PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case Nos.: **16-O-16570 (16-O-17289; 17-O-04177)-YDR**
PATRICK THOMAS NICHOLS,	)	**DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**
A Member of the State Bar, No. 214860.	)	

Introduction[1]

Patrick Thomas Nichols (Respondent) is charged with a total of nine counts of misconduct. In eight of nine counts, Respondent is charged with misconduct involving two separate client matters, including failure to maintain client funds in a trust account, misappropriation of client funds, and failure to respond to client inquires. In the ninth count, Respondent is charged with seven violations of the conditions of the one-year disciplinary probation that the Supreme Court imposed on him in an order filed on September 19, 2016, in *In re Patrick Thomas Nichols on Discipline*, case number S235995 (State Bar Court case number 15-O-13373) (*Nichols* I).

The Office of Chief Trial Counsel of the State Bar of California (OCTC) has the burden of proving the charges by clear and convincing evidence.[2] Nonetheless, Respondent stipulated to

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

[2] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

the facts establishing his culpability on seven of the nine counts. However, as discussed in detail below, the court dismisses two of those seven counts as duplicative of two other counts on which Respondent is found culpable. After the two duplicative courts are dismissed, the stipulated facts establish Respondent's culpability on five counts of misconduct.

After considering the nature and extent of Respondent's misconduct, including Respondent's numerous misappropriations of client funds totaling more than $10,000, and the aggravating and mitigating circumstances, the court concludes that disbarment is the appropriate level of discipline to recommend to the Supreme Court. Furthermore, in light of the court's disbarment recommendation, the court will order that Respondent be involuntarily enrolled inactive under section 6007, subdivision (c)(4).[3]

Significant Procedural History

OCTC initiated this proceeding by filing a notice of disciplinary charges (NDC) on December 15, 2017. Respondent filed a response to the NDC on February 5, 2018. The parties filed a partial stipulation as to facts and admission of documents on April 2, 2018.

OCTC was represented by Deputy Trial Counsel David Aigboboh and Deputy Trial Counsel Stacia L. Johns. Respondent represented himself. Trial was held on April 17, 2018, and this matter was submitted for decision the same day. OCTC timely filed a closing brief on April 27, 2018, and Respondent belatedly filed his closing brief on May 3, 2018.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on November 19, 2001, and has been licensed to practice law in the State of California since that time.[4]

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[3] Attorneys who are enrolled inactive cannot lawfully practice law.

[4] Even though Respondent has been licensed to practice law in this state since November 2001, his license has been suspended since January 8, 2018. The Review Department suspended Respondent's license effective January 8, 2018, because Respondent failed to take and pass the

The following findings of fact and conclusions of law are based on the partial stipulation of facts and admission of documents that the parties filed on April 2, 2018, and the documentary and testimonial evidence admitted into evidence at trial.

Case No. 16-O-16570 – The Moberg Client Matter

Facts

In June of 2015, Wayne Moberg hired Respondent to represent him as a plaintiff in a personal injury matter. Moberg received medical treatment from Dr. Matthew Leary, and signed a medical lien. After retaining Respondent in June 2015, Moberg did not receive any communication from Respondent or Respondent's office until the following April (i.e., April 2016) when Respondent's office told Moberg that Respondent was unable to work on Moberg's case due to family issues. When Moberg asked for his client file, Respondent's secretary told him that he would have to wait for Respondent to release the file.

Notwithstanding the contrary statements that Respondent's office made to Moberg in April 2016, Respondent continued to work on Moberg's case. On June 30, 2016, Respondent contacted Moberg about a settlement offer for $3,300 that would be divided equally among Moberg, Respondent, and Dr. Leary. Moberg agreed to accept the settlement offer and to the stated distribution of the $3,300 among himself, Respondent, and Dr. Leary.

