family home so the Property could be remodeled, he found Kathleen an apartment in Encino, California. However, Kathleen has a limited income, receiving only $200 per month in general relief assistance and could not afford to stay in the apartment. Haworth, therefore, had to take out an equity line of credit to keep Kathleen housed. She also had to find and hire an eviction lawyer to represent Kathleen when the apartment manager served Kathleen with an eviction notice. After Kathleen was evicted, Haworth had to find her another apartment and had to use her own money to pay Kathleen's first and last month's rent.[15] Haworth also had to give up Kathleen's dogs because the new apartment did not allow animals. This was all financially and emotionally very stressful for Haworth and

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[13] The State Bar presented testimony on the issue of harm from Attorney Girard, Haworth, and Kathleen McGinty. The court finds that each of these three witnesses presented extremely credible testimony.

[14] Haworth believes that what respondent put the family through put too much pressure on Timothy McGinty and resulted in his death, and Kathleen believes that were it not for all the stress from the situation created by respondent and Bouzaglou, her brother might be alive today. Nevertheless, there is no clear and convincing evidence to support a finding that McGinty's death was the result of respondent's misconduct.

[15] Kathleen believes that she would be homeless if not for her cousin, Haworth.

taking care of Kathleen was time consuming and draining. Haworth is still financially supporting Kathleen.

Further harm occurred as Bouzaglou filed bankruptcy and moved into the McGinty family home for about five to seven months. They then had to hire an eviction attorney to get Bouzaglou out of the home. When he left, Bouzaglou took everything with him, including all home appliances, doorknobs, etc., and they had to pay for the landscaping to be done to get the home ready to sell.

The situation created by respondent and Bouzaglou also affected Haworth's father, who died last year. Haworth was her father's primary caretaker, and she could not care for him because she had to deal with this matter.

The property is still owned by the trust and when the property was last valued approximately two years ago, it was worth approximately $1.7 million. For about one-to-two years, until January 2017, the property was leased for $7,500 per month. Within approximately the last six months, the property was assigned to Kathleen. While Kathleen still owns the house, she cannot move into it because there is a lien on it for approximately $400,000, and she cannot afford to pay the lien. There is also a one million dollar lien on the property.[16] Haworth had to declare bankruptcy on behalf of Kathleen.

The court finds that the significant harm caused by respondent's conduct is a substantial aggravating circumstance.

Lack of Insight/Remorse/Indifference Toward Rectification or Atonement (Std. 1.5(k).)

Respondent demonstrated indifference, lacks insight into his misconduct, and lacks remorse. " 'An attorney's failure to accept responsibility for, or to understand the wrongfulness

[16] This is the basis of another series of civil lawsuits regarding the property that resulted from the conduct of respondent and Bouzaglou.

of, [his] actions may be an aggravating factor unless it is based on an honest belief in innocence.' [Citation.]" (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380.) There is no evidence that respondent has an honest belief in his innocence regarding his conduct in the McGinty matter. Even after a jury found him culpable of professional negligence and fraud, respondent has not demonstrated any remorse for his misconduct against McGinty. Rather, he attempts to excuse his actions by claiming that he was only following the orders of his client. He fails to realize that his misconduct contributed to the loss of the Property and to the success of the fraud which was found by the superior court. False penitence is not required by the law. However, the law does require that a respondent come to grips with his culpability and accept responsibility for his conduct. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Not only has respondent failed to do so, but his misconduct was exacerbated by the fact that he continued to represent clients against the trust.[17]

In addition, he knowingly violated the client trust account rules, even though he had received a 90-day actual suspension previously for similar misconduct and therefore knew such conduct was improper. Furthermore, he failed to pay court imposed sanctions, and his trial testimony that he thought he only had to pay sanctions to transfer the matter to San Diego was incredulous. Respondent also failed to notify the State Bar of the sanctions, even though opposing counsel repeatedly informed him of that obligation, and he has not paid those sanctions

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[17] Respondent admitted that (1) after Attorney Girard filed *Haworth v. Bouzaglou* in Los Angeles, respondent filed a mechanic's lien on Ness Adam's behalf against Bouzaglou in Santa Monica which was deceptive and disingenuous; (2) he failed to notify the court in Santa Monica that the mechanics lien was related to any other pending matter, as he contended the mechanics lien was not related as it concerned different "'parties'" (State Bar's May 10, 2017 closing brief, page 19, line 15); (3) on behalf of his client, Ness Adam, respondent took a default judgment against his client Bouzaglou, after he failed to file an answer on Bouzaglou's behalf and then failed to notify Attorney Girard of the mechanic's lien in an attempt to thwart *Haworth v. Bouzaglou*; and (4) on behalf of Issac Richtiger, respondent filed a claim against the Trust for money that respondent had arranged for Richtiger to loan Bouzaglou to pay off McGinty's $400,000 loan.

or demonstrated that he is financially unable to pay them. This is also evidence of respondent's demonstrated indifference toward rectification or atonement for his misconduct.

