PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed September 28, 2017

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 13-O-11286
	)	
MICHAEL CHRISTOPHER BENNETT,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 240565.	)	
	)	

Michael Christopher Bennett appeals a hearing judge's decision recommending disbarment because Bennett defrauded and intentionally misappropriated $13,860 from his employer, forged signatures, and misused the seals of two notaries public. Bennett does not contest culpability but requests discipline less than disbarment. Principally, he argues that he did not intend any harm, has implemented safeguards against future violations, and has otherwise been rehabilitated. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal and requests that we affirm the disbarment recommendation.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's findings of fact and law with minor modifications. The applicable disciplinary standard calls for disbarment absent compelling mitigation that clearly predominates. Bennett has not established this level of mitigation. To the contrary, his mitigation is far outweighed by his egregious, dishonest misconduct, which caused significant harm to his former employer, his clients, the public, and the administration of justice. Thus, we affirm the hearing judge's disbarment recommendation as appropriate discipline.

I. PROCEDURAL BACKGROUND

OCTC filed the operative, 18-count Amended Notice of Disciplinary Charges (Amended NDC) on March 2, 2016, charging Bennett with: 11 counts of moral turpitude (one count of engaging in a scheme to defraud, five counts of misappropriation, and five counts of misrepresentation); and seven counts of failing to comply with laws (five counts of breaching the common law fiduciary duty of loyalty and two counts of violating a state statute).[1]

In his July 8, 2016, pretrial statement, Bennett admitted certain dispositive facts as undisputed. A six-day trial took place in August 2016. On the first day, the undisputed facts were recited on the record without objection from Bennett. In her October 25, 2016, decision, the hearing judge found Bennett culpable on 13 counts and recommended disbarment.

While the case was pending on review, we granted Bennett's motion, over OCTC's opposition, to augment the record with a letter from Bennett's therapist, Dr. Tim Willison, dated February 16, 2017. (Rules Proc. of State Bar, rule 5.156(C), (E).)[2]

II. FACTS AND CULPABILITY

The hearing judge's factual findings are, for the most part, undisputed by the parties and supported by the record.[3] We adopt these findings with minor modifications as noted. Bennett does not contest culpability and acknowledges that his misconduct warrants discipline, but raises multiple arguments that seem to relate to culpability, including some "to preserve . . . for future appeal and litigation." To the extent that he seeks a reduction in the level of his discipline based on these arguments, we address them in mitigation. We find Bennett culpable on all counts.

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[1] OCTC filed the initial Notice of Disciplinary Charges (NDC) on December 16, 2014. This NDC was later dismissed without prejudice on OCTC's motion.

[2] All further references to rules are to the Rules of Procedure of the State Bar unless otherwise noted.

[3] The facts are based on trial testimony, undisputed facts recited at trial, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rule 5.155(A).)

A. Scheme to Defraud, Misappropriation of Fees, and Breach of Duty of Loyalty

Bennett was admitted to the practice of law in California on December 1, 2005. He worked as an associate attorney at Generations, an estate and trust law firm, from December 4, 2006, to January 2, 2013. Trudy Nearn was the sole owner of Generations, and her husband, Tom Nearn,[4] was a paralegal and the firm's chief operating officer.

On January 2, 2013, Bennett informed the Nearns that he was leaving the firm that day for another job. Afterwards, Tom searched Bennett's computer and discovered emails referencing a client matter not in the firm's database, which had been forwarded to Bennett's home email address. Tom also found an engagement letter directing the client to make a prepayment to Bennett and assuring that the prepayment would be placed in the firm's trust account.

On January 11, 2013, Trudy wrote to Bennett that Generations was aware that he had engaged a client and accepted a prepayment on the firm's behalf without notifying it. On January 15, 2013, the Nearns confronted Bennett, who misrepresented to them that he had personally received payment in only one matter.[5] On January 17, 2013, Tom emailed Bennett, informing him that he and Trudy knew Bennett had improperly engaged other clients, and identifying four more matters. Bennett then responded that those four were the only ones. Bennett knew, however, that he had worked on and received funds for additional matters.

Ultimately, the Nearns discovered evidence of other "off-book" work. Trudy testified that she concluded Bennett took fees in 18 matters. Bennett admits that, while employed by the firm, he "provided legal services on sixteen (16) matters and billed a total of $13,860, separate and apart from the work billed from Generations; i.e.[,] [he] met with 16 people, performed legal

[4] When referring to them individually, we use Tom and Trudy Nearns' first names to avoid confusion. When referring to them collectively, we refer to them as the Nearns.

