PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

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STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of KIMBER BRIAN GODDARD, A Member of the State Bar, No. 125160.	02-O-15259 (07-O-11739, 07-O-13495) OPINION

This case involves two clients and one prospective client, all of whom believed that they had been victims of unethical billing practices by respondent, Kimber Brian Goddard. We find this case to be very troubling because the manner in which Goddard handled his legal fees clearly engendered misunderstanding and distrust by these three individuals. Yet, after a 12-day trial and 20 witnesses, the hearing judge found that the Office of the Chief Trial Counsel of the State Bar (State Bar) failed to prove by clear and convincing evidence that Goddard had committed any ethical violations, including charging illegal and unconscionable fees, seeking to mislead a judge, committing acts involving moral turpitude and improperly soliciting a client. The hearing judge thus ordered this entire matter dismissed with prejudice.

The State Bar seeks review and asserts Goddard is culpable of all the alleged charges and should receive a two-year actual suspension. Goddard urges us to affirm the order of dismissal.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we conclude that the State Bar failed to establish that Goddard committed misconduct in Case Number 02-O-15259 (the Akins/Gilmore matter) and in Case Number 07-O-13495 (the Koenig matter).

However, the State Bar did prove by clear and convincing evidence[1] in Case Number 07-O-11739 (the Winternitz matter) that Goddard charged an unconscionable fee in violation of rule 4-200(A) of the Rules of Professional Conduct[2] and that he made an improper solicitation in violation of rule 1-400(D). Accordingly, we affirm the hearing judge's dismissal of the Akins/Gilmore matter and the Koenig matter. Finding culpability as to two counts in the Winternitz matter, we reverse the dismissal of those counts and recommend that Goddard receive a six-month stayed suspension.

I. PROCEDURAL AND FACTUAL BACKGROUND

Goddard was admitted to practice in California in December 1986 and he has no prior record of discipline. His alleged misconduct occurred between 1994 and 2007. The State Bar filed a Notice of Disciplinary Charges (NDC) on August 15, 2008, alleging three violations of rule 4-200(A) [illegal and unconscionable fees]; a violation of Business and Professions Code section 6068, subdivision (d)[3] [misleading a judge]; two violations of section 6106 [moral turpitude]; and a violation of rule 1-400(D) [improper solicitation].

The hearing judge filed her opinion on May 13, 2010, dismissing the case with prejudice for lack of proof as to each charge. We note that the hearing judge found Goddard to be "extremely credible" and that his "testimony was direct, clear, specific, and very believable." We give great deference to this credibility determination because the hearing judge saw and

[1] The clear and convincing evidence test requires a finding of high probability, based on evidence so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552, citations omitted.)

[2] Unless otherwise noted, all further references to "rule(s)" are to the Rules of Professional Conduct.

[3] Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

heard Goddard testify. (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.)

II. CASE NUMBER 02-O-15259 (AKINS/GILMORE MATTER)

A. FACTS

In 1994, Jeanne Akins sought Goddard's legal assistance concerning her elderly mother, Nina Gilmore, who was incapacitated and resided with Akins in Sacramento County. At the time, Akins's brother, Roy Gilmore, was the trustee of Nina Gilmore's inter vivos revocable trust created in 1992 (the Trust), which included all of her assets except her Social Security benefits. Akins wanted to remove her brother Roy as trustee because she believed he was filing fictitious trust reports and was "pilfering the trust." Akins also wanted to be appointed as the conservator of her mother and her mother's estate.

On March 31, 1994, Goddard filed a petition in Sacramento County Superior Court to appoint Akins as conservator of the person and the estate of Nina Gilmore (Petition), which was granted in May 1994.[4] Goddard also petitioned the Shasta County Superior Court to remove Roy as trustee, which it did in November 1994. The court appointed Akins as successor trustee and authorized payment of Goddard's attorney fees from the Trust principal.

Akins used her mother's Social Security checks plus income and principal from the Trust to pay Nina Gilmore's living expenses. She also paid Goddard's fees from the Trust income and principal. On July 25, 1995, Goddard filed a petition for approval of the initial accounting of the conservator for the period May 17, 1994 to May 17, 1995, which was amended on September 6, 1995. Neither the first accounting nor the amendment disclosed that Goddard had received approximately $31,386 in fees from the Trust. On May 21, 1997, Goddard's office filed a

[4] Goddard identified the Trust as property of the conservatee in the Petition and in two subsequent pleadings, but he testified that he did so to alert the Superior Court that the majority of Nina Gilmore's income and assets was separately held in the Trust.

second accounting for the period May 17, 1995 to May 17, 1997, which was amended on August 15, 1997. Neither the second accounting nor the amendment disclosed that Goddard had been paid an additional $31,283 in legal fees from the Trust. Nina Gilmore died in 2000. Between March 1994 and February 2002, Goddard was paid approximately $108,270 for his services on behalf of the conservatorship.