In July of 2016, State Farm Insurance sent Respondent a $3,300 settlement check made payable to both Respondent's law office and Moberg. Respondent deposited the check into his client trust account (CTA) on July 13, 2016. Thereafter, Respondent was required to maintain both Moberg's and Dr. Leary's $1,100 shares of the settlement proceeds in his CTA until he disbursed those shares to Moberg and Dr. Leary. (Rules Prof. Conduct, rule 4-100(A).)

Multistate Professional Responsibility Examination (MPRE) within the time prescribed by the Supreme Court in its September 19, 2016, order in *Nichols* I.

The bank records for Respondent's CTA for the two year period from November 2014 through November 2016 (exs. 7 and 10) show that Respondent routinely withdrew between $200 and $500 from his CTA by writing CTA checks made payable to himself. On multiple instances, Respondent withdrew three or four such small sums of money using checks that were all dated on the same day. Because OCTC failed to provide the court with any analysis of Respondent's small withdrawals from his CTA, the court reviewed eight months of bank records and noted that Respondent made more than 82 such withdrawals during the eight month period.

Moreover, the bank records show that on July 13, 2016, the same day on which Respondent deposited the $3,300 settlement check into his client trust account, Respondent withdrew $400 from his CTA using CTA check number 2026, made payable to Respondent and dated July 13, 2016. The bank records further show that, over the next 12 days, Respondent made eight more such withdrawals from his CTA with checks made payable to himself in amounts between $200 and $550 and totaling $3,150. Thus, by July 25, 2016, 12 days after he deposited the $3,300 check into his CTA, Respondent had withdrawn a total of $3,550 ($400 plus $3,150) from his CTA. Respondent did not proffer any explanation for his repeated practice of withdrawing small sums of money from his CTA using checks that he made payable to himself.

By July 26, 2016, when Respondent was required to maintain at least the $2,200 that he held in trust for Moberg and Dr. Leary in his CTA and which was only 13 days after Respondent deposited the $3,300 check into his CTA, the actual balance in Respondent's CTA, dropped to a negative $1,788.30.

Moberg called Respondent's office multiple times between July 21 and July 29, 2016, to request a status update and an accounting. Respondent did not return the calls. On July 26, 2016, Moberg went to Respondent's office, but was unable to speak with Respondent or

Respondent's office staff. Moberg complained to the State Bar. After Respondent learned of the State Bar complaint, he sent Moberg a check for $1,100 dated October 20, 2016. Moberg cashed the check. Dr. Leary was unable to contact Respondent and stopped pursuing payment.

Conclusions of Law

Count One - Rule 4-100(A) (Failure to Maintain Client Funds in Trust Account])

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions not relevant here. The stipulated facts clearly establish that, on July 26, 2016, when the balance in Respondent's CTA dropped to a negative $1,788.30, Respondent failed to maintain, in his CTA, the $2,200 that he held in trust for Moberg and Dr. Leary in willful violation of rule 4-100(A). However, Respondent's failure to maintain the $2,200 in his CTA on July 26, 2016, is the same misconduct underlying the section 6106 misappropriation that is charged and found in count two below. Accordingly, the court does not consider Respondent's culpability for the rule 4-100(A) violation for purposes of determining the appropriate level of discipline in this proceeding. (See *In the Matter of Sampson* (Review Dept.1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [no additional weight given to rule 4-100(A) violation when same misconduct addressed by section 6106 violation].)

Count Two - § 6106 (Moral Turpitude - Misappropriation)

Section 6106 provides, in part, that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes cause for suspension or disbarment. In count two, Respondent is charged with violating section 6106 by misappropriating the $2,200 that he held in trust for Moberg and Dr. Leary. An attorney's failure to use entrusted funds for the purpose for

which they were entrusted constitutes misappropriation. (*Baca v. State Bar* (1990) 52 Cal.3d 294, 304.)