[5] During oral argument, Bennett conceded that he made multiple misrepresentations to the Nearns.

work on their behalf, and had them pay him directly." He performed this off-book work without the firm's knowledge or authorization, instructed clients to pay him directly, misled clients that he was providing their payments to Generations, and used firm resources, including letterhead and computers, while being compensated by the firm to perform full-time work on its behalf. Bennett did not notify Generations that these clients had retained the firm for new or additional legal services, or that they had paid for the services. The record contains specific information about five off-book client payments: (1) $400 from Anthony Barros, Jr., on September 27, 2012; (2) $300 from Jewell Fryklund on April 17, 2012; (3) $160 from Della Casey on October 10, 2012; (4) $1,000 from Misty Jones on November 20, 2012; and (5) $200 from Antony and Jody Guest on March 12, 2012.[6] Bennett did not remit these fees to Generations and instead retained them for his own purposes. Trudy complained to the State Bar, but before Bennett learned about the resulting investigation, he paid Generations $13,860 for clients he had directly billed for legal services.

Based on these facts, we affirm the hearing judge's finding that Bennett is culpable of engaging in a scheme to defraud Generations, in violation of Business and Professions Code section 6106,[7] as charged in count one of the Amended NDC.

We also affirm the hearing judge's finding that Bennett committed acts involving moral turpitude and dishonesty, in violation of section 6106. He misappropriated advance fees paid by the following clients: (1) $400 from Barros (count two); (2) $300 from Fryklund (count four);

[6] The Guests' matter was discovered during the State Bar's investigation. Bennett failed to inform the Nearns about this matter, and testified at trial, "that was the one I had forgotten." The Amended NDC does not identify all of the other off-book clients or related fees. For the unnamed clients, we base our findings on Bennett's admission that 16 clients were involved, and he billed a total of $13,860 in fees.

[7] All further references to sections are to the Business and Professions Code unless otherwise noted. Section 6106, in relevant part, states: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."

(3) $160 from Casey (count six); (4) $1,000 from Jones (count eight); and (5) $200 from the Guests (count ten). (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1069–1070 [attorney who intentionally misappropriated approximately $29,000 from his law firm violated § 6106].) While the judge did not expressly determine that Bennett acted intentionally,[8] we find clear and convincing evidence[9] that he did. He instructed clients to pay him directly, misled them that he was providing their payments to Generations, and hid his off-book practice from the Nearns.[10]

And we find that these facts establish Bennett breached his common law fiduciary duty of loyalty owed to Generations, in violation of section 6068, subdivision (a).[11] While we find that the facts underlying these charges also establish moral turpitude, unlike the judge, we do not dismiss counts three, five, seven, nine, and eleven as duplicative, and find Bennett culpable as charged. (See *Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 41 [while employed, employee owes undivided loyalty to employer]; *Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285, 295 [duty of loyalty breached when "employee takes action which is inimical to the best interests of the employer"].) Nevertheless, we assign no additional disciplinary weight to these violations because they are based on the same facts that underlie the section 6106 findings, which support the same or greater discipline. (See *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

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[8] The hearing judge implicitly found Bennett acted intentionally: "[B]y misappropriating . . . advanced fees for his own purposes, [Bennett] committed an act of dishonesty and moral turpitude . . . ." In discipline, she analyzed the matter as involving intentional or dishonest misappropriation.

[9] 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.)

[10] Bennett admitted that he first provided off-book services in 2007 when, without informing Generations, he assisted personal friends with an estate plan for $500. However, we affirm the hearing judge's determination that the evidence is not clear and convincing that, in so doing, Bennett committed professional misconduct.

[11] Section 6068, subdivision (a), requires an attorney "[t]o support the Constitution and laws of the United States and of this state."

B. Forgeries, Notary Seal Misuse, and Misrepresentations

Bennett admitted that he forged multiple individuals' signatures, misused the seals of two notaries public, and made other misrepresentations while he was employed by Generations. On January 11 and 12, and August 24, 2011, Bennett represented himself as notary public Susan Meyer and forged her signature and used her notary seal on estate planning documents of James and Patricia Mariner and Ronald and Della Casey. Similarly, on March 26, 2011, he represented himself as notary public Margaret Evangelista and forged her signature and used her notary seal on Nolan and Cristina Armstrong's estate planning documents.

Bennett also forged his wife's signature on the Caseys' and Michael Fabiano's estate planning documents on August 24, 2011, and October 4, 2012, respectively. In both instances, the documents contained a declaration made under penalty of perjury representing that his wife had witnessed the documents' execution even though she was not present. In addition, to secure a home loan for himself, Bennett forged Tom's signature on (1) an October 23, 2012, verification of employment form, and (2) an October 24, 2012, letter to a loan company confirming income Bennett had earlier claimed.