The attorney-client relationship between Goddard and Akins ended on a bad note after Akins was sued by her brother Roy in 2002 for false accountings and misappropriation of Trust assets. Ironically, these were the very same claims that Akins had made against him in 1994. The matter was settled before the conclusion of the trial, but upon instruction by the Superior Court judge hearing the case, Akins filed a lawsuit, in her capacity as conservator of her mother's estate and trustee of the Trust, against Goddard for malpractice for active concealment of known facts and unlawful business practices. That matter also settled.

B. CULPABILITY

Count One (A): Illegal Fee (Rule 4-200(A))

The State Bar alleged that Goddard violated rule 4-200(A)[5] by illegally collecting fees for services rendered on behalf of the conservatorship without obtaining court approval. The hearing judge dismissed this count with prejudice after finding the State Bar failed to provide clear and convincing evidence that court approval was required. We adopt the hearing judge's dismissal of this charge, although we find that the issue of court approval of Goddard's fees is a question of law, not fact.

We start with the basic proposition: "In conservatorship proceedings, an attorney seeking fees for services rendered to the conservat[ee]'s estate must first seek court-ordered approval before compensation is paid. (Prob. Code, §§ 2640, 2642.)" (*Rossman v. State Bar* (1985) 39

[5] Rule 4-200(A) provides that an attorney "shall not enter into an agreement for, charge or collect an illegal or unconscionable fee."

Cal.3d 539, 545.) However, whether court approval for Goddard's fees was required depends on whether the assets of the Trust were part of the conservatorship estate. Goddard asserts that he carefully researched the issue of whether court approval was required for attorney fees paid from a revocable inter vivos trust at the time he filed the Petition in 1994. He concluded that court approval was not required although he recognized that this was a gray area of the law. The State Bar argues that when Goddard filed the conservatorship accountings, the law required that all attorney fees incurred on behalf of a conservator be disclosed and approved by the court, irrespective of whether they were paid from a revocable trust.

Between the time of the initial accounting in 1995 and the second accounting in 1997, the Probate Code was amended to provide that in conservatorship proceedings: "[T]he court shall only determine fees that are payable from the estate of the . . . conservatee and not limit fees payable *from other sources*." (Prob. Code, § 2646, italics added.) To date, no decisional law has interpreted the meaning of "other sources." Instead, the State Bar relies on cases that demonstrate the basic and long-standing principle that assets held in a trust remain the property of the settlor (in this case, Nina Gilmore) as long as the trust remains revocable. (See, e.g., *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1319; *Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 633; Prob. Code, § 18200.) None of the cases cited by the State Bar addresses the specific issue before us of whether an inter vivos revocable trust is considered an asset of a conservatorship estate.

The State Bar also cites *Johnson v. Kotyck* (1999) 76 Cal.App.4th 83, which was published *after* Goddard had filed the conservatorship's two accountings, and which states, in dicta, that a trustee of a revocable inter vivos trust "is a person in control of property in the conservatorship estate." (*Id.* at p. 89.) No court has relied on this dicta in *Johnson v. Kotyck* to support a finding that court approval is required in conservatorship proceedings for payment of

attorney fees from a revocable trust, and indeed, practitioners and legal scholars have criticized the *Johnson* decision. (Comment, *Revocable Trusts; Accounts; Conservatorship Estate* (1999) 21 Estate Planning Rep. 88 [criticizing decision as "controversial" and contrary to statutory provisions for management and control of trust property and conservatorship property].) Similarly, treatises in the field of conservatorship law have declined to endorse or rely on the dicta in *Johnson*. (Adamiak et al., Continuing Education of the Bar, Cal. Conservatorship Practice (2007) § 20.3 [author's view that fees paid from conservatee's preexisting revocable trust fall outside jurisdiction of conservatorship proceeding].) The controversy continues to the present. (Adamiak et al., Continuing Education of the Bar, Cal. Conservatorship Practice (2010) § 20.48 [serious controversy continues whether conservatee's revocable trust assets can be used to pay attorney fees without prior court approval].)

