PUBLIC MATTER – DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **JOSEPH LEIB SHALANT,** A Member of the State Bar.	**01-O-04627** **OPINION ON REVIEW**

Respondent Joseph Leib Shalant has requested review of a hearing judge's decision recommending a five-year stayed suspension, a four-year probation, and a two-year actual suspension. The hearing judge found respondent culpable of charging and collecting an illegal fee (Rules Prof. Conduct, rule 4-200(A))[1] and committing an act involving moral turpitude (Bus. & Prof. Code, § 6106).[2]

Upon our independent review (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we agree that respondent was culpable of committing an act involving moral turpitude as well as entering into an agreement for, charging, and collecting an illegal fee. Nevertheless, upon considering all of the relevant factors, including the fact that this is respondent's *fifth* disciplinary proceeding, we do not adopt the hearing judge's disciplinary recommendation, but instead recommend that respondent be disbarred as necessary to adequately protect the public and the courts.

[1]All further references to rules are to the Rules of Professional Conduct unless otherwise indicated.

[2]All further statutory references are to the Business and Professions Code unless otherwise indicated.

FACTS

Respondent was admitted to the practice of law in California in June 1967 and has been a member since that time. As we discuss *post*, respondent previously has been disciplined four times.

Stuart Smith is a retired businessman who resides in Indian Wells, California. Sometime in early 1998, a neighbor who was a former Olympic champion, referred him to respondent regarding a possible medical malpractice action against Smith's doctors. Smith met with respondent, who told Smith that for a fee of $5,000, respondent would spend four or five months researching the case to see whether or not Smith had a viable case. At that time, Smith asked respondent what would happen if respondent decided to take the case, and respondent replied that if he decided the case was meritorious, he would take the case on a contingency fee basis.

Smith returned to his home and discussed the matter with his wife, and within approximately a week sent respondent a check for $5,000. On February 18, 1998, respondent and Smith signed a written agreement providing for respondent to research the case in exchange for $5,000.[3]

Without first discussing it with Smith, on June 23, 1998, respondent sent a document entitled Notice of Claim for Medical Malpractice (notice) to Dr. Robert W. Murphy and Dr. Donald Drew, notifying them that respondent was representing Smith for damages sustained as a result of their negligent practice of medicine. The notice specified that Dr. Murphy negligently prescribed an intrathecal injection of Depo-Medrol for Smith's low back condition and that Dr. Drew negligently administered the intrathecal injection. The notice further stated that Smith was seeking damages against both doctors in the amount of ten million dollars.

Also without first discussing it with Smith, on August 31, 1998, respondent filed a complaint for medical malpractice and lack of informed consent in the Riverside County

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[3]We note that no claim has been made that this agreement was improper.

Superior Court on behalf of Smith against Drs. Murphy and Drew.

Respondent testified at trial in this matter that he served the notice and filed the lawsuit only to protect Smith's case against the running of the statute of limitations and that he had not at that point determined whether Smith's case was meritorious or whether he would be willing to represent Smith in the case. Smith, on the other hand, testified that respondent called him in August 1998 and informed him that respondent had concluded that the case was meritorious and had served the notice and filed the lawsuit against the doctors. Smith testified that he was uneasy with the fact that respondent had sought ten million dollars in Smith's name without first discussing the matter with Smith, as Smith lived in a small community and felt that he would look, within his community, like he "was shooting for the lottery." Contrary to respondent's testimony, Smith further testified that at that time, he asked respondent to explain the fee basis for respondent's services in representing him in the medical malpractice case, and respondent informed Smith that he would represent Smith in the case on a contingency basis. According to Smith, respondent orally explained the contingent fee at some length, including the limits placed upon this type of fee by section 6146.[4] As Smith testified, this oral agreement was never reduced to writing. In his decision in this matter, the hearing judge explicitly found that Smith's version of the facts surrounding the filing of the lawsuit was credible. We give great weight to this credibility determination. (Rules Proc. of State Bar, rule 305(a) [review department gives great weight to hearing judge's findings resolving issues of credibility]; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 708.)

In December 1998, Smith received a letter from respondent questioning whether Smith had the condition, arachnoiditis, which Smith claimed he had as a result of the allegedly negligent acts of his doctors and whether the lawsuit should proceed. In response, Smith spent

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[4]Section 6146 is part of the Medical Injury Compensation Reform Act, often known, and sometimes referred to herein, as MICRA.

over a month researching medical treatises and sent to respondent his research results as well as a history of Smith's illness in an attempt to verify Smith's claims regarding his illness and the cause of it.

After several continuances, Smith's deposition was scheduled for Tuesday, June 22, 1999. On Friday, June 18, 1999, three business days before his deposition, Smith received a faxed letter from respondent informing Smith that, based upon respondent's interpretation of Smith's medical records, "it appears that you may have an impossible time attributing any meaningful physical symptoms to the intrathecal injection of Depo-Medrol." The letter requested that Smith carefully consider, in consultation with Smith's new doctor, Dr. Byrd, whether the case should be dismissed. The letter also stated that respondent and Smith had previously entered into an agreement only for respondent to investigate the case in exchange for $5,000, and that respondent had performed well beyond the investigation, such that "additional arrangements are necessary if I am to continue being your attorney." Respondent continued in his letter by stating that "I am obviously more flexible and responsive to your wishes if my time is being paid for, as compared to proceeding on a contingency basis where the merits of your case are less than clear." Respondent requested Smith to call him to discuss this issue of respondent's compensation and ended the letter with this post-script: "As you know, your deposition is scheduled for next Tuesday at 10:00 a.m. It is important, therefore, that we resolve these aforementioned issues today if possible."