Thus, we affirm the hearing judge's finding that Bennett is culpable of multiple acts involving moral turpitude, in violation of section 6106: twice forging Tom's signature to secure a home loan (count sixteen); forging his wife's signature on the Caseys' estate planning documents (count seventeen) and on Fabiano's estate planning documents (count eighteen); forging Evangelista's signature and using her notary seal on the Armstrongs' estate planning documents (count twelve); and forging Meyer's signature and using her notary seal on the Mariners' and the Caseys' estate planning documents (count fourteen).

We also affirm that these acts of forgery and notary seal misuse constitute breaches of Government Code section 8227.l,[12] in violation of section 6068, subdivision (a), as charged in counts thirteen[13] and fifteen. (See *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487 [§ 6068, subd. (a), is conduit by which attorneys may be charged and disciplined for violations of other specific laws that are not disciplinable under State Bar Act].) However, we assign no additional disciplinary weight for these violations. (*In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.)

C. Revocation of Notary Public Commission

Bennett was commissioned as a notary public from August 29, 2006, to August 28, 2010, and reappointed on March 19, 2012. On May 20, 2015, in a proceeding before, and in a Stipulation for Decision adopted by, the Secretary of State, Bennett agreed to revocation of his notary public commission due to his misconduct, which included forging signatures and using the notary seals of two notaries public (Evangelista and Meyer) without their knowledge. He had previously written to the Investigative Services of the Notary Public and Special Filings Section, Office of the Secretary of State (Secretary of State, Investigative Services): "I admit to the allegations as stated in your letter. I sincerely apologize for these actions. I have no excuses." Bennett was ordered to pay a civil penalty of $1,375, which he did.

[12] Government Code section 8227.1 provides that it is a misdemeanor "for any person who is not a duly commissioned, qualified, and acting notary public for the State of California to do any of the following: [¶] (a) Represent or hold himself or herself out to the public or to any person as being entitled to act as a notary public. [¶] (b) Assume, use or advertise the title of notary public in such a manner as to convey the impression that the person is a notary public. [¶] (c) Purport to act as a notary public."

[13] Count thirteen alleged forgery and improper use of Evangelista's notary seal on May 5, 2012, instead of March 26, 2011. This typographical error is immaterial and harmless.

III. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[14] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Bennett has the same burden to prove mitigation. (Std. 1.6.)

A. Aggravation

1. Multiple Acts of Wrongdoing (Std. 1.5(b))

We agree with the hearing judge's unchallenged finding that Bennett's multiple acts of misconduct constitute an aggravating factor, and we assign significant weight to this factor given his culpability on 18 counts of misconduct. (Std. 1.5(b) [multiple acts of wrongdoing constitute circumstance in aggravation]; see *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 317 [24 counts of misconduct assigned significant weight in aggravation].)

2. No Pattern of Misconduct (Std. 1.5(c))

We agree with the hearing judge's unchallenged finding that Bennett's misconduct does not amount to a pattern because, except for one occasion in June 2010, it was confined to roughly a two-year period in 2011 and 2012. (See *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 555 [pattern involves serious misconduct spanning extended time period]; *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 959.)

3. Uncharged Misconduct (Std. 1.5(h))

During trial, it was discovered that Bennett forged his wife's signature on the wills of Chris and Karen Tomine as a witness to their execution when, in fact, he knew his wife was not a witness. The hearing judge found this to be uncharged misconduct, in violation of section 6106.

It was also revealed at trial that Bennett executed estate documents for his off-book client Jones using the firm's resources on November 23, 2012, and collected $1,000 in fees from her.

[14] All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

He signed her will as a witness, declaring under penalty of perjury that he had witnessed his wife signing as a subscribing witness to the will and that he knew his wife's signature was her true signature. Bennett admitted at trial, however, that his wife was not present at the signing and that he forged her signature. On November 26, 2012, even though he had already prepared the estate documents and received $1,000 from Jones, Bennett signed a letter on the firm's letterhead, stating that Jones did not want to further engage Generations for legal services and that Generations would not bill her for their November meeting. The hearing judge found that this letter constituted an additional uncharged act of dishonesty, in violation of section 6106.

Bennett did not object to questioning related to the above acts and does not challenge the uncharged misconduct findings on review. Moreover, he explicitly admitted the violation related to the Tomines' matter at trial and in his brief on review. We thus affirm and assign this factor moderate weight in aggravation. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35 [uncharged allegations of misconduct may be considered in aggravation so long as respondent's due process rights are not violated].)

4. Significant Harm (Std. 1.5(j))

The hearing judge found that Bennett's misconduct significantly harmed clients, the public, and the administration of justice. (Std. 1.5(j) [significant harm to client, public, or administration of justice is aggravating circumstance].)