As noted above, the stipulated facts clearly establish that, on July 26, 2016, when Respondent was required to maintain, on deposit in his CTA, at least the $2,200 that he held in trust for Moberg and Dr. Leary, the actual balance in Respondent's CTA dropped to a negative $1,788.30. That fact creates an inference that Respondent misappropriated the $2,200 for his own use and benefit and shifts the burden to Respondent to prove that the misappropriation did not, in fact, occur. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474; *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.) Respondent did not proffer any evidence to show that the misappropriation did not occur.

In light of the totality of the circumstances, including Respondent's pattern of routinely withdrawing small amounts of money from his CTA by writing checks made payable to himself, the court finds that Respondent deliberately and dishonestly misappropriated, for his own use and benefit, the $2,200 that he held in trust for Moberg and Dr. Leary in willful violation of section 6106. (*In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 618.)

Count Three - § 6068, subd. (m) (Failure to Communicate)

Section 6068, subdivision (m), provides that an attorney has a duty to promptly respond to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services. The stipulated facts clearly establish that Respondent willfully violated section 6068, subdivision (m) in July 2016 when he failed to respond to Moberg's repeated requests for an accounting and status update.

Count Four - Rule 4-100(B)(3) (Render Accounting)

Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds, securities, and other properties coming into the attorney's possession and render appropriate accounts to the client regarding such property. In count four, OCTC charges that Respondent willfully violated rule 4-100(B)(3) by failing to comply with Moberg's request for an accounting. The record fails to establish a rule 4-100(B)(3) violation. As no rule 4-100(B)(3) violation has been shown, count four is DISMISSED with prejudice for want of proof.

Case No. 16-O-17289 – The Gutierrez Client Matter

Facts

In February of 2014, Luz Gutierrez hired Respondent to represent her and her minor daughter in a personal injury matter. Under the fee agreement, Respondent was entitled to 25 percent of the total amount recovered if the clients' claims were settled before a lawsuit was filed plus costs. Gutierrez and her daughter received treatment for their injuries from several medical providers. Pursuant to settlement discussions, in January of 2015, Allstate Insurance mailed Respondent a $10,000 check to settle the case with Gutierrez and a $2,000 check to settle the case with Gutierrez's daughter. Of this $12,000, Respondent was entitled to $3,000 in attorney's fees. Respondent deposited the two settlement checks in his CTA.

Beginning in January of 2015, Gutierrez continually contacted Respondent's office to obtain her and her daughter's portions of the settlement proceeds. Allstate informed Gutierrez that it mailed the settlement checks to Respondent. In addition, Respondent's staff assured Gutierrez that she would receive her portion of the settlement and that Respondent would pay Gutierrez's medical providers. Respondent failed to pay Gutierrez's medical providers, which caused the providers to refer her accounts to collections agencies for nonpayment.

On August 13, 2016, Respondent provided Gutierrez with an accounting of the $12,000 in settlement proceeds that he received and held in trust for her and her daughter. The accounting showed that, from the $12,000, Respondent would receive $3,880 ($3,000 as his attorney's fee plus $880 in cost reimbursement); the lienholders (presumably medical lienholders) would receive $2,996.04; and Gutierrez and her daughter would receive the remaining $5,123.96 ($12,000 less $3,880 less $2,996.04). From the remaining $5,123.96, Gutierrez was to receive $4,048.96, and her daughter was to receive $1,075 ($5,123.96 less $4,048.96). According to the accounting, out of the $12,000 in settlement proceeds, Respondent was required to maintain on deposit in his CTA at least the $8,120 ($4,048.96 plus $1,075 plus $2,996.04) that he held in trust for Gutierrez and her daughter and the lienholders until he actually paid them their respective shares of the $8,120.

On August 13, 2016, when Respondent sent his accounting to Gutierrez, he also sent Gutierrez two CTA checks totaling $5,123.96 ($4,048.96 plus $1,075) for her and her daughter's respective shares of the settlement proceeds. Gutierrez attempted to negotiate those two checks, but they were returned unpaid because there were not sufficient funds on deposit in Respondent's CTA when they were presented to his bank for payment.

