FILED AUGUST 6, 2014

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **VITO TORCHIA, JR.,** **Member No. 244687,** A Member of the State Bar.	)))))))	Case Nos.: **12-O-11847-RAP (12-O-13469; 12-O-14081; 12-O-14522; 12-O-16003; 12-O-17260; 12-O-17119; 12-O-18135)** **DECISION**

Introduction[1]

In this original, disciplinary proceeding, the Office of the Chief Trial Counsel of the State of Bar of California (State Bar) initially charged Respondent Vito Torchia, Jr., with a total of thirty-one counts of misconduct involving eight separate client matters. At trial, however, on the motion of the State Bar, the court dismissed without prejudice the four counts of misconduct charged in the Chapman client matter under correlated case number 12-O-18135 (i.e., counts twenty-eight, twenty-nine, thirty, and thirty-one).

In the remaining seven client matters, Respondent is charged with the following twenty-seven counts of misconduct: seven counts of failing to perform competently; two counts of failing to communicate; three counts of failing to return the client's file; six counts of failing to account for advanced fees; six counts of failing to refund unearned fees; one count of appearing

[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.

for a party without authority; one count of engaging in the unauthorized practice of law in another jurisdiction; and one count of collecting an illegal fee.

The court finds Respondent culpable on 16 of those 27 counts. After considering the facts and the law, the court recommends that Respondent be placed on four years' stayed suspension and four years' probation on conditions, including a two-year suspension (actual) that will continue until Respondent establishes his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.2(c)(1) of the Standards for Attorney Sanctions for Professional Misconduct.[2]

The State Bar was represented by Deputy Trial Counsel Hugh G. Radigan. Respondent was represented by Attorney David A. Clare.

Significant Procedural History

The State Bar filed the notice of disciplinary charges (NDC) against Respondent on August 13, 2013. The parties filed a partial stipulation as to facts and admission of documents on May 5, 2014.

The trial was held on May 5 through 8, 2014. The court took the proceeding under submission for decision on May 8, 2014.

Findings of Fact and Conclusions of law

Respondent was admitted to the practice of law in California on December 1, 2006, and has been a member of the State Bar of California since that date.

Brookstone Law, PC

Respondent is the managing attorney and sole owner of Brookstone Law, professional Corporation (Brookstone), in Newport Beach. When Respondent first opened Brookstone in 2009, Respondent had little, if any, law office management experience. Respondent's

[2] The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards (stds.) are to this source.

management of Brookstone over the past four plus years discloses that he still has much to learn about law office management and the practice of law.

According to Respondent, the size of Brookstone grew sharply once Respondent expanded the scope of Brookstone's practice to include mass-joinder litigation and related legal services necessary to postpone foreclosure sales on real property (e.g., bankruptcy). Mass-joinder litigation refers to lawsuits in which numerous (e.g., hundreds of) property/homeowners sue their common mortgage lender or servicer for alleged false, fraudulent, and deceptive lending and foreclosure practices.

In February 2010, when Brookstone filed its *Wright v. Bank of America* mass-joinder lawsuit, Brookstone had about 30 to 40 employees, which included 8 or 9 attorneys and 2 or 3 employees Respondent contends are "banking specialists." According to Respondent, Brookstone now has about 4,000 clients, many of whom are plaintiffs in one of Brookstone's mass-joinder lawsuits.

Before Respondent started Brookstone, he practiced primarily in the area of entertainment law and had no experience in mass-joinder litigation or mortgage lending. In light of Respondent's limited experience practicing law and complete lack of experience in mass-joinder litigation and mortgage lending, Respondent employed purportedly well-seasoned attorneys to advise him on and to supervise Brookstone's mass-joinder lawsuits.

In setting up Brookstone's operating procedures and office protocols, Respondent again claims to have been advised by the well-seasoned attorneys he employed and who Respondent claims are experts in law-office management and legal ethics. Notably, a number of the well-seasoned attorneys that Respondent employed and all but blindly relied upon when setting up and running Brookstone were then facing State Bar disciplinary investigations or federal government investigations.

As the seven client matters that are the subject of the present State Bar Court disciplinary proceeding clearly illustrate, Respondent lacked and continues to lack the law-office-management skills and basic knowledge of mortgage lending law and bankruptcy law necessary to adequately and properly represent some 4,000 mortgage loan clients and to adequately supervise a law office staff of 30 to 40 employees. The subject seven client matters also clearly illustrate that a number of, if not most of, the office procedures and protocols Respondent instituted on the advice of the well-seasoned attorneys he employed were and are either seriously inadequate or ignored by Respondent's staff or both.

Finally, even though it has not been charged, the seven client matters in this proceeding also clearly highlight Respondent's repeated failure to adequately supervise Brookstone's staff/associate attorneys and support staff. "While an attorney cannot be held responsible for every event which takes place in his or her office, he or she does have a duty to reasonably supervise staff, both by taking steps to guide employees and by reviewing client files to determine whether staff work has been appropriate. [Citation.]" (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 336.) Thus, "where an attorney has been alerted to problems and does not adequately address them, then such gross neglect may be disciplinable as a failure to perform services competently" in violation of rule 3-110(A). [Citation.]" (*Id*. at p. 335.)

Case No. 12-O-11847 – The Base Client Matter

Findings of Fact

In February 2011, Brookstone sent out a mass mailing advertising its mortgage loan forbearance and related services to property owners. Wayne and Katja Base (collectively the Bases) were two of the recipients of that mass mailing. At that time, the Bases owned seven pieces of real property. Five of the seven properties were residential properties in either Los

Angeles or Riverside Counties. The promissory notes that were secured by deeds of trust on all seven of the Bases' properties totaled more than $1 million. After reading Brookstone's mailing, the Bases thought that Brookstone would be able to help them.

On February 10, 2011, the Bases met with a Brookstone representative whose name they cannot recall and retained Brookstone to evaluate them as potential candidates for inclusion in a prospective mass-joinder litigation involving some of their mortgage lenders.

During the time that Brookstone represented the Bases, neither Wayne nor Katja Base ever met with or spoke to Respondent. Nor did they ever send a letter or email directly to him.

On February 10, 2011, the Bases also signed a retainer agreement with Brookstone. The legal services described in that retainer agreement were (1) prospective litigation against national banks that were allegedly engaging in predatory lending practices and (2) a detailed litigation analysis report. It was initially agreed that an analysis would be performed on the loan documents for three properties owned by the Bases. The Bases paid Respondent $2,685 on February 10, 2011 to accomplish this analysis.

On March 1, 2011, the Bases signed a second retainer agreement with Brookstone. Under that second retainer, Brookstone was to provide the legal services necessary to postpone the then impending April 7, 2011, foreclosure sale of a piece of property on Kelton Street that the Bases owned. The Bases agreed to pay Brookstone $1,500 for those necessary services.

On March 17, 2011, the Bases signed a third retainer with Brookstone. The third retainer provided that the Bases would be allowed to join Brookstone's mass-joinder litigation against Wells Fargo Bank on a hybrid-contingency-fee basis. The Bases paid Brookstone an additional $5,000 for those services (the $5,000 initial fee was to be set-off by the contingency fee, if any).

On March 22, 2011, the Bases signed a fourth retainer with Brookstone. That fourth retainer was for legal services to postpone the impending foreclosure sale of the Bases' Kelton Street property, which had been rescheduled for April 28, 2011.

On May 20, 2011, the Bases signed a fifth retainer with Brookstone. That retainer sought to postpone the impending foreclosure sale of property on Summit Ridge that the Bases also owned. Brookstone's fee for postponing that sale was another $1,500.