Further evidence of respondent's lack of insight and remorse is shown by his testimony that McGinty was not his client and that, with respect to the property transfer agreement, it was not his job to protect McGinty. In addition, respondent continues to represent conflicting interests in the defense of a cross-complaint brought by Haworth as successor trustee.

Respondent's lack of insight and remorse raises the likelihood that respondent will engage in misconduct in the future. The court therefore finds that respondent's indifference, lack of insight into his misconduct and his lack of remorse is a significant aggravating factor.

Pattern of Misconduct (Std. 1.5(c.)

In case No. 15-O-10052, respondent's misconduct, over an almost four year period, of repeatedly depositing personal funds totaling $606,800 into his CTA which also contained client funds, and failing to maintain any of the accounting records required under rule 4-100(B)(3) during that same period, as well as the similar misconduct for which he was found culpable in his prior disciplinary matter, demonstrates a pattern of misconduct. (See *Garlow v. State Bar* (1988) 44 Cal.3d 689, 711-712 [disbarment warranted where attorney's behavior of failing to communicate with clients, making false statements to the courts, failing to return client documents and property, failing to competently perform, and inducing others to testify falsely constituted a serious pattern of misconduct which involved recurring types of wrongdoing].) This is a significant aggravating factor.

Failure to Make Restitution (Std. 1.5(m).)

The court will not find respondent's failure to pay the $7,500 sanctions in the *BHP v. Sage* matter as an aggravating circumstance, as it is part of the basis for the court's finding of

indifference toward rectification or atonement for his misconduct and is therefore duplicative. (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 77.)

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

Both McGinty and his sister Kathleen are dependent adults with mental limitations, and the Trust built in special protections for Kathleen. The circumstantial evidence clearly establishes that, despite his denial, respondent well knew that McGinty had mental health issues. The fact that respondent took advantage of his client with mental limitations is a significant aggravating factor.

Mitigation

Respondent must prove mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with respect to mitigating circumstances.

Cooperation with State Bar (Std. 1.6(e).)

Respondent is entitled to very significant mitigation for entering into a stipulation with the State Bar. Stipulating to both facts and culpability warrants significant mitigation because it suggests that the respondent desires to rehabilitate himself from his misconduct. (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521 [stipulating to facts and culpability is mitigating circumstance].)

Good Character (Std. 1.6(f).)

As a result of a post-trial motion by respondent, the court re-opened the record in this matter to admit into evidence four character letters. The court affords respondent only nominal weight in mitigation for his evidence of good character, as four character witness letters do not constitute a wide range of references (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 359; contra, *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576 [significant weight given to three character witnesses who had basic understanding

of charges and judge's tentative culpability determinations due to their familiarity with the respondent and knowledge of his professional skills, work habits and good character) and the letters did not demonstrate that the writers were aware of the full extent of respondent's misconduct. (Std. 1.6(f).) Furthermore, although one character letter mentions respondent's assistance in various pro bono matters, there is no evidence as to the nature and extent of this pro bono activity. Accordingly, the court does not find pro bono work a mitigating factor in this matter.

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 additional aggravating or mitigating factors.

First, with regard to the breach of fiduciary duty to McGinty and acts involving moral turpitude found in count five, the standards call for the imposition of a sanction ranging from actual suspension to disbarment. Standard 2.11 provides that disbarment or actual suspension is

the presumed sanction for an act of moral turpitude, dishonesty, fraud, or corruption, and that the degree of the sanction depends on: the magnitude of the misconduct, the extent to which the misconduct harmed or misled the victim, the impact on the administration of justice, if any, and the extent to which the misconduct related to the members practice of law.

Second, standard 1.8 applies to the determination of the proper level of discipline given respondent's prior record of discipline. 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." Although respondent's prior misconduct is remote in time, it was serious and bears a striking similarity to certain misconduct in this matter. It is therefore accorded great weight.

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.)

The State Bar requested, among other things, that respondent be disbarred. The respondent seeks a two or three year period of actual suspension.

In addition to his representation of conflicting interests, Respondent's deliberate breach of his fiduciary duties as an attorney, which resulted in significant harm to McGinty, Haworth, and Kathleen warrants disbarment. Furthermore, respondent's rule 4-100(A) violations for commingling on 72 occasions and improperly using his CTA for personal purposes for almost

four years standing by themselves are very serious misconduct. As the Supreme Court has repeatedly noted, such misconduct places any client funds in the CTA in danger of being seized by the attorney's creditors. The rule against commingling "was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money." (*Peck v. State Bar* (1932) 217 Cal. 47, 51.)