On Monday, June 21, 1999, Smith faxed a letter to respondent in response, noting that respondent "would prefer to change the fee agreement that you and I agreed to at the time of our initial consultation, and, more importantly, last summer when you decided that the case had merit and you subsequently filed suit." Smith objected to respondent's letter on the ground that it was an "inappropriately late" date for respondent to question the merits of the lawsuit and request a modification of the fee agreement, giving them "only one working day until [my] deposition" to

resolve the issues raised in the letter. Smith stated that he did not intend to submit to changes in the fee agreement, questioned whether respondent was prepared to represent him in his deposition because neither respondent nor anyone in respondent's office had spoken with Dr. Byrd, and requested that respondent postpone the deposition scheduled for the following day. However, Smith spoke with someone in respondent's office that day who informed Smith that it would be impossible to postpone the deposition in that "there were a lot of costs, [a] lot of lawyers involved."

The deposition went forward as scheduled, and respondent represented Smith at the deposition. At lunch on the day of the deposition and during the next few days, respondent and Smith discussed the fee agreement. Respondent insisted that Smith pay respondent an additional $25,000 nonrefundable fee, which would be credited against the contingent fee should Smith prevail in the case, as well as $10,000 for costs. Respondent told Smith that if Smith did not pay the $25,000, respondent would ask to be relieved as counsel in the case. Although Smith's wife wanted to fire respondent, Smith was worried about his health, so he initially attempted to reach a compromise with respondent. On June 24, 1999, Smith sent respondent a letter asking respondent to accept a nonrefundable fee of $12,500 and a greater percentage as a contingent fee. Smith also requested that respondent evenly share the cost of the defense's experts if Smith should lose the case and be required to pay defense costs. Respondent turned down Smith's offer.

Also on June 24, 1999, respondent sent a partly handwritten letter/retainer agreement to Smith. That letter/retainer agreement spelled out respondent's modifications to the original oral contingent fee agreement, specifically that Smith would "pay $25,000 towards what is otherwise a contingent fee – as set forth in the also inclosed retainer agreement, as modified. This will be non-refundable and will cover all services through trial (if the case goes that far) and also defending an appeal should we win and then they appeal." The last paragraph on page 3 of the

June 24, 1999, letter/retainer agreement stated that "[t]his memo will become part of the retainer agreement. See said document included herein." The document which forms the fourth page of the letter/retainer agreement was entitled Medical Malpractice – Modified Contingency Retainer Agreement. The letter/retainer agreement required Smith's signature to indicate his acceptance of the terms. Smith did not sign these documents.

At the end of June 1999, Smith and his wife went to stay with Smith's brother in northern Virginia so that Smith could obtain medical treatment from Dr. Donion Long, a neurosurgeon at Johns Hopkins University Hospital in Maryland. It had taken Smith four months to obtain the appointment with Dr. Long, and Smith was to be in that area for six to eight weeks for treatment. On July 1, 1999, Smith and his wife sent respondent the $25,000 respondent was requesting, and respondent received their check and deposited the funds into his general account.

On July 13, 1999, Smith faxed a letter to respondent seeking clarification regarding the partly handwritten letter/retainer agreement. On August 11, 1999, respondent sent Smith a letter in reply, stating that the $25,000 check would "constitute credit against the contingent legal fee, on the assumption that we prevail. If we do not prevail, it will have, nonetheless, paid for my services through trial and for an appeal if we win and the other side appeals." Respondent also enclosed a typed version of the partly handwritten retainer agreement (slightly modified from the partly handwritten version sent June 24, 1999) entitled Retainer Agreement and a Modified Proposal dated June 24, 1999, both of which the parties signed on September 1, 1999. The agreement, like the earlier partly handwritten letter/retainer agreement, provided for the maximum contingent fee allowed under section 6146 as well as a nonrefundable fee of $25,000. The newest Retainer Agreement contained the following fee provision: "Except as set forth in the Modified Proposal attached hereto as Exhibit 'A,' the attorney shall receive in consideration for such professional services 40% of the first $50,000.00 recovered, 33 1/3% of the next 50,000.00 recovered, 25% of the next $500,000.00 recovered and 15% of any amount recovered

in excess of $600,000.00. Fee is based on the total sum recovered. This fee has been negotiated and agreed to by the parties hereto. IF NO RECOVERY IS OBTAINED, NO FEE IS PAYABLE TO THE ATTORNEY. Should the law change with respect to attorney's fees, the fee shall be adjusted upward so as to be in compliance with the maximum fee permitted at that time. However, the fee shall not under any circumstances exceed 40% of the gross recovery obtained at trial or arbitration. Credit is to be allowed for all payments by Client made pursuant to the Modified Proposal attached hereto as Exhibit 'A.' [¶] Not included in the above fee schedule are appeals, for which this law firm shall not be responsible, except as set forth in the Modified Proposal attached hereto as Exhibit 'A.' The attorney will, however, if requested by client assist in the retention of appellate counsel at client's expense. Any appellate costs or fees will be separate and in addition to the fees described herein to and including the trial level." The Modified Proposal stated as to fees (as opposed to costs) that "You will pay $25,000 towards what is otherwise a contingent fee - as set forth in the also enclosed Retainer Agreement, as modified. This will be non-refundable and will cover all services through trial (if the case goes that far) and also defending an appeal should we win and then they appeal."