On June 5, 2011, the Bases met with Brookstone Attorney Aalok Sikand because they wanted to stop/postpone the foreclosure sale of their Kelton Street property that was scheduled for the next day (i.e., June 6, 2011). Respondent did not meet with the Bases, but he did speak with Attorney Sikand on June 5, 2011, about the foreclosure sale on June 6, 2011, and Sikand's plan to prevent the sale from taking place the next day.

Attorney Sikand explained to Respondent that the only way the Bases could stop the sale on such short notice was for the Bases to file for bankruptcy. Sikand further explained that the Bases were eligible to file for bankruptcy only under chapter 11 of the Bankruptcy Code and that the Bases could not pay Brookstone's $20,000 standard advanced fee for filing a chapter 11 bankruptcy petition. Because the Bases agreed to pay Brookstone's $20,000 fee in monthly installments of $5,000 each, Sikand proposed a plan in which Brookstone would file a chapter 13 bankruptcy petition for the Bases to stop the June 6, 2011, sale of the Kelton Street property and in which Brookstone would thereafter convert Bases' bankruptcy from chapter 13 to chapter 11 once the Bases paid the entire $20,000 fee. Respondent admits that he authorized Attorney Sikand to go ahead and file the Bases' bankruptcy that way. Respondent, however, claims that he did so only after he asked Sikand if such a procedure was legal and Sikand assured him that it was.

On June 5, 2011, the Bases executed a sixth retainer agreement with Brookstone. With Respondent's authorization, that retainer provided for Brookstone to file a chapter 13 bankruptcy petition for the Bases even though they were admittedly not eligible to file under chapter 13. That retainer provided for $20,000 fee with an initial payment of $5,000. Brookstone filed a chapter 13 bankruptcy petition for the Bases on June 5, 2011, and thereby effectively stayed the June 6, 2011, foreclosure sale of the Kelton Street property.

The Bases made the initial $5,000 payment to Brookstone on about June 20, 2011. However, the Bases never paid any portion of the remaining $15,000 of the agreed $20,000 fee.

Thereafter, the bankruptcy court dismissed the Bases' chapter 13 petition on August 30, 2011, because neither an attorney from Brookstone nor the Bases appeared at the initial meeting of the creditors on August 23, 2011. The bankruptcy court duly set that initial meeting of creditors in an order filed on June 6, 2011, which was properly served on Brookstone and the Bases.

Wayne Base credibly testified that he was never told by Brookstone that he needed to appear at the August 23, 2011, creditors meeting. Respondent testified that Sikand told him that the Bases knew from the beginning they did not qualify to file a petition under chapter 13; that Sikand had discussed the meeting with Katja Base;[3] and that Sikand and Katja agreed not to show up for the creditor's meeting. Moreover, Respondent insists that there was no reason for a Brookstone attorney or the Bases to appear at the creditor's meeting. Respondent opines that, regardless of whether an attorney or the Bases appeared at the creditors' meeting, the Bases' chapter 13 petition was going to be dismissed because the Bases did not qualify to file a petition under chapter 13.

[3] The State Bar did not call Katja Base to testify in this matter.

Respondent testified that he would not allow Attorney Sikand to file a second chapter 13 bankruptcy petition for the Bases, which was one of the reasons that led Respondent to terminate Sikand's employment by Brookstone.

/ / /

/ / /

On September 7, 2011, after Attorney Sikand's employment with Brookstone was terminated, Sikand opened his own law office, on behalf of himself and his own law firm, filed a second chapter 13 petition for the Bases without the Bases' knowledge or consent.

On October 7, 2011, Attorney Sikand was substituted out of the Bases' second chapter 13 bankruptcy and was replaced by Attorney David Epstein. On December 2, 2011, Attorney Epstein sent Respondent a letter requesting an accounting of the time expended on each of the Bases' matters. Respondent received the letter, but did not respond. Thus, on December 23, 2011, Epstein sent an email to Respondent stating that Respondent had not responded to his inquiry regarding the Bases although he promised to do so.

On June 12, 2012, Attorney Epstein sent yet another letter to Respondent stating that Respondent had never provided any information in response to his requests. Respondent received the letter.

Respondent testified that he sent an accounting to Epstein consisting of spread sheets of time expended by Brookstone in all of the Bases' matters. Epstein, however, credibly testified that, while he did receive those spread sheets, they were of no help because he could not understand them.

On August 3, 2012, Epstein sent a letter to Respondent stating that at long last, in response to an adversary complaint, Brookstone had come up with a spreadsheet of time spent. Respondent received the letter.

The parties stipulated that on December 2, 2011, and again on June 12, 2012, the Bases requested both an accounting from Brookstone of the time it spent on each of their matters and a refund of any unearned fees. The parties further stipulated that Respondent received these requests for an accounting.

/ / /

Respondent provided the State Bar with a fee accounting in Respondent's reply to an investigation letter he received from a State Bar investigator and believed that the State Bar would send the accounting to the Bases. The parties stipulated that the only accounting that Respondent provided to the Bases was the fee accounting he provided to the State Bar.

Conclusions of Law

Count One - (Rule 3-110(A) [Failure to Perform Competently])

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. In count one, the State Bar charges that Respondent willfully violated rule 3-110(A) by failing to advise the Bases to attend the August 23, 2011, creditors' meeting and by failing to personally appear at that meeting. The record fails to establish either of the charged rule 3-110(A) violations. Specifically, the State Bar failed to establish, by clear and convincing evidence, that Respondent filed the Bases' chapter 13 bankruptcy petition; that Respondent was the Bases' attorney of record in their chapter 13 bankruptcy proceeding; or that Respondent otherwise had a personal duty to notify the Bases of the creditors' meeting or to attend the meeting himself.

Even though Respondent may be vicariously liable in a civil suit for Attorney Sikand's failure to advise Wayne Base to attend the creditors' meeting and for Sikand's failure to personally attend that meeting, Respondent is not vicariously liable or subject to discipline for Sikand's failures. To be sure, except in the context of being required to refund unearned fees or

of violating the duty to adequately supervise subordinate attorneys and clerical staff, an attorney is not subject to discipline for another attorney's professional misconduct. In other words, in the context of attorney discipline, an attorney is not vicariously liable for the professional misconduct of another attorney except in the context of ordering restitution or dealing with an attorney's failure to adequately supervise his or her staff.

In sum, count one is DISMISSED with prejudice for want of proof.

Even though the record does not clearly establish the charged violations of rule 3-110(A), the record clearly establishes that Respondent willfully violated rule 3-110(A) by failing to adequately supervise Attorney Sikand and willfully violated his duty under section 6068, subdivision (c) to counsel and maintain only legal and just actions and proceedings Respondent failed to adequately supervise Sikand when Respondent authorized Sikand to file a chapter 13 bankruptcy petition for the Bases when Respondent knew that the Bases were not eligible to file a chapter 13 petition. Even if Attorney Sikand assured Respondent that filing a chapter 13 petition for the Bases was legal as Respondent claims, Respondent remains culpable of willfully violating rule 3-110(A) and section 6068, subdivision (c) because filing and maintaining a bankruptcy proceeding in which the client is not eligible for relief is neither legal nor just and is a clear abuse of the bankruptcy court in which the proceeding was filed.