As noted *ante*, in *Stern* I, respondent stipulated to and was disciplined for willfully violating rule 4-100(A) by commingling and depositing his personal funds into his CTA. Moreover, under the stipulated discipline in *Stern* I, respondent was required to attend and successfully complete the State Bar's Client Trust Account Record-Keeping Course. Without question, respondent knew that commingling and using his CTA for personal purposes were strictly prohibited by rule 4-100. In sum, respondent's rule 4-100(A) violations spanning almost four years from August 2011 through June 2015 and involving well over one-half of a million dollars were deliberate, affirmative acts of misconduct, which strongly suggest that respondent is unwilling to conform his conduct to the strictures of the profession and that disbarment is the appropriate level of discipline. Without question, repetitive misconduct warrants severe discipline. (See *Davis v. State Bar* (1983) 33 Cal.3d 231, 241.)

Likewise, respondent's rule 4-100(B)(3) violation for failing to maintain the required records for the client funds he received, held, and disbursed for almost four years is also serious misconduct and was a factor in respondent's previous misconduct. For almost 25 years now, California attorneys have been required, under the Trust Account Record Keeping Standards adopted by former Board of Governors of the State Bar of California (now the Board of Trustees of the State Bar of California) effective January 1, 1993, to keep detailed records of their handling of client funds.

> "The purpose of keeping proper books of account . . . is to be prepared to make proof of the honesty and fair dealing of attorneys when their actions are called into question, whether in litigation with their clients or in disciplinary proceedings and it is a part of their duty which accompanies the relation of attorney and client. *The failure to keep proper books . . . is in itself a suspicious circumstance*."

(*Clark v. State Bar* (1952) 39 Cal.2d 161, 174, quoting *In re O'Neill* (1st Dept. 1930) 240 N.Y.S. 183, 186, italics added.)

In addition, detailed accounting records maintained in good faith and in the regular course of business are one of the two requirements for obtaining the proper Federal Deposit Insurance Corporation (FDIC) insurance coverage for each client whose funds are on deposit in a CTA that is an Interest on Lawyers' Trust Account (an IOLTA account).[18] (See State Bar's Handbook on Client Trust Accounting for California Attorneys (2016) at p. 13.)

In determining the appropriate discipline to recommend in this matter, the court also finds *In the Matter of Schooler* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 494, instructive. In *Schooler*, the Review Department of the State Bar Court recommended that respondent be disbarred for misconduct which resulted from her actions as the trustee and executor of her parents' multi-million dollar estate and trust. Respondent was found culpable of (1) section 6106 (moral turpitude) for breaching her fiduciary duties as a personal representative and trustee, making misrepresentations, and intentional bad faith violation of court orders; (2) section 6068, subdivision (a), for failing to comply with laws (i.e., breaching fiduciary duties); and (3) section 6068, subdivision (c), for maintaining unjust actions by filing frivolous appeals. In aggravation, Schooler engaged in multiple acts of misconduct over several years; there was significant harm to the beneficiaries of the trusts and estate; and respondent was indifferent toward rectification or atonement for the consequences of her wrongdoing. The court gave substantial weight to the

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[18] The other requirement for proper FDIC insurance coverage is that the fiduciary nature of the CTA must be disclosed in the actual title of the account as stated on the bank's deposit agreement opening/covering the account.

overall evidence in aggravation. In mitigation, the court found that respondent had a 17-year period of unblemished practice. However, this was moderated as respondent had only practiced law for a short period of time. The court recommended disbarment based on respondent's egregious misconduct and the substantial harm to the trust beneficiaries which resulted.

Respondent deliberately violated rule 4-100(A) for almost four years and deliberately violated section 7159.5. Respondent refuses to obey the rules of professional conduct and the laws of this state. The egregious nature of respondent's violations of his fiduciary duties to his mentally disabled and vulnerable client in the McGinty matter and the significant harm which occurred as a result of that conduct, as well as respondent's lack of insight and remorse, the nature of respondent's prior disciplinary record, and the other aggravating circumstances, as well as the limited mitigating circumstances in this matter, necessitates that respondent be disbarred in order to ensure protection of the public and the legal profession and to maintain high professional standards.

Recommendations

Disbarment

The court recommends that respondent ANDREW JAMES STERN, State Bar number 51648, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys.

Sanctions

The court does not recommend that respondent be ordered to pay the sanctions ordered in *BHP v. Sage*, as the court is recommending respondent's disbarment and the state court has already ordered payment of these sanctions. (*In the Matter of Schooler* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 494, 498.)

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California Rules of Court, Rule 9.20

The court further recommends that Andrew James Stern be ordered to comply with the requirements of California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

Costs

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

Order of Involuntary Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that Andrew James Stern, State Bar number 51648, be involuntarily enrolled as an inactive member of the State Bar of California effective three calendar days after the service of this decision and order by mail. (Rule 5.111(D).)

Dated: August 7, 2017.

Cynthia Valenzuela
CYNTHIA VALENZUELA
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 August 7, 2017, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

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:

PAUL JEAN VIRGO
9909 TOPANGA BLVD # 282
CHATSWORTH, CA 91311

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

CHARLES T. CALIX, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on August 7, 2017.

Paul Barona

Paul Barona
Case Administrator
State Bar Court