In December 2000, Smith called respondent to find out about the trial date. During that phone call, respondent put Smith on hold several times and shouted at him. Smith decided to terminate respondent's services and to that end had an attorney write a letter to respondent asking him to turn over Smith's file. Respondent replied to the letter by faxing a letter and a substitution of attorney form to Smith. In that letter, dated December 20, 2000, respondent stated that Smith would "owe me no more money for services rendered." A substitution of attorney form was filed January 2, 2001, substituting Smith in propria persona in the place of respondent as attorney of record.

On March 6, 2001, Attorney Steven Weinberg sent respondent a letter on Smith's behalf in which Weinberg asserted that respondent's modified retainer agreement with Smith signed

September 1, 1999, violated MICRA limits. Weinberg demanded that respondent return the $25,000 retainer he had collected from Smith. However, respondent refused to return the $25,000 and to date has not returned any portion of the fee Smith paid. In a responsive letter to Weinberg dated March 15, 2001, respondent asserted that his fee did not run afoul of the applicable MICRA limits.

Weinberg referred Smith to Attorney Robert Warford. On March 8, 2001, Warford substituted into the case as Smith's counsel. During the time Warford was handling Smith's case, Warford had no contact with respondent. He saw no reason to contact respondent, in that he saw no claim of an attorney lien on behalf of respondent in the file. In early 2002, Warford decided to cease his relationship with his firm, and since he was the only lawyer in the firm handling medical malpractice cases, he substituted out of all of the cases he was handling.

On March 6, 2002, Richard Booth substituted into the case as Smith's counsel. On June 2, 2002, Booth settled Smith's case for $500,000.[5] On December 17, 2002, respondent wrote to Booth demanding additional attorney fees and costs in connection with Smith's case.

On September 25, 2002, the State Bar filed a two-count notice of disciplinary charges (NDC) in the instant case. In this NDC, the State Bar charged respondent with (1) entering into an agreement for, charging, and collecting an illegal and unconscionable fee; and (2) committing an act involving moral turpitude, dishonesty, or corruption.

On February 11, 2003, respondent wrote directly to Smith demanding that Smith and his lawyers agree to arbitrate respondent's claimed quantum meruit fee entitlement. The offer to arbitrate was not accepted.

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[5]The amount of the settlement is set forth in the State Bar's Voluntary Settlement Conference Statement, admitted as part of the State Bar's exhibit 36 at trial in this case. Because the hearing judge admitted this exhibit without limitation, we may and do consider it for the truth of the matter stated. (See *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 523, fn. 32 and cases discussed therein.)

CULPABILITY

Count One - Rule 4-200(A) - Illegal or Unconscionable Fee

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

The hearing judge concluded that respondent was culpable of charging and collecting a fee which was illegal because it was in excess of the MICRA limits set forth in section 6146. Respondent contends on review that section 6146 applies by its terms only to contingent fees and therefore does not apply to, and does not prohibit, the flat fee portion of his contract with Smith. The State Bar asserts that the intent of section 6146 is to prohibit, in a medical malpractice case involving a contingent fee, the charging of any fee in excess of the limits set forth in that section and that respondent's flat fee in addition to a contingent fee was an illegal attempt to evade those limits.

We must first clarify respondent's fee agreement in order to determine whether that fee is prohibited by section 6146. As previously stated, in about August 1998, respondent initially entered into an oral agreement to represent Smith in the malpractice case for a contingent fee within the MICRA limits.[6] Subsequently, in June 1999, approximately ten months after Smith's complaint was filed, respondent informed Smith that he required a nonrefundable $25,000 fee in addition to the contingent fee. In August 1999, respondent clarified in writing that Smith would receive a credit for the $25,000 nonrefundable fee against the contingent fee *if* Smith prevailed in his case. The Retainer Agreement itself provides for a contingent fee equal to the maximum allowed under MICRA "[e]xcept as set forth in the Modified Proposal attached hereto as Exhibit "A." The Modified Proposal attached to the retainer agreement provides in part that Smith would "pay $25,000 towards what is otherwise a contingent fee – as set forth in the also enclosed

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[6]We note that section 6147 requires, among other things, that a contingency fee contract be in writing.

Retainer Agreement, as modified. This will be non-refundable and will cover all services through trial (if the case goes that far) and also defending an appeal should we win and then they appeal." The $25,000 was thus included within the contingent fee. We agree with the hearing judge's determination that there is clear and convincing evidence that respondent undertook representation of Smith in a medical malpractice case and entered into a contingent fee agreement subject to maximum MICRA limits.

"Contingent fees are dependent upon the result achieved in the matter (i.e., the attorney's right to a specified fee is *contingent* on obtaining a successful result for the client) and the agreed-upon percentage or contingency factor. If the attorney is unsuccessful or there is no recovery, no attorney fee is payable. [Citation.]" (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2004) ¶ 5:77, p. 5-10.)