In October of 2016, Respondent paid Gutierrez's outstanding medical expenses. Respondent then purchased a cashier's check for $5,230 payable to Gutierrez and delivered it. Gutierrez cashed that check on November 2, 2016.

Respondent stipulated that, on multiple dates during the 20-month period from January 2015 through September 2016, the balance in his CTA balance fell below the $8,120 that Respondent held in trust and was required to maintain in his CTA for Gutierrez, her daughter, and their lienholders. As the parties stipulated and the bank records of Respondent's CTA show, on July 15, 2015, the balance in Respondent's CTA fell to a negative $118.13.

Conclusions of Law

Count Five - Rule 4-100(A) (Failure to Maintain Client Funds in Trust Account)

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions not relevant here.

The stipulated facts clearly establish that, on July 15, 2015, when the balance in Respondent's CTA dropped to a negative $118.13, Respondent failed to maintain, in his CTA, the $8,120 that he held in trust for Gutierrez, her daughter, and their lienholders in willful violation of rule 4-100(A). However, Respondent's failure to maintain the $8,120 in his CTA on July 15, 2015, is the same misconduct underlying the section 6106 misappropriation that is charged and found in count six below. Accordingly, the court does not consider Respondent's culpability for the rule 4-100(A) violation when determining the appropriate level of discipline in this proceeding. (*In the Matter of Sampson, supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.)

Count Six - (§ 6106 [Moral Turpitude-Misappropriation])

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 six, Respondent is charged with violating section 6106 by misappropriating the $8,120 that he held in trust for Gutierrez, her daughter, and their lienholders.

As noted above, the stipulated facts clearly establish that, on July 15, 2015, when Respondent was required to maintain, on deposit in his CTA, at least the $8,210 that he held in trust for Gutierrez, her daughter, and their lienholders, the actual balance in Respondent's CTA dropped to a negative $118.13. That fact creates an inference that Respondent misappropriated the $8,120 for his own use and benefit and shifts the burden to Respondent to prove that the

misappropriation did not, in fact, occur. (*Giovanazzi v. State Bar, supra*, 28 Cal.3d at p. 474; *In the Matter of Sklar, supra,* 2 Cal. State Bar Ct. Rptr. at p. 618.) Respondent did not proffer any evidence to show that the misappropriation did not occur.

In light of the totality of the circumstances, including Respondent's pattern of routinely withdrawing small amounts of money from his CTA by writing checks made payable to himself which continued throughout the relevant time period in the Gutierrez client matter, the court finds that Respondent deliberately and dishonestly misappropriated, for his own use and benefit, the $8,120 that he held in trust for Gutierrez, her daughter, and their lienholders in willful violation of section 6106. (*In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 618.)

Count Seven - § 6106 (Moral Turpitude-Issuance of NSF Checks)

In count seven, OCTC charges that Respondent committed acts involving moral turpitude by issuing two checks drawn on his CTA when Respondent knew or should have known that there were insufficient funds in his trust account. The record, however, fails to establish the charged violations of section 6106.

"It is settled that the '*continued* practice of issuing [*numerous*] checks which [the attorney *knows* will] not be honored violates' " section 6106. (*Bowles v. State Bar* (1989) 48 Cal.3d 100, 109, italics added, quoting *Alkow v. State Bar* (1952) 38 Cal.2d 257, 264.) The record fails to establish, by clear and convincing evidence, that Respondent engaged in a *continued* practice of issuing insufficiently funded checks (NSF checks). Moreover, Respondent did not issue *numerous* NSF checks; he issued two. There is no clear and convincing evidence that Respondent knew (or that he should have known) that the two checks were insufficiently funded when he issued them or that Respondent was grossly negligent in issuing the two NSF checks.

At worst, Respondent was negligent in issuing the two NSF checks. And it is well settled that mere negligence is insufficient to support a violation of section 6106. Accordingly, count seven is DISMISSED with prejudice.