Bankruptcy courts do not exist to provide mortgage borrowers with the means to delay foreclosure sales. It is appropriate to delay a foreclosure sale by filing for bankruptcy only when the debtor intends in good faith to pursue the bankruptcy case to completion and obtain debt relief or reorganization provided for under the Bankruptcy Code. The Bases never had any intention of competing the chapter 13 bankruptcy proceeding that Brookstone filed for them or of reorganizing their debts under chapter 13. Thus, it is clear that Respondent violated his duty to adequately supervise Sikand by authorizing Sikand to improperly and wrongfully file a chapter

13 bankruptcy petition for the Bases. Under Federal Rules of Bankruptcy Procedure, rule 9011 (which is virtually identical to Federal Rules of Civil Procedure, rule 11), when the Bases signed and Brookstone filed the chapter 13 bankruptcy petition on June 5, 2011, they certified to the bankruptcy court, that to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the petition was not being presented for any improper purpose and that the Bases intended to pursue a chapter 13 case to completion and that the claims and legal contentions in the petition were warranted by existing law or by a nonfrivolous argument of the extension, modification, or reversal of existing law or the establishment of new law. Even though the court may not properly consider this proved, but uncharged rule 3-110(A) violation as an independent grounds for discipline, the court may and does properly consider it for purposes of aggravation under *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36 and standard 1.5(d) as other uncharged statutory or rule violations.

Count Two – (Rule 4-100(B)(3) [Maintain Records and Account for Client Property])

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 two, the State Bar charges that Respondent willfully violated rule 4-100(B)(3) by failing to provide the Bases with an accounting of the $15,685 in advanced attorney's fees the Bases paid to Brookstone. As Respondent admits, the record clearly establishes the charged violation of rule 4-100(B)(3). The Bases (or their new counsel on their behalf) requested an accounting from Respondent in December 2011. Respondent failed to provide any type of an appropriate accounting until June or July 2012. Furthermore, the court concludes that any appropriate accounting of the advanced fees would show that Brookstone did not earn any portion of the $5,000 in advanced fees that it charged and collected from the Bases to prepare and file the improper chapter 13 bankruptcy

petition. Accordingly, the court's discipline recommendation will include a requirement that Respondent make restitution with interest to the Bases for $5,000 in unearned fees.

/ / /

/ / /

Case No. 12-O-13469 – The Daily Client Matter

Facts

On March 22, 2011, Keith and Myra Daily (collectively the Dailys) executed a retainer agreement with Brookstone . Under that retainer, Brookstone was to determine whether the Dailys were viable, potential plaintiffs for a prospective mass-joinder lawsuit directed against their lender. In addition, the Dailys paid $6,000 in advanced fees to Brookstone under that retainer agreement.

On March 22, 2011, the Dailys also executed a second retainer with Brookstone. In that second retainer, the Dailys retained Brookstone to pursue the mass-joinder lawsuit against their lender, IndyMac.

Keith Daily (Daily) testified that, on March 22, 2011, he and Myra met with a Brookstone representative named Anthony Williams. Daily does not know what Williams's job title was at Brookstone. Williams told the Dailys that the banks would "back-off" if they joined the mass-joinder lawsuit. Williams did not give a time-line for when the Dailys would be added to the mass-joinder lawsuit, but Williams did say that it would be soon. Daily reasonably believed he would be joined in the lawsuit in about 30 days. Williams did not explain the process of joining the lawsuit to Daily.

Sometime in April 2012, Daily found a legal notice that his mortgage lender attached to the garage door of his residence. Daily contacted Williams and was directed to Attorney Sikand,

who filed a chapter 13 bankruptcy petition for Daily. At the time of trial in this matter, that chapter 13 proceeding was about one year away from being completed.

According to Daily, after his bankruptcy petition was filed, his mass-joinder lawsuit was put on the back-burner. On June 22, 2011, the Dailys emailed Brookstone and requested a status update with respect to the filing of the mass-joinder lawsuit against IndyMac. On July 6, 2011, a Brookstone representative advised the Dailys that Brookstone was in the process of drafting the complaint and that once the Dailys were joined as plaintiffs in the prospective action against IndyMac, Brookstone would contact them.

Daily thereafter spoke to Respondent by telephone. During the conversation, Daily became concerned by Respondent's lack of knowledge of the Dailys' case. On February 28, 2012, the Dailys wrote to Respondent terminating his services and demanding a full refund of the $6,000 in advanced fees they paid to Brookstone.

Daily did not receive a response to his termination letter, but on March 12, 2012, a Brookstone representative notified the Dailys that Brookstone was about to file the mass-joinder lawsuit against IndyMac and wanted to get a supporting factual declaration from the Dailys.

On June 28, 2012, the Dailys wrote Brookstone a follow-up letter renewing their demand for a refund and iterating that they had severed their relationship with Brookstone in the preceding February.

On October 24, 2012, the Dailys again wrote to Brookstone demanding an accounting and refund as well as their client file.

Daily credibly testified that he never received the pre-litigation discovery report (litigation analysis) that Brookstone was to provide him as part of his fee for the mass-joinder litigation. At trial in this matter, Respondent produced a pre-litigation discovery report that was purportedly previously prepared for the Dailys. Daily credibly testified that he never saw this

report. The alleged report is not dated. And Respondent did not proffer any evidence as to when that report was prepared or if and how it was allegedly delivered to Daily. Respondent testified vaguely that these reports were ordinarily mailed to the client.

Respondent testified that it would not have been possible to file the mass-joinder lawsuit against IndyMac any sooner because IndyMac had been placed into a receivership by the FDIC, which complicated and slowed the process. According to Respondent, the FDIC required that a claim or application had to be submitted to it and that a claim was subject to a 180-day evaluation period process before litigation could be initiated against IndyMac. According to Respondent, this process added time to the required process, which caused the delay in filing the Dailys' mass-joinder claim.

Unfortunately, no Brookstone representative ever explained the mass-joinder lawsuit filing process to Daily or explained to him why his mass-joinder claim against IndyMac had not been filed.

Even though Daily testified that Brookstone sent his client file to the Dailys' new attorney, the record does not establish when the file was sent. Respondent admits that an accounting was never supplied to Daily and that Daily is entitled to a refund of the unearned fees in the mass-joinder lawsuit. However, Respondent contends that he earned a majority of the $6,000 advanced fee Daily paid Brookstone. The court does not agree.

Whatever work Brookstone performed on the mass-joinder lawsuit against IndyMac, it was of no value to Daily. Brookstone may have filed a complaint against IndyMac on behalf of Daily with the FDIC and may have prepared a pre-litigation discovery report (litigation analysis) on behalf of Daily prior to Brookstone being terminated. However, there is no evidence that Brookstone filed a FDIC complaint on behalf of Daily or that a litigation analysis was ever delivered to Daily. In short, Daily is entitled to a full refund of his fee in the mass joinder case.

Conclusions of Law

Count Three - (Rule 3-110(A) [Failure to Perform Competently])

The court finds that there is clear and convincing evidence that Respondent recklessly failed to perform legal services with competence, in willful violation of rule 3-110(A), by failing to provide the Dailys with a litigation analysis to determine whether they were qualified to for the mass-joinder litigation from March 2011 through February 2012.

Count Four – (Rule 4-100(B)(3) [Maintain Records/Render Appropriate Accounts])

As Respondent admits, the record clearly establishes that Respondent failed to provide the Dailys with an appropriate accounting of the $6,000 in advanced fees that Brookstone charged and collected from them and thereby willfully violated rule 4-100(B)(3).

Count Five – (Rule 3-700(D)(2) [Failure to Return Unearned Fees])

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund any part of a fee paid in advance that has not been earned. In count five, the State Bar charges that Respondent willfully violated rule 3-700(D)(2) by failing to refund, to the Dailys, any portion of the $6,000 in advanced fees that Brookstone charged and collected from them. The record clearly establishes that Respondent willfully violated rule 3-700(D)(2) because as Respondent admits Brookstone did not earn the entire $6,000 in advanced fees and because he did not refund any part of the unearned portion of the $6,000. Even though Respondent claims that Brookstone earned most of the $6,000, he never provided the Dailys with an accounting that disclosed how much or how Brookstone earned much of the $6,000.