Section 6146, subdivision (a) provides as relevant that "[a]n attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in *excess* of the following limits: [¶] (1) Forty percent of the first fifty thousand dollars ($50,000) recovered. [¶] (2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered. [¶] (3) Twenty-five percent of the next five hundred thousand dollars ($500,000) recovered. [¶] (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars ($600,000)." (Italics added.)

As was the hearing judge, we are guided by *Yates v. Law Offices of Samuel Shore* (1991) 229 Cal.App.3d 583 (*Yates*). There, in a medical malpractice wrongful death case, Shore entered into a contingent retainer fee with his clients, the plaintiffs. Among other things, the fee agreement provided that the contingent fee did not include any services in connection with any appeal in the case. Upon the plaintiffs' success in the case, Shore deducted from the judgment funds paid to an outside attorney engaged by Shore to handle the appeal at an hourly rate. (*Id.* at

pp. 585-587.) The appellate court noted that the statutory language of MICRA limited the contingent fee chargeable in an action and that Code of Civil Procedure section 1049 deemed an action to be pending from its commencement until the final determination on appeal. The court therefore determined "that Shore was limited to the section 6146 contingent fee for the entire case [including appeals]. He could not enhance that fee by truncating his contingent representation at the appellate threshold and charging additional, ostensibly noncontingent amounts for the appeal." (*Id.* at p. 591.)[7] "In sum, section 6146 did not permit Shore to charge additional fees for the appeal, either for himself or for his chosen associated counsel." (*Id.* at p. 592.)[8]

Similarly, we conclude in the present case that, in view of the determination that respondent entered into a contingent fee agreement which was subject to MICRA limits,

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[7]We note that the Retainer Agreement signed on September 1, 1999, expressly excluded appeals from the services covered by the fee schedule, which is directly contrary to the holding in *Yates* interpreting section 6146.(*Id.* at pp. 591-592.) The Retainer Agreement also required attorney fees to be calculated on the "total sum recovered," contrary to the plain language of section 6146 subdivision (c)(1) which requires that fees be calculated based on "the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim." However, the parties have raised no issues regarding these provisions, and we need not and do not discuss the provisions further.

[8]Because *Yates* held that an attorney cannot charge another fee *in addition to* the section 6146 contingent fee in a medical malpractice case, we reject respondent's assertion that, because the law in this area is unsettled, it would violate due process to find him culpable of charging an illegal fee in this case. We also reject respondent's invitation for us to be guided by the comment accompanying Florida's rule of professional conduct limiting contingent fees in personal injury and other tort cases, apparently including medical malpractice cases. First, we note that the rule to which respondent refers in his briefs does not provide for a strict limit on contingent fees, as does section 6146, but rather provides for a rebuttable presumption that a contingent fee exceeding the standards set forth in the rule is excessive. Second, we find the comment to which respondent refers to be ambiguous, and in any event, absent a similar comment accompanying section 6146 or other legislative history indicating that section 6146 is to be interpreted in the same manner as Florida's rule, we determine that Florida's rule is irrelevant to the interpretation of section 6146.

respondent's modification of that fee agreement providing for an amount above those limits clearly violated section 6146. That section specifies the maximum fees to which an attorney is entitled under a medical malpractice contingent fee agreement depending on the amount recovered, and we hold that an attorney cannot evade the limitations of that section by contracting for a non-refundable minimum fee or a flat fee *in addition to* the statutory maximum contingent fee. Such a contract provides for a total fee in excess of the statutory maximum.[9]

While respondent claims that it would have been impossible for Smith to have recovered less than $60,000, such that respondent's total fee would have been in compliance with section 6146, we conclude that the fee was illegal *at the time he entered into it* simply because section 6146 does not allow a contingent fee agreement in a medical malpractice case to provide for a non-refundable flat fee *in addition to* the statutory *maximum* contingent fee.[10] Even if an

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[9]In an order dated August 16, 2004, we granted respondent's motion to augment the record with the legislative history of section 6146, reserving consideration of the issue of the weight that may be accorded the additional evidence. Because respondent had not attached the legislative history to his motion to augment, in an order dated January 4, 2005, we ordered respondent to lodge the legislative history with this court.

Upon this court's examination of the documents respondent lodged with this court, the documents appear to be in complete disarray. The original document contains slightly over 200 pages, while at least one of the copies appears to contain over 300 pages. Additionally, a comparison of the original with one of the copies yielded the discovery that the Bates stamp numbers on the pages do not match; for example, page 175 of the original is not the same as page 175 of the copy which we examined. Further, the Bates stamp page numbers in the copy are themselves out of order, requiring a search through the document for consecutive pages as the document is read. Because respondent failed to lodge an original and two exact, comprehensible copies with this court pursuant to this court's order of January 4, 2005, we give no weight to the legislative history documents which respondent lodged with the court.

Moreover, in view of our independent determinations regarding respondent's motions to augment the record in the review department, respondent's assertion that the hearing judge abused his discretion in refusing to reopen the record in the hearing department is moot. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 436.)

[10]We are not presented in this case with, and therefore do not address, the issue of whether an attorney could legally charge a fee in addition to a contingent fee less than the statutory maximum, where the total fee did not exceed the MICRA limits.

attorney's total fee at the conclusion of a case may not constitute an illegal amount, that fact would not prevent the contract from being illegal at the time it is entered into. We conclude, as did the hearing judge, that under the facts of this case respondent violated rule 4-200(A) by entering into an agreement for, charging, and collecting an illegal fee.