The only other authority cited by the State Bar is the Superior Court of Sacramento County, Local Rules, rule 15.81 (as amended in 1994).[6] However, this rule does not address the unresolved issue of whether a revocable inter vivos trust is considered an asset of the conservatorship estate. Rather, it merely restates the basic proposition at the time the Petition was filed that fees in conservatorship proceedings will be determined "in the manner authorized by section 2640, et seq."[7] Given the absence of controlling authority when Goddard filed the two accountings, and the ongoing debate over using a revocable trust's assets to pay attorney

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[6] Superior Court of Sacramento County, Local Rules, rule 15.81 (as amended in 1994) provides in relevant part: "The guardian or conservator or the attorney for the guardian or conservator may petition the court to determine fees in the manner authorized by section 2640, et seq. The petition shall specify the services rendered and the fees requested."

[7] At the hearing below, the State Bar presented the expert testimony of Peter S. Stern who is one of the co-authors of the CEB treatise entitled *California Conservatorship Practice*. Stern stated that under the law and Superior Court of Sacramento County, Local Rules, rule 15.81, Goddard was required to obtain court approval of his fees. Although Stern could opine on the issue, ultimately, it is up to the independent decision-making of this court. (*In the Matter of Harney, supra,* 3 Cal. State Bar Ct. Rptr. at p. 277, fn. 7.)

fees without prior court approval, we cannot conclude that Goddard's fees were illegal as a matter of law.

Count One (B): Misleading Judge (§ 6068, subd. (d))

On appeal, citing *In the Matter of Harney, supra,* 3 Cal State Bar Ct. Rptr. 266, the State Bar argues that Goddard mislead the probate judge in willful violation of section 6068, subdivision (d), when he failed to disclose to the probate judge the questionable legal issue about whether court approval of his fees was necessary.

We find that *Harney* is distinguishable. Harney's failure to disclose to the court the possible application of MICRA limits to his fee request was grossly negligent and not reasonable, since the decisional law interpreting MICRA was fairly well-developed when Harney was seeking court approval of his fee. (*In the Matter of Harney, supra,* 3 Cal. State Bar Ct. Rptr. at p. 281, fn. 13.) We make no such findings in this case. Rather, given the absence of controlling law with respect to court approval of his fees at the time Goddard filed the accountings, we find his belief that he did not need to disclose the unsettled state of the law was both honest and reasonable and therefore he acted in good faith. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rtpr. 166, 173 [recognizing good faith of attorney in making false statement is defense to charge of violating § 6068, subd. (d)].)

Count One (C): Moral Turpitude (§ 6106)

The State Bar argues on appeal that Goddard committed a dishonest act involving moral turpitude in violation of section 6106 because he failed to disclose the gray area of the law regarding court approval of attorneys fees. Based on our analysis in Counts One (A) and (B), we adopt the hearing judge's dismissal of this charge with prejudice.

III. CASE NO. 07-O-11739 (WINTERNITZ MATTER)

A. FACTS

In May 2006, Marian Bakken retained Goddard to complete her estate plan. When she became incapacitated shortly thereafter, her daughter, Brenda Winternitz, became successor trustee under the terms of the Bakken Trust. In November 2006, Winternitz called Goddard's office to notify him that her mother had died. Her call was directed to Chris Holden,[8] who suggested a "no-cost" consultation to discuss her responsibilities as successor trustee. Since Winternitz was very concerned about incurring legal fees, she confirmed with Holden in a subsequent phone conversation that she would not be charged for the consultation.

Winternitz met Holden on January 3, 2007, and that same day, she wrote Goddard a letter informing him that she had decided not to retain his services. On January 31, 2007, Goddard billed Winternitz $450 in legal fees. Although the invoice indicated "no charge" for the 1.3 hour meeting with Holden, Goddard billed 1.8 hours for the time spent in preparing for the meeting, reviewing trust administration issues, drafting a memo, and for a telephone call to her.

Winternitz wrote to Goddard on February 13, 2007, disputing the bill "because the consultation is advertised as no-cost (see attachment), and I confirmed as such with your associate Mr. Chris Holden in a subsequent phone call." Winternitz attached copies of advertisements for Goddard's "no-cost" legal services from his newsletter and website as proof that she should not have been charged.[9] Winternitz further stated in her letter: "Had I known there would be a fee associated with this no-cost consultation, I would not have proceeded."

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[8] Holden was an attorney in Goddard's office, but he was not licensed to practice in California.