Furthermore, the Dailys hired Brookstone to perform specific services (i.e., prepare a litigation analysis to determine whether they were qualified for the mass-joinder litigation and to file mass-joinder lawsuit against IndyMac). Brookstone failed to perform either task within a reasonable time. In addition, Brookstone failed to keep the Dailys adequately apprised of its

efforts and the alleged unavoidable delays caused by the FDIC. Accordingly, the Dailys were justified in terminating Brookstone's employment after about a year. Moreover, none of the services Brookstone allegedly performed resulted in any benefit to the Dailys. Accordingly, for purposes of determining the amount of restitution Respondent should be required to make, the court concludes that it is appropriate to deem the entire $6,000 advanced fee unearned. (Cf. *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 231 ["It is common in State Bar matters involving the failure to perform services to require as a rehabilitative condition, restitution of unearned fees kept by the attorney and to deem as unearned the entire fee when only preliminary services were performed which did not result in benefit to the client. [Citations.].) Therefore, the court's discipline recommendation will include a requirement that Respondent be required to make restitution with interest to the Dailys for the entire $6,000.

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

Rule 3-700(D)(1) requires an attorney, upon termination of employment, to promptly release to the client, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. This includes pleadings, correspondence, exhibits, deposition transcripts, physical evidence, expert's reports and other items reasonably necessary to the client's representation, whether the client has paid for them or not. In count five, the State Bar charges that Respondent violated rule 3-700(D)(1) because he failed to return the Dailys' client file as they requested. Daily testified, however, that Brookstone returned the Dailys' file to their new attorney. There is no evidence suggesting that Brookstone delayed in sending the file. Accordingly, the record fails to clearly establish that Respondent willfully violated rule 3-700(D)(1), and count six is DISMISSED with prejudice for want of proof.

Case No. 12-O-16003 – The Crawford Matter

Facts

Maria Crawford received one of the advertisements that Brookstone mass mailed in June 2011. After reading the ad, Crawford decided to contact Brookstone regarding her home mortgage loan. At the time, Crawford's home was not in foreclosure, but was under a short sale.

Crawford called Brookstone and spoke with Damon, who told Crawford that he was a banking specialist. Damon explained mass-joinder lawsuits and Brookstone's *Wright v. Bank of* America lawsuit to Crawford and asked Crawford questions about her home loan. Damien told Crawford that, if she were interested in joining a mass-joinder lawsuit, she should come in to Brookstone's office.

On July 9, 2011, Crawford went to Brookstone's office and met with Peter Rodriquez, who Brookstone represents is a banking specialists. Rodriquez reviewed Crawford's home loan documents. After a review of the documents, Rodriquez told Crawford that it appeared to him that she would qualify in joining the mass tort litigation against her lender, but that he first needed to order a securitization report. Crawford told Rodriquez that time was of the essence because, although her home was not in foreclosure, she wanted to keep her house. On July 9, 2011, Crawford retained Brookstone to determine if she was a proper candidate for inclusion within a prospective mass-joinder lawsuit against specific lenders. On July 11, 2011, Crawford paid Brookstone $1,250 in advanced fees by executing a credit card debit authorization in that amount in favor of Brookstone.

Crawford met with Rodriquez again on July 27, 2011. At that time, Rodriquez gave her a copy of the securitization report. At that time, Crawford signed a retainer with Brookstone, under which Crawford was to join the mass-joinder lawsuit of *Wright v. Bank of America*. Rodriquez told Crawford that she would be added to that lawsuit in August 2011, but that she had to be deposed by Brookstone before she could added to the *Wright* lawsuit. Crawford agreed to pay an advanced fee of $4,500. On July 27, 2011, she paid Brookstone $3,000. Thereafter,

she made four additional payments of $500 each on August 27, September 15, October 15, and November 14, 2011, in doing so she paid Brookstone $5,000 and not $4,500).

Respondent is unaware of the need for any Brookstone client to be deposed by his firm for any reason and believes Crawford is mistaken in her terminology. Brookstone does rely on client reliance declarations. Respondent agrees that Crawford should have been corrected on the terminology.

On September 11, 2011, and again on October 2, 2011, Crawford contacted Brookstone and inquired as to when she would be added to the mass-joinder lawsuit. At one point, a Brookstone representative told Crawford that she would not be added until the end of November 2011. In October and November 2011, Crawford corresponded with Brookstone by email about her short sale and how such a sale would affect her participation in the *Wright v. Bank of America* lawsuit. Because the short sale of Crawford's home began to move fairly fast, Crawford soon became dissatisfied with Brookstone's representation particularly since Brookstone failed to respond to her repeated requests for information regarding her status in the *Wright v. Bank of America* lawsuit. And, on November 25, 2011, Crawford sent Brookstone a letter terminating its services.

The next day, Crawford received a telephone call about her termination letter from Todd, who stated that he was Brookstone's operations manager. Todd told Crawford that, if he did not hear from her the next day, that she would not be added to the *Wright v. Bank of America* lawsuit. Even though Crawford did not call Todd the next day, Brookstone listed Crawford as a plaintiff in the caption of the second amended complaint that it filed in the *Wright v. Bank of America* lawsuit on November 30, 2011. Crawford's name was listed only in the caption. There were no allegations involving Crawford or her mortgage loan in the body of the second amended complaint. And Respondent credibly testified that Crawford's name appeared in the caption of

the complaint because of a mistake his office staff made. The fact that there are no allegations involving Crawford or her loan in the body of the amended complaint supports Respondent's claim that Crawford's name was included in the caption by mistake.

On December 5, 2012, Crawford sent Respondent a letter requesting an accounting. Respondent did not provide an appropriate accounting to Crawford. Thus, on December 10, 2012, Crawford sent Respondent another letter requesting an itemized billing statement and her client file. Respondent did not provide an appropriate accounting or the client file to Crawford.

Respondent admits that Crawford is also due a refund of unearned fees. At first, Respondent believed that the second amended complaint was filed on November 5 or 6, 2011, and that Brookstone had earned the advanced fees Crawford paid. Respondent now realizes that the second amended complaint was not filed until November 30, 2011, and that Crawford is entitled to a full refund. Respondent claims that he relied on his staff to determine whether Crawford was entitled to a refund.

Conclusions of Law

Count Seven – (Rule 3-110(A) [Failure to Perform Competently])

The record clearly establishes that Respondent recklessly and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A), by failing to file an amended complaint in the *Wright v. Bank of America* lawsuit to add Crawford as a plaintiff from July 27, 2011, through November 25, 2011, as Crawford made clear that time was of the essence because she wanted to keep her home. In other words, Respondent failed to file an amended complaint to add Crawford to the lawsuit within a reasonable time after she retained Brookstone. Whether an attorney has timely performed the legal services for which he was retained timely is ordinarily viewed from the client's perspective.

/ / /

/ / /

Count Eight – (Rule 4-100(B)(3) [Maintain Records/Render Appropriate Accounts])

As Respondent admits, the court finds that there is clear and convincing evidence that Respondent failed to render an appropriate accounting of client funds to Crawford in willful violation of rule 4-100(B)(3), by failing to provide Crawford with an accounting of the $6,250 in advanced fees she paid Brookstone as she requested.

Count Nine – (Rule 3-700(D)(2) [Failure to Return Unearned Fees])

As Respondent admits, the court finds that there is clear and convincing evidence that Respondent failed to return unearned fees in willful violation of rule 3-700(D)(2) by not refunding any portion of the $6,250 in advanced fees that Crawford paid to Brookstone.

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

As Respondent admits, the court finds that there is clear and convincing evidence that Respondent failed to release a client file, in willful violation of rule 3-700(D)(1), by failing to release Crawford's client file to her as she requested.