Bennett maintains that he did not intend to harm anyone and committed forgeries for expediency and client convenience. He challenges the judge's "finding of significant harm to the client" on multiple grounds, including the following: no evidence was presented that clients were actually harmed; he received no financial gain in some cases and minimal gain overall; clients received the work they paid for, often at a lower cost than they would have been charged by Generations, and were thus better off than had they used Generations; and OCTC presented

evidence neither of harm nor challenge to the estate documents in cases of deceased clients, and, more generally, no evidence that the underlying trust and estate documents were invalid. Bennett contends that he was trying to help clients who might not otherwise have received help. He further maintains that the one client OCTC brought in as a witness could not accurately identify the harm Bennett caused. Moreover, he argues that any potential issues with documents have been rectified and none have arisen with documents that could not be changed due to the client's subsequent death.

The hearing judge properly found that Bennett caused significant client harm. Bennett defrauded clients by giving them the false impression they were hiring and paying Generations. Once the fraud was uncovered, clients spent resources to re-execute estate planning and trust documents. That Bennett did not enrich himself and may have provided clients with legal services of value does not negate the harm he caused his clients in dealing with the aftermath of his fraud.

We affirm the hearing judge's unchallenged finding that Bennett harmed the public and the administration of justice as supported by the record. Specifically, his notary fraud undermines trust in the administration of justice, the authenticity of notarized documents, and the notary profession, which serves such an important role in society that it is codified by law. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 519; see Civ. Code, § 1181 et seq.; Gov. Code, § 8200 et seq.) In his brief on review, Bennett acknowledges, "There is harm to the notary profession."

Finally, we recognize the significant harm Bennett caused Generations and the Nearns. He took their resources, name, reputation, and over $13,000 in fees, and caused them to spend

considerable time and money in response.[15] Moreover, the off-book work created unknown potential conflicts issues, which forced Trudy to maintain malpractice insurance in retirement—at a cost of about $26,000 per year. Yet, because Bennett was repeatedly dishonest about the extent of his misconduct and because of additional dishonesty discovered at trial, discussed above in aggravation, the Nearns remain uncertain as to whether he engaged other clients without their knowledge. Trudy testified that she feels like she will have to maintain malpractice insurance coverage "forever," even though she is retired, as she cannot be certain she and Tom unearthed all the cases Bennett worked on using the firm's name without the firm's quality controls or in which he forged signatures. We reject as unproven Bennett's various claims that he benefitted Generations and the Nearns financially more than he harmed them.

We assign this factor significant weight in aggravation.[16]

B. Mitigation

1. No Mitigation for Lack of Prior Discipline (Std. 1.6(a))

Bennett's misconduct began in June 2010—less than five years after he was admitted. Contrary to his claim, he is not entitled to "some weight" based on "over four years of no complaints since [he] left Generations on January 2, 2013," and the hearing judge properly assigned no mitigation for his lack of prior discipline. (Std. 1.6(a) [absence of prior record of discipline over many years of practice coupled with present misconduct that is not likely to recur

[15] Trudy testified that she and Tom each "spent probably at least 200 hours" working to identify all matters affected by, and resolve issues related to, Bennett's misconduct. Similarly, Tom testified that he and Trudy spent "hundreds of hours" dealing with the situation. Tom also estimated that Bennett's misconduct cost Generations $250,000 to $350,000 in legal fees, bonus money the Nearns contended that Bennett should have repaid, and lost time spent reviewing documents and files and meeting with clients.

[16] Given that we find he caused significant harm, we reject Bennett's request for mitigation for causing only minimal harm (see std. 1.6(c)). We also reject OCTC's assertions that Bennett lacks insight into his misconduct, which the hearing judge did not find. (See std. 1.5(k).)

is mitigating]; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 473 [no mitigating credit where attorney had practiced for only four years prior to misconduct].)

2. Extreme Emotional Difficulties (Std. 1.6(d))

Mitigation is available for extreme emotional difficulties if: (1) Bennett suffered from them at the time of his misconduct; (2) they are established by expert testimony as being directly responsible for the misconduct; and (3) they no longer pose a risk that Bennett will commit future misconduct. (Std. 1.6(d).)