[9] Goddard's annual newsletter, which he sent to all of his existing clients, prominently displays the following advertisement: "*Services to our clients at <u>no cost</u>*: Initial consultations; Ongoing client estate planning phone advice; Annual 'Estate Law Report;' Surviving spouse

Goddard did not respond to her letter. Instead, he sent another bill on February 28, 2007, with his handwritten notation: "Last billing prior to collection action." On March 9, 2007, Goddard again wrote to Winternitz, requesting "prompt payment" and explaining his billing practices in connection with his no-cost consultations: "We prepare for every appointment by carefully reviewing our entire file which includes the estate planning documents, and all other attorney work produced during the years of representing our clients . . . . [W]e provide all of these services to successor trustees whom we have never met. To continuing clients, we offer the actual consultation without cost. All preparation and follow up is billed at our regular rate."

Winternitz responded on March 11, 2007, advising Goddard: "I was not informed of any costs associated with the consultation, and had I been so informed, I would have declined the consultation." She continued: "[W]hen Mr. Holden suggested I come in for the free consultation, I informed him at that time that I did not have the funds to avail the Trust with the services of your law office. Mr. Holden then stated the consultation was free and did not inform me of any preparation fee or any other cost associated with this consultation." Goddard followed up with another invoice in May, 2007, and he added $141.95 for his preparation of the March 9th letter explaining his fees, plus interest on the past-due amount, for a total of $591.96. His handwritten notation on that bill said: "Final Demand."

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direction and consultation; Executor (successor trustee) direction and consultation; New client review of existing estate plan; Flat fee, fixed fee document drafting [sic]; French and Spanish Language." (Emphasis in the original.)

Goddard's website contains a similar advertisement: "We invite you to visit with us for a complimentary no-cost consultation to review your present estate plan or create a new one." The website then lists the following "no-cost" services: "Initial consultations; Ongoing client estate planning phone advice; Annual 'Estate Law Report;' Surviving spouse direction and consultation; Executor (successor trustee) direction and consultation; New client review of existing estate plan; Flat fee, fixed fee document drafting [sic]; French and Spanish Language." The advertisement concludes: "Compare our services…. Then Call Us For a No-Cost Consultation (916) 488-9788." (Emphasis in original.)

Winternitz complained to the State Bar, which wrote to Goddard on June 7, 2007. As a result, he cancelled the bill on June 14, 2007, having concluded that "if they're making a State Bar complaint, then it would not be worth the battle no matter what."

B. CULPABILITY

Count Two (A): Unconscionable Fee (Rule 4-200(A))

The hearing judge dismissed Count Two (A) in the NDC, which alleged that Goddard violated rule 4-200(A) by charging $450 for a no-cost consultation. She found that Goddard's fee was not so exorbitant as "to shock the conscience" and noted that he ultimately cancelled the invoice. In our view, the hearing judge's analysis misses the point.

At the time of the no-cost consultation, Winternitz was not a client of the firm and she had no agreement with Goddard to pay for his services. Indeed, she advised Holden that she could not afford to incur any costs or fees when he suggested the consultation. In *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, we found that a legal fee in the amount of $217.18 was unconscionable and violated rule 4-200(A) because "there [was] no evidence that Kaiser [Hospital] ever employed respondent and agreed to pay him such a fee." (*Id*. at p. 851.) We further found that "[d]ollar amounts are not the sole criteria in determining unconscionable fees," particularly where the attorney has not obtained informed consent to the fees. (*Ibid.*)

Here, we find *no* consent to the fees charged, much less informed consent. Rather, Goddard unilaterally decided to charge Winternitz for the ancillary services related to the no-cost consultation based on his standard billing practices for his existing clients, even though she was not a client of the firm. He then attempted to justify his charges in his March 9, 2007, letter to Winternitz relying on their "ongoing" relationship that arose from his prior representation of her mother.

In *Grossman v. State Bar* (1983) 34 Cal.3d 73, an attorney sent a similar letter justifying his excessive fees as being consistent with his "normal practice." As with the instant case, the attorney's explanation to his client of his billing practices was "a deliberate, unilateral determination [by the attorney] that such a fee was fair payment for [the attorney's] services." (*Id*. at p. 78.) The Supreme Court was unwilling to view this as an "honest misunderstanding" over the fee charged and instead found that the attorney was culpable of misappropriation because the fee had not been agreed to by the client. (*Id*. at pp. 77-78.) The Court further observed that once the client brought the mistake to the attorney's attention, he should have conceded the error. "Instead [the attorney] refused to correct the error and attempted to justify the overcharge in the . . . letter." (*Id*. at p. 79.)