Count Eleven – (§ 6104 [Appearing Without Authority])

Section 6104 states, "Corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension." In count eleven, the State Bar charges that Respondent willfully violated section 6104 by joining Crawford as a plaintiff in the *Wright v. Bank of America* lawsuit after Crawford terminated Brookstone's employment. As note above, the record establishes that Brookstone listed Crawford as a plaintiff in the caption of its second amended petition because of a mistake Respondent's staff made. Accordingly, the record fails to clearly establish a willful violation of section 6104. Therefore, count eleven is DISMISSED with prejudice for want of proof.

/ / /

/ / /

Case No. 12-O-14081 – The Hess Matter

Facts

Susan Hess was another recipient of Brookstone's February 2011 mass mailing advertisement. On August 22, 2011, an unlawful detainer action was filed by Provident Savings against Hess, seeking to have Hess removed from Hess's Palm Springs property. Provident Savings had earlier foreclosed on the property and obtained ownership of the property when it purchased it at foreclosure sale.

Hess is a property manager and has been a licensed real estate agent since 1986. In 2011, before Provident Savings foreclosed on Hess's Palm Springs property, Hess owned seven properties, most of which were investment properties.

On August 22, 2011, Hess met with Peter Rodriquez, who as noted ante is one of Brookstone's alleged banking specialists. Brookstone Attorney Darin Colby was also present during a portion of Hess's meeting with Rodriquez. During that meeting, Hess retained Brookstone to determine if she was a proper candidate for inclusion within a prospective mass-joinder lawsuit against specific lenders. Hess paid Brookstone $1,250 in advanced fees for this service on August 22, 2011.

On September 2, 2011, Brookstone provided Hess with an audit of loan documents relating to Hess's Palm Springs property. That audit established that Hess did not have grounds to pursue a case against her mortgage lender, Provident Savings, in a mass-joinder lawsuit.

On October 28, 2011, a trial was conducted in the unlawful detainer action resulting in judgment for Provident Savings. Thereafter, on November 1, 2011, Provident Savings secured a writ of possession as to the Palm Springs property, which was satisfied on November 21, 2011.

/ / /

/ / /

On November 2, 2011, a Brookstone representative named Jamie Esparza called Hess and told her that the law had recently changed and now afforded Hess legal recourse against Provident Savings.

On November 3, 2011, Hess executed another retainer with Brookstone to individually pursue lender litigation against Provident Savings. The agreement provided for an initial legal fee of $6,000 of which $3,000 was payable upon execution of the retainer with the remaining $3,000 balance being paid at the rate of $500 a month. On November 3, 2011, Hess also executed a retainer with Brookstone under which Brookstone would represent Hess in Provident Savings' unlawful detainer matter even though Provident Savings had already obtained a judgment against Hess in the matter. Hess paid Brookstone a $3,500 fee for the unlawful detainer on or about November 4, 2011.

Hess did not receive a copy of either retainer agreement. On November 14, 2011, a Brookstone representative contacted Hess and told Hess that nothing could be done to help her in the unlawful detainer action and that the $3,500 advanced fee that Hess had paid in that matter would be credited as the first payment on her individual lender litigation matter against Provident Savings.

On December 6, 2011, Hess contacted Esparza for a status update and was advised that paralegals from Brookstone would be contacting her in the next week regarding her suit against Provident Savings. Esparza also stated he would send her copies of all documents Hess had signed with Brookstone. Also, on December 6, 2011, Brookstone debited Hess's checking

account in the amount of $3,000 pursuant to the automated electronic funds transfer agreement to satisfy the terms of the individual litigation agreement.[4]

Hess made numerous phone calls to Brookstone seeking an update on her case in December 2011.

In early January 2012, Hess spoke again with Attorney Colby. And he told Hess that he was her Brookstone attorney and was the gate-keeper in her case and that she direct all her inquires to him. About a week later Hess received phone call from Anthony Williams who told her that her case against Provident Savings fell through the cracks and that Brookstone was regrouping after the holidays.

On January 4, 2012, Brookstone collected $3,000 out of Hess's bank account pursuant to the automated electronic funds transfer agreement that Hess signed. In January 2012, Hess went to Brookstone's office and delivered copies of her loan documents.

During February and March 2012, Hess learned that Attorney Colby and Williams were no longer employed by Brookstone. Then, in late March 2012, Hess and her husband went to Brookstone's office and met with a Brookstone employee named Dwight Watanabe. Watanabe informed Hess that Brookstone had stopped working on her case because she had cancelled one of the $3,000 payments it collected from her bank account. After discussing the $6,500 in payments that Hess had made to Brookstone, Watanabe told Hess that he would review the matter.

Hess believed that she had not received any benefit for the $6,500 in fees that she had paid to Brookstone. Thus, on March 28, 2012, Hess sent a letter to Watanabe demanding a refund of the $6,500 she had paid to Brookstone. The letter included documentation that showed Hess had, in fact, paid Brookstone $6,500. Then, on April 12, 2012, Hess sent yet another letter

[4] Hess testified that one of two $3,000 payments Brookstone collected from her bank account was reversed by her bank.

to Watanabe demanding a refund of the $6,500 and her client file. Watanabe failed to refund the $6,500 to Hess or to send Hess her file.

/ / /

On June 19, 2012, Hess sent a letter to Respondent demanding that he refund the $6,500 she had paid Brookstone and provide her with a complete accounting and her client file. It was not until about July 12, 2012, that Brookstone finally refunded $6,075 of the $6,500 to Hess. Respondent claims that he was not aware of Hess's repeated requests for a refund until he received Hess's June 19, 2012, letter. Respondent charged Hess $425 for one hour of legal work and refunded remaining balance of $6,075 to Hess. Respondent failed to account to Hess for the $425 he collected out of the $6,500. Hess received her client file with all of the original documents she gave Brookstone, but she was not given copies of the two retainer agreements she entered into with Brookstone.

Conclusions of Law

Count Twelve – (Rule 3-110(A) [Failure to Perform Competently])

The record fails to establish either of the charged violations of rule 3-110(A) by clear and convincing evidence. Specifically, the State Bar failed to clearly establish that Respondent was to be Hess's attorney of record in either of the two matters in which Brookstone was to represent her or that Respondent was otherwise under a duty to personally represent Hess. Again, Respondent is not vicariously liable in this disciplinary proceeding for Attorney Colby's failure to prosecute Hess's claims against Provident Savings.

At worst, Brookstone's failure to realize that Provident Savings' unlawful detainer action had already gone to judgment when it agreed to represent Hess in that action was negligent. The review department has repeatedly held that the negligent failure to competently perform legal services (even if it amounts to legal malpractice) does not violate rule 3-110(A).

In sum, count twelve is DISMISSED with prejudice for want of proof.

Count Thirteen – (Rule 4-100(B)(3) [Maintain Records/Render Appropriate Accounts])

The court finds that there is clear and convincing evidence that Respondent failed to render an appropriate accounting of client funds to a client, in willful violation of rule 4-100(B)(3), by failing to account to Hess for the $425 in fees he collected out of the $6,500 in advance fees she paid to Brookstone.

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

The court finds that there is clear and convincing evidence that Respondent failed to release a client file, in willful violation of rule 3-700(D)(1), by failing to release Hess's client file to Hess for almost three months after she requested it and by failing to include in Hess's client file copies of the actual retainer agreements that Hess entered into with Brookstone.

Count Fifteen - (Rule 3-700(D)(2) [Failure to Return Unearned Fees])

The court finds that there is clear and convincing evidence that Respondent failed to return unearned fees, in willful violation of rule 3-700(D)(2), by failing to *promptly* refund at least $6,075 to Hess. Respondent did not refund the $6,075 to Hess until almost six after she first requested it. The court rejects Respondent's contention that Hess is responsible for his failure to time refund the $6,075 in unearned fees to Hess because she did not address her request for a refund to him until June 2011. Respondent's is required to have office procedures in place that insure he will receive all important letter from his clients.