Count Two - Section 6106 - Moral Turpitude

Section 6106 provides in relevant part that "[t]he 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."

In count two of the complaint, respondent was charged with committing an act involving moral turpitude, dishonesty, or corruption by insisting on modifying the oral contingent fee agreement to include a $25,000 nonrefundable fee ten months after the case had been filed and only three business days before Smith's deposition, and threatening to withdraw if Smith did not pay this additional fee.

In *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, this court found an attorney culpable of violating section 6106 in part due to the attorney's acts of exploiting her "position of trust to the detriment of her vulnerable client." (*Id.* at p. 244.) There, the client, Johnson's sister-in-law, was severely injured when a hair spray product she was using ignited while she was cooking. (*Id.* at p. 238.) After settling the personal injury suit on her client's behalf, Johnson had the funds electronically transferred to her personal account, then borrowed almost the entire settlement proceeds from her client. The terms of the loan agreement were unfair to the client, and the testimony of the client's daughter indicated that the client was in need of the settlement funds. (*Id.* at pp. 238-240.) The review department there agreed with the hearing department's conclusion that Johnson "obtained the loan in a manner 'so egregious and so abusive of her obviously vulnerable client as to constitute moral turpitude.' " (*Id.* at p.

242.)

Similarly, we conclude in the present case that respondent obtained the modification of the original oral contingent fee agreement in a manner that was abusive of his client. Respondent waited until the Friday before Smith's deposition, to be held the following Tuesday, to fax Smith a letter informing Smith that they needed to work out a new fee agreement *before* the deposition. Moreover, respondent stated in the letter that "I am obviously more flexible and responsive to your wishes if my time is being paid for, as compared to proceeding on a contingency basis where the merits of your case are less than clear," implying that Smith would not receive respondent's best efforts on Smith's case if Smith did not agree to modify the oral contingent fee agreement. Additionally, because Smith spoke with someone in respondent's office that day who told Smith that it would be impossible to postpone the deposition, Smith was under pressure to make a decision quickly.

Although respondent represented Smith at his deposition without having first obtained additional funds, on the day of the deposition and for several days thereafter respondent insisted that Smith pay an additional $25,000 nonrefundable fee, to be credited against the contingent fee should Smith prevail in the case, and conditioned respondent's continued representation of Smith on payment of this amount.

Importantly, all of these discussions took place approximately one week before Smith was to leave California to stay in Virginia with his brother for a six-to eight-week period to obtain treatment at Johns Hopkins University Hospital. Because it had taken Smith four months to obtain the appointment with the neurosurgeon at this hospital, it appeared that rescheduling the treatment would be extremely difficult. As Smith testified during respondent's cross-examination of him, if he did not accede to respondent's demands, "my case would be in abeyance for two months while I worried back there about, one, my progressive spinal disease, and two, trying to find another attorney."

In view of all of these circumstances surrounding respondent's demand for the additional $25,000 fee from Smith, we conclude that the demand was abusive of Smith and constituted a coercive act involving moral turpitude. Although we agree with the hearing judge's assessment that respondent intentionally timed the demand for an additional fee in order to force his client's compliance, we note that, even assuming that respondent did not intend to place his client in a difficult position as a result of the timing of respondent's demand, it is well established that when an attorney's fiduciary duties are involved, a finding of gross negligence will support a moral turpitude charge. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.) Here, respondent was at least grossly negligent in waiting to demand additional fees until just before Smith's deposition and soon before Smith was to be out of the state for medical treatment. We therefore conclude that these facts present a clear violation of section 6106.

LEVEL OF DISCIPLINE

Aggravation

The hearing judge found four factors in aggravation: a prior disciplinary record; multiple acts of wrongdoing; significant harm to respondent's client; and indifference toward rectification of or atonement for the consequences of his misconduct. In its responsive brief on review, the State Bar asserts that this court should additionally find that respondent's misconduct was surrounded by bad faith, dishonesty, concealment, overreaching, and uncharged acts of misconduct.

Respondent has been the subject of four prior disciplinary proceedings during his legal career (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i)),[11] a factor which weighs heavily in aggravation.

In January 1979, respondent was privately reproved for failing to perform all services for

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[11]All further references to standards are to these Standards for Attorney Sanctions for Professional Misconduct unless otherwise indicated.

which he was retained and for failing to use reasonable diligence and his best judgment in an effort to accomplish, with reasonable speed, the purpose for which he was employed. The hearing panel in that matter found that, in the course of representing a couple and their minor children in a personal injury matter, respondent obtained a settlement on their behalf. However, after the couple refused to sign the releases sent by the defense, respondent failed to take further action in the case, including failing to appear or to notify the clients to appear at an order to show cause re dismissal. As a result, the action was dismissed for failure to prosecute; however, the hearing panel determined that there was no financial loss in that the clients received a good settlement.