The case before us involves more than a mere fee dispute. In those cases where discipline has been imposed for excessive fees, "there has usually been present some element of fraud or overreaching on the attorney's part . . . ." (*Herrscher v. State Bar* (1935) 4 Cal.2d 399, 403.) Such is the case here. In spite of Winternitz's reasonable and repeated requests that Goddard withdraw his charges, Goddard escalated the pressure over a six-month period when he continued to bill her, threatened to turn the matter over to a collection agency, and increased his fee by charging her for his explanation of his billing practices. This course of conduct illustrates the danger of an attorney trained in persuasion and in a superior position to exert influence, who uses such skills to convince a client, or in this case a prospective client, to pay an unjustified bill. Goddard was so focused on collecting his fee that he was blinded to the larger issue of the overreaching inherent under the circumstances. We thus find that Goddard is culpable of charging an unconscionable fee because Winternitz was not a client, she never agreed to pay *any* fee to Goddard and she was subjected to overreaching due to his collection efforts.

Count Two (B): Improper Solicitation (Rule 1-400(D))

In Count Two (B) of the NDC, Goddard was charged with a violation of rule 1-400(D), which provides that a communication or solicitation that offers professional employment to a present or prospective client shall not "contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead . . . ."

As noted *ante*, Holden assured Winternitz that their consultation would involve no cost to her. Concerned that she did not have the money to pay any fees, Winternitz called a second time to confirm her understanding, which was corroborated when she read Goddard's newsletter and website advertisements. It was therefore entirely reasonable under the circumstances for Winternitz – and indeed, for any client or prospective client who read these advertisements – to believe that the solicited consultation would not involve charges for preparation or review of the file. Yet by his own admission, it was Goddard's regular practice to charge his existing clients for these services when they availed themselves of his advertised "no-cost" consultations.

We thus conclude that Goddard's practice of advertising his "no-cost" services and consultations without *clearly* disclosing in the same advertisement, newsletter, or verbal solicitation that additional fees and costs may be incurred for ancillary services, constitutes a deceptive solicitation in violation of rule 1-400(D). (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 627 [attorney advertising $60 flat fee to prepare debt relief application found materially misleading in violation of former rule 2-101(A)(3) because no disclosure of additional attorney fees charged for services related to debt relief proceedings]; rule 1-400(E), std. 14 [communication stating or implying "no fee without recovery" presumed to violate rule 1-400 "unless such communication also expressly discloses whether or not the client will be liable for costs"].) We accordingly reverse the hearing judge and find Goddard culpable of violating rule 1-400(D) as alleged in Count Two (B).

IV. CASE NO. 07-O-13495 (KOENIG MATTER)

A. FACTS

Goddard represented Avon Koenig, a widow in her late 80's, from November 2004 to July 2007. According to the retainer agreement, Koenig hired Goddard to perform work on trust issues, which included marshalling and transferring Koenig's assets into a bypass trust and survivor's trust to minimize federal estate taxes. His work also involved petitioning the court to modify an irrevocable trust and obtaining consent to the modification from numerous trust beneficiaries. The retainer agreement provided that Goddard would charge for his services at the rate of $225 per hour, with additional provisions for charging minimum and fixed fees under certain circumstances.[10] By March 2006, Goddard had completed the trust-related work and had collected approximately $71,797 in fees.

In February 2006, Goddard sent Koenig a letter advising that his billing rates would be increased. He also modified his original retainer agreement to charge a minimum of 0.2 hours and fixed fees for certain tasks performed by his non-legal staff. He charged these minimum and fixed fees at his highest attorney rate.

In March 2006, the nature of Goddard's representation changed when Koenig requested that he manage her financial affairs. She sought his help because she was not keeping up with basic financial responsibilities, such as filing tax returns and paying bills, even though she had the financial means to do so. In fact, Koenig had years of unopened mail and uncashed checks. She had no family and depended somewhat on her neighbors for help. Goddard was reluctant to

[10] Telephone calls, file review, and review of letters performed by Goddard and staff attorneys would be billed at a minimum of two-tenths (0.2) of an hour; letters drafted by Goddard and his non-attorney legal staff were to be billed at a minimum of five-tenths (0.5) of an hour, and memoranda at a minimum of three-tenths (0.3) of an hour. Such minimum and flat-rate fees were charged at the highest office rate of $225/hour, even when performed by staff attorneys or non-attorney staff. According to the rate schedule in the retainer agreement, Goddard, staff attorneys, and paralegals billed at $225, $150, and $95 per hour, respectively.

take on these responsibilities and suggested that she retain the services of a professional fiduciary. However, Koenig was insistent and Goddard agreed. Ultimately, Goddard and his staff became involved in virtually every detail of Koenig's life, from contacting her gardener about lawn care, to dealing with caregivers on a daily basis, to overseeing repairs on Koenig's home to allow her to remain there. In addition to handling her day-to-day finances, Goddard consulted with a financial planner and accountant to oversee Koenig's financial portfolio, which significantly increased in value during the time he was her attorney. Goddard ultimately collected an additional $154,410 in fees over a year and one-half period of time.