Bennett and his wife had their first child in April 2010 and their second in May 2012. With both pregnancies, Bennett's wife suffered severe perinatal and/or postpartum depression. The hearing judge noted, inter alia, that (1) Bennett's witnesses believed he was experiencing a very difficult family crisis, and many explained that his wife's illness impacted his judgment; (2) Bennett asserted that his wife's postpartum depression was one cause of his misconduct; (3) Dr. Pec Indman, a therapist who met with Bennett and his wife in June and July 2016, opined that Bennett had classic symptoms of depression, which caused confusion, poor judgment, and impulsivity; and (4) Dr. Willison, Bennett's therapist who has been treating him since June 2016, testified to the strong possibility that Bennett was suffering from an anxiety disorder and depression. However, the judge assigned only minimal weight to this evidence because Bennett had only recently begun individual therapy, no strong evidence showed that he was in the 10 percent of males who suffer from postpartum depression, and no clear evidence indicated that his emotional difficulties have ceased to be a problem or no longer pose a risk of future misconduct.

On review, Bennett challenges the judge's evidentiary findings and "requests that significantly more weight be accorded to the extreme emotional difficulties he was experiencing

at the time of his violations." He also requests that we "consider the magnitude of his rehabilitation when considering appropriate sentencing for his violations."

Like the hearing judge, we find Bennett's efforts commendable, particularly his ongoing relationship with Dr. Willison. However, Dr. Willison qualified his testimony at trial about whether Bennett was suffering from "anxious depression" at the time of the "incidents." The therapist was also guarded about Bennett's recovery, declaring that he "is developing a [*sic*] different interpersonal resources and [a] network of support" and "there's a very strong likelihood that [Bennett] is moving in the right direction, and is going to learn from what he's done in the way that he needs to in order to be not just a good attorney, but to be unerringly ethical in the future." Similarly, in his February 2017 letter, Dr. Willison stated: "*It is not possible to offer a guarantee of rehabilitation*. However, I firmly believe that [Bennett] has dealt substantively with the issues that caused the inappropriate behavior that led to his discipline." (Italics added.) He suggested that the odds of Bennett committing further misconduct are "miniscule." But Dr. Willison only started working with Bennett about two months before trial. And the doctor acknowledged that Bennett was referred to him for help in handling the stress and anxiety arising from potential discipline and to advocate for him in this disciplinary matter.

We also note that Bennett and others testified about several "safeguards against future violations" that are now in place (e.g., Bennett is now self-employed, he uses an outside notary to handle notarizations, he is a member of a professional support group, he and his wife have a personal group around them that they did not previously have, he and his wife do not plan to have more children, and his wife is on medication and receiving help for her anxiety/depression). Bennett contends that these "specifically address the misconduct" at issue here.

Yet Bennett did not prove by clear and convincing evidence that his rehabilitation is complete. (Std. 1.6(d) [clear and convincing proof required that extreme emotional difficulties

no longer pose risk of future misconduct].) He has been in individual therapy only since June 2016, which was over three years after he left Generations. Further, even Dr. Willison's opinions regarding Bennett's rehabilitation and the nexus between Bennett's emotional difficulties and his misconduct were qualified and guarded. It is thus not clear that Bennett's emotional issues have ceased to be a problem or that they no longer pose a risk of future misconduct. Notably, Bennett testified, "The issues that I've had, I don't want to sit here and pretend like they're 100 percent behind me. They will be issues for the rest of my life." Moreover, the effectiveness of the purported "safeguards" is unclear, particularly given that Bennett repeatedly testified that he did not know *why* he committed the misconduct. In sum, Bennett's "proffered evidence fails to demonstrate the sustained recovery which would satisfy us of [his] ability to withstand such stresses." (*In re Lamb* (1989) 49 Cal.3d 239, 248.)

Accordingly, like the hearing judge, we assign Bennett's emotional difficulties only minimal weight in mitigation. (See *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, 59–60 ["some mitigating weight" assigned to personal stress factors established by lay testimony]; *Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [marital problems may be considered mitigating]; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701–702 [depression due to stress of son's emotional turmoil considered in mitigation].)

3. Cooperation (Std. 1.6(e))

Though the hearing judge did not find this factor, we find that Bennett is entitled to minimal mitigation for cooperation with the State Bar. His trial testimony and his admission of undisputed facts in his pretrial statement effectively constituted a stipulation to the facts, which, though easily provable, established his culpability. (Std. 1.6(e) [mitigation credit permitted for spontaneous candor and cooperation displayed to State Bar]; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443 [factual stipulation merits some mitigation].)