Count Eight - Rule 4-100(B)(4) (Promptly Pay/Deliver Client Funds)

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the attorney's possession which the client is entitled to receive. In early January 2015, shortly after Allstate advised Gutierrez that two checks totaling $12,000 had been mailed to Respondent, Gutierrez contacted Respondent and requested the settlement funds due Gutierrez and her minor daughter. By failing to promptly pay the client funds owed Gutierrez and her minor daughter before he misappropriated those funds, Respondent willfully violated rule 4-100(B)(4).

Case No. 17-O-04177 – Violations of Probation Conditions

Facts

As noted above, the Supreme Court placed Respondent on one year's disciplinary probation with conditions in its September 19, 2016, order in *Nichols* I.[5] The Supreme Court imposed that probation and each of its conditions on Respondent in accordance with a stipulation as to facts, conclusions of law, and disposition that Respondent entered into with OCTC and that

[5] No proof was offered to establish that Respondent had notice of the Supreme Court's September 19, 2016, order. However, the Clerk of the Supreme Court was required to promptly send a copy of the order to Respondent once it was filed. (Cal. Rules of Court, rule 8.532(a).) Also, except with respect to the lawfulness of arrests made without a warrant, it is presumed that official duties have been regularly performed unless the party against whom the presumption operates proves otherwise. (Evid. Code, §§ 606, 660, 664; *In re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Thus, because Respondent has not proved otherwise, the court must find that the Supreme Court Clerk properly sent Respondent a copy of the order promptly after it was filed. (*Ibid.*) Furthermore, because there is no evidence in the record that would support a finding to the contrary, the court finds that Respondent actually received that copy of the order. (Cf. Evid. Code, §§ 604, 630, 641 [correctly addressed and properly mailed letter is presumed to have been received in the ordinary course of mail].)

was approved by the State Bar Court in an order filed on May 26, 2016, in State Bar Court case number 15-O-13373.

The conditions of Respondent's one-year probation in *Nichols* I included:

a) That Respondent contact the Office of Probation within 30 days of the effective date of discipline and schedule a meeting to discuss the terms and conditions of probation with his assigned Probation Deputy;

b) That Respondent submit reports on each January 10, April 10, July 10, and October 10 of the probation period;

c) That, within one year of the effective date of discipline, Respondent provide to the Office of Probation proof of attendance at State Bar Ethics School and passage of the test given at the end of Ethics School; and

d) That Respondent submit a final report by October 19, 2017.

On November 9, 2016, assigned State Bar Probation Deputy Eddie Esqueda (Esqueda) posted a letter on Respondent's State Bar attorney profile reminding Respondent of the conditions of his probation. The letter reminded Respondent of the above conditions and the deadlines for compliance with those conditions. On the same day, Esqueda emailed Respondent at his official email address of record, notifying him of the letter. Delivery of the email was completed.

On March 15, 2017, Esqueda mailed Respondent a letter warning Respondent that the Office of Probation had not received Respondent's first quarterly report, due January 10, 2017. Enclosed with the letter was, inter alia (1) a copy of Esqueda's November 9, 2016 letter; (2) a copy of the Supreme Court Order imposing discipline in Supreme Court matter S235995 (State Bar Court case No. 15-O-13373), (3) a copy of that portion of the stipulation entered into by Respondent in State Bar Court case No. 15-O-13373; (4) a quarterly report form and

instructions; and (5) information and an enrollment form for Ethics School. Esqueda mailed the letter to Respondent's membership address of record. That same date, the letter was emailed to Respondent at his membership records email address. Delivery of the email was completed.

On March 20, 2017, Esqueda emailed Respondent regarding Respondent's voicemails, which acknowledged receipt of the March 15, 2017, letter. Esqueda returned Respondent's call, but was unable to leave a message. Esqueda, via email, requested further information.