Koenig's full-time caregiver, Caren Dalton, testified that Koenig understood the extent and nature of the services Goddard provided and did not complain to her about those services other than that "she thought he charged her quite a bit." However, in early 2007, Koenig became concerned about the considerable legal fees she was paying Goddard, and she sought help from another attorney, Jean McEvoy. McEvoy had been hired to look into Goddard's legal fees when the matter was referred to the Sacramento Department of Adult Protective Services in early 2007 for investigation of possible elder financial abuse of Koenig by Goddard. Due to McEvoy's efforts, Goddard was removed as Koenig's attorney and as trustee of her irrevocable trust. McEvoy did not pursue reimbursement from Goddard, believing it was futile since Goddard resolutely insisted that his fees were fair and reasonable. Although McEvoy believed Koenig had a claim of elder financial abuse against Goddard, Koenig did not want to undergo the stress of litigation. Instead, with McEvoy's assistance, Koenig filed a complaint against Goddard with the State Bar in August 2007. Koenig died in 2008.

B. CULPABILITY

Count Three (A): Unconscionable Fee (Rule 4-200(A))

The State Bar alleged that Goddard charged an unconscionable fee in violation of rule 4-200(A) because his representation of Koenig involved minimal legal work, he charged the attorney rate for work performed by non-attorneys, and his fees were grossly disproportionate to the services performed. The hearing judge dismissed this charge with prejudice after finding that Goddard's fees were not disproportionate to the services performed and that Koenig "knew exactly what she wanted and how she wanted it," having reviewed and approved each monthly bill.

The State Bar relied on the testimony of its expert witness, Peter Stern, who opined that Goddard's fees were excessive and not proportional to the value of the services rendered. However, Stern had not thoroughly reviewed Goddard's records to determine if his bills accurately reflected the work performed by Goddard and his staff. The State Bar also presented the testimony of McEvoy, who reviewed each of Goddard's bills and every document in his files from June 2004 to March 31, 2006, to compare the work done with the amounts billed. It was her opinion that Goddard's time sheets were padded and that his fees were unreasonable.[11]

The testimony of the State Bar's two experts, Stern and McEvoy, was controverted by Goddard's expert, Richard Antognini. He was a fee bill auditor and had reviewed each of Goddard's bills, handwritten time sheets and file documents. Antognini also questioned Goddard about each of the bills. Antognini concluded that Goddard's fees were fair, accurate

[11] For example, she noted that Goddard's firm oversaw the installation of new carpet and painting in Koenig's home while she was in the hospital. The work was completed in about a week and a half and the total cost, including moving the furniture, was about $9,000. Most of the coordination and supervision of the home renovation was performed by Goddard's non-attorney staff. His bills for these services, which also included his own review of the various contractors' bids and invoices, showed approximately 80 hours of work at the rate of $250 an hour for a total fee of about $20,000.

and honest and that documentation in Goddard's file confirmed that the work billed was actually performed. In Antognini's opinion, Goddard completed an enormous amount of work in an efficient manner that benefited Koenig. He reformed her trusts and organized her financial affairs after several years of neglect, resulting in a net increase in the overall value of her estate. Goddard's substantial efforts also enabled Koenig to continue to live in her home, which was her highest priority.

On appeal, the State Bar distills this charge to one central issue – whether it was unconscionable for Goddard to bill Koenig at an attorney rate for work performed by non-attorneys. Without question, Goddard's bills and his timesheets are extremely difficult to decipher because they do not identify who performed what work and how much time each individual spent on a specific task. To add to the confusion, the bills appear to charge Koenig at the highest attorney rate for all work performed by law associates and non-attorneys. But Goddard credibly testified that he ultimately charged a lower rate by discounting the time spent by his law associates and non-attorneys based on a formula that was proportionate to the actual fees stated in his retainer agreement. Antognini confirmed that Goddard's records established that the non-legal staff and associate attorneys' time was in fact discounted, although he admitted that the bills required a knowledge of "higher math" to confirm this discount. The State Bar was unable to offer clear and convincing evidence that Goddard billed his non-attorney staff at an attorney rate, other than when permitted by the retainer agreement, such as the fixed fees.