4. Good Character (Std. 1.6(f))

The hearing judge properly found that Bennett's evidence of good character, supported by testimony and declarations, is a significant mitigating factor. (Std. 1.6(f) [mitigation afforded for extraordinary good character attested to by wide range of references in legal and general communities who are aware of full extent of misconduct].) Sixteen witnesses, including family members, attorneys, clients, friends, and therapists, testified and attested to his good character. Despite Bennett's misconduct, they praised his integrity, intelligence, commitment, compassion, and trustworthiness. (See *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591–592 [significant weight given to testimony of two attorneys and fire chief who had long-standing familiarity with attorney and broad knowledge of his good character, work habits, and professional skills]; *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].)[17]

5. Community Service

Pro bono work and community service are mitigating circumstances. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) We agree with the hearing judge and assign some weight in mitigation for Bennett's volunteer work with the American Cancer Society in the Sacramento region, the Sacramento Estate Planning Council, and his young daughter's soccer team.

6. No Mitigation for Remorse and Recognition of Wrongdoing (Std. 1.6(g))

The judge accorded Bennett's remorse and recognition of wrongdoing some weight in mitigation because she found: (1) all of his witnesses testified that he was remorseful; (2) Dr.

[17] Testimony in this case, particularly from the Nearns, reflects negatively on Bennett's character. However, we have considered most of the facts about which such testimony relates in making our culpability determinations. We thus do not rely on the same facts to reduce the weight of Bennett's good character evidence. (Cf. *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [where factual finding used for culpability, improper to consider in aggravation].)

Willison testified that Bennett is remorseful and has engaged in individual therapy to better understand himself; (3) Dr. Indman opined that Bennett knows what he did was wrong and is deeply regretful and ashamed; and (4) Bennett expressed remorse and acknowledged his wrongdoing. In a June 2014 letter to the Secretary of State, Investigative Services, he wrote: "I admit to the allegations as stated in your letter. I sincerely apologize for these actions. I have no excuses."

We find insufficient evidence to warrant any mitigation. While we acknowledge Bennett's concession that he deserves discipline and we recognize his efforts to express remorse, admit wrongdoing, and seek therapy, he did not do so in some cases until years after he committed the misconduct. As such, he did not take "*prompt* objective steps, demonstrating *spontaneous* remorse and recognition of the wrongdoing and timely atonement," as standard 1.6(g) requires. (Italics added.) Further, Bennett argues that the hearing judge's decision did not mention his in-person apologies to Evangelista, and notes that he testified that he apologized in person to the Nearns, Meyer, and Evangelista. However, Tom testified that Bennett did not apologize to him, and that he did not recall Bennett expressing any concern or remorse about the welfare of the clients for whom he had performed off-book work. We thus find a lack of clear and convincing evidence on the subject and conclude that neither Bennett's expressions of remorse (or his breaking down during trial) nor his witnesses' testimony merit mitigation on their own. (See *Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 2 [expressing remorse is "an elementary moral precept which, standing alone, deserves no special consideration in determining the appropriate discipline"].)

7. No Mitigation for Remoteness in Time of Misconduct and Subsequent Rehabilitation (Std. 1.6(h))

We reject as meritless Bennett's contention that he should receive mitigating credit for his approximately four years of discipline-free practice since the conclusion of his misconduct.

(See std. 1.6(h) [remoteness in time of misconduct and subsequent rehabilitation can be mitigating].) That he "was highly successful both ethically and financially at another position until the initial NDC . . . caused his employer to terminate his employment" is unavailing, particularly given that he knew of the State Bar's investigation since April 2013. Indeed, the time period during which an attorney is being investigated is not entitled to much consideration as proof of rehabilitation and good character. (See *In re Gossage* (2000) 23 Cal.4th 1080, 1099.) Further, as discussed above, Bennett has not proven full and sustained rehabilitation.

8. Restitution (Std. 1.6(j))

The hearing judge assigned minimal weight in mitigation for Bennett's payment of $13,860 in restitution to Generations.[18] (Std. 1.6(j) [restitution made without threat or force of administrative, disciplinary, civil or criminal proceedings entitled to mitigation].) On review, Bennett argues that the judge "misapplied this standard," and contends that he told Generations about four of the five client matters at issue on February 13, 2013,[19] made "complete restitution" (as to the matters he was then aware of) on February 20, 2013, and was not informed of the State Bar proceedings until April 2013. He thus requests that his "voluntary restitution" be given greater weight in mitigation than the hearing judge found. For its part, OCTC argues that Bennett's restitution is not entitled to mitigation because he did not pay it promptly, did so only in response to the Nearns' demands, and concealed and misrepresented what was owed.

[18] We note that the $13,860 included repayment of $500 that Bennett received in December 2007 from personal friends for whom he provided off-book services. As noted above, there is no clear and convincing evidence that Bennett committed professional misconduct in helping his friends, and thus, he did not need to repay the $500. However, Bennett's repayment did not include $200 that he received from the Guests and misappropriated from Generations in March 2012. At oral argument, Bennett admitted that he had not repaid that $200. Therefore, Bennett was required to repay $13,560 to Generations ($13,860 – $500 + $200 = $13,560). As such, he has paid at least the amount he was obligated to repay.