Despite all of the assistance, reminders, and warnings Respondent received from the Office of Probation, Respondent did not comply with probation conditions a through d, listed above in this decision. Respondent failed to file any of the required quarterly reports or the final report; failed to provide proof to the Office of Probation of attending and passing Ethics School; and failed to contact the Office of Probation and schedule a meeting with his assigned Probation Deputy. In fact, Respondent did not comply with a single probation condition that contained a due date or a specific time period for compliance.

Conclusions of Law

Count Ten[6] - § 6068, subd. (k) (Failure to Comply with Conditions of Probation)

The court finds that Respondent was aware of his probation conditions. First, he stipulated to the conditions. Second, on multiple occasions, Respondent was contacted by the Office of Probation regarding his probation conditions.[7] And third, Respondent left voicemail messages for his assigned Probation Deputy, acknowledging his receipt of a March 15, 2017, letter warning him that his January 10, 2017, quarterly report had not yet been received by the Office of Probation and which contained enclosures regarding his probation conditions. The

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[6] The NDC contains a typographical error in that there is no count nine. The NDC skips from count eight to count ten.

[7] Methods of contact were by mail, email, and telephone.

court therefore finds that Respondent willfully violated Business and Professions Code section 6068, subdivision (k), by failing to comply with the following conditions of his probation:

a) That Respondent contact the Office of Probation within 30 days of the effective date of discipline and schedule a meeting to discuss the terms and conditions of probation with his assigned Probation Deputy;

b) That Respondent submit reports on each January 10, April 10, July 10, and October 10 of the probation period;

c) That, within one year of the effective date of discipline, Respondent provide to the Office of Probation proof of attendance at State Bar Ethics School and passage of the test given at the end of Ethics School; and

d) That Respondent submit a final report by October 19, 2017.[8]

Aggravation and Mitigation[9]

Aggravation

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

Respondent has a single prior record of discipline, which is the Supreme Court's September 19, 2016, order in *Nichols* I. In that order, the Supreme Court placed Respondent on one year's stayed suspension, one year's probation, and thirty days' actual suspension.

In *Nichols* I, Respondent stipulated to willfully violating rule 1-400(C), which prohibits attorneys from soliciting employment from individuals with whom they have no prior family or

[8] In their April 2, 2018, stipulation, the parties erroneously purport to stipulate that Respondent also violated the conditions of his one-year probation by failing to pass the MPRE. Respondent was not required to take and pass the MPRE as a condition of his probation. Respondent was required to take and pass the MPRE under an independent, "self-enforcing" provision in the Supreme Court's order in *Nichols* I.. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 892, fn. 8.)

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

business relationship. Respondent improperly appeared uninvited at the home of the parents of a man who had recently been killed in a motorcycle accident when the decedent's family had gathered there to mourn. While Respondent was there and before he was asked to leave, Respondent improperly attempted to convince members of the decedent's family to retain him to file a wrongful death lawsuit.

In *Nichols* I, Respondent also stipulated to wilfully violating section 6104, which prohibits attorneys from "[c]orruptly or willfully and without authority appearing as attorney for a party to an action or proceeding. After Respondent was unable to convince any of the decedent's family to retain him, Respondent took it upon himself to corruptly and without authority to file a wrongful death lawsuit for the decedent's three minor children. In addition, Respondent tried to have the superior court appoint one of his acquaintances as guardian ad litem for the three children.

The aggravating factors in *Nichols* I were multiple acts of wrongdoing and overreaching, and the mitigating factors were no prior record of discipline and cooperation by stipulating to his misconduct.

Respondent engaged in the misconduct underlying the discipline imposed on him in *Nichols* I during a two-month period from May 25 through July 20, 2015. Moreover, Respondent engaged in the misconduct found in the Gutierrez client matter during a six-month period from about late January 2015 through mid-July 2015. Thus, Respondent's misconduct in the Gutierrez client matter occurred during the same time period as the misconduct in *Nichols* I. This fact moderately diminishes the aggravating weight of Respondent's prior record of discipline. (*In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.)