The fact that Goddard's and his staff's services are documented in the record does not address the central issue in this matter, which Goddard himself aptly describes: "The elephant in the middle of the room here is whether Avon Koenig knew what she was doing when she paid [more than] $200,000 to Kimber Goddard." We observe that Koenig was competent during the entire period that she was represented by Goddard and when she paid his monthly bills. She

personally signed each check after Goddard or his paralegal explained the invoices to her. Koenig also was competent enough to recognize that Goddard's bills were very high, as she repeatedly complained to her neighbors and her caretaker. Yet, she continued to pay them every month, all the while acknowledging to Goddard's paralegal that she knew she was requiring a lot of the firm, almost to the point of being burdensome. When Koenig finally decided that she was paying too much, she had the wherewithal to seek the advice of another attorney. At that point, and with McEvoy's detailed review of the cost of the services performed, Koenig was dissatisfied enough to file a complaint with the State Bar.

Although Goddard's relationship with Koenig was fraught with the *potential* for overreaching, the record does not establish clearly and convincingly that overreaching in fact occurred. The evidence also is not clear and convincing that Koenig unknowingly and unwillingly paid Goddard's high legal fees. She certainly was aware that the services provided to her were extensive and she was insistent that Goddard and his law firm provide those services. We simply cannot equate a very large fee, even under the circumstances of this case, with an unconscionable fee. (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 285-286.)

In the end, we must resolve all reasonable doubts in favor of Goddard "and if equally reasonable inferences may be drawn from a proven fact, the inference which leads to a conclusion of innocence rather than one leading to a conclusion of guilt will be accepted. [Citations.]" (*Millsberg* v. *State Bar* (1971) 6 Cal.3d 65, 68-69.) We accordingly dismiss Count Three (A) with prejudice.

Count Three (B): Moral Turpitude (§ 6106)

The State Bar alleged that Goddard committed an act involving moral turpitude because he charged Koenig the attorney rate for non-attorney work, knowing that she was easily influenced due to her advanced age and lack of sophistication and therefore not likely to contest

his billing. Based on our discussion above, we find the State Bar failed to provide clear and convincing evidence that, with the exception of the services provided for either a minimum or a fixed fee, Koenig was charged the attorney rate for non-attorney work. We also do not find clear and convincing evidence of undue influence. We adopt the hearing judge's dismissal of this charge with prejudice.

V. DISCIPLINE ANALYSIS

The State Bar must establish aggravating circumstances by clear and convincing evidence while Goddard has the same burden to prove mitigating circumstances. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b) and (e).)[12]

A. AGGRAVATING CIRCUMSTANCES

1. Overreaching (Std 1.2(b)(iii))

We disagree with the State Bar that Goddard's overreaching is an aggravating factor under standard 1.2(b)(iii) as we have already relied on it as a basis for our finding of an unconscionable fee in Count Two (A). (*In the Matter of Chesnut, supra,* 4 Cal. State Bar Ct. Rptr. at p. 176.)

2. Indifference (Std. 1.2(b)(v))

We agree with the State Bar that Goddard has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. It was only after these proceedings were commenced that Goddard grudgingly admitted that Winternitz "technically' was not a client. And rather than acknowledge the impropriety of his conduct to Winternitz, Goddard merely indicated that there was some "confusion" over his billing. Indeed, he testified that he ultimately waived Winternitz's fee because it was "not worth the battle" to continue his pursuit of his fees. For these reasons, we do not agree with the hearing judge's determination

[12] Unless otherwise noted, all further references to "standard(s)" are to this source.

that Goddard's ultimate cancellation of Winternitz's invoice mitigates his conduct since that cancellation occurred only after the State Bar interceded on her behalf.

B. MITIGATING CIRCUMSTANCES

1. Absence of Prior Record (Std. 1.2(e)(i))

Before the January 2007 misconduct in the Winternitz matter, Goddard had no prior record of discipline. We give significant weight to his 20 years of practice without discipline.

2. Good Character (Std. 1.2(e)(vi))

Goddard presented testimony from nine witnesses consisting of businessmen, homemakers, and two attorneys. These witnesses have known Goddard between 10 and 27 years and apprised themselves of the charges by reviewing the pretrial statements. Each testified as to Goddard's high reputation in the church and community. We accord Goddard considerable mitigation for his character evidence. We also recognize that he has provided service to his community by holding various positions of responsibility in his church over several years. We assign Goddard additional mitigation for his community service. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [community service as mitigating factor entitled to considerable weight].)