Case No. 12-O-14522 – The Navarro Matter

Facts

In August 2011, Raymond Navarro-Morales (Navarro) received one of Brookstone's mass mailed advertisements. Navarro was interested in joining a mass-joinder lawsuit even though he was current in his home mortgage payments.

Navarro called Brookstone and was told to come to Brookstone's office with his loan documents.

On September 8, 2011, Navarro went to Brookstone's office and met with Salvatore Ocello, who described himself as a banking specialist. After consulting with Ocello, Navarro executed a retainer agreement to determine if he was a proper candidate for inclusion within a pending mass-joinder lawsuit against his lender, Wells Fargo. Navarro paid Respondent $895 for this service on September 8, 2011.

On September 8, 2011, Navarro executed a retainer agreement with Brookstone to join the pending lender litigation against Wells Fargo. The agreement provided for a non-refundable $3,000 initial legal fee, plus a $250 monthly fee thereafter for twelve months or until the pending suit is concluded. Two additional credit card/debit card authorization agreements were entered with Brookstone on September 8, 2011, to satisfy these obligations.

On September 21, 2011, Brookstone prepared a mortgage compliance analysis report regarding Navarro's property.

On September 28 and October 28, 2011, Brookstone received $1,500 from Navarro to cover the mass joinder retainer agreement.

On October 1, November 1, and December 1, 2011, and on January 1, and February 1, 2012, Navarro paid Brookstone $250.

Between the months of September 2011 through February 2012, Navarro repeatedly and regularly inquired of Brookstone when he could expect to be joined to the Wells Fargo litigation and was repeatedly advised that the joinder would be accomplished with the next group within the next 45-60 days.

Not satisfied with Brookstone's service, on February 20, 2012, Navarro sent a letter to Brookstone's Client Service Department terminating Brookstone's services and demanded a full refund by certified mail. Navarro did receive a response to his letter from Brookstone.

Shortly after Navarro terminated Brookstone, he received a telephone call from Brookstone asking for a new debit card number. Navarro had cancelled the debit card he used in the Brookstone payment schedule when he terminated Brookstone. Navarro refused to give Brookstone a new debit card number since he had already terminated their relationship.

On March 6, 2012, Felicia Edelman, an associate attorney with the law offices of Parker Stanbury LLP wrote to Respondent on behalf of Navarro demanding a full refund at risk of legal action. Respondent received the letter, but recklessly gave it to one of his staff members to handle. Neither Brookstone nor Respondent responded to Attorney Edelman's demand letter.

Navarro waited a few weeks after Edelman's letter to Respondent and then contacted the State Bar of California concerning his relationship with Brookstone.

On July 24, 2012, a Brookstone representative mailed to Navarro a copy of an audit of his loan documents earlier provided to Navarro.

On July 26, 2012, Respondent issued a refund check payable to Navarro in the amount of $3,832.50.

On August 6, 2012, Navarro demanded a full accounting and explanation for the amount of the refund, which Navarro claimed was short $1,062.50. Respondent received the demand but again recklessly failed to respond in any way.

Navarro filed a small claims court action in the Orange County Superior Court against Brookstone Law PC (Vito Torchia) to recover the remainder of the unearned fee he paid to Brookstone and not refunded.

Finally, on March 6, 2013, Navarro and Respondent stipulated to a small claims judgment in the amount of $656.25, payable to Navarro no later than March 20, 2013, in full and complete resolution of the fee dispute.

Respondent testified that it was not possible to have joined Navarro in the Wells Fargo mass litigation case due to a court ordered stay in the proceeding due to a defense counsel motion to coordinate cases filed in December 2011 or January 2012. A court hearing was held in March 2012 and the court issued a ruling in April 2012. Respondent also testified that Navarro was not notified, nor any other client of Brookstone's in the Wells Fargo mass litigation case of the court ordered stay by Brookstone. Respondent did not produce any court documents to support his claim that the court in the Wells Fargo mass joinder case filed a stay order during the time period that Brookstone represented Navarro.

Respondent testified Navarro should have been given an accounting but was not. Also, Navarro was not at first given a full refund because Brookstone had worked on his case and was just waiting for the court stay to be lifted to file.

Conclusions of Law

Count Sixteen - (Rule 3-110(A) [Failure to Perform Competently])

The court finds that there is clear and convincing evidence that Respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A), by failing to add Navarro to the Wells Fargo mass-joinder lawsuit. Respondent failed to establish that there was an actual stay in that lawsuit that precluded his performance. Moreover, even if there was, as Respondent contends such a stay, Respondent was required to notify Navarro and determine how Navarro wanted to proceed. Respondent simply cannot decide to do nothing without first obtaining his client's authorization.

Count Seventeen - (Rule 3-700(D)(2) [Failure to Return Unearned Fees])

The court finds that there is clear and convincing evidence that Respondent failed to return unearned fees, in willful violation of rule 3-700(D)(2), by failing to promptly refund the entire $4,895 to Navarro. The court's discipline recommendation will include a requirement that Respondent make restitution with interest to Navarro for $1,062.50. Respondent will, of course, upon proper proof of payment, be entitled to credit for payments he has made to Navarro in the amount of $656.25.

Count Eighteen - (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])

The court finds that there is clear and convincing evidence that Respondent failed to render an appropriate accounting of client funds to a client, in willful violation of rule 4-100(B)(3), by failing to properly account to Navarro for the $1,062.50 that he withheld from the refund.

Case No. 12-O-17119 – The Welling Matter

Facts

Yvonne Welling (Welling) and her husband, William, received one of Brookstone's mass mailed ads. On February 21, 2012, Welling and her husband visited Brookstone's office and met with Peter Rodriquez. After consulting with Rodriquez, Welling signed a retainer agreement with Brookstone to determine if Welling was a proper candidate for inclusion within two prospective mass-joinder lawsuits against Bank of America and Chase. Welling owned two properties, among others, and sought to protect both by joining these two mass-joinder lawsuits. No fee was charged for this service.

On February 24, 2012, Welling and her husband returned to Brookstone's office and signed a retainer agreement with Brookstone, allowing Welling to join the mass-joinder lawsuit against Bank of America. Rodriquez and two Brookstone attorneys, one of whom was Kevin Rock off, met with the Welling's. Welling impressed upon Brookstone at the time of executing

the agreement the need to be properly joined to the Bank of America litigation no later than March 11, 2012.

Prior to the meeting, Welling had gone on-line and investigated the status of the Bank of America litigation and noticed that the court had issued an order to not add additional plaintiffs to the case after mid-March 2011. Rodriquez said they would try, but could not guarantee that Welling would be added to the Bank of America mass joinder litigation by March 11.

On February 24, 2012, Welling signed another retainer agreement with Brookstone, allowing Welling to join the mass-joinder litigation against Chase. Welling paid a total fee of $4,300 in three separate payments on March 2, April 2, and April 4, 2012.

Shortly after retaining Brookstone, Welling had problems receiving from Brookstone and then sending in to Brookstone a completed questionnaire. Welling received the questionnaire on March 7, 2012.

On March 9, 2012, Welling emailed Brookstone inquiring as to when the amendment to the mass joinder would be accomplished adding her to the litigation as a plaintiff. Welling also reminded Brookstone of her request to be added to the Bank of America mass joinder lawsuit by March 11, 2012. In addition, Welling faxed her completed questionnaire to Brookstone. On March 23, 2012, Welling faxed another copy of her completed questionnaire to Brookstone when a Brookstone representative claimed it was not received on March 9.