[19] Bennett asserts that the fifth matter was not uncovered until November 2014 when he reviewed all of his bank statements, which were subpoenaed.

We conclude that Bennett is entitled to mitigation. Although he paid only when Generations confronted him about his misappropriations after he left the firm, he did so soon thereafter and before he learned of any State Bar disciplinary proceedings. Moreover, he paid at least the amount he was obligated to repay. We assign this factor moderate weight in mitigation.

9. No Other Mitigation Warranted

Bennett argues that the Nearns were "vengeful" and "vindictive," and that this proceeding was partly a business dispute between them. "Although we scrutinize with care any evidence bearing 'the earmarks of private spite' [citation], it is nevertheless settled that '[w]hatever may have been the instigating factor, or whatever may have been the personal motive, in the initiation of the State Bar proceeding, are not matters of controlling concern in a case where the facts disclosed independently lead to the conclusion that the attorney is subject to some disciplinary action.' [Citations.]" (*Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431.)

Bennett contends that Trudy potentially committed misconduct by providing privileged and/or confidential documents to the State Bar without receiving clients' written permission to do so. He also claims that the State Bar, in turn, potentially committed misconduct by accepting those materials, filing a public NDC that included clients' names, and posting the NDC with those names on the State Bar's website. Bennett provides no authority for his contentions. And although he acknowledges that OCTC filed a motion to dismiss the original NDC without prejudice about two weeks after it had been filed, he fails to note that OCTC promptly returned the documents when it realized the materials were arguably privileged and/or confidential. Bennett responded to OCTC's motion by requesting that the NDC be dismissed with prejudice, which was rejected. He fails to show that this was an error, or that he was denied a fair hearing. (See *Dahlman v. State Bar* (1990) 50 Cal.3d 1088, 1094–1095 [respondent's only due process entitlement is to fair hearing overall].)

Finally, Bennett insists that he was caused irreparable harm when the State Bar allegedly transferred him to inactive status around October 28–30, 2016, instead of 30 days after the judge's decision was served, as ordered. He presents no supporting evidence, and we take judicial notice of the fact that the State Bar's member records show that Bennett was transferred to inactive status on November 24, 2016. (See rule 5.156; Evid. Code, § 452, subd. (h).)

IV. DISBARMENT IS THE APPROPRIATE DISCIPLINE[20]

Our disciplinary analysis begins with the standards, which, although not binding, are entitled to great weight (std. 1.1; *In re Silverton* (2005) 36 Cal.4th 81, 91–92), and should be followed whenever possible (std. 1.1; *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11).

Here, several standards apply, but standard 2.1(a) is the most severe, providing that disbarment is the presumed sanction for intentional misappropriation "unless the amount misappropriated is insignificantly small or sufficiently compelling mitigating circumstances clearly predominate, in which case actual suspension is appropriate." (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) Bennett misappropriated over $13,000, a significant amount (see *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1361, 1368 [$1,355.75 deemed not insignificant amount), and his mitigation is not compelling nor does it clearly predominate when weighed against his misconduct and the aggravating circumstances.

Disbarment is the proper discipline here. Misappropriation "violates basic notions of honesty, and endangers public confidence in the profession. [Citations.]" (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) It is grave misconduct for which disbarment is the usual discipline. (*Edwards v. State Bar*, *supra*, 52 Cal.3d at p. 38.) "Even a single 'first-time' act of misappropriation has warranted such stern treatment." (*Kelly v. State Bar*, *supra*, at p. 657.)

[20] 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 standards for attorneys. (Std. 1.1.)

Bennett's overall misconduct is rife with dishonesty. He created and hid an off-book practice from his employer and then lied about the extent of this practice when confronted. Moreover, he lied to clients, committed multiple forgeries, and used two notary seals without authorization. This dishonesty goes directly to his fitness to practice. And honesty is absolutely fundamental in the practice of law; without it, "the profession is worse than valueless in the place it holds in the administration of justice." (*Tatlow v. State Bar* (1936) 5 Cal.2d 520, 524.)

We acknowledge Bennett's and several witnesses' contention that his wife's severe depression and the resulting stress upon Bennett were a cause of his misconduct. We also note that Bennett and his wife have taken steps to lessen the chance of such pressures arising again. Yet many attorneys experience emotional and physical difficulties comparable to those that Bennett faced. "While these stresses are never easy, we must expect attorneys to cope with them without engaging in dishonest activities, as did [Bennett]." (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 522.) "Misappropriation . . . simply cannot be excused or substantially mitigated because of an attorney's needs, no matter how compelling." (*Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 709.)