Significant Harm to Client (Std. 1.5(j).)

Respondent's misconduct greatly harmed Gutierrez by delaying her receipt of her settlement proceeds for over a year and a half and by failing to pay her medical providers who referred her accounts to collections agencies for nonpayment. This client harm is a significant aggravating factor.

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

As noted above, Respondent has never paid Dr. Leary the $1,100 that Respondent deliberately and dishonestly misappropriated from him. The court finds this fact to be an extremely serious aggravating circumstance under standard 1.5(m) and will recommend that Respondent be required to make restitution to Dr. Leary with interest from July 15, 2015, which is when Respondent misappropriated the funds. Again, the aggravating weight of this factor is very significant.

Mitigation

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

By entering into an extensive stipulation in the present proceeding, Respondent has effectively acknowledged much of his misconduct and is entitled to mitigation for recognition of wrongdoing and saving the State Bar significant resources and time. (*Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1079 [mitigating credit given for entering into a stipulation as to facts and culpability]; accord *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521.)

Family Problems/Emotional Difficulties

Under standard 1.6(d), extreme emotional difficulties or physical or mental disabilities suffered by Respondent at the time of the misconduct may be found to be a mitigating circumstance provided that the difficulties or disabilities are established *by expert testimony* as

being directly responsible for the misconduct and that Respondent has established by clear and convincing evidence that the difficulties or disabilities *no longer pose a risk that Respondent will commit misconduct.* (Std. 1.6(d); *In the Matter of Spaith* (1990) 3 Cal. State Bar Ct. Rptr. 511, 519, 520 [marital and emotional problems can be mitigating, but must be extreme and directly responsible for the misconduct and must be resolved].)

Without question, Respondent has suffered extreme emotional distress and sleep deprivation since his ex-wife's apparent abduction of their three children and fleeing with them to Israel in May of 2014. Respondent contends that his emotional difficulties, sleep deprivation, and family problems were directly responsible for his misconduct, leading him to focus solely on his abducted children while neglecting his professional responsibilities. Respondent, however, failed to establish his contention with expert testimony as expressly required under standard 1.6(d). (*In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.)

Respondent did not proffer any evidence that he sought and obtained psychiatric treatment, psychological counseling, or any other type of medical care to address and resolve these issues. As challenging as Respondent's emotional difficulties, sleep deprivation, and family problems might be, the court cannot assign any meaningful mitigating weight to them because Respondent has failed to show, by clear and convincing evidence, that he has overcome or learned to cope with them such that they no longer pose a risk that Respondent will commit additional misconduct. (See *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 405 [attorney's mitigation for depression and emotional difficulties discounted because there was no "clear and convincing evidence of recovery such that the situation would not recur in the future"].)

In short, there was a failure of the evidence to support a mitigating finding under standard 1.6(d).

Discussion

The disciplinary analysis begins with the standards, which provide guidance and are intended to promote consistent application of discipline. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Initially, the court considers standard 1.1, which acknowledges that the purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. Where, as here, a respondent commits two or more acts of misconduct and the standards specify different levels of discipline for each, the most severe discipline must be imposed. (Std. 1.7(a).)

The most severe discipline is set forth in standards 2.1(a), which applies to Respondent's misappropriation of client/trust funds in willful violation of section 6106. Standard 2.1(a) provides that disbarment is the presumed sanction for intentional or dishonest misappropriation "unless the amount misappropriated is insignificantly small or sufficiently compelling mitigating circumstances clearly predominate, in which case actual suspension is appropriate."

Respondent's misappropriations, however, do not fall within either of the foregoing exceptions in standard 2.1(a). He dishonestly misappropriated $8,120 in the Gutierrez client matter and $2,200 in the Moberg client matter. Both of those amounts are significant amounts of money. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1361, 1368 [$1,355.75 is significant].)