On March 13, 2012, a Brookstone representative advised Welling they would be added to the mass joinder litigation by amendment within the next 30-45 days.

On March 27, 2012, Welling called Brookstone seeking to determine the status of her joinder via amendment to both mass joinder litigations. A Brookstone representative was unable to confirm that Welling had been joined to either litigation.

On April 2, 2012, Welling emailed Brookstone and requested written evidence that Brookstone had advised both involved lenders of her representation by Brookstone. Welling also requested copies of any correspondence generated by Brookstone on behalf of Welling related to both mass joinder cases. Brookstone received the request.

On April 25, 2012, Welling wrote Brookstone terminating their services and demanding a full refund.

On July 20, 2012, Welling sent an email to Brookstone again for a refund of all the fees paid to Brookstone in both mass-joinder cases.

On August 8, 2012, Welling emailed Brookstone again and demanded a refund of all the fees paid to Brookstone in both mass joinder cases.

A Brookstone representative named Gil Meniscal replied to Welling by email on the same date, explaining that it appeared that all the work was done on her cases.

On August 29, 2012, Welling emailed Brookstone and renewed her demand for a full refund within five business days.

On September 14, 2012, Welling again emailed Brookstone demanding an accounting and a full refund.

On November 5, 2012, Welling wrote to Respondent demanding a full refund of her fees in both mass joinder cases, a copy of her client file, and an accounting.

In some of her correspondence to Brookstone, Welling asks for documentation that Brookstone informed Bank of America that Brookstone represented Welling in the mass joinder litigation. The court is not aware that Brookstone had a duty to notify Bank of America that it represents any particular client in an unfiled claim in the mass-joinder litigation.

According to Welling, at one of the initial meetings, Rodriquez told her that bank would not foreclose if she joined the mass-joinder lawsuit. However, there was no representation that the bank would not foreclose if notified that a borrower had retained counsel to join the lawsuit.

On May 6, 2013, Respondent issued two checks in the amount of $3,320, payable to Welling, as a refund in her two mass joinder litigation cases. Welling received and cashed the checks.

On May 17, 2013, Welling wrote to Brookstone acknowledging the refund of $3,320, demanding the remainder of the full fee, $1,030, and noting that no accounting has been made.

Respondent failed to respond to Welling's May 17, 2013, letter.

Conclusions

Count Nineteen - (Rule 3-110(A) [Failure to Perform Competently])

The record fails to establish the charged violations of rule 3-110(A) by clear and convincing evidence. Count nineteen is DISMISSED with prejudice for want of proof.

Count Twenty - (Rule 3-700(D)(2) [Failure to Return Unearned Fees])

As Respondent admits, the record clearly establishes that Respondent willfully failed to promptly refund all of the advanced fees to Welling in willful violation of rule 3-700(D)(2).

Count Twenty-One - (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])

As Respondent admits, the record clearly establishes that Respondent failed to properly account to Welling for all of the advanced fees she paid to Brookstone in willful violation of rule 3-700(D)(2).

Count Twenty-Two - (§ 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 record fails to clearly establish that Respondent violated section 6068, subdivision (m). Respondent did not have a duty to notify Band of America or Chase Bank that he represented Welling. Nor did Brookstone agree to add Welling to the lawsuit by March 11.

Case No. 12-O-17260 – The Foster Matter

Facts

On March 7, 2011, Rob Foster and Karen Dingerson (collectively the Fosters) retained Brookstone to determine if the Fosters were proper candidates for inclusion within a pending mass-joinder litigation directed against Bank of America. The Fosters were residents of Idaho and the property they sought to protect by joining this mass joinder litigation was located in Idaho.

Respondent did not sign the retainer agreement nor is he aware of how the Fosters were signed as clients since they and their property are located in Idaho. According to Respondent, the Foster matter was accepted in contradiction of office protocol, which advises that only California properties were to be accepted in the mass joinder litigation.

The Fosters paid a total fee of $6,000 in March 2011.

On May 17, 2011, Brookstone added Ron Foster to the mass-joinder litigation against Bank of America in a first amended complaint. At paragraph 257 of that first amended complaint, Foster was mistakenly identified as a California resident owning California real estate. Beyond this filing, no legal services of value were performed by Respondent for the Fosters.

According to Respondent, the attorney that drafted the first amended complaint made a mistake when he named the Fosters as California residents owning California real estate.

Once informed, Respondent realized a mistake had been made and on May 26, 2011, Respondent dismissed Foster from the mass-joinder lawsuit. Respondent called Karen

Dingerson (Dingerson) and informed her that her case had been removed from the mass-joinder lawsuit because she was added by mistake and that he would be refunding her fee.

Confronted with an imminent foreclosure sale date with respect to the Idaho property, Foster contacted Brookstone representative Carl Saterfield in August 2011. In a series of emails between Dingerson and Saterfield in September and October 2011, Dingerson informed Saterfield of the status of the foreclosure sale of her property. Saterfield responded with explanations of what the bank is trying to accomplish in their letters and by visiting her home. Saterfield also informs Dingerson that he will speak with a Brookstone attorney and get back to her.

Foster retained Brookstone on October 28, 2011, to stop or postpone the sale. The Fosters paid $1,500 in additional fees on November 16, 2011. Foster also signed a letter of authorization advising Bank of America that Brookstone has been retained in the foreclosure sale matter.

The retainer agreement informs Foster that Brookstone has the discretion to select local counsel to assist in providing services under the agreement and the Fosters consent to transfer the matter to local counsel, if needed.

On January 3, 2012, Dingerson emailed Saterfield asking, among other things, about the status of an Idaho attorney. On January 6, 2012, the successor trustee issued an order in continuing the trustee sale on Foster's property to May 15, 2012.

On January 11, 2012, Dingerson again emailed Saterfield asking if Brookstone obtained an attorney licensed in Idaho. On January 18, 2012, Brookstone notified Foster that they were successful in continuing the sale date to May 15, 2012.

On May 17, 2012, the Fosters requested by e-mail a status update on the progress of the mass joinder litigation. On September 12, 2012, Dingerson emailed Saterfield asking if they are still in the mass tort suit.

On October 10, 2012, Foster filed a complaint against Brookstone with the California Attorney General's Office alleging that Brookstone dropped him from the Bank of America mass joinder but did not notify him until recently that his case had been dropped.

On October 12, 2012, Foster filed a complaint against Brookstone with the Office of the Idaho Attorney General. Foster alleges that he was not notified by Brookstone that he had been eliminated from the Bank of America mass joinder litigation until September 15, 2012.

On October 15, 2012, Respondent sent an email to an office employee concerning Foster's allegation that he was not aware of Foster being dropped from the *Wright* litigation. Respondent states that he spoke to the clients over a year ago and over the summer and that they were well aware that they were not in the *Wright* lawsuit.

On January 22, 2013, Respondent issued a refund check in the amount of $6,000 payable to Ron Foster. Respondent testified that it took approximately six months to return the fee to Foster because Karen Dingerson had asked him May 2012 to help find an Idaho attorney and not to return the fee until he was able to do so. Respondent was unable to locate an Idaho attorney for the Fosters.

Respondent did not earn the $6,000 in advanced fees paid by the Fosters.

Idaho Rules of Professional Conduct, rule 5.5 (Unauthorized practice of law) states that "(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction. (b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when: (1) the lawyer is authorized by law or order, including pro hac vice admission pursuant to

Idaho Bar Commission Rule 222, to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or (2) other than engaging in conduct governed by paragraph (1): (i) a lawyer who is an employee of a client acts on the client's behalf or, in connection with the client's matters, on behalf of the client's commonly owned organizational affiliates; (ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; or (iii) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation. (c) A lawyer shall not assist another person in the unauthorized practice of law."