In February 1983, the Supreme Court publicly reproved respondent for failing to communicate with a client and indirectly communicating with an opposing party represented by counsel. There, respondent failed to inform a personal injury client that the client's former attorney had sued both respondent and the client for the former attorney's claimed fee. The client did not learn of the lawsuit until she was personally served a year after respondent learned of the suit. Subsequently, the client retained other counsel to represent her in the fee dispute with former counsel. Knowing that the client was now represented by other counsel, respondent suggested to the client's father, while meeting with him concerning other matters, that the father have the client meet with him to resolve issues in the case of the fee dispute with the former attorney.

In August 1994, in a six-client matter, the Supreme Court ordered a two-year stayed suspension, and a two-year probationary period with no actual suspension based on a stipulation. In one count, respondent advanced funds to a client directly from respondent's trust account. The stipulation specified that respondent had recently earned these funds as fees in other cases but had not yet withdrawn them from the trust account and that the advance of these funds from the trust account constituted commingling of funds. In a second count, while respondent

represented a client in a bad faith lawsuit against Farmer's Insurance Group, respondent conversed about the case with an individual he knew to be a claims manager with the insurance company, thereby communicating with a represented party. In a third count, respondent represented a client in an application for workers' compensation benefits but failed to reply to a request from the State Compensation Insurance Fund that respondent designate an Agreed Medical Examiner, thereby failing to perform legal services competently. In the fourth, fifth, and sixth counts, respondent settled clients' personal injury cases after the client was deceased. In the fourth count, respondent witnessed the client's signature on the release without informing the defense of the death of the plaintiff, thereby failing to employ only means consistent with truth. In the fifth count, respondent disbursed settlement funds to the daughter of his deceased client without verifying she was entitled to received the funds, thereby failing to perform legal services competently, and in the sixth count, respondent disbursed settlement funds without verifying the appropriate identity of the recipient of the funds, thereby failing to perform legal services competently.

In May 2000, respondent was privately reproved based on a stipulation. There, respondent settled the personal injury claims of three minors and dismissed their complaints without obtaining required court approval of the settlement and payment of all liens, thereby violating section 6103.

We disagree with the hearing judge's determination that respondent engaged in multiple acts of wrongdoing. (Std. 1.2(b)(ii).) Respondent has been found culpable of entering into an agreement for, charging and collecting an illegal fee and committing acts involving moral turpitude. This misconduct involved only two counts, and both counts arose from the one transaction of respondent's modification of the contingent fee agreement with Smith. Under these circumstances, we do not find aggravation on account of multiple acts of misconduct. (See *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170 [misappropriation,

failure to pay out client's funds upon request, and entering into an improper business transaction with a client in a one-client matter coupled with failure to timely report court-ordered sanctions to the State Bar in another matter; court did not see case as "strongly presenting aggravation on account of multiple acts of misconduct"].)

We agree with the hearing judge's finding that respondent's client was harmed in this case (std. 1.2(b)(iv)), in that Smith forfeited $25,000 in fees which were in excess of the MICRA limits. (Cf. *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 518 [harm to client resulted both from loss of use of $3,000 for over a year and from the emotional distress caused by not having the money during the time when client's husband had died and her two children were seriously injured].)

We agree with the hearing judge's finding that respondent showed indifference toward rectification of or atonement for the consequences of his misconduct (std. 1.2(b)(v)), as respondent showed a lack of remorse and indifference toward atonement for the consequences of his acts involving moral turpitude. Respondent implied in cross-examining Smith at trial that Smith could have simply fired respondent if Smith did not want to modify the contingent fee contract. Further, respondent testified that, at the time respondent charged the $25,000, respondent knew that Smith was a successful businessman and felt that Smith could "well afford" the $25,000 up-front fee. We determine that this implication and testimony shows respondent's indifference toward the dilemma in which he placed Smith and toward the difficulties Smith faced at the time respondent demanded the modification.

We reject the State Bar's assertion that respondent's misconduct was surrounded by bad faith, dishonesty, concealment, overreaching (other than the overreaching we relied upon in finding a moral turpitude violation), or other uncharged misconduct. (Std. 1.2(b)(iii).) The State Bar contends that these factors were present in (1) respondent's failure to inform Smith that the modified fee agreement was, or might be, illegal and (2) respondent's suggestion to Smith in his

letter of August 11, 1999, that he had the right to keep sanctions imposed against the defense in Smith's malpractice case.

As to the first contention, the State Bar relies upon *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 283. We view *Harney* as distinguishable, since Harney was "self-described as the top medical malpractice attorney" in the United States, was a recognized expert in medical malpractice cases, had "testified before the California Legislature in 1975 during its committee hearings on [MICRA]" and had "filed a number of amicus curiae briefs unsuccessfully challenging the constitutionality of [MICRA]" (*Id.* at pp. 273-274.) We there specifically relied upon Harney's recognized expertise when we rejected his claim that he was not obligated to discuss "every law . . . with his client and the judge." (*Id.* at p. 283.) Here, in contrast, although respondent has extensive experience in the practice of law and, as we have noted, some experience in medical malpractice litigation, we have no evidence before us that respondent was an expert in medical malpractice law, or had nearly as great knowledge of MICRA, as did Harney. We therefore decline to find as additional aggravation respondent's failure to inform his client that the modified fee agreement was, or might be, illegal.