Additionally, Respondent's mitigation for his cooperation with OCTC, while very significant, is not compelling, and it does not predominate over the aggravation for his prior record of discipline, client harm, and failure to make restitution to Dr. Leary.

Also relevant is standard 1.8(a), which requires that, when a member has a single prior record of discipline, a greater level of discipline than the prior level of discipline must be

imposed 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." Neither exception applies here. Respondent's prior discipline, which became effective in October 2016, was not remote in time. Respondent's prior misconduct was serious enough to warrant both a one-year stayed suspension and a 30-day actual suspension. Also, as set forth above, Respondent's mitigating circumstance is not compelling.

"Misappropriation of client trust funds has long been viewed as a particularly serious ethical violation. [Citations.]" (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656 [attorney disbarred for $20,000 misappropriation, moral turpitude, dishonesty even though the attorney had no prior record of discipline or any other aggravating circumstances].) In fact, the Supreme Court has held that discipline of less than disbarment "is warranted only where extenuating circumstances show that the misappropriation of entrusted funds was an isolated event." (*Id.* at p. 657.)

Disbarment is necessary and appropriate since the gravity of Respondent's misconduct has increased over that in *Nichols* I to include intentional dishonesty and misappropriation and since his current violations, coupled with his prior misconduct, evidence a continuing disregard for his ethical responsibilities. Likewise, Respondent's numerous section 6068, subdivision (k) violations establish that Respondent is either unwilling or unable to comply with Supreme Court disciplinary orders. They also establish that Respondent is not engaged in the rehabilitation process.

Even though Respondent's failure to take and pass the MPRE within the time prescribed in the Supreme Court's September 19, 2016, order in *Nichols* I is not disciplinable as a violation of the conditions of his probation under section 6068, subdivision (k) (see footnote 8, *ante*) or an aggravating circumstance under standard 1.5, Respondent's failure and his resulting suspension are clearly relevant to this court's determination of the appropriate discipline in the present

proceeding. (*In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, 331, citing *Barnum v. State Bar* (1990) 52 Cal.3d 104, 113; accord *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527, 531-532.) Respondent's failure to take and pass the MPRE is yet further proof of Respondent's unwillingness or inability to comply with Supreme Court disciplinary orders.

In sum, the court concludes that disbarment is required to ensure adequate protection of the public, the profession, and the courts and is supported by the standards and the decisional law.

Recommendations

Discipline

It is recommended that Respondent Patrick Thomas Nichols, State Bar Number 214860, be disbarred from the practice of law in California and Respondent's name be stricken from the roll of attorneys.

It is further recommended that Respondent be ordered to make restitution to Dr. Matthew Leary, or such other recipient as may be designated by the Office of Probation or the State Bar Court, in the amount of $1,100 plus 10 percent interest per year from July 26, 2016. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

California Rules of Court, Rule 9.20

It is further recommended that Respondent 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 imposing discipline in this matter.[10] Failure to do so may result in disbarment or suspension.

Costs

It is further recommended 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. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

Order of Involuntary Inactive Enrollment

The court orders that Patrick Thomas Nichols, State Bar number 214860, be involuntarily enrolled inactive under Business and Professions Code section 6007, subdivision (c)(4) effective three calendar days after the date on which this decision and order are served by mail.

Dated: July 16, 2018.

YVETTE D. ROLAND
Judge of the State Bar Court

[10] For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Respondent is required to file a rule 9.20(c) affidavit even if Respondent has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

CERTIFICATE OF SERVICE

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

I am a Court Specialist of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on July 16, 2018, 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:

PATRICK T. NICHOLS
LAW OFC PATRICK T NICHOLS
15487 SENECA RD STE 201
VICTORVILLE, CA 92392

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

David E. Aigboboh, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on July 16, 2018.

Elizabeth Alvarez
Court Specialist
State Bar Court