Bennett argues that discipline that includes a period of actual suspension with conditions, including continued counseling, is appropriate.[21] In addition to attempting to distinguish the two cases that the hearing judge found guidance in (*Porter v. State Bar* (1990) 52 Cal.3d 518 and *Kaplan v. State Bar*, *supra*, 52 Cal.3d 1067), Bennett cites two cases where discipline less than disbarment was imposed. However, neither case is on point, and both are distinguishable from Bennett's intentional and dishonest misconduct: *Hipolito v. State Bar*, *supra*, 48 Cal.3d 621 involved an attorney who willfully misappropriated $2,000 and was credited with several mitigating factors, including no prior record of discipline, remorse, cooperation, candor, payment

[21] In his brief on review, Bennett suggested a one- to two-year actual suspension. At oral argument, he suggested a multiple-year actual suspension with a required reinstatement hearing.

of restitution, and engagement of a management firm to avoid future difficulties; and *Disciplinary Matter Involving West* (Alaska 1991) 805 P.2d 351—an out-of-state case—involved an attorney who counseled a client to affix a false signature and misused a notary seal, but did not involve misappropriation.

Like the hearing judge, we find guidance in *Porter* (two-year actual suspension where attorney committed misconduct in nine client matters, including misappropriating over $14,500 in trust funds, writing a bad check, forgery, lying to clients, and unlawfully practicing law while suspended, but had strong mitigation, such as extreme emotional difficulties and rehabilitation evidenced by social, community, and professional activities, having sought psychological treatment for emotional difficulties, and psychoanalyst's conclusion he was fully recovered), and *Kaplan* (disbarment where attorney intentionally misappropriated approximately $29,000 from his law firm during eight-month period, despite 11 years of discipline-free practice, 16 character witnesses, and psychiatric evidence regarding his emotional state and family pressures). We also find guidance in other cases involving misappropriation where disbarment was imposed.[22]

Unlike the attorney in *Porter*, whose psychoanalyst concluded he was completely rehabilitated, Bennett began treatment only in 2016, and his therapist, Dr. Willison, asserted, "It is not possible to offer a guarantee of rehabilitation." Further, as with the attorney in *Kaplan*, no clear and convincing evidence proves Bennett no longer suffers from his mental and personal difficulties. To his credit, he is seeking recovery, but he has not yet recovered. As the Supreme

[22] E.g., *Gordon v. State Bar* (1982) 31 Cal.3d 748 (disbarment for misappropriating and commingling over $27,000, despite mitigation, including 13 years of discipline-free practice, financial difficulties, emotional difficulties due to divorce, and remorse); *Chang v. State Bar* (1989) 49 Cal.3d 114 (disbarment for misappropriating approximately $7,898 and misrepresenting circumstances of theft to State Bar, despite no prior discipline); *In the Matter of Spaith*, *supra*, 3 Cal. State Bar Ct. Rptr. 511 (disbarment for misappropriating approximately $40,000, intentionally misleading client about funds, despite mitigation, including emotional problems, repayment of money, 15 years of discipline-free practice, strong character evidence, and candor and cooperation with State Bar).

Court noted in *Kaplan*: "Without assurance that [his] emotional problems are solved, we must be concerned that routine marital stresses or medical emergencies in the future will trigger similar behavior. [Citation.]" (*Kaplan v. State Bar*, *supra*, 52 Cal.3d at p. 1073.) And "[w]hile marital stresses . . . are always personal tragedies, we fully expect that members of the bar will be able to cope with them without engaging in dishonest or fraudulent activities . . . ." (*Ibid.*)

Consequently, we find no basis to recommend a more lenient sanction than disbarment given Bennett's multiple acts of moral turpitude and dishonesty and the significant harm he caused. (See stds. 1.2(i), 1.7(c) [lesser sanction than recommended in standard may be warranted where misconduct is minor, little or no injury to client, public, legal system, or profession, and attorney able to conform to ethical responsibilities in future]; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [clear reasons for departure from standards should be shown].) We agree with the hearing judge that disbarment is warranted under the facts of this case, the standards, and relevant decisional law, and it is necessary to protect the public, the courts, and the profession.

V. RECOMMENDATION

We recommend that Michael Christopher Bennett be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that Bennett comply with rule 9.20 of the California Rules of Court and 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 matter.

Finally, we recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable as provided in section 6140.7 and as a money judgment.

VI. ORDER

The order that Michael Christopher Bennett be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective November 24, 2016, will continue, pending the consideration and decision of the Supreme Court on this recommendation.

HONN, J.

WE CONCUR:

PURCELL, P. J.

McGILL, J.