C. LEVEL OF DISCIPLINE

In determining the appropriate level of discipline, we look to the applicable standards for guidance. We afford "great weight" to the standards (*In re Silverton* (2005) 36 Cal.4th 81, 92), although we do not follow them in a "talismanic" fashion. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) We also review decisional law for additional guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

As a general principle, standard 1.3 provides that the primary purposes of the disciplinary proceedings are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal

profession. There are two applicable standards in this case: (1) standard 2.10 calls for reproval or suspension for a misleading solicitation in violation of rule 1-400 depending on the gravity of the misconduct and the harm, if any, to a client; and (2) standard 2.7 provides that an unconscionable fee in violation of rule 4-200 "shall result in at least a six-month actual suspension from the practice of law, irrespective of mitigating circumstances." If two or more acts of misconduct are found, the sanction imposed shall be the more severe of the applicable sanctions. (Std. 1.6(a).)

In spite of the seemingly mandatory language of standard 2.7, which provides for a minimum six months' actual suspension, less severe discipline has been imposed in unconscionable fee cases after taking into account "considerations peculiar to the offense and the offender. [Citation.]" (*In the Matter of Van Sickle, supra,* 4 Cal. State Bar Ct. Rptr. at p. 994 [three-month actual suspension for twice collecting unconscionable fee with no mitigating factors].)[13] We believe a departure from the minimum six months' actual suspension provided in standard 2.7 is justified in this case. While we are concerned whenever an attorney charges an unconscionable fee, our primary focus here is on the inherently deceptive nature of Goddard's solicitations for his "no-cost" services in violation of rule 1-400(D).

Our review of relevant cases involving improper solicitations discloses that violations of rule 1-400(D) have resulted in a range of discipline as lenient as admonishment and as severe as one month of actual suspension. (*In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442 [admonishment for single instance of misleading out-of-state solicitation in violation of rule 1-400(D) where no aggravating circumstances found and no harm found in

[13] The vast majority of unconscionable fee cases were decided before the standards were implemented and a wide range of discipline has been imposed in those cases, from three months' suspension (see, e.g., *Recht v. State Bar* (1933) 218 Cal. 352; *In re Goldstone* (1931) 214 Cal. 490), to disbarment. (See, e.g., *Dixon v. State Bar* (1985) 39 Cal.3d 335; *Tarver v. State Bar* (1984) 37 Cal.3d 122.)

mitigation]; *Leoni v. State Bar, supra,* 39 Cal.3d 609 [public reproval for two attorneys who mass-mailed misleading solicitations and had no prior discipline in over 30 years of practice]; *Belli v. State Bar* (1974) 10 Cal.3d 824 [one-month actual suspension for improper solicitation].) We note that the fee generated by the misleading solicitation in this case was not sizable and that there was no evidence that anyone besides Winternitz was misled by Goddard's solicitation.

Nevertheless, the potential for harm to the public is significant in this matter, given that Goddard's misleading advertisements are distributed to countless individuals on his website and to all of his clients through his newsletters. Furthermore, Goddard's indifference to the consequences of his overreaching of Winternitz and his lack of recognition of his wrongdoing reduce the significant weight of his mitigation evidence. In light of the unique factors in this case and the relevant standards and decisional law applying those standards, we conclude that a six-month stayed suspension will adequately serve the discipline goals of protecting the public, the courts and the profession.

Nearly 40 years ago, the Supreme Court cautioned that "the legal profession is more than a mere 'money getting trade'. . . . " (*Hulland v. State Bar* (1972) 8 Cal.3d 440, 449.) We are hopeful that the discipline imposed here will prompt Goddard to give serious consideration to this admonishment.

VI. RECOMMENDATION

We recommend that Kimber Brian Goddard be suspended from the practice of law for six months, that execution of that suspension be stayed, and that Goddard be placed on probation for one year on the following conditions:

1. Goddard must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

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

office is maintained, the address to be used for State Bar purposes, Goddard must report such change in writing to the Membership Records Office of the State Bar Office of Probation.

3. Goddard must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

4. Subject to the assertion of applicable privileges, Goddard must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

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

6. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if Goddard has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Kimber Brian Goddard be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VIII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

EPSTEIN, J.

WE CONCUR:

REMKE, P. J.

PURCELL, J.