Respondent was not at any relevant time, licensed to practice law in the state of Idaho.

The Fosters did not testify at trial in this matter.

Conclusions of Law

Count Twenty-Three - (Rule 3-110(A) [Failure to Perform Competently])

The record fails to clearly establish that Respondent willfully violated rule 3-110(A) as charged. Count twenty-three is DISMISSED with prejudice for want of proof.

Count Twenty-Four - (Rule 3-700(D)(2) [Failure to Return Unearned Fees])

The record fails to clearly establish that Respondent willfully violated rule 3-700(D)(2) as charged. Count twenty-four is DISMISSED with prejudice for want of proof. Dingerson approved of Respondent temporarily holding the fee.

Count Twenty-Five - (§ 6068, subd. (m) [Failure to Communicate])

The record fails to clearly establish that Respondent willfully violated section 6068, subdivision (m) as charged. Count twenty-five is DISMISSED with prejudice for want of proof.

In May 2012, Respondent told Dingerson that they were removed from the mass-joinder lawsuit because they were added by mistake.

Count Twenty Six - (Rule 1-300(B) [Prohibition on Practicing Law in Violation of Other Jurisdiction's Professional Regulations])

Rule 1-300(B) provides that an attorney must not practice law in a jurisdiction where to do so would be in violation of regulations of that jurisdiction's profession. Without question, adding the Fosters to the mass-joinder lawsuit did not involve the practice of law in Idaho. Moreover, there is no clear and convincing evidence that Respondent engage in the practice of law in Idaho with respect to stopping the foreclosure sale. In short, the count twenty-six is also DISMISSED with prejudice for want of proof.

Count Twenty-Seven - (Rule 4-200(A) [Illegal Fee])

Rule 4-200(A) provides that an attorney must not charge, collect, or enter into an agreement for an illegal or unconscionable fee. The record fails to clearly establish that Respondent or Brookstone collected an illegal fee as charged. Thus, the count twenty-seven is also DISMISSED with prejudice for want of proof.

Aggravation

The State Bar has established, by clear and convincing evidence, the following factors in aggravation. (Std. 1.5.)

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

Respondent is culpable of multiple acts of misconduct.

Other Uncharged Statutory and Rule Violations (Std. 1.5(d).)

As noted *ante*, the record clearly establishes that Respondent willfully violated an number of uncharged statutory and rule violations, which the court concludes it must appropriately consider as aggravation.

Mitigation

The record shows that Respondent has proved by clear and convincing evidence the following factor in mitigation. (Std. 1.6.)

/ / /

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

Even though Respondent has no prior record of discipline, he is not entitled to mitigation because his misconduct began with about four years after he was first admitted to practice.

Candor/Cooperation to Victims/State Bar (Std. 1. 6(e).)

Respondent entered into an extensive stipulation to facts and admission of documents at trial. Moreover, Respondent has admitted to culpability on multiple accounts. Respondent is entitled to significant mitigation for his extensive cooperation.

Remorse/Recognition of Wrongdoing (Std. 1. 6(g).)

Respondent recognizes many of the mistakes he made in managing Brookstone and has undertaken significant steps to prevent the misconduct from re-occurring.

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.)

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 1.1 provides that the primary purposes of disciplinary proceedings "are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards, and the preservation of public confidence in the legal profession."

Standard 1.1 also provides in pertinent part, rehabilitation can also be an objective in determining the appropriate sanction in a particular case, so long as it is consistent with the primary purposes of discipline."

Standard 1.7(a) 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(b) provides, in pertinent part, if aggravating circumstances are found, they should be considered alone and in balance with any mitigating factors.

Standard 1.7(c) provides, in pertinent part, if mitigating circumstances are found, they should be considered alone and in balance with any aggravating factors.

Standard 2.2(a) provides for actual suspension of three months to be appropriate for commingling or failure to promptly pay out entrusted funds.

Standard 2.2(b) provides that suspension or reproval is appropriate for any other violation of Rule 4-100.

Standard 2.3(b) provides that suspension or reproval is appropriate for entering into an agreement for, charging, or collecting an illegal fee for legal services.

Standard 2.5(b) provides that actual suspension is appropriate for failing to perform legal services or properly communicate in multiple client matters, not demonstrating a pattern of misconduct.

Standard 2.15 provides that suspension not to exceed three years or reproval is appropriate for violation of a provision of the Business and Professions Code or the Rules of Professional Conduct not specified in these Standards.

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Ct. Rptr. 980, 994.) It has long been held that the court is "not bound to follow the standards in a talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges that Respondent be suspended from the practice of law for a period of two years while Respondent asserts that, at most, an actual suspension of 30 days is the appropriate disposition.

In this proceeding, Respondent has been found culpable on 16 counts of professional misconduct involving 7separate client matters. More specifically, Respondent is culpable on 3 counts of failure to perform (rule 3-110(A)); 2 counts of failing to release the client file; 5 counts of failing to refund unearned fees; and 6 counts of failing to account for client funds. In addition, for purposes of aggravation, Respondent has been found culpable of uncharged violations for repeatedly failing to adequately supervise his associate attorneys and clerical staff and of maintaining an improper bankruptcy proceeding.

The court is concerned with Respondent's failure to adequately supervise his employees. There are a number of cases involving attorneys who failed to control their law practice, grossly neglected their client trust account and allowed their staff to embezzle client funds. (See *In the Matter of Steele* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 708; *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119*; In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411; and *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar

Ct. Rptr. 404.) In cases involving serious failure to supervise the level of discipline ranges from six months of actual suspension to disbarment.

The court views *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944 instructive on the issue of discipline. In that case, the attorney was placed on five years' stayed suspension and five years' probation on conditions including a two-year actual suspension. The attorney in that case engaged in similar, but more extensive misconduct than Respondent did in the present proceeding. Thus, the court concludes that less stayed suspension and less probation is needed in the present case. On balance, the court finds that the appropriate discipline for the found misconduct is four years' stayed suspension and four years' probation on conditions, including a two-year actual suspension that will continue until Respondent complies with standard 1.2(c)(1).

Recommendations

It is recommended that Respondent **VITO TORCHIA, JR.,** State Bar number 244687, be suspended from the practice of law in California for four years, that execution of that period of suspension be stayed, and that Respondent be placed on probation[5] for a period of four years subject to the following conditions:

1. Respondent is suspended from the practice of law for the first two years of probation and Respondent will remain suspended until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and present learning in the general law pursuant to standard 1.2(c)(1).

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

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including Respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar

[5] The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

purposes, Respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

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

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

6. During the period of probation, Respondent must make restitution to the following payees (or reimburses the Client Security Fund, to the extent of any payment from the fund to the payees, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles:

    (1) Wayne and Katja Base in the amount of $5,000 plus 10 percent interest per year from June 20, 2011;

    (2) Keith and Myra Daily in the amount of $6,000 plus 10 percent interest per year from March 22, 2011;

    (3) Maria Crawford in the amount of $6,250 plus 10 percent interest per year from November 25, 2011;

    (4) Raymond Navarro-Morales in the amount of $1,062.50 plus 10 percent interest per year from August 6, 2012; and

    (5) Yvonne Welling in the amount of $1,030 plus 10 percent interest per year from November 5, 2012.

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

8. Within one year after the effective date of the discipline herein, Respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of the session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and Respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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

Multistate Professional Responsibility Examination

It is recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within the period of his suspension and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

California Rules of Court, Rule 9.20

It is further recommended that Respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court 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. Failure to do so may result in disbarment or suspension.

Costs

It is 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.

Dated: August 6, 2014.

RICHARD A. PLATEL
Judge of the State Bar Court