As to the second contention, it appears that the State Bar is asserting that we should find culpability of uncharged misconduct due to respondent's retention of the sanctions imposed against the defense in Smith's medical malpractice case. Evidence of uncharged misconduct may be considered in aggravation where the evidence is elicited for a relevant purpose and where the determination of uncharged misconduct is based on the attorney's own evidence. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) Here, the evidence of respondent's retention of fees apparently awarded to Smith in the medical malpractice case is based on the State Bar's exhibit. If the State Bar wished to penalize respondent for improperly retaining money awarded to Smith, the correct procedure would have been for the State Bar to charge respondent with an additional violation based on respondent's statements in this letter. However, in view of the State Bar's

failure to charge respondent with an additional violation, or even to raise the issue during trial to afford respondent the opportunity to explain or justify his statements in the letter, we decline to use the evidence at this point in the proceedings as a basis for enhanced discipline.

Mitigation

The hearing judge found minimal evidence of mitigation resulting from respondent's character witnesses and respondent's community service.

We agree with the State Bar's assertion in its brief on review that the testimony of respondent's two witnesses (his secretary, Leslie Flowers, and an associate attorney in his office, Ronald Cher) did not constitute evidence of respondent's good character. Rather, these two witnesses merely rebutted Smith's testimony that respondent had yelled at or had been verbally abusive to Smith. Moreover, even if these two witnesses had testified as to respondent's good character, their testimony would not constitute an extraordinary demonstration of respondent's good character from a wide range of references in the legal and general communities. (Std. 1.2(e)(vi); *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 133.)

We agree with the hearing judge's determination that respondent presented some evidence, via his own testimony, as to his community service. Such evidence is entitled to some weight in mitigation, although the weight of the evidence is limited because respondent's testimony was the only evidence on the subject, and therefore the extent of respondent's service is unclear. (See *In the Matter of Bach*, (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647-648; *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158 & fn. 22.)

Discussion

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. (Std. 1.3; *In re Morse*, *supra*, 11

Cal.4th at p. 205.) No fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Instead, we determine the appropriate discipline in light of all relevant circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

The Standards for Attorney Sanctions for Professional Misconduct provide us with guidelines in determining the appropriate degree of discipline to be recommended. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) When, as here, there are two or more acts of misconduct in one proceeding, the sanction shall be the most severe of the applicable sanctions. (Std. 1.6(a).) We have found respondent culpable of violations of rule 4-200(A) (illegal fee) and section 6106 (moral turpitude), and of the two acts of misconduct, standard 2.3, which applies to moral turpitude, is the more serious, with sanctions ranging from actual suspension to disbarment. However, standard 2.3, and the cases applying this standard, must be considered in conjunction with standard 1.7(b), which under the facts and circumstances of this case provides the focus of our discipline analysis.

Standard 1.7(b) states that where an attorney who is found culpable of disciplinable misconduct "has a record of two prior impositions of discipline . . . , the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate." Respondent's four prior disciplinary proceedings constitute serious aggravation to the misconduct present in this case. We are mindful that "under guiding case law, we look to the standards not reflexively, but, with regard to standard 1.7, with an eye to the nature and extent of the prior record." (*In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 217.) In that regard, we note that although respondent has been disciplined on four previous occasions, he received no actual suspension, but only a two-year stayed suspension, together with a two-year probationary period, in addition to various private and public reprovals. But, when we view the course of his previous misconduct in toto, we find

that respondent's involvement with the disciplinary system has spanned every decade over nearly thirty years, beginning in early 1976, and that his past disciplinary proceedings involved 9 separate matters where at least 13 clients were adversely affected, of whom at least 5 were minor children. Put another way, respondent has been involved with the State Bar's disciplinary process for 28 of his 38 years of practice.

In our search to recommend the proper discipline, we also consider prior decisions imposing discipline based on similar facts. (*In re Morse, supra*, 11 Cal.4th at pp. 206-207; *In the Matter of Taylor,supra*, 1 Cal. State Bar Ct. Rptr.at p.580.)

Looking to the case law, we find that when considering the applicability of standard 1.7(b), the Supreme Court has placed great weight on whether or not there is a "common thread" among the various prior disciplinary proceedings or a 'habitual course of conduct' which justifies disbarment. (*Arm v. State Bar* (1990) 50 Cal.3d 763, 780 (*Arm).*) Here respondent's prior record of four disciplines establishes a disturbing repetitive theme. In particular, the misconduct for which he was disciplined in 1979, 1983, 1994, and 2000 reflects a continuing inability to fully appreciate the fiduciary nature of his relationship with his clients in view of his continuing failure to fully perform his duties toward his clients. In the present case respondent has once again demonstrated his inability to recognize his duties, this time by placing his own interests above those of his client. Most of his prior misconduct was fee-related.

In one instance, when the clients refused to sign the releases upon a settlement of the case, respondent failed to take any further action in the case and it was dismissed. In another instance, respondent failed to inform his client that he and his client had been sued by the client's former attorney for attorney fees. In other instances, respondent settled cases of deceased clients, in one matter witnessing the signature of a deceased client on a release without informing the opposition of the client's death. In still other matters, respondent distributed deceased clients' funds without verifying the proper recipients of the funds, which action implies that respondent

received his attorney fees in the distribution. In the most recent prior discipline, respondent settled a case and distributed funds on behalf of three minors without obtaining court approval of the settlement. In the instant case, respondent again viewed his interest in his fees as paramount, taking advantage of his client, a retired businessman, at a time when the client had neither the opportunity nor the stamina to resist respondent's overreaching. Respondent has had every opportunity during the last 28 years to learn from his past mistakes, and yet he has failed to do so. Either he fails to understand his professional duties or his prior discipline fails to impress upon him the importance of compliance with these duties.

The instant case thus is distinguishable from *Arm*, where the Supreme Court rejected a recommendation of disbarment pursuant to standard 1.7(b) even though Arm had been involved in three prior disciplinary proceedings in his 22 years of practice. (*Id.* at pp. 769-770, 778, 780.) But in *Arm* the court found no common thread and no evidence that Arm had engaged in 'a repetition of offenses' for which he had previously been disciplined. (*Id.* at p. 780.) Furthermore, although Arm was found culpable of misleading a judge by failing to disclose his upcoming 60-day suspension, which misconduct involved moral turpitude, and commingling client and attorney funds (*id.* at pp. 774-777), the court found in mitigation a lack of significant harm resulting from Arm's misconduct and the absence of bad faith. (*Id.* at pp. 779-780.) The Supreme Court determined that an 18-month actual suspension was necessary to protect the courts, the public, and the legal profession. (*Id.* at pp. 768, 781.) Here, in contrast, there is minimal mitigation, significant client harm, and, most importantly, a disturbing continuation of the kind of misconduct for which respondent has been repeatedly disciplined.

We also are guided by *Morgan v. State Bar* (1990) 51 Cal.3d 598, wherein attorney Morgan was found culpable of one count of practicing law while on suspension and one count of entering into an unfair business transaction with a client pursuant to former rule 5-101. Although the attorney in *Morgan* received more serious prior discipline than respondent, the actual history

of misconduct was similar to that of the instant case. Morgan was initially suspended for six months for misappropriation, and then for two more years, stayed, for engaging in the unauthorized practice of law while under suspension. He was given one more year of actual suspension when he settled two personal injury cases without the consent of his clients and misappropriated client trust funds. He again misappropriated funds in a personal injury matter, and in another matter he failed to communicate with a client and to perform services competently. Morgan offered more mitigation evidence than in the instant case, including five good character witnesses. In addition the attorney presented evidence that he was a founder of the Challengers Boys' Club and served on its board of directors. Finally, he contributed pro bono legal services to the Boys' Club and to the Youth Intervention Program, and he periodically spoke to children who were placed in that program. There also was evidence that the last instance of unauthorized practice was an isolated incident during his suspension.

Nevertheless, the Supreme Court concluded that disbarment was appropriate under standard 1.7(b) because the attorney had been found culpable in four prior disciplinary proceedings. In so concluding, the court found, "petitioner's behavior demonstrates a pattern of professional misconduct and an indifference to this court's disciplinary orders . . . ." (Morgan v. State Bar, supra, 51 Cal.3d at p. 607.)

Respondent's extended history of inattention to his fiduciary responsibilities to his clients, together with his failure to learn from his past misdeeds, creates a grave risk that additional harm will result to his clients. Furthermore, respondent's manifest indifference to the consequences of his actions and the absence of any significant mitigation evidence compel us to conclude that the two years' actual suspension and four years' probation recommended by the hearing judge is inadequate to protect the courts, the profession, and most importantly in this case, the public.

We therefore recommend disbarment as necessary to best serve the goals of attorney

discipline in this case. We wish to emphasize that we did not arrive at our recommendation of disbarment based solely on the mere number of respondent's past disciplinary proceedings, but only after a careful examination of the substance and nature of his disciplinary history and with due regard to the facts and circumstances of his present misconduct.

RECOMMENDATION

We recommend that respondent Joseph Leib Shalant be disbarred and his name stricken from the roll of attorneys.

We further recommend that respondent be ordered to comply with the provisions of California Rules of Court, rule 955 and to perform the acts specified in paragraphs (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend that the State Bar be awarded costs in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7

ORDER OF INACTIVE ENROLLMENT

Pursuant to the provisions of Business and Professions Code section 6007, subdivision (c)(4) and Rules of Procedure of the State Bar, rule 220(c), respondent is ordered enrolled inactive upon personal service of this opinion or three days after service by mail, whichever is earlier.

WATAI, J.

We concur:

STOVITZ, P. J.

EPSTEIN, J.

Case No. 01-O-04627

In the Matter of Joseph Leib Shalant

Hearing Judge

Hon. Alban I. Niles

Counsel for the Parties

For State Bar of California:	Alan B. Gordon Office of the Chief Trial Counsel The State Bar of California 1149 S. Hill St. Los Angeles, CA 90015-2212
For Respondent:	Joseph Leib Shalant 3699 Wilshire Blvd #1100 Los Angeles, ca 90010

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on May 18, 2005, I deposited a true copy of the following document(s):

OPINION REVIEW FILED MAY 18, 2005

in a sealed envelope for collection and mailing on that date as follows:

[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

JOSEPH L SHALANT
3699 WILSHIRE BLVD #1100
LOS ANGELES, CA 90010

BRIAN A. YAPKO
LAW OFC JOSEPH L SHALANT
3699 WILSHIRE BLVD #1290
LOS ANGELES, CA 90010

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

ALAN B GORDON, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **May 18, 2005.**

Rosalie Ruiz
Case Administrator
State